



FACULTY OF LAW
Lund University

Jose Manuel Correro Martin

The seafarer's rights and P&I coverage on the crew in the UK

Master thesis
30 credits

Lars-Göran Malmberg

Master's Programme in Maritime Law

Spring 2011

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Summary

In this thesis different topics will be explained, with the common denominator that all of them are related to the seafarers rights and the extend of the cover on the crew of the P&I Clubs in every case.

In order to have a comprehensive view of the relation between the seafarer's rights and the P&I Clubs cover on the crew, the following topics will be addressed:

- The origins of the P&I Clubs, how they work and the scope of their cover and the International Group of the P&I Clubs
- The Common Law liability and negligence in the UK; the contractual law and P&I Cover on the crew. Since The ILO Maritime Labour Convention 2006 will be implemented in the UK, and most of the UK law comply already with this convention, the convention will be explained and the UK statutory law regarding the seafarer's rights will be addressed by a cross reference at the end of this thesis.
- Direct action against the P&I Clubs in the UK in case of crew claims; the Pay to be paid rule, and the Direct Action (Rights Against Insurers) Act 1930 and 2010 will be explained.
- Piracy and P&I cover on the crew, what is it and to what extend the claims of the crew are covered by the P&I clubs (injury, illness, repatriation, substitution, the payment of ransom...)
- Criminalization of the seafarers; the reasons of this trend and the extend of the coverage of the P&I Clubs on the crew are analysed.

The focus will be on English Seafarers on board English registered ships.

Abbreviations

BIMCO	The Baltic and International Maritime Council
CBA	Collective Bargaining Agreement
DFT	Department for Transport
ECSA	European Community Shipowners Association
ETF	European Transport Federation
EU	European Union
FOC	Flag of Convenience
GA	General Average
IG P&I	International Group of P&I Clubs
ILO	International Labour Convention
IMO	International Maritime Organization
IRTC	Internationally Recognised Transit Corridor
ISM	International Safety Management Code
MARPOL	International Convention for the Prevention of Pollution from Ships
MCA	Maritime Coastguard Agency
MLC	Maritime Labour Certificate
MLC 2006	Maritime Labour Convention 2006
MSA	Merchant Shipping Act
MSCHO	Maritime Security Centre Horn of Africa
OCIMF	Oil Companies International Marine Forum
OECD	Organisation for Economic Cooperation and Development
P&I Clubs	Protection and Indemnity Clubs
SOLAS	Save of Life at Sea
STCW	Standard Training Certification and Watchkeeping
TWG	Tripartite Working Group
UK	United Kingdom
UKMTO	United Kingdom Maritime Trade Operations
UNCLOS	United Nation Convention on the Law of the Sea
UNCITRAL	United Nation Commission on International Trade Law
USD	United States Dollars
WGLCCS	Working Group on Liability and Compensation regarding Claims for death, personal injury and abandonment of seafarers

1 Introduction

1.1 Background

The P&I clubs born to cover the third party liability; it was the answer of the British shipowners when in the 19th century injured crew members began to seek compensation from their employers. Nowadays, there are thirteen principal underwriting member clubs of the International Group of P&I Clubs (“the Group”) between them provide liability cover (protection and indemnity) for approximately ninety percent of the world’s ocean going tonnage.

Regarding to what is a P&I club and what kind of liabilities are covered, the IGP&I website explains it in brief with these words:

Each Group club is an independent, non-profit making mutual insurance association, providing cover for its shipowner and charterer members against third party liabilities relating to the use and operation of ships. Each club is controlled by its members through a board of directors or committee elected from the membership.

Clubs cover a wide range of liabilities including personal injury to crew, passengers and others on board, cargo loss and damage, oil pollution, wreck removal and dock damage. Clubs also provide a wide range of services to their members on claims, legal issues and loss prevention, and often play a leading role in the management of casualties.¹

The idea for the topic chosen for this thesis came from the importance of the claims for injuries, illness and death of the crew, which -as was stated before-,was in the very beginning of the P&I clubs, and today have an important role in the claims against the shipowners and their insurers. The relation between the P&I cover on the crew and the Seafarers Rights lead to some actual topics, as how the Maritime Labour Convention 2006 is going to affect the covers, the piracy, and the criminalization of the seafarers.

The claims for personal illness, injury and death are more than 30% of the claims statistic of the P&I clubs.² An example of the amount of money that this claims move will be illustrative:

During the period 1995-2001, Clubs had handled or were handling 84,300 claims (rounded down to the nearest hundred) relating to seafarer illness, personal injury and death amounting in value to USD 1,146,000,000.00 (rounded down to the nearest USD 100,000.00). The latter figure was

¹ IG P&I website, online at: www.igpandi.org/ (last visit 14/04/2011).

² Statistic from The UK P&I Club, online at www.ukpandi.com/loss-prevention/people-claims/ (last visit 13/05/2011).

*calculated on sums paid where claims had been finalized and estimates where they had not.*³

1.2 Purpose

The aim of this thesis is to analyse the relation between seafarer's rights in UK and the P&I cover on the crew, in a comprehensive way. Therefore, the UK domestic law and the cover of the P&I clubs on the crew will be examined, also the possibility of a direct action against the P&I clubs in case of a seafarer claim will be studied.

The Maritime Labour Convention 2006, which is not yet in force but hopefully it will be in force in 2012, will be explained, due to its importance, and also because the UK government, shipowners and P&I Clubs are getting ready for its implementation in the UK. The question of how it will affect the cover of the P&I clubs will be addressed.

Other topic of interest treated is the Piracy (crew injuries, death, ransom...), in relation with P&I cover on the crew, and the liabilities that arise in case of a piratical attack.

Finally yet importantly, the criminalization of the seafarers will be addressed, especially regarding the crew rights and if arise any shipowner liability that could trigger the P&I coverage.

1.3 Method and material

The methodologies used in this paper to fulfil its purpose are: the dogmatic method, to illustrate the legal concepts, and the analytic method to highlight the relation between the seafarer's rights and the cover on the crew of the P&I Clubs.

The sources for the investigation are: the last version of the rule book of Britannia P&I club, different books (as the Gard Handbook on P&I insurance, the Seafarers Right, P&I Law and Practice...), articles, the websites of the IGP&I and the clubs has been used in the research of information and statistics, governmental sites like the MCA website, and the ILO and ITF websites for information related with the ILO MLC 2006.

³ IGP&I, *Examination of the issue of financial security for crew seafarers with regard to compensation in cases of personal injury, death and abandonment*, IMO/ILO/WGLCCS 7/2/7, 7th session 25 january 2008.

1.4 Delimitation

The seafarers rights addressed in this thesis are focus on the English seafarers on English registered vessels.

Having said that, the first chapter is the introduction to the thesis, where it is explained what and how is going to be done. The second chapter is an overview of the P&I insurance, its origin, what is it, the scope of the cover, and the IGP&I.

The third chapter is about the law and P&I cover of the crew in the UK. It start explaining the common law liability and the negligence, to continue with the contractual liability, and ends with the P&I cover of the crew, where the rules of one of the member of the IG P&I (Britannia) will be commented.

The fourth chapter deals with the possibility of direct action against the P&I Club in case a claim for injury, illness or death. The UK law applicable (third parties (rights against insurers) act 1930 and the new one of 2010, pay to be paid rule) will be explained.

The fifth chapter goes through the ILO Maritime Labour Convention 2006, and its implementation in the UK, to finish by explaining how the improvement of some rights will affect the shipowners liability with respect to the crew.

In the sixth chapter, a hot topic is addressed: piracy, crew and P&I Clubs, with focus on the P&I cover regarding the crew and ransom payments.

The seventh chapter is about the criminalisation of the seafarers, and it will be explained what is criminalisation, how it affect to the seafarers, and if it is covered somehow by the P&I clubs.

The eighth chapter are the analysis and conclusion.

2 About the P&I clubs

2.1 Origins

The P&I Clubs were created in United Kingdom around the mid- 1850, and comes from the Hull clubs. In 1720 the Royal Exchange Assurance co. and the London Assurance co. were granted with a statutory monopoly by the “bubble Act”, and the hull insurance provided at that time by these companies was unacceptable to the shipowner due to:⁴

- In a situation of monopoly, the insurers have a strong position that lead to an increase in the price –higher premium.
- The hull insurance does not cover the whole liability of the shipowners in case of collision, only three fourth’s.

Therefore, in order to cover the one fourth not covered and the shipowners liability for personal injury (the protection Insurance), the shipowners broke the law (the bubble act mentioned) and create mutual associations – Mutual Hull Clubs.⁵

This system was not perfect, because the bad operators took advantage of the system making most of the claims against their club, and the good operators compensating them.⁶

When in 1810 the monopoly was removed, the operators began to be polarized in two sections:⁷

- the insurance market allowed to the good operators to have better premiums rates, and they change from the clubs to the commercial markets.
- The bad operators, who could not get good rates in the commercial markets, stay in the Hull clubs.

This trend was changed when in 1836, with the case of collision *de Vaux v Salvador*⁸ which held that a damage done to another vessel in collision (third party collision liability) does not fall under the perils of the sea of an ordinary policy. The shipowners negotiated with the insurers to cover the collision liability cover, but the agreement reached only the cover of three

⁴ Anderson, Phil, *P&I Clubs and Mutual Insurance, Module 3 of the Postgraduate Diploma in Marine Insurance 2007-2008* (LM1901), World Maritime University and Lloyds Maritime Academy, pp 11-12.

⁵ *Ibid*, p 12.

⁶ *Ibid*, p 13.

⁷ *Ibid*, p 13.

⁸ *De Vaux v Salvador* (1836) 5 LJ (KB) 134.

fourth's of the claims (the Running Down Clause), and the shipowners, to cover the one fourth left, turned to the Hull clubs.⁹

The changes at the time in the British legislation made the shipowners face more and more liabilities toward third parties. Two acts will be illustrative:¹⁰

- Lord Campbell's Act (Fatal Accident Act) of 1846, the injured crew members and the dependents of crew members who were killed, were entitled to seek compensation from their employers.
- the Harbour, Docks and Piers Clauses Act of 1947 allowed harbour authorities to recover the damage done to port property by a ship from the shipowners under strict liability.

Another major event before the birth of the P&I Clubs was the Merchant Shipping Act 1854, in which it was stated the right of the shipowners to limit their financial liability to include injury and death, which define the boundaries of the insurance risk.¹¹

After this, Mr. Peter Tindall, manager of one of the leading hull insurance clubs, set up the first 'Protection Club', the Shipowners' Mutual Protection Society¹² in 1855. The risks covered by the 'Protection Club' were those of the MSA 1854: loss of life, personal injury, property damage and the risk of running down other vessels which were not covered by the ordinary hull policies (the one fourth in case of collision).¹³

At this time, the shipowners were not concerned with cargo claims, because the carriers took advantage of the almost total freedom of contract to include in to the Bills of Lading terms to the effect that:¹⁴

"...the carrier is not responsible for any loss or damage to cargo how-so-ever caused..."

However, this situation was changed by *The Westenhope*¹⁵ case in 1870. In this case, the vessel was carrying a cargo bound for Cape Town, but proceeded instead first to Port Elizabeth, where she loaded further cargo, and then sailed back to Cape Town. Unfortunately, she sank in on the way to Cape Town with the total loss of the ship and the cargo.¹⁶

The cargo owners held that the exceptions in the contract of carriage did not apply because of the deviation, which was a breach that made the contract

⁹ Anderson, *Supra* note 4, p 13.

¹⁰ *Ibid*, p 14.

¹¹ *Ibid*.

¹² Known as Britannia P&I Club nowadays.

¹³ Anderson, *Supra* note 4, p 14.

¹⁴ *Ibid*, p 15.

¹⁵ *The westenhope* (1870) (unreported).

¹⁶ Anderson, *Supra* note 4, p 15.

invalid. The judge agreed with this argument, finding the shipowner liable to compensate the cargo owner for the loss of the cargo. The shipowner went to his Protection Club seeking an indemnity, but the cargo liabilities were not covered under the rules.¹⁷

After this judgment, Mr. Mitcalf (who was an underwriter with an insurance company in Newcastle) wrote an article about the wide range of potential liabilities that shipowners might have towards cargo owners and underwriters. As a consequence of the article, a group of shipowners asked him to form a new club in 1874, to provide insurance to these potential cargo liabilities, called 'Indemnity Club'.¹⁸

After some years of being separated, the first Protection and Indemnity Club was formed in 1886: The North of England Protection and Indemnity Association.¹⁹

In 1893, the need for cargo insurance was remarked by the US Harter Act, which restricted the rights of the shipowners to rely on the exclusion clauses in the bills of lading and required them to do the due diligences to make the ship seaworthy, and the Hague Rules (1924) which spread worldwide these principles. This is the moment when the P&I clubs began to offer defence cover, to provide insurance for legal cost, and claims handling service for P&I and many non P&I matters.²⁰

2.2 What is a P&I club and how it works?

The Characteristics that define a P&I club are:

- It is an association of shipowners and charterers and other associated parties.
- The members of the club are insured and insurers, contributing to claims through the "calls";
- They are mutual, non profit making insurance associations;
- The protection and indemnity insurance of the P&I clubs indemnifies the shipowners on the discharge of the incurred legal liabilities that he can face in running his ship.²¹

¹⁷ Anderson, *Supra* note 4, p 15.

¹⁸ *Ibid*, p 16.

¹⁹ *Ibid*.

²⁰ Gold, Edgar, *Gard Handbook on P&I insurance*, 5th ed., , Assuranceforeningen Gard-gjensidig, Arendal, Norway, 2002, pg 68.

²¹ Hazelwood, Steven J., Semark, David, *P&I Clubs: Law and Practice*, 4th ed., Lloyd's List, London, 2010, pg 1.

2.2.1 Structure

The clubs originally were established as unincorporated associations –this is, the members (shipowners and charterers) were personally involved as insurer and assured. Nowadays, most of the clubs *”had become incorporated such that they were then a separate legal entity from their members. This incorporation was typically done in the UK under the Companies Act and invariably as a company limited by guarantee.”*²²

The structure and the relationship between the company and the members are stipulated in a Memorandum and Articles of association.²³ A typical organization of the clubs is composed by directors and managers.

2.2.1.1 The directors

The clubs have as member’s shipowners and charterers. Originally, the members appointed their representatives (one per member) to be the board of directors and made the important decisions about how their club should be run. Because the large number of members in the P&I clubs and its internationalisation, nowadays this has change, and the representation of the members in the Board of Directors is made by shipowners who reflect a cross-section of the Membership of the individual Club. The configuration of a Board of director is normally a Chairman, one or two Vice-chairman, and 20+ normal members.²⁴ The chairman and vice chairman are elected by the other members of the board. The Board’s competences are:²⁵

- The formulation of the underwriting policy of the club,
- Its high level financial planning,
- The extent of the cover provided. They also decide regarding amendments to the cover set out in the Rules.
- If a new risk not covered by the club happens, the board can admit or reject discretionally depending on the circumstances.

2.2.1.2 Managers

The day-to-day running of the club is delegated to management teams. These managers can be:

- Independent professional managers who charge a fee for their management services (for example, Tindall, Riley who manage the Britannia Club).

²² Anderson, *Supra* note 4, p 17.

²³ *Ibid.*

²⁴ *Ibid*, p 18.

²⁵ Steamship Mutual website, online at: www.simsl.com/About-Steamship-Mutual/the-current-pi-market.html (last Visit 15/05/2011).

- “in-house” management team (for example, Skuld, who employ their management and staff directly).²⁶

The managers and their representatives employ a staff of underwriters, analysts, lawyers and claim’s adjusters who provide the very wide breadth of expertise required to deal with P&I claims on the member’s behalf. The chief executive of manager is normally part of the Board of Directors.²⁷

2.2.2 The Scope of the cover

The insurance in respect of liabilities to third parties are divided in:

- Liability insurance: in this form the insurer has the obligation to pay to the assured the damages produced as consequence of an event covered in the policy.²⁸
- Indemnity insurance: the insurer has the obligation to indemnify or reimburse to the assured only to the extent that the assured has incurred and discharged his liability. The assured must pay first to the third party to trigger the insurer duty to indemnify.²⁹

The P&I clubs insurance cover has been traditionally indemnity insurance, but this principle has been changed in some important respects by international instruments such as³⁰:

- The Civil Liability Convention (1969 and 1992)
- The Bunker Convention 2001
- The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substance 1996
- The Nairobi International Convention on the Removal of Wrecks 2007

These convention allows the direct action against the Clubs, even in the case that the assured is in breach of his duty to pay first.³¹

The P&I cover provided by the Clubs provides insurance for a Member against loss, damage, liability or expense incurred by him, which arises:

- (A) In respect of the Member’s interest in an Entered Ship; and
- (B) Out of events occurring during the period of entry of the Ship in

²⁶ Anderson, *Supra* note 4, pg 18.

²⁷ Steamship Mutual website, online at: www.simsl.com/About-Steamship-Mutual/the-current-pi-market.html (last Visit 15/05/2011).

²⁸ Hazelwood *et al*, *Supra* note 21, pg 123.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

the Association; and

(C) In connection with the operation of the Ship.³²

The members can negotiate with the P&I club which risk they want to cover, and if they want to bear deductibles in any of them. Regarding what a typical club covers in his book-rule, in words of HAZELWOOD,

"A typical P&I Club provide indemnity insurance in respect of a member's liabilities triggered by these events:

1. *Collisions and non contact damage*
2. *Damage to fixed and floating objects*
3. *Cargo claims*
4. *Property on board*
5. *Loss of life, personal injury and illness*
6. *Passengers*
7. *Crew liabilities*
8. *Supernumeraries and others on board*
9. *Fines*
10. *Inquiries and criminal proceedings*
11. *Quarantine expenses*
12. *Stowaways, etc.*
13. *Diversion expenses*
14. *Life salvage*
15. *Unrecoverable general average*
16. *Ship's proportion of general average*
17. *Liabilities relating to the wreck of the entered vessel*
18. *Pollution*
19. *Towage contracts*
20. *Expenses incurred pursuant to directions of the club*
21. *The "omnibus rules"*³³

2.2.3 P&I club reinsurance and the International Group of P&I clubs

The P&I clubs are a good solution for the shipowners to get insurance at a low price, because its mutual and non profit basis; but due to the contribute by way of unlimited calls in case of claims against the Club, if this claims are frequent and astronomical, the members can find unexpected large emergency or supplementary calls. The clubs, to avoid or minimize this, developed a reinsurance system.³⁴

This system is a reinsurance pooling agreement. This means that the clubs agree to pool claims in excess of a specified figure (an Excess Loss Pool). In other words, the members of a P&I club (primary insurer) will pay up to the

³² Rule 3.1 of Britannia Rules of Class 3, 2011.

³³ Hazelwood *et al*, *Supra* note 21, p 124.

³⁴ *Ibid*, p 365.

specified figure, and reached that point, the reinsurance enter in action, and from that level all the members of all the clubs in the pool agreement will share the risk and contribute up to a fixed amount.³⁵

The 10 of April of 1899 was concluded the first club pooling agreement between six British Clubs, and they were known as the London Group. This Group change the name when other non British Clubs enter in the agreement, and nowadays is known as the International Group.³⁶

2.2.3.1 The International Group Pooling Arrangement

The key components are:

The Constitution: which sets out the rights and obligations of the clubs members of the International Group, and settle the administration system.³⁷

The International Pool Agreement:³⁸

- *Regulates how clubs accept entries from owners who wish to move their fleet from one club to another*
- *Sets out how clubs are to quote rates on renewal and what information the clubs are allowed and obliged to share with each other*
- *Imposes sanction in case of a member do not follow the rules stipulated in the IGA*
- *Requires to the clubs to disclose the ratio of their operating cost to their premium and investment income.*³⁹

The Pooling Agreement and the International Group's reinsurance programme

The Pool provides a mechanism for sharing all claims in excess of USD8 million up to, currently, approximately USD6.9 billion. There is no premium paid between the clubs under the agreement, and claims are simply shared in agreed proportions according to an agreed formula.⁴⁰

Because the clubs of the International Group share claims through the pooling system, they have a common interest in loss prevention and control, and in the maintenance of quality standards throughout the membership.⁴¹

³⁵ Hazelwood *et al*, *Supra* note 21, p 365.

³⁶ *Ibid*, p 365.

³⁷ *Ibid*, p 367.

³⁸ The most recent version of the agreement is from 20 of February 2008, and can be download at: www.igpandi.org/Group+Agreements/The+International+Group+Agreement (last visit 16/04/2011).

³⁹ Hazelwood *et al*, *Supra* note 12, p 366.

⁴⁰ IG P&I Clubs website, online at: www.igpandi.org/Group+Agreements/The+Pooling+Agreement (last visit 16/04/2011).

⁴¹ *Ibid*.

The Pooling Agreement defines which claims can be pooled, the types of claim which can be pooled, the types of claim which are excluded from pooling, the method by which claims are calculated for pooling purposes, the contribution formula and the provision for new applications to the pool.⁴²

The Pooling arrangement works as a reinsurance in layers; the first three are part of the pooling agreement, and the rest are part of the IG reinsurance programme. This comes from 1951, when the clubs decided to effect excess reinsurance cover with the proprietary market to protect the pool from any claim above 250,000 pounds to 1,500,000 pounds.⁴³

A chart of the reinsurance structure is shown at the Supplement A (see below).

2.2.3.2 The representative function of the International Group of P&I clubs

The principal function of the IG P&I clubs is to provide the insurance pool and arranges market reinsurance, but representing the ninety percent of the world's ocean tonnage, the members of the IG P&I use their weight to defend their interest in international conventions and legislation that can affect shipowners liabilities.

It carries out this function in relation to, and liaises with:⁴⁴

- inter-governmental bodies such as IMO, UNCITRAL and OECD
- national governments and the EU
- other industry organisation such as Intertanko, BIMCO, OCIMF etc.

There are thirteen separate and independent principal clubs in the International Group:

- American Steamship Owners Mutual Protection and Indemnity Association, Inc
- Assuranceforeningen Skuld
- Gard P&I (Bermuda) Ltd.
- The Britannia Steam Ship Insurance Association Limited
- The Japan Ship Owners' Mutual Protection & Indemnity Association
- The London Steam-Ship Owners' Mutual Insurance Association Limited
- The North of England Protecting & Indemnity Association Limited

⁴² IG P&I Clubs website, online at:

www.igpandi.org/Group+Agreements/The+Pooling+Agreement (last visit 16/04/2011).

⁴³ Hazelwood *et al*, *Supra* note 21, pg 368

⁴⁴ IG P&I Clubs website, online at: www.igpandi.org/About (last visit 16/04/2011).

- The Shipowners' Mutual Protection & Indemnity Association (Luxembourg)
- The Standard Steamship Owners' Protection & Indemnity Association (Bermuda) Limited
- The Steamship Mutual Underwriting Association (Bermuda) Limited
- The Swedish Club
- United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited
- The West of England Ship Owners Mutual Insurance Association (Luxembourg)

3 Law and P&I Cover regarding the crew in UK

The UK is one of the main actors in the shipping industry, and a legal and commercial reference in shipping nowadays. However, the weight of the UK as flag state is decreasing due to the open registries (the shipowners prefer to flag out to FOCs); this situation and the cheapest and available seafarers from developing countries diminish the importance of the UK as a crew supplier.⁴⁵

The importance of the UK in the shipping industry, in its different branches (finance, operation, insurance...), leads to its importance as a centre for dispute resolution.⁴⁶ The historic maritime tradition of the UK leave as result the admiralty jurisdiction, and the ability of the courts to deal with maritime disputes regardless of the nationality of the crew or the flag of the ship, with a well developed jurisprudence.⁴⁷

The seafarers rights in the UK are established in the Merchant Shipping Act 1995 (MSA 1995), and in the general employment legislation, making distinction of seafarers of UK registered vessels and seafarers on foreign flag vessels.⁴⁸ The focus will be maintained on the seafarers in the UK registered vessels.

The P&I clubs liability in respect of the injury, illness or death of crew members can arise from:

- Contracts, CBAs and articles
- Statute
- Common law

Next will be explained the common law liability and negligence, to continue with the contractual liability. Regarding the statutory obligations and the law of the flag state (for this thesis, the UK law), due to the forthcoming enter in force of the Maritime Labour Convention 2006, (the seafarers “bill of rights”), and the compliance of the UK legislation with the standard establishes in the MLC 2006, and the amendments that are being carried out when do not comply with it, the focus will be on the MLC 2006 and its implementation in the UK, which will be analyzed in the fifth chapter.

⁴⁵ Fitzpatrick and Anderson, *Seafarer’s Rights*, Oxford University Press 2005,p 486

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, p 487

3.1 Common law liability and negligence

The common law is “a system of laws that have been developed from customs and from decisions made by judges, not created by Parliament”.⁴⁹

In the UK, with the statutory obligations, also operates a common law. For instances, for negligence, common law liability can override the shipowner’s obligations to the crew member under the individual contract or CBAs. This means that a shipowner may be liable to pay a common law compensation even when he paid a contractual compensation to a crew member.⁵⁰

One first point that must be kept in mind is that any claim from a seafarer could come via contractual, and depending on the jurisdiction, it is possible to make the claim in tort. The differences of these two procedures are:⁵¹

- If the seafarer uses the contract, normally is enough to demonstrate the injury, and then highlight the clause of the contract where the employer liability is settled.
- If the seafarer use the tortious way, it will be more difficult, because he will need to proof that the injury was caused by the negligence of the shipowner.

It is obviously easier the contractual remedy, but the way chosen will depend on whether the seafarer think that he will obtain a higher level of compensation.⁵²

Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.⁵³ The case of *Donoghue v. Stevenson* [1932]⁵⁴ is one of the most famous cases in British legal history. The decision of the House of Lords founded the modern tort of negligence (delict in Scotland), both in Scots law and across the world in common law jurisdictions. The case originated in Paisley, Scotland but the House of Lords declared that the principles of their judgment also applied in English law. It is often referred to as the “Paisley snail” or the “snail in the bottle” case.⁵⁵

The case is perhaps best known for the speech of Lord Atkin and his “neighbour” or “neighbourhood” principle, where he applied biblical Luke

⁴⁹ Oxford Advanced learner’s Dictionary, Oxford University Press, 2011.

⁵⁰ Gold, *Supra* note 20 p 241.

⁵¹ Anderson, *Supra* note 4, p 110.

⁵² *Ibid.*

⁵³ *Blyth v Birmingham Water works Co.* (1856) 11 Ex.781.

⁵⁴ *Donoghue v Stevenson* [1932] AC 562 (HL).

⁵⁵ Wordpress. *Donoghue v Stevenson*. Online at www.donoghuev.info/ (last visit on 12/05/2011).

10 to law, that is, where an established duty of care does not already exist, a person will owe a duty of care not to injure those whom it can be reasonably foreseen would be affected by their acts or omissions.⁵⁶

The duty of care is the first of the three elements of negligence:

1. A duty of care, and the breach of that duty
2. Breach causing harm in fact
3. The harm must be not too remote a consequence of the breach (the foreseeability play's a leading role)⁵⁷

After the case of *Donoghue v Stevenson*, negligence law became much more complicated because the neighbour principle could be applied in many facets of the life.⁵⁸ The House of Lords reinforce the neighbour principle in the case of *Anns V Merton*⁵⁹, which establish a presumptive duty.⁶⁰ If this principle is applied to ships, the liability grows exponentially.

English law reject this principle now, and the foreseeability play a minor role.⁶¹

3.2 Contractual liability

The relation between the shipowner and the seafarers arise from individual contracts, collective agreements, and the articles (also called “shipping articles”) posted onboard vessels. A crew member can make an individual contract with the shipowner, his manager or operator, with terms agreed by the parties; this terms must not be against the statutory law.⁶²

Collective Bargaining Agreements are negotiated between a shipowner and a Seafarer’s Union about the pay and working conditions of the union members. The Seafarers union can be affiliated to the Transport Workers Federation (ITF), which has its own CBAs.⁶³

In the UK, the statutory provisions regarding Seafarers and Masters on UK registered vessels are established in the Part III of the MSA 1995.⁶⁴ The

⁵⁶ Wordpress. *Donoghue v Stevenson*. Online at www.donoghuev.info/ (last visit 12/05/2011).

⁵⁷ Richard Smellie, *Understanding the negligence issues*, paper given to the IBC Conference, March 2002, online at: www.fenwickelliott.co.uk/files/docs/articles/html/understand_neg.htm (last visit 13/05/2011).

⁵⁸ Gold, *Supra* note 20, p 231.

⁵⁹ [1978]AC 728.

⁶⁰ Gold, *Supra* note 20, p 231.

⁶¹ *Ibid*, p 232.

⁶² *Ibid*, p 238.

⁶³ ITF web page, online at: www.itfseafarers.org/itf_agreements.cfm (last visit 12/05/2011).

⁶⁴ Gold, *Supra* note 20, p 493.

Maritime Coastguard Agency (MCA) supplements the MSA provisions with Marine Notices, which are divided in:⁶⁵

- Merchant Shipping Notice (MSN): mandatory information that must be complied with under UK legislation
- Marine Guidance Note (MGN): give significant advice and guidance relating to the improvement of the safety of shipping and of life at sea
- Marine Information Note (MIN): intended for information which will only be of use for a short period of time

In art. 25 MSA 1995 (crew agreements), it is stated that the agreement must be made in writing, and signed, by the seafarer and the employer, and all the agreements made by the persons employed on a ship "shall be contained in one document", which is referred as crew agreement. This Crew Agreement must be approved by the Secretary of State (art.25.3 MSA 1995), but in practice this is done by the Maritime and Coastguard Agency (MCA) on behalf of the Secretary of State. The crew agreement must be carried onboard.⁶⁶

There is a standard Crew Agreement produced by the MCA, which fulfils the requirements of the STCW convention and the ILO C22⁶⁷. Any other agreement need the approbation of the MCA, which will check if the agreement proposed complies with UK standards. A record of the crew joining and leaving must be kept in the Official Log Book on the vessel.⁶⁸

The crew agreement must include:⁶⁹

- a description of the ship and its owners
- the ship's master
- the port the voyage will start from
- the destination and the port where the voyage will end
- meal supplies for the crew
- rules or laws to be observed
- particulars of each member of the crew – for instances: name, age, place of birth, previous ship, place and date of signing, capacity, certificates of competency, pay for the journey, and crew's addresses
- particulars of discharge

⁶⁵ MCA website: online at www.dft.gov.uk/mca/mcga07-home.htm (last visit 12/05/2011).

⁶⁶ Fitzpatrick *et al*, *Supra* note 45, p 493.

⁶⁷ ILO Seamen's Articles of Agreement Convention 1926.

⁶⁸ Fitzpatrick *et al* *Supra* note 45, p 493.

⁶⁹ Business Link, UK government's online resource, at: www.businesslink.gov.uk/bdotg/action/detail?itemId=1087136625&r.11=1081597476&r.12=1086795191&r.13=1087115858&r.14=1087136317&r.s=sc&type=RESOURCES (last visit 12/05/2011).

The Crew Agreement is a fixed term contract between the employer, crew member, and the vessel. It automatically terminates at the end of a stated period - which cannot be longer than 12 months - or specific voyage.⁷⁰

It must contain a list of all crew members, and the following information on each crew member:⁷¹

- minimum terms of employment
- job descriptions
- period of notice
- how the master or employer must give notice
- circumstances when the agreement can be terminated
- stated salary

The MCA produced a draft proposal of Seafarers Employment Agreement, preparing for the implementation of the MLC 2006 in the UK. This draft is published online to assist owners of UK ships in their preparations for the MLC.⁷²

The minimum terms and conditions (working hours, repatriation, etc...) are according most times with the Maritime Labour Convention 2006, and when not, the UK government is making amendments to comply with the convention. These terms will be explained in the fifth chapter.

To conclude, the contractual liability may be quite complex: a seafarer may have an Individual contract that must comply with the minimum standard established by the Articles (Crew Agreement), and incorporate by reference a CBA in his contract.⁷³

3.3 P&I cover regarding crew members

“Seaman” is defined in the rules-book of Britannia as:

- *A person (including the Master) engaged under articles of agreement or otherwise contractually obliged to serve on board an Entered Ship (except persons engaged only for nominal pay)*

⁷⁰ Business Link, UK government's online resource, at: www.businesslink.gov.uk/bdotg/action/detail?itemId=1087136625&r.11=1081597476&r.12=1086795191&r.13=1087115858&r.14=1087136317&r.s=sc&type=RESOURCES (last visit 12/05/2011).

⁷¹ *Ibid.*

⁷² MCA website, at: www.dft.gov.uk/mca/mcga07-home/workingatsea/mcga-healthandsafety/maritime_labour_convention_2006/mcga-ds-ssh-mlc-sea.htm (last visit 12/05/2011).

⁷³ Gold, *Supra* note 20, p 239.

*including a substitute for such person and also including such persons while proceeding to or from such Ship.*⁷⁴

First, the P&I clubs do not provide injury or illness insurance to the seafarers themselves, but to their members (shipowners) in respect of the liabilities that arise in the relation between the shipowner and the seafarers as employer and employee, from the contract, the statutory law, the collective agreements and the international conventions applicable.

The clubs normally expand this definition in relation to the families of the crew who visit on board or travel with the crew, because the member can incur in liabilities to them in respect of loss of life, illness, personal injury, loss of effects, etc. The normal practice is that the crew and their families should have the written permission of the member and this arrangement should be approved by the Club.⁷⁵

In this chapter will be presented the liabilities cover in respect of the crew, and for this purpose the Rule 19 of Britannia Rules book 2011 is going to be analyzed as general example of the scope of the cover typically provided by the IG P&I clubs.

3.3.1 Illness, injury and death

Rule 19.1 Illness, injury and death (A)

Medical, hospital, funeral and other expenses necessarily incurred and wages, maintenance, compensation and damages payable by reason of the illness or death of, or injury to, a Seaman. Notwithstanding the proviso to Rule 5(1), where a Member has failed to discharge or pay a liability for wages, maintenance, compensation or damages for the illness or death of, or injury to, a Seaman, the Association shall discharge or pay such liability on the Member's behalf directly to such Seaman or dependent thereof.

Provided always that

- (i) the Seaman or dependent has no enforceable right of recovery from any other party and otherwise would be uncompensated;
- (ii) subject to (iii) below, the Association shall in no circumstances be liable for any sum in excess of the amount which the Member would have been able to recover from the Association under these Rules and the Member's terms and conditions of entry;
- (iii) where the Association is under no liability in respect of the claim by virtue of Rules 33(1) and 35(1), the Association shall nevertheless discharge or pay the claim to the extent that it arises from an event occurring prior to the cesser of the insurance, but only as agent of the Member and the Member shall reimburse the Association in full.

Comments:

⁷⁴ Definition from Britannia Class 3 Rule book 2011.

⁷⁵ Hazelwood *et al*, *Supra* note 21, p 167.

Normally the compensation regarding illness, injury and death are stated in terms of the contract, by an amount of money or a certain number of days pay; but the liability for this compensation can arise not only from the contract but also from statutory and common law. The compensation which arises from statutory and/or common law is covered by the club, but the liability that arise's from the contractual terms should be approved by the Club.⁷⁶

Other added liability of the shipowner could be the expenses derived from hospital, medical expenses and, if the seafarer pass away, funeral and linked expenses.⁷⁷

The long-term compensation and the cost of hospitalisation and medical treatment of a serious illness to a seaman can vary -it can include expenditures for acute treatment, diagnostic measure, surgery, post-surgery treatment, nursing care and medicines, be given in a public or private hospital, in which country is given...⁷⁸. Most of the clubs recommend to carry out a medical examination of the seafarers before their employment.⁷⁹

The Clubs may pay the cost of sending a close relative (for instance, the spouse) to visit a crew member when he is hospitalized far away from home, but it is necessary a certificate from the doctor or the person in charge of the medical advisory, stating that this visit probably help to a sooner recovery.⁸⁰

Also, a proviso to this rule stipulated that *"where the liability arises or the costs or expenses are incurred under the provisions of a crew agreement or other contract of service or employment and would not have arisen but for those terms, that liability or those costs or expenses are only covered by the club if and to the extent that those terms shall have been previously approved by the managers in writing"*⁸¹. Approval is usually not given where the contract provided an open-ended commitment in respect of medical care.⁸² This approval is required in order to protect the mutuality, in other words, to protect all the members of the club from the risks and liabilities beyond the normal standard assumed by one of his member.

In the case of occupational diseases such as mesothelioma caused by the exposure to asbestos, the problem arises because the symptoms take a long time to develop (up to 40 years). It is obvious the difficulties face by the claim to proof when the expositions that cause the disease occurred. Some jurisdiction allow to the claimant of this disease to sue all his former's

⁷⁶ Hazelwood *et al*, *Supra* note 21, pg 165, and Gold, *Supra* note 28, p 256.

⁷⁷ Gold, *Supra* note 20, p 257.

⁷⁸ Gold, *Supra* note 20, p 257.

⁷⁹ Anderson, *Supra* note 4, p 110.

⁸⁰ Gold *Supra* note 20, p 257.

⁸¹ Hazelwood *et al*, *Supra* note 21, p 165.

⁸² Gold, *Supra* note 20, p 256.

employers jointly, due to the risk of contract mesothelioma increase with the exposure.⁸³

The practise in the case of asbestos claims is divide pro rata between the former's employers according to the sea services days that the seafarer had which each one.⁸⁴

3.3.2 Shipwreck unemployment indemnity

19.1 Shipwreck unemployment indemnity (B)

Wages payable to a Seaman during unemployment in consequence of the wreck or loss of an Entered Ship and other payments made to Seamen in consequence of such wreck or loss under statutory obligation.

Provided always that any such wages and other payments which exceed two months basic wages shall not be recoverable from the Association.

Comments:

The seafarers face different perils. The vessels can ground, sink, fire, etc. in their journey. The members will be indemnified in their liability respect a seaman who is proceeding to, or from that vessel, or on board, for the loss of his employment because the ship wreck or is loss.⁸⁵

The liability of the shipowner normally arise from the contract of employment, which provides a compensation of one month's basic wages usually, but depending on the country, statutory or common law may be applicable.⁸⁶

3.3.3 Loss of effects

19.1 Loss of effects (C)

Compensation payable under statutory obligation in respect of loss of or damage to the Personal Effects of a Seaman.

Comments:

The shipowner can find himself liable to compensate a seafarer for loss of or damage to their personal property, as consequences of theft by stevedores, fire on board, etc. This cover exclude valuables, cash, negotiable instruments and objects of a rare or precious nature.⁸⁷

⁸³ Hazelwood, *Supra* note 21, p 165.

⁸⁴ *Ibid.*

⁸⁵ *Ibid*, p 166.

⁸⁶ Gold, *Supra* note 20, p 260.

⁸⁷ Anderson, *Supra* note 4, p 112.

3.3.4 Substitutes

19.1. Substitutes (D)

Expenses necessarily incurred in providing a substitute for a Seaman who is unfit for duty, or has been left behind for any reason where liability for such expenses could not reasonably have been avoided.

Provided always that wages shall only be recoverable as part of the said expenses when the Member is legally obliged to pay wages to two Seamen simultaneously for the same job and is unable to recover such double wages from any other source.

Comments:

If a seaman died or is injured or ill, and as consequence a substitute is necessary for the safe operation of the ship, or for any other reason is "unfit for duty" –for example, a national government, for security reasons, refused to allow a vessel to enter to port with a particular seaman on board- the only choice of the shipowner will be to substitute that man, in order to maintain the ship properly manned and sea worthy. In this cases, the club cover the cost of the substitution.⁸⁸

The same treatment receives the situations regarding when a seaman is left behind. This can be due to different reasons, as desertion, or because the seaman was negligent and he did not return on time on board and the vessel departed without him. In any case, as far as the substitute is necessary to run the ship properly –complying with the standards regulations, seaworthy, etc. Then the costs of the substitution are a valid claim against the club.⁸⁹

3.3.5 Distressed Seamen, Desserters and Strikers

19.1 Distressed Seamen, Deserters and Strikers (E)

Expenses incurred by or chargeable to a Member under statutory obligation in respect of a distressed Seaman or Seamen who desert or go on strike, where such expenses are not recoverable under any other paragraph of this Rule and where such expenses cannot be recovered from the Seaman himself.

Comments:

*Strikers: Seamen employed in UK ships which go to sea will be committing an offence under section 59 of the Merchant Shipping Act 1995 if they go on strike at a time when their ship is **at sea**, which means (for the purposes of section 59) at any time when it is **not securely moored in a safe berth**. The Act does not appear to prohibit such action at berths in places outside the*

⁸⁸ Anderson, *Supra* note 4, p 111

⁸⁹ Gold, *Supra* note 20, p 265

UK.⁹⁰ If the Strike is in port (ship moored), the Seafarers are subject to ordinary laws governing industrial action. This will give rise to potential civil liability that can be only avoided if the facts fall within one of the statutory immunities.⁹¹

Deserters: **Desertion** “is the wilful abandonment of an employment or of duty”⁹². A seaman becomes a **deserter** when he is signed on a crew agreement but wilfully fails to rejoin the ship in breach of the agreement.⁹³ In this case, the employer may make a civil action for the mentioned breach. A seafarer who desert is no committing a criminal offence, but depending of the country, the seaman may be illegal according to the State’s immigration laws, which will lead to criminal prosecution and fine or imprisonment, and deportation.⁹⁴ This can generate cost -as repatriation of the seafarer- to the shipowner, who is covered by the P&I club.

Distressed seaman: Under SOLAS Convention there is an obligation to save lives. The costs derivated from this obligation (it can lead to deviation, for example) will be bear by the shipowner, and if can not be recovered from the H&M underwriters, then it will be covered by the P&I club.⁹⁵

3.3.6 Diversion

19.1 Diversion (F)

Diversion expenses associated with liabilities covered under this Rule which are payable in accordance with Rule 19(6).

19-6 Diversion expenses: The cost to a Member of putting in to, or remaining in, port in circumstances which could entitle the Member to recover under Rule 19(1), Rule 19(2), Rule 19(3), Rule 19(4) or Rule 19(5), but confined to the net loss to the Member (over and above the expenses that would have been incurred but for the diversion or delay) in respect of port charges, bunkers, insurance, Seamen’s wages, stores and provisions necessarily incurred as a result of the diversion, while securing medical attention for sick or injured persons on board the ship, or while awaiting a substitute.

Comments: The vessels are always engaged in a commercial operation, trading under a time or voyage charter etc, subject to deadlines and subject to specific amounts of money to make the trip. However, there are some events that will make necessary to divert the route, for example to help another ship in distress, or to land an injured seaman, etc.⁹⁶

⁹⁰ Malcolm Maclachlan, *The shipmaster’s bussines companion*, 4th ed. The Nautical Institut, London 2004, p 469.

⁹¹ Fitzpatrick *et al*, *Supra* note 45, p.489.

⁹² Oxford Dictionary, *Supra* note 31.

⁹³ Maclachlan, *Supra* note 90 p.757.

⁹⁴ *Ibid.*

⁹⁵ Anderson, *Supra* note 4, p 116.

⁹⁶ Anderson, *Supra* note 4, p 113.

If the vessel is under a time charter party, probably the charterer will put the vessel off hire for the time of the diversion. There will be cost related to the diversion in any case to the ship operator, like bunkers, the wages of the seamen, stores and provisions...⁹⁷

This cost will end only when the vessel is back to his original voyage. These losses, even when they are not "third party losses" (they are losses of the ship operator), are partially covered by the P&I clubs, "confined to the net loss"⁹⁸ (the loss of hire is not included).⁹⁹

3.3.7 Repatriation

19.1 Repatriation (G)

Repatriation expenses associated with liabilities covered under this Rule which are payable in accordance with Rule 19(7).

19.7 The cost to a Member of maintaining, repatriating or deporting persons in circumstances which would entitle the Member to recover under Rule 19(1), Rule 19(2), Rule 19(3), Rule 19(4) or Rule 19(5).

Comments: When a seaman must be repatriated, for:

Illness, injury: In some part of the world, the appropriate equipment may not be available, or the seaman may not be in physical condition to sail with the vessel, so he will need to be repatriated to his country to recover enough to travel. The member can claim the expenses on repatriation to the club, provided that the repatriation was necessary –sometimes the repatriation is possible without alteration of the original route; in this cases the cost are considered "operational costs" and are not covered by the Club.¹⁰⁰

Must be mentioned that a visitor (normally a relative) may be used as escort during the repatriation, paying the club the costs –provided that this is the cheapest solution. Anyway, the clubs recommend their members to consult for advice and approval in this situation.¹⁰¹

Death: The cost of a normal funeral and burial are covered, as well as the expenses in return the body, ashes and the personal effects of the seaman who pass away. Extra costs as flowers are not covered.¹⁰²

Shipwreck: This situation may take place far away from the homeland of the seafarers. Nowadays, the crew have the legal right to be repatriated by the

⁹⁷ Anderson, *Supra* note 4, p 114.

⁹⁸ Net loss: A decrease in owner's equity from the result of unprofitable operations. In other words, total expenses exceed total revenues (definition from www.invertordictionary.com).

⁹⁹ Anderson, *Supra* note 4, p 114.

¹⁰⁰ Gold, *Supra* note 20, p 257.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*, p 258.

employer, and the ship operator can recover such expenses from the P&I club.¹⁰³

In addition, in the case of the example commented above of the government who do not allow a vessel to get into the port for one particular seaman, that seaman has the right to repatriation.¹⁰⁴

P&I clubs do not cover normal repatriation at the end of a seaman's employment:¹⁰⁵

- upon the sale of the vessel
- when a seaman is dismissed for misconduct

3.3.8 Collective and special agreements

19.1 Collective and special agreements (H)

The liabilities, costs and expenses covered under this Rule may be extended to include those for which a Member may be liable under collective or special agreements which have received the prior approval of the Managers.

However, there shall be no recovery under this Rule arising out of a Member's liability under a contract of indemnity or guarantee between the Member and a third party (see Rule 19(15)).

PROVIDED ALWAYS THAT:

There shall be no recovery under this Rule 19(1) in respect of liabilities, costs or expenses:

- (i) which arise as a result of the termination of an agreement of service in accordance with the terms thereof, or by mutual consent, or from any other discretionary act of the Member, or from the sale of an Entered Ship; or
- (ii) in respect of Seamen employed as catering staff on board the Entered Ship when moored (otherwise than on a temporary basis) and open to the public as a hotel, restaurant, bar or other place of entertainment.

Comments: The liability of the shipowner arise also from the applicable CBA for the ship, and the clubs cover this liabilities, if they have been approved by the managers; this is, as was mentioned above, to protect the membership of the Club from the risks and liabilities beyond the normal standard assumed by one of his member.¹⁰⁶

¹⁰³ Anderson, *Supra* note 4, p 112.

¹⁰⁴ *Ibid.*

¹⁰⁵ Hazelwood *et al.*, *Supra* note 21, p 166.

¹⁰⁶ Anderson, *Supra* note 4, p 109, and Gold, *supra* note 20, pp 239-240.

3.4 Limitation of the liability regarding the crew

The cover is limited to a maximum of USD 3.000.000.000, “unless otherwise limited to a lesser sum”.¹⁰⁷

¹⁰⁷ Rule 27.2.B.(ii) Britannia Rules of Class 3, 2011.

4 Crew claims and direct actions against P&I clubs

The P&I clubs cover the liability of the shipowners regarding third parties, as it has been shown. It is not an insurance over the crew, and the aim of the P&I clubs is to protect the members and indemnify them for the losses that they suffer. Having said that, what happens in the event that a shipowner – member of the club fall in bankruptcy? Can a seafarer subrogate on the position of the member and make a direct action against the P&I club?

In England, this situation was deal with The Third Parties (Rights Against Insurers) Act 1930, and a new act that replace it, The Third Parties (Rights Against Insurers) Act 2010. The P&I clubs positions respect the direct actions are the same, except for the third party claims about injury and death of the crew.¹⁰⁸

4.1 The Third Parties (Rights Against Insurers) Act 1930

Before the The Third Parties (Rights Against Insurers) Act 1930, the insurance protected only to the one who pay's for it, and who was a part of the insurance contract. However, this Act changes it; The purpose of the Act is:

*to confer on third parties rights against insurers of third-party risks in the event of the insured becoming insolvent, and in certain other events.*¹⁰⁹

Respect of its applicability, the Act covers the entire insurance contract

*“Where under any contract of insurance a person (...) is insured against liabilities to third parties which he may incur in the event of the insured becoming bankrupt (...)”*¹¹⁰

The third party then has the same rights as the insured against the insurers, and the insurers have the same defences as if the third party were the insured, but subject to some conditions (section 1 (4) of the Act):

- *if the liability of the insurer to the insured exceeds the liability of the insured to the third party, nothing in this Act shall affect the rights of the insured against the insurer in respect of the excess; and*
- *if the liability of the insurer to the insured is less than the liability of the insured to the third party, nothing in this Act shall affect the rights of the third party against the insured in respect of the balance.*

¹⁰⁸ Hazelwood *et al*, *Supra* note 21, p 292.

¹⁰⁹ Third Parties (Rights Against Insurers) Act 1930.

¹¹⁰ *Ibid*, section 1.

The subrogation can only take place if there is a legal liability between the insurer and the assured, and the third party and the assured. Also, the section 1 (3) of the Act stipulate that any clause to make the contract void in case of bankruptcy or insolvency of the insured, in order to protect the insurer from the application of the Act, is void.¹¹¹

Once the third party is in the position of the assured, the assured has the duty to give the necessary information to the third party (section 2 of the Act).¹¹²

The P&I clubs response to The Third Parties (Rights Against Insurers) Act 1930 was that they were not under the scope of the Act, since it only applied to “contracts of insurance”, and the relation between the members and the club is different than in the commercial insurance. After some years, it was clear that the P&I clubs fall under the scope of the Act. However, as stated in the section 1(4) of the Act, the insurers have the same defences as if the third party were the insured. The defences of the insurance contract (in this case the club rules).¹¹³

This means that the third party will receive the same treatment by the club as if he were a member; for instance, if the claim’s origin is an act of wilful misconduct of the member, the club will not be liable.

4.2 Pay to be paid rule

Another defence is the “pay to be paid rule”; this rule means that, because the clubs are indemnity insurance, the member must pay and settle the claim before asking for the indemnification to the club. This rule is stipulated in the Britannia rulebook in these words:

“If a Member shall become liable as hereinafter set out in Rule 19, in damages or otherwise, or shall incur any costs or expenses in respect of a Ship which was entered in the Association at the time of the casualty or event giving rise to such liability, costs or expenses, such Member shall be entitled to recover out of the funds of this Class of the Association the amount of such liability, costs or expenses to the extent and upon the terms, conditions and exceptions provided by these Rules and by the Certificate of Entry. (...) Provided always that, unless the Committee in its discretion otherwise determines, it shall be a condition precedent of a Member’s right to recover from the funds of the Association in respect of any liability, costs or expenses that the Member shall first have discharged or paid them.”¹¹⁴

The “pay to be paid” defence was used in the cases of The “Fanti” and The “Padre Island”. The defence relied on the obligation of the member (the insured) to pay to the third party in order to get the right to recover the money from the P&I club; but if the member is in bankruptcy this will be

¹¹¹ Hazelwood *et al*, *Supra* note 21, p 292.

¹¹² *Ibid*, p 293.

¹¹³ *Ibid*, pp 293-294.

¹¹⁴ Britannia Class 3 Rule Book, rule 5.1.

impossible. Therefore, the third party who subrogate in the position of the member under the 1930 Act, should pay himself to fulfil the requirement of the rule to get the right to recover from the funds of the insurer.¹¹⁵

In “The Fanti”¹¹⁶ the court held that this requirement is impossible to fulfil.¹¹⁷ It also held that, therefore, the clause falls in the scope of the section 1.3 of the Act 1930, and was void.

In the “Padre Island”¹¹⁸, a similar case to “The Fanti”, the court held that the club was allowed to use the same defence against the third party as if the third party were the member, and that this was not in the scope of the mentioned section.

Despite the requirement was impossible, the House of Lords held that:¹¹⁹

- an insured with a good defence against the assured has the same defence in the case of the 1930 Act subrogation
- a contract provision that cannot be performed does not mean that it should be nullify
- the pay to be paid rule was not in the scope of the Section 1.3 of the Act 1930, and therefore, was not void

Lord Justice Goff warned the Clubs to not use this defence for cases of loss of life or personal injury.

4.3 The Third Parties (Rights Against Insurers) Act 2010

On 25 March 2010, the Third Parties (Rights Against Insurers) Act 2010 (“the Act”) received royal assent and became law in England and Wales.

The aim of the Act is to modernize the previous Act from 1930. As in the Act 1930, it transfers the rights of an insolvent assured against his insurers regarding the indemnity that arise from the insurance contract to a third party claimant, but the 2010 Act introduces four key changes; in words of Christina Fitzgerald:

¹¹⁵ Hazelwood *et al*, *Supra* note 21, pp 300-301.

¹¹⁶ *Firma C-Trade SA v. Newcastle Protection and Indemnity Association (The Fanti)* [1987] 2 Lloyd's Rep. 299 .

¹¹⁷ Hazelwood *et al*, *Supra* note 21, p 300.

¹¹⁸ *Socony Mobil Oil Co Inc v. West of England Ship Owners Mutual Insurance Association (London) Ltd (The Padre Island) (No.1)* [1984] 2 Lloyd's Rep. 408.

¹¹⁹ *Firma C-Trade SA v. Newcastle Protection and Indemnity Association (The Fanti)* and *Socony Mobil Oil Co. Inc. and Others v. West of England Ship Owners Mutual Insurance Association Ltd (The "Padre Island") (No.2)* [1991] 2 A.C. 1.

“1.A third party claimant is no longer required to first establish liability against an insured before bringing proceedings against their insurers. A new Court procedure is available to third parties. The third party has a right to seek declarations as to the insured’s liability to them and as to the insurer’s potential liability under a contract of insurance in one set of proceedings. If the Court or Tribunal makes such declarations it will be able to make an appropriate judgment which is likely to be a money judgment. A third party will no longer be obliged to join the insured in proceedings against the insurer.

2.The definition of insolvency has been widened to include companies subject to a Company Voluntary Arrangement or a Scheme of Arrangement.

3.The regime governing a third party’s ability to seek information is clarified. The list of disclosable material is set out in the Act. A third party will now have greater rights of access to information to establish the terms of any relevant insurance policy which will assist in deciding whether to embark on litigation. If it can be established that there is a contract of insurance that covers, or might reasonably be expected to cover the supposed liability, information can be obtained on the identity of the insurer, the terms of the insurance, and whether there are or have been proceedings between the insurer and the insured in respect of the supposed liability.

4.A third party claimant need not take steps to restore a dissolved insured company to the Companies House Register.”¹²⁰

Regarding the personal injuries claims, The “Pay to be paid” defence to avoid the third parties claims in case of loss of life or personal injury when the member/assured has become insolvent is now useless under the English law (but it can be used for other kind of claims). The third party personal claims which arise after the enter in force of the Third Parties (Rights against Insurers) Act 2010, can be actioned directly against the clubs.¹²¹

This change is part of the preparation for the MLC 2006, which is expected to enter in to force soon. Some clubs, in their preparations, have changed their rules to waive:

- any pay to be paid provision, and
- retrospective termination of cover in respect of claims for crew injury or death.¹²²

¹²⁰ Christina Fitzgerald, *Third Parties (Rights Against Insurers) Act 2010*, 7 June 2010, online at www.mablaw.com/2010/06/3778/ (last visit 13/05/2011).

¹²¹ Hazelwood *et al*, *Supra* note 21, p 166.

¹²² *Ibid*.

5 The Maritime Labour Convention 2006

The MLC has its roots in the in Article 94 UNCLOS:

Article 94 - Duties of the flag State

1. *Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.*

Particularly, the states shall:

(b) *assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship...*

3. Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia, to:...

(a) *the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments; ...*

5. In taking the measures called for in paragraphs 3 and 4 each State is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance.

In the words of Chao and Turner: “The MLC is a single, consolidated convention that provides comprehensive rights and protection at work for more than 1,200,000 seafarers worldwide. It consolidates and updates more than sixty five international labour standards relating to seafarers adopted over the last eighty years and, importantly, for the first time, it creates a system of certification and inspection to enforce those standards”.¹²³

5.1 The aim of the convention

The MLC is designed to sit alongside other regulations such as the IMO standards on ship safety, security and quality ship management (such as SOLAS, STCW and MARPOL). Where those instruments deal more with the vessel and its operation, the MLC deals with the rights of the seafarers.¹²⁴

Therefore, the Convention’s aim is the standardisation of the seafarers right internationally, setting their rights to decent working conditions, and providing the tools to certificate and enforce this standards, regardless of the

¹²³ John Turner and Chao Wu, *Legal Briefing: MLC (November 2010) Comprehensive rights and protection at work*, UK P&I Club, 02-12-2010.

¹²⁴ ITF Seafarers webpage, online at: www.itfseafarers.org/ILOMLC.cfm (last visit 14/05/2011).

flag of the vessel and the seaman race, religion, sex, colour, social origin, etc.¹²⁵

5.2 Adoption of the convention and entering in to force

The MLC was adopted in February 2006. It will come into force exactly 12 months after a minimum of 30 countries representing at least 33% of the world fleet in gross tonnage have ratified the convention.¹²⁶ The requirement of the 33% has been met already, and the countries that ratified the convention are:

Convention No. *MLC*

(Source: ILOLEX - 18. 4. 2011)

Country	Ratification date	Status
Bahamas	11:02:2008	ratified
Bosnia and Herzegovina	18:01:2010	ratified
Bulgaria	12:04:2010	ratified
Canada	15:06:2010	ratified
Croatia	12:02:2010	ratified
Liberia	07:06:2006	ratified
Marshall Islands	25:09:2007	ratified
Norway	10:02:2009	ratified
Panama	06:02:2009	ratified
Saint Vincent and the Grenadines	09:11:2010	ratified
Spain	04:02:2010	ratified
Switzerland	21:02:2011	ratified

Ratified: 12 Conditional ratification: 0 Declared applicable: 0 Denounced: 0

A large number of other countries in all regions have already taken steps toward ratification. In June 2007, the EU Council adopted a decision authorizing all EU Member States to ratify the MLC, 2006 in the interest of the European Community before 31 December 2010. In December 2008, the Council of the European Union reached a political agreement on a proposal for a Directive implementing the agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport

¹²⁵ Turner *et al*, *Supra* note 123.

¹²⁶ Art. VIII.3 of the MLC 2006

Workers' Federation (ETF) on the MLC, 2006.¹²⁷ In words of Moira McConnell:

*Although December 2010 has now passed, the goal of five years may still be possible, as there has been significant progress in other countries, particularly in the Asia, Southeast Asia and Pacific region. Many countries in the Caribbean are moving forward now, as well as several countries in Africa. But, not surprisingly, the global economic destabilization and other political events and major natural disasters have had an impact on national legislative agendas.*¹²⁸

5.3 The convention

The Member States (Member hereinafter) are the ones to decide how the convention will be implemented in their domestic law. Regarding the structure, the Convention is divided in three parts: The Articles, the Regulations and the Code. The Articles and Regulation establish the core rights and the basic obligations of the Members of the Convention. In the Code are contained the details about how to implement the Regulations.¹²⁹

5.3.1 The Articles

It began with the preamble and sixteen articles were state the general obligations, definitions and scope of application, the fundamental rights and principles, the seafarers' employment and social rights, the implementation and enforcement responsibilities, the entry into force, how to made the amendments...

Article III state that the fundamental rights in the convention are:

- (a) freedom of association and the effective recognition of the right to collective bargaining;*
- (b) the elimination of all forms of forced or compulsory labour;*
- (c) the effective abolition of child labour; and*
- (d) the elimination of discrimination in respect of employment and occupation.*

The Article IV, about the seafarer's employment and social rights, state in its point 5 that:

¹²⁷ ILO, Article: *Achieving the seafarers' international bill of rights: more than half way there!* Geneva (ILO Online) 23/02/2009, online at: www.ilo.org (last visit 14/05/2011).

¹²⁸ Moira L. McConnell, *The ILO's Maritime Labour Convention, 2006: Filling a Gap in the Law of the Sea*, Thursday, 07 April 2011, MEPIELAN Electronic Bulletin, online at: www.mepielan-bulletin.gr/default.aspx?pid=18&CategoryId=2&ArticleId=55&Article=The-ILO (last visit 14/05/2011).

¹²⁹ Turner *et al*, *Supra* note 123.

Each Member shall ensure, within the limits of its jurisdiction, that the seafarers' employment and social rights set out in the preceding paragraphs of this Article are fully implemented in accordance with the requirements of this Convention. Unless specified otherwise in the Convention, such implementation may be achieved through national laws or regulations, through applicable collective bargaining agreements or through other measures or in practice.

In Article V (implementation and enforcement responsibilities), the convention state that the members shall implement and enforce laws or regulations or other measures that it has adopted to fulfil its commitments under this Convention with respect to ships and seafarers under its jurisdiction.¹³⁰ Each Member shall effectively exercise its jurisdiction and control over ships that fly its flag by establishing a system for ensuring compliance with the requirements of this Convention, including regular inspections, reporting, monitoring and legal proceedings under the applicable laws.¹³¹ One point to highlight is Article V.7, which stipulate that Each Member shall implement its responsibilities under this Convention in such a way as to ensure that the ships that fly the flag of any State that has not ratified this Convention do not receive more favourable treatment than the ships that fly the flag of any State that has ratified it.¹³² In other words, after the MLC is in force, it will be the standard and no advantage should be gained when registering a vessel in a non-ratifying state.

Article VI explain the regulations and the code. This will be explained below (5.3.2 The regulations and the code). Article VII states that any derogation, exemption or other flexible application of this Convention requires consultation with shipowners' and seafarers' organizations.

Article VIII is about the entry into force, already explained (see above point 5.2 Adoption of the convention and entering into force). Article IX explain how a Member State may denounce the convention. It stipulate a period of ten years to denounce it. If there is no denounce, the Member State will be bound for another period of ten years.

Article X establishes the effect of entry into force. All the conventions that are revised by the MLC 2006 are listed. Article XI and XII are about the depositary functions. Article XIII explains the function of the special tripartite committee (composed by representatives of the Governments, seafarers and shipowners of each Member State). The function is to "keep the working of this Convention under continuous review through a committee established by it with special competence in the area of maritime labour standards."

¹³⁰ MLC 2006, Article V.1.

¹³¹ MLC 2006, Article V.2.

¹³² Turner *et al*, *Supra* note 123.

Article XIV explains the procedure to make amendments in the convention, and the Article XV explains the procedure to make amendments in the code. The Article XVI stipulates that the authoritative languages of the convention are English and French.

5.3.2 The Regulations and the Code

Regarding the Regulations, the convention is structured in five titles:

- Title 1: Minimum requirements for seafarers to work on a ship;
- Title 2: Conditions of employment;
- Title 3: Accommodation, recreational facilities, food and catering;
- Title 4: Health protection, medical care, welfare and social security protection and;
- Title 5: Compliance and enforcement.

All the titles are divided in three parts:

- The First part (Regulations) stipulate the purpose and general principles and mandatory obligations.
- A second one (Part A) set the mandatory standards that the member states must implement.
- The third Part (Part B) establishes the guidelines about how the Part A should be interpreted. This part is not mandatory¹³³

5.3.2.1 Title 1: Minimum requirements for seafarers to work on a ship

Title 1 is about the regulations, standards and guidelines of:

The minimum age (Regulation 1.1), to ensure that no under-age persons work on a ship (the minimum age 16, the night work under the age of 18 is prohibited¹³⁴, the employment, engagement or work of seafarers under the age of 18 shall be prohibited where the work is likely to jeopardize their health or safety¹³⁵).

Medical certificate (Regulation 1.2), to ensure that all seafarers are medically fit to perform their duties at sea. The medical certificate shall be issued by a duly qualified medical practitioner.¹³⁶

Training and qualifications (Regulation 1.3), To ensure that seafarers are trained or qualified to carry out their duties on board the ship; training and

¹³³ Article VI.

¹³⁴ Std A1.1.2.

¹³⁵ Std A1.1.4.

¹³⁶ Std A1.2.4.

certification in accordance with the mandatory instruments adopted by the International Maritime Organization shall be considered as meeting the requirements for this purpose.¹³⁷

Recruitment and placement (Regulation 1.4), To ensure that seafarers have access to an efficient and well-regulated seafarer recruitment and placement system, without charge to the seafarer. If the recruitment and placement service operate in the territory of a Member State, it must comply with the standards set out in the code.¹³⁸ In respect of seafarers who work on ships that fly its flag, that shipowners who use seafarer recruitment and placement services that are based in countries or territories in which this Convention does not apply, the Members shall ensure that those services conform to the requirements set out in the Code.¹³⁹

5.3.2.2 Title 2 Conditions of Employment

Title 2 is about the seafarers' employment agreements, wages, hours of work and hours of rest, entitlements to leave, repatriation, compensation for the ship's loss or foundering, manning levels and career and skill development and opportunities for seafarers' employment.

The Convention has the definitions of Seafarer and ship in its Article II:

1. For the purpose of this Convention and unless provided otherwise in particular provisions, the term:

Seafarer means any person who is employed or engaged or works in any capacity on board a ship to which this Convention applies;

Ship means a ship other than one which navigates exclusively in inland waters or waters within, or closely adjacent to, sheltered waters or areas where port regulations apply;

4. Except as expressly provided otherwise, this Convention applies to all ships, whether publicly or privately owned, ordinarily engaged in commercial activities, other than ships engaged in fishing or in similar pursuits and ships of traditional build such as dhows and junks. This Convention does not apply to warships or naval auxiliaries.

Seafarer's employment agreements (Regulation 2.1): To ensure that seafarers have a fair employment agreement, the terms and conditions "shall be set out in a clear written legally enforceable agreement and shall be consistent with the standards set out in the Code."¹⁴⁰ Also the seafarers must have "the opportunity to review and seek advice on the terms and conditions in the agreement"¹⁴¹ before signing.

¹³⁷ Reg 1.3.4.

¹³⁸ Reg 1.4.2.

¹³⁹ Reg 1.4.3.

¹⁴⁰ Reg 2.1.1.

¹⁴¹ Reg 2.1.2.

Where a collective bargaining agreement forms all or part of a seafarers' employment agreement, a copy in English of that agreement shall be available on board.¹⁴²

Wages (regulation 2.2): All seafarers shall be paid for their work regularly and in full in accordance with their employment agreements.¹⁴³ The payments interval should not be greater than a month.¹⁴⁴ Also, " Seafarers shall be given a monthly account of the payments due and the amounts paid, including wages, additional payments and the rate of exchange used where payment has been made in a currency or at a rate different from the one agreed to."¹⁴⁵

Shipowners shall take measures to provide seafarers with means to transmit all or part of their earnings to their families or dependants or legal beneficiaries.¹⁴⁶

Hours of work and hours of rest (Regulation 2.3): Each Member shall ensure that the hours of work or hours of rest for seafarers are regulated.¹⁴⁷ The normal working hours' standard for seafarers shall be based on an eight-hour day with one day of rest per week and rest on public holidays.¹⁴⁸

In determining the national standards, each Member shall take account of the danger posed by the fatigue of seafarers, especially those whose duties involve navigational safety and the safe and secure operation of the ship.¹⁴⁹

The limits on hours of work or rest shall be as follows:¹⁵⁰

- maximum hours of work shall not exceed: 14 hours in any 24-hour period; and 72 hours in any seven-day period;
- minimum hours of rest shall not be less than ten hours in any 24-hour period; and 77 hours in any seven-day period.

Hours of rest may be divided into no more than two periods, one of which shall be at least six hours in length, and the interval between consecutive periods of rest shall not exceed 14 hours.¹⁵¹

¹⁴² Std A2.1.2.

¹⁴³ Reg 2.2.1.

¹⁴⁴ Std A2.2.1.

¹⁴⁵ Std A2.2.2.

¹⁴⁶ Std A2.2.3.

¹⁴⁷ Reg 2.3.1.

¹⁴⁸ Std A2.3.3.

¹⁴⁹ Std A2.3.4.

¹⁵⁰ Std A2.3.5.

¹⁵¹ Std A2.3.6.

The Master of a ship has the right to require a seafarer to perform any hours of work necessary for the immediate safety of the ship, persons on board or cargo, or for the purpose of giving assistance to other ships or persons in distress at sea.¹⁵²

Entitlement to leave (Regulation 2.4) : Each Member shall require that seafarers employed on ships that fly its flag are given paid annual leave;¹⁵³ this paid annual leave shall be calculated on the basis of a minimum of 2.5 calendar days per month of employment.¹⁵⁴

Seafarers shall be granted shore leave to benefit their health and well-being and with the operational requirements of their positions.¹⁵⁵

Repatriation (Regulation 2.5): Seafarers have a right to be repatriated at no cost to themselves in the circumstances and under the conditions specified in the Code.¹⁵⁶

Each Member shall require ships that fly its flag to provide financial security to ensure that seafarers are duly repatriated in accordance with the Code.¹⁵⁷

Seafarer compensation for the ship's loss or foundering (Regulation 2.6): The seamen have the right to a compensation in the case of injury, loss or unemployment arising from the ship's loss or foundering.¹⁵⁸ In the guideline is explained how the calculation of indemnity should be made: at the same rate, and with a maximum of the total indemnity payable of two months wages.¹⁵⁹

Manning levels and career and skill development and opportunities for seafarers employment (Regulations 2.7 and 2.8): The MLC stipulates standards that must be implemented in the domestic law of the States Members. The purposes are to “*ensure that seafarers work on board ships with sufficient personnel for the safe, efficient and secure operation of the ship*” and “*To promote career and skill development and employment opportunities for seafarers*”.

5.3.2.3 Title 3 Accommodation, recreational facilities, food and catering

This title is divided in two, one part regarding the regulations, standards and guidelines of accommodation and recreational facilities, and the second part about the food and catering.

¹⁵² Std A2.3.14.

¹⁵³ Reg 2.4.1.

¹⁵⁴ Std 2.4.2.

¹⁵⁵ Reg 2.4.2.

¹⁵⁶ Reg 2.5.1.

¹⁵⁷ Reg 2.5.2.

¹⁵⁸ Reg 2.6.1.

¹⁵⁹ Guideline B2.6.1.

In respect of the **Accommodation and recreational facilities (Regulation 3.1)**, it is stipulated that each Member shall ensure that ships that fly its flag provide and maintain decent accommodations and recreational facilities for seafarers working or living on board, or both, consistent with promoting the seafarers' health and well-being.¹⁶⁰ It also states that the implementation of the regulation established in the Code related to ship construction and equipment apply only to ships constructed on or after the date of the convention will enter in force for the Member concerned.¹⁶¹

About **Food and catering (Regulation 3.2)**, the Code provides that "each Member shall ensure that ships that fly its flag carry on board and serve food and drinking water of appropriate quality, nutritional value and quantity that adequately covers the requirements of the ship and takes into account the differing cultural and religious backgrounds."¹⁶² The food during the period of engagement of the seafarers on the ship must be free of charge.¹⁶³ The code, in the standard A3.2 (8) also set a prohibition: the ship's cook work must be carried out by employees with age of 18 or more.

5.3.2.4 Title 4 Health protection, medical care, welfare and social security protection

This title is divided in regulations, standards and guidelines about:

- Medical care on board ships and ashore
- Shipowners liability
- Health and safety protection and accident prevention
- Access to shore-based welfare facilities
- Social security

Medical care on board ship and ashore (Regulation A4.1): Each Member shall ensure that all seafarers on ships that fly its flag are covered by adequate measures for the protection of their health and that they have access to prompt and adequate medical care whilst working on board.¹⁶⁴ This protection and care shall, in principle, be provided at no cost to the seafarers.¹⁶⁵

The Member shall ensure that seafarers on board ships in its territory who are in need of immediate medical care are given access to the Member's medical facilities on shore. The standards of the health and protection for the seafarers on board settled by the code are aimed to provide medical care

¹⁶⁰ Reg 3.1.1.

¹⁶¹ Reg 3.1.2.

¹⁶² Reg 3.2.1.

¹⁶³ Reg 3.2.2.

¹⁶⁴ Reg 4.1.1.

¹⁶⁵ Reg 4.1.2.

as comparable as possible to that which is generally available to workers ashore.

The health protection and medical care includes (Standard A4.1):

- dental care
- the right to visit a qualified medical doctor or dentist without delay in ports of call, where practicable

The Members shall implement national laws and regulation where set the requirements stipulated in the Standard A4.1(4) as a minimum. The main requirements are:

- ships carrying 100 or more persons and ordinarily engaged on international voyages of more than three days' duration shall carry a qualified medical doctor who is responsible for providing medical care.¹⁶⁶
- ships which do not carry a medical doctor shall be required to have either at least one seafarer on board who is in charge of medical care and administering medicine as part of their regular duties or at least one seafarer on board competent to provide medical first aid. This seafarer in charge of the medical care must have the STCW training in medical care.¹⁶⁷
- The competent authority shall arrange a system of medical advice at any time (24/7), by radio or satellite. The communication shall be free of charge irrespective of the flag that they fly.¹⁶⁸

Shipowners' liability (Regulation 4.2): The purpose states that is *to ensure that seafarers are protected from the financial consequences of sickness, injury or death occurring in connection with their employment.* In order to fulfil this purpose, the Standard A4.2 set some mandatory minimum standards, such as:

- Shipowners shall be liable to bear the costs:
 - for seafarers working on their ships in respect of sickness and injury of the seafarers occurring between the date of commencing duty and the date upon which they are deemed duly repatriated, or arising from their employment between those dates;¹⁶⁹
 - of burial expenses in the case of death occurring on board or ashore during the period of engagement.¹⁷⁰

¹⁶⁶ Std A4.1.4(b).

¹⁶⁷ Std A4.1.4(c).

¹⁶⁸ Std A4.1.4(d).

¹⁶⁹ Std A4.1.4(a).

¹⁷⁰ Std A4.2.1(d).

- shipowners shall provide financial security to assure compensation in the event of the death or long-term disability of seafarers due to an occupational injury, illness or hazard, as set out in national law, the seafarers' employment agreement or collective agreement;¹⁷¹
- Shipowners shall defray the expense of medical care, including medical treatment and the supply of the necessary medicines and therapeutic appliances, and board and lodging away from home until the sick or injured seafarer has recovered, or until the sickness or incapacity has been declared of a permanent character;¹⁷²
- When the illness or injury results in incapacity to work for the seafarer, the shipowner is liable to pay wages:¹⁷³
 - As long as the seafarer remains on board, or until he has been repatriated.
 - In whole or in part as settled in the national legislation or in the CBAs from the time when the seafarers are repatriated or landed until their recovery or, if earlier, until they are entitled to cash benefits under the legislation of the Member.
- *Limitation of the liability of the shipowners:* in the case of the liability to defray the expense of medical care and board and lodging, and the liability to pay wages in whole or in part in respect of a seafarer no longer on board, national legislation of the Members may limit such liabilities to a period which shall not be less than 16 weeks from the day of the injury or the commencement of the sickness.¹⁷⁴
- *Exclusion of the shipowner's liability:* National legislation may exclude it in respect of the injury incurred otherwise than in service of the ship; also, if the illness or injury is due to the wilful misconduct of the seafarer, or in case that the sickness is concealed intentionally when the engagement is entered into.¹⁷⁵
- *Exemption of the shipowner's liability* The shipowner may be exempted from liability to defray the expenses of medical care and board and lodging and burial expenses by the national legislation to the extent that this is covered by the public authorities.¹⁷⁶

Health and safety protection and accident prevention (Reg. 4.3): With this regulation, the MLC aim is that the work environment on board ships

¹⁷¹ Std A4.2.1(b).

¹⁷² Std 4.2.1(c).

¹⁷³ Std 4.2.3.

¹⁷⁴ Std 4.2.4.

¹⁷⁵ Std 4.2.5.

¹⁷⁶ Std 4.2.6.

promotes occupational safety and health for the seafarers. In order to do this, the code stipulates that the Members shall:

- develop and promulgate national guidelines for the management of occupational safety and health on board ships that fly its flag, after consultation with representative shipowners' and seafarers' organizations and taking into account applicable codes, guidelines and standards recommended by international organizations, national administrations and maritime industry organizations.¹⁷⁷
- adopt laws and regulations addressing the matters specified in the Code, taking into account relevant international instruments, and set standards for occupational safety and health protection and accident prevention on ships that fly its flag;¹⁷⁸ this regulation is developed in the Standard A4.3, which said that laws and regulations shall include:
 - The adoption, implementation and promotion of policies and programmes about safety and health, including risk evaluation and training of seafarers.¹⁷⁹
 - Programmes for the prevention of occupational accidents, injuries and diseases on-board, including measures to reduce and prevent the risk of exposure to harmful levels of ambient factors and chemicals as well as the risk of injury or disease that may arise from the use of equipment and machinery on board ships;¹⁸⁰
 - Control measures, to inspect, investigate, report and correct unsafe conditions and occupational accidents.¹⁸¹
- The competent authority shall ensure that the occupational accidents, illness and injuries are properly reported in accordance with the ILO guidance, that statistics about such events are analyzed to find the causes in order to minimize it, and that investigations will be carried out when the result of the accident, injuries or sickness is the loss of life or serious personal injury.¹⁸²

Access to shore-based welfare facilities (Regulation 4.4): The Members are responsible for that Seafarers working on board a ship have access to shore-based facilities and services to secure their health and well-being;¹⁸³

¹⁷⁷ Reg. 4.3.2.

¹⁷⁸ Reg. 4.3.3.

¹⁷⁹ Std. A4.3.1(a).

¹⁸⁰ Std. A4.3.1(c).

¹⁸¹ Std. A4.3.1(d).

¹⁸² Std. A4.3.5.

¹⁸³ Reg.4.4.1.

Social security (Regulation 4.5): to ensure that measures are taken with a view to providing seafarers with access to social security protection, the Members shall ensure that:

- all seafarers and their dependants (as far as in the national legislation are protected) have access to social security protection in accordance with the Code, and are entitled to benefit from social security protection no less favourable than that enjoyed by shoreworkers.¹⁸⁴
- steps are taken to achieve progressively comprehensive social security protection for seafarers; this includes medical care, sickness benefit, unemployment benefit, old-age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit and survivors' benefit.¹⁸⁵
- the procedures for settlement of disputes shall be established by the Member State.¹⁸⁶

5.3.2.5 Title 5 Compliance and enforcement

Flag State responsibilities (Regulation 5.1): The aim of the regulations in this title is to ensure that each Member implements its responsibilities under this convention with respect to ships that fly its flag. In order to do that, the Members shall establish a system of inspection and certification of maritime labour conditions to ensure that the standards of the convention are meted.¹⁸⁷ This system may be done by competent and independent public institutions or other organisations (including those of another Member, if latter agrees), which carries out inspections or issue certificates or both. Nevertheless, the Member will be responsible for the results of the system regarding the working and living conditions of the seafarers concerned on ships that fly its flag.¹⁸⁸

To proof that the ship has been duly inspected by the Member and it comply with the Convention requirements relating to working and living conditions of the seafarers, a Maritime Labour Certificate complemented by a Declaration of Maritime Labour Compliance will be needed.¹⁸⁹

Maritime Labour Certificate and Declaration Of Maritime Labour Compliance (Regulation 5.1.3): The Maritime Labour Certificate, once issued, will be valid for a period of five years,¹⁹⁰ and it will be subject to an

¹⁸⁴ Reg. 4.5.1.

¹⁸⁵ Reg. 4.5.2 and Std A4.5.1.

¹⁸⁶ Std. A4.5.9.

¹⁸⁷ Reg. 5.1.1.2.

¹⁸⁸ Reg. 5.1.1.3.

¹⁸⁹ Reg. 5.1.1.4.

¹⁹⁰ Std. A5.1.3.1.

intermediate inspection to ensure the continuing compliance with the requirements of the Convention.¹⁹¹

The renewal inspection can be done:¹⁹²

- Within three months before the expiry of the existing Maritime Labour Certificate: then the new MLC will be valid for five years, starting from the date of expiry of the existing MLC.
- More than three months before the expiry date of the existing MLC: in this case the new MLC will be valid for five years starting from the completion of the renewal inspection

Provisional Maritime Labour Certificate may be issued:¹⁹³

- To new ships on delivery
- when a ship changes flag
- when a shipowner assumes responsibility for the operation of a ship that is new to that shipowner.

On-board complaints procedures (Regulation 5.1.5): In this Regulation it is established the obligation of the Members to ensure on-board procedures for the fair, effective and expeditious handling of seafarer complaints regarding the non-compliance of the standards and rights settled in the convention.¹⁹⁴ Also, the Members shall prohibit and penalize any kind of victimization of a seafarer for filing a complaint.¹⁹⁵

The procedure mentioned above shall seek to resolve complaints at the lowest level possible. Nevertheless, the seafarers have the right in any case to complain directly to the master (and to external authorities where necessary).¹⁹⁶ A copy of this complaints procedure must be provided to all the seafarers on board.¹⁹⁷

Port State responsibilities (Regulation 5.2): The Members can inspect the foreign ships calling at their ports to check if they comply with the requirements of the Convention relating to working and living conditions of the seafarers on the ship.¹⁹⁸ The maritime labour certificate and the declaration of maritime labour compliance shall be accepted as prima facie evidence of the compliance with the mentioned requirements.¹⁹⁹ This

¹⁹¹ Std. A5.1.3.2.

¹⁹² Std. A5.1.3.3 and Std A5.1.3.4.

¹⁹³ Std. A5.1.3.5.

¹⁹⁴ Reg. 5.1.5.1.

¹⁹⁵ Reg. 5.1.5.2.

¹⁹⁶ Std. A5.1.5.2.

¹⁹⁷ Std. A5.1.5.4.

¹⁹⁸ Reg. 5.2.1.1.

¹⁹⁹ Reg. 5.2.1.2.

inspection shall be carried out by authorised officers, and based on a monitoring system to ensure that the working and living conditions meet the requirements of the Convention, including seafarers' rights.²⁰⁰

When the authorised officer finds that the requirements of the Convention are not met, a second inspection, more detailed, shall be carried out with focus on the points where the breaches were found.²⁰¹ If after this inspection the ship is found not to conform with the requirements of the convention, with conditions on board hazardous to the safety and health of the seafarers or a serious breach of the requirements of the convention, the authorised officer shall take steps to ensure that the ship shall not proceed to sea until this situation has been rectified, or a plan to fix this situation is presented to and approved by the authorised officer. In this event, the authorized officer shall notify to:²⁰²

- the relevant shipowners organization
- the appropriate seafarers organisation in the port where the inspection was carried out

5.4 Implementation in the UK

The MLC 2006 is expected to enter into force internationally around mid-2012. The MLC will bring in, and set the new internationally agreed minimum living and working conditions for seafarers working at sea on board UK registered ships. The MLC inspections will be carried out by the Maritime and Coastguard Agency, and shipowners will need to show their compliance with the new requirements.²⁰³

The UK Government has the intention to ratify the MLC 2006:

At its 94th (Maritime) Session in February 2006 the International Labour Conference adopted the Maritime Labour Convention 2006 (MLC). The new Convention consolidates and updates over 60 maritime labour instruments adopted by the International Labour Organization since 1920. The UK Government firmly supported the development of the new Convention and is committed to ratifying it at the earliest practical date.

The nature of the MLC is such that it cannot be ratified piecemeal, but must be ratified as a whole. A review of all the provisions of the Convention indicates that in some cases, the UK is already fully compliant. In other cases, while existing UK legislation is not exactly in line, there are powers in the Merchant Shipping Act 1995 which provide the necessary vires to make the necessary amending legislation. Finally, in relation to a third category of provisions, existing legislation does not implement the Convention

²⁰⁰ Reg. 5.2.1.4.

²⁰¹ Std. A5.2.1.1.

²⁰² Std. A5.2.1.6.

²⁰³ MCA webpage, online at www.dft.gov.uk/mca/mcga07-home/workingatsea/mcga-healthandsafety/maritime_labour_convention_2006/ds-ssh-mlc-shipowner-training.htm (last visit 15/05/2011).

*requirements and the Merchant Shipping Act 1995 does not include the vires to introduce the necessary legislation.*²⁰⁴

In this chapter the focus will be on how the convention is being implemented, and what the UK shipowners will need to do to comply with the UK legislation which is being revised to meet the requirements of the MLC 2006.

First, the Convention provides that there should be no reduction in existing standards; therefore, if the national legislation is above the minimum requirements of the MLC 2006, it will remain as it is.²⁰⁵

The MLC applies to all seafarers; regarding the ships, in the Convention it is stipulated that applies to all ships engaged in commercial operations (ships engaged in fishing, ships of traditional build such as dhows or junks and warships are excluded). In the convention, ship is defined as:

Ship means a ship other than one which navigates exclusively in inland waters or waters within, or closely adjacent to, sheltered waters or areas where port regulations apply

The convention gives some flexibility about the application “in case of doubt” about if the convention applies or not. Regarding the definition of sea-going ship, in the UK there is no change of policy, but the MCA use a definition from the Medical Certification Regs for a greater clarity:

"sea-going" in relation to a United Kingdom ship means -
(a) a ship in respect of which a certificate is required to be in force in accordance with-
(i) the Merchant Shipping (Load Line) Regulations 1998 (1),
(ii) the Merchant Shipping (Vessels in Commercial Use for Sport or pleasure) Regulations 1998 (2), or
(iii) the Merchant Shipping (Small Workboats and Pilot Boats) Regulations 1998 (3),
(b) a passenger ship of class I,II,II(A), III, VI or VI(A) in respect of which a certificate is required to be in force in accordance with the Merchant Shipping (Survey and Certification) Regulations 1995 (4), or
*(c) a high speed craft in respect of which a permit to operate outside waters of Categories A,B,C or D is required to be in force in accordance with the Merchant Shipping (High Speed Craft) Regulations 2004(5).*²⁰⁶

The UK therefore will apply the provisions of the Convention to:

- all UK seagoing ships which operate either on international voyages, or from a foreign port; and

²⁰⁴ Department for Transport, UK, *Explanatory memorandum to the European Communities (definition of treaties) (maritime labour convention)* order 2009 no. 1757.

²⁰⁵ MCA: MIN 383 (M) about the implementation of the MLC in the UK.

²⁰⁶ Extract of the Medical Certifications Regs, as quoted in MCA, Application of the MLC 2006, United Kingdom Policy, online at: www.dft.gov.uk/mca/mcga07-home/workingatsea/mcga-healthandsafety/maritime_labour_convention_2006/mcga.ds-ssh-mlc-definitions (last visit 13/05/2011).

- all UK ships operating on UK domestic voyages, which operate more than 60 miles from a safe haven in the UK;
- all UK ships operating on UK domestic voyages outside of categorized waters which are 500 gross tonnage or over.²⁰⁷

Anyway, standards such as medical certification and hours of work will not be limited to certain sea-going ships, but applied to all.

The UK is changing its legislation where needed to be prepared for the MLC 2006; it will be ratified once the preparations will be finished. The Maritime and Coastguard Agency has focus for the implementation of the convention on three basis:

- The Tripartite Working Group
- Legislative amendments
- And Inspection and certification regime

5.4.1 MLC Tripartite Working Group

The Tripartite Working Group comprises representation from government, industry and Trade Unions. The aim of this Group is to discuss policy and advise the Maritime and Coastguard Agency (MCA) on the implementation of the Convention in the UK. The Group consists of representatives of UK shipowners, Maritime Unions, the Red Ensign Group administrations, the Department for Transport (DfT) and the MCA.

The TWG has had twelve meetings and four sub-group meetings that has produced fifty eight reference papers.

5.4.2 Legislation amendments

The MLC 2006 affects 30 sets of UK regulation, and 14 sets of new regulations are required.²⁰⁸ A cross-references between the Maritime Labour Convention and the UK legislation is available in the Supplement B (at the end of this thesis).

5.4.3 Inspection and certification regime

The inspection and certification regime of the MLC 2006 was explained above, but to explain the implementation in the UK a it will be good to remember that the ships subject to the convention will require a Maritime

²⁰⁷ MCA, *Application of the MLC 2006, United Kingdom Policy*, online at: www.dft.gov.uk/mca/mcga07-home/workingatsea/mcga-healthandsafety/maritime_labour_convention_2006/mcga.ds-ssh-mlc-definitions (last visit 13/05/2011).

²⁰⁸ MCA, *Maritime Labour Convention Seminar, 2009*, online at: www.dft.gov.uk/mca/mcga07-home/workingatsea/mcga-healthandsafety/maritime_labour_convention_2006/maritime_labour_convention_seminar_-_2009-3.htm (last visit 12/05/2011).

Labour Certificate issued by the flag state, and will need to have on board and maintain a Declaration of Maritime Labour Compliance. This declaration will be implemented in two parts:

- Part I, completed by the MCA, which will refer to the national requirements, equivalences and exemptions.
- Part II, completed by the shipowners, must have the measures that they will put in place to ensure compliance and continuous improvement.

The inspections will be carried out at the same time for those required under the ISM Code for the Safety Management Certificate, because the time between the inspection is the same for both; this is not a coincidence, the MLC 2006 was drafted in a way to minimize the time and bureaucracy cost of its implementation.²⁰⁹

The MCA plan to carry out MLC inspections instead of the actual ILO 178 Convention²¹⁰ inspection in the twelve months before the convention enter in force, once it has been ratified. In that year, a Maritime Labour Certificate will be issued with the same expiry date as the Safety Management Certificate.²¹¹

5.5 How will affect the MLC 2006 to the P&I cover?

The P&I clubs cover the Convention in the majority of its extension, for example:²¹²

- (a) repatriation - including repatriation in cases of a shipowner's insolvency (effectively abandonment); and
- (b) compensation for illness, injury and death of a crew member

However the shipowners will not have other defence under the Convention than the wilful misconduct of the seafarer, even in cases of war, terrorism, insolvency or bio-chemical attack for which Club cover is either limited or not available.²¹³

Regarding the financial security for the abandonment of seafarers, that will be applied and amendment once the Convention enter in force the background is as follow:

²⁰⁹ MCA, *MIN 383 (M)*.

²¹⁰ ILO Convention (No. 178) concerning the Inspection of Seafarers' Working and Living Conditions.

²¹¹ Turner *et al*, *Supra* Note 123.

²¹² *Ibid*.

²¹³ Chris Spencer and Davis Tilsley, *The Maritime Labour Convention 2006 special edition*, Standard Safety, The Standard Club, March 2011.

*The Maritime Labour Convention 2006 (MLC) places responsibility on shipowners to provide financial security in respect of liability for the repatriation of seafarers, including maintenance pending repatriation (Regulation 2.5) and compensation for death sickness or injury of seafarers in connection with their employment (Regulation 4.2). Further to IMO Resolution A.930(22) and A.931(22) of 17 December 2001, the 9th meeting of the Joint IMO/ILO Ad Hoc Expert Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers, held between 2-6 March 2009 in Geneva, formulated proposed mandatory principles in the form of text regarding the provision of financial security in the case of abandonment of seafarers. The principles are designed to amplify MLC Regulation 2.5 and Regulation 4.2 of the MLC.*²¹⁴

The Expert Working Group proposed some standards and guidelines, which are still not in force, but now is sure that the financial security will be required to the shipowners. The principles will be, in words of Turner and Wu:

The 'principles' relating to abandonment, state that the financial security system should provide for:

- (1) a right of direct action against the financial security provider*
- (2) the cost of repatriation and reasonable expenses incurred by the seafarer from the time of abandonment until the time of repatriation*
- (3) outstanding wages and other contractual entitlements, limited to a period of four months.*²¹⁵

The P&I clubs do not cover with requirements at the moment. The question is what evidence of financial responsibility will be acceptable by the Members, which is unclear at the moment, but meanwhile the recommendation of the P&I clubs for the members is to use a copy of the ship's certificate of entry in the P&I club as evidence of partial compliance.²¹⁶

²¹⁴ MCA, *MIN 389 (M)*.

²¹⁵ Turner *et al*, *Supra* note 123.

²¹⁶ *Ibid.*

6 Piracy, crew and P&I clubs

Piracy is nowadays a hot topic in the maritime industry due to the legal problems which arise from this activity, the doubts about how to fight it and the question about “who pays what” in case of a piratical attack.

The most notorious geographical location where piracy attacks occurs lately has been the Gulf of Aden, where the piracy attacks are linked with the inland situation of Somalia, defined as a failed state. But there are other regions where piracy attacks occur, as the South China Sea, the waters around Indonesia and South America. The causes of piracy are diverse, for example Carolin Liss, of Murdoch University in Australia, argues that five factors “are of particular importance in shaping piracy in Southeast Asia: over-fishing, lax maritime regulations, the existence of organised crime syndicates, the presence of radical politically motivated groups in the region, and widespread poverty.”²¹⁷

The shipping industry is suffering extra costs because of the piracy, however the real victims are the seafarers, who are exposed to the pirates' violence and robbery of their belongings; and when the pirates hijack the vessel, the crew is normally held as hostages, with the deprivations derived from this situation.²¹⁸

In this chapter it will be discussed what is piracy, how it affects the seafarers' rights, and if it is covered by the P&I Clubs.

6.1 What is piracy?

The **classic definition of a pirate** is in *Republic of Bolivia v Indemnity Mutual Mar Ass Co Ltd (1909)* (11 Asp MLC 117), which is ‘a man who is plundering indiscriminately for his own ends and not a man who is simply operating against the property of a particular state for a public end, the end of establishing a government, although that act may be illegal and even criminal, and although he may not be acting on behalf of a society which is politically organised’²¹⁹

Piracy has existed since the maritime trade began; it is an international crime in the international law, that can be punished by any State, since it is a crime against the human kind, provided always that the pirates were in the

²¹⁷ As quoted in “*Piracy in South East Asia, A Growing Threat*”, 17 July 2009, Idarat Maritime, online at: www.idaratmaritime.com/wordpress/?p=137 (last visit 10/05/2011).

²¹⁸ Dr. Sam Bateman, *The thinker: Asia vs. the pirates*, Article published in the Jakarta Globe, February 12, 2011, online at: www.thejakartaglobe.com/opinion/the-thinker-asia-vs-the-pirates/421871 (last visit 12/05/2011).

²¹⁹ Jonathan Bruce, *Who pays the bill for piracy?* 23-03-2009, Maritime Risk International, Vol 23 No 2, online at: www.i-law.com (last visit 13/05/2011).

high seas, or in the territorial sea of the State concerned and it is a crime punishable under its domestic law.²²⁰

The definition of Piracy in UNCLOS is in Article 101:

“Piracy consists of any of the following acts:
(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).”

The rights of a warship regarding to board a ship suspicious of piracy are in the Article 110 UNCLOS, which says:

“1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:
(a) the ship is engaged in piracy;(…)”

Due to the special situation in Somalia, the United Nations Security Council approve the Resolution 1816 (2008) which enable the fight of the piracy in Somalian waters; in article 7 states that:

“7. Decides that for a period of six months from the date of this resolution, States cooperating with the TFG in the fight against piracy and armed robbery at sea off the coast of Somalia, for which advance notification has been provided by the TFG to the Secretary General, may:
(a) Enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and
(b) Use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery;”

6.2 Seafarers rights and P&I coverage in the case of a pirate attack

For insurance purposes, piracy acts are not limited to the high seas, the ones in the somalian waters are also considered pirate attacks. Must be kept in

²²⁰ Gotthard Gauci, *Piracy and its legal problems: with specific reference to the english law of marine insurance*, Journal of Maritime Law and Commerce, October, 2010.

mind that the P&I clubs do not insure the seafarers, therefore to trigger the cover of the P&I clubs the pirate attack must have as consequence a liability of the shipowner, and one liability that is covered by the club.

P&I clubs cover the liabilities stipulated in the “risk covered” rule²²¹. Piracy is not one of the named risks covered by the P&I clubs, but neither is it named in the exclusions for the liabilities covered by the club. In fact, in the exclusion of war risk, in the Britannia rulebook, rule 25.1(b), the piracy is excepted:

General Exclusion 25(1)

Unless otherwise agreed in writing there shall be no recovery from the Association against any liabilities, costs or expenses incurred as a result of:
B) Capture, seizure, arrest, restraint or detainment (barratry **and piracy excepted**) and the consequences thereof or any attempt thereat;

Nevertheless, under these general exclusions, it is include the “act of terrorism” and “weapons of war”:

A) An incident caused by war, civil war, revolution, rebellion, insurrection or civil strife arising therefrom, or any hostile act by or against a belligerent power, or any act of terrorism;
C) An incident caused by mines, torpedoes, bombs, rockets, shells, explosives or other similar weapons of war (save for those liabilities, costs or expenses which arise solely by reason of the transport of any such weapons whether on board the Entered Ship or not).

Pirate attacks can result in injury, illness or death of crew or passenger, or loss of their effects; damage to or loss of ship, pollution, wreck removal, damage to or loss of cargo, delay, wasted time and expenses. To maintain the focus on the topic, only the results related with the crew will be discussed (injury, illness or death of crew, crew repatriation and substitution, or loss of their effects). To be covered, the first thing to do is analyse if the War Risk Exclusion are applicable.

Piracy is a marine peril which falls under the scope of the clubs cover. It must be differentiated from terrorism, which is a war risk that falls outside of the cover. The difference between piracy and terrorism is that piracy, as was mentioned above in the UNCLOS definition, is an illegal act of violence or detention committed on the high seas for private gain, meanwhile terrorism acts are attacks politically or ideologically motivated.²²²

Regarding the explosives (mines, torpedoes, bombs, etc...), it is an enumeration as example, it means all kind of explosives; this enumeration is to be used in contrast of “normal weapons” such guns, rifles and so on. If

²²¹ See, for instance, Britannia rule book class 3, rule 3 – nature of the cover.

²²² IG P&I, *Piracy, Frequently asked questions*, 02/06/2009, online at: www.igpandi.org/downloadables/news/news/Piracy_FAQs_final.pdf (last visit 12/05/2011).

weapons of war are used, the liabilities which arise from a pirate attack may be excluded. Also, some primary P&I War Risk underwriters include piracy as a specific named peril in which case P&I liabilities arising are covered by them and not by the clubs.²²³

6.3 Ransom

Having said that, and now that it is clear that the consequence of a pirate attack regarding the crew is covered (injury, loss of effects, etc), another question that arises is: In the case that the pirates kidnap the crew and ask for ransom, Who pays it? Is it covered by the P&I clubs?

For the shipowners and cargo owners, the issue is that if they want the vessel, the cargo and the crew in good conditions, they will need to pay the ransom that the pirates are demanding.²²⁴ Can it be legally paid?

6.3.1 UK legislation and Ransom Payments

The payment of a ransom is legal, but depending on whom the money is paid and the circumstances, the payer may be committing an offence of money laundering or terrorist financing.²²⁵

Terrorist legislation: the terrorist act 2000 established in its section 15 (3) that “a person commits offence if (a) he provides money or other property, and (b) knows or has reasonable cause to suspect that it will or may be used for the purposes of terrorism. In addition, the section 17 of the same act sets:

Funding arrangements.

A person commits an offence if—

(a) he enters into or becomes concerned in an arrangement as a result of which money or other property is made available or is to be made available to another, and

(b) he knows or has reasonable cause to suspect that it will or may be used for the purposes of terrorism.

If the ransom payment took place overseas, the person who made it could be found guilty in a UK court under the section 63 of the act, which establishes extraterritorial jurisdiction. The definition of terrorism in this Act (for this offence) is in section 1 of the 2000 Act as amended in the Counter-terrorism Act 2008 as being the use or threat of action which is designed to influence

²²³ IG P&I, *Supra* note 222.

²²⁴ Harry Hirst, Ince & Co Partner, *Piracy, the legal issues* available at The Nautical Institute, Hong Kong Branch, online at: www.nautinsthk.com/archive/documents/PiracyHKG09/PRESENTATIONS/ince.htm (last visit 12/05/2011).

²²⁵ European Union Committee - *Money Laundering And The Financing Of Terrorism*; Annex A *The Law In The Uk On Ransom Payments*, online at www.publications.parliament.uk/pa/ld200809/ldselect/ldcom/132/9031112.htm (last visit 12/05/2011).

the government or an international governmental organisation or to intimidate the public or a section of the public, and is made for the purpose of advancing a political, religious, racial or ideological cause. To the present, the attacks and hijacking of vessels in the horn of Africa are considered piratical and not terrorist acts.²²⁶

Money Laundering legislation: Once the ransom monies are in the hands of the pirates, they become the “*proceeds of a crime*”,²²⁷ and therefore fall under the scope of the Proceed of Crime Act 2002, which establishes the obligations to report money laundering. In fact, Section 19 of the Terrorism Act 2000 stipulates a general duty to report suspicions of terrorist finance offences to the police or SOCA (Serious Organised Crime Agency), and it is an offence the breach of this duty.²²⁸

To conclude, the payment of ransom is legal if the payers comply with the terrorist and money laundering legislation; now in Somalia there are terrorist groups, but it is not believed that there is a systematic connection with the Somali pirates. If in the future new information to prove these connections appears, then the pay of ransom will fall on the scope of the terrorist legislation and money laundry legislation.²²⁹

6.3.2 Who pays for the ransom?

The amount of money for the ransom can be quite high. Furthermore, the amount is not only about the ransom itself, it also include expense and risk involved in negotiating the deal, getting the cash safely to its drop-off point and extracting the vessel itself.²³⁰

Can it be recovered from the insurers?

The payment of the ransom leads to the release of the ship, the cargo and the crew. Therefore, the payment of the money under English law is recoverable under the hull policy as sue and labour expenditure; and when there is cargo on board, as general average (“GA”) expenditure.²³¹

What happens with the P&I clubs?

Sue and labour:

Extraordinary costs and expenses (...) reasonably incurred on or after the occurrence of any casualty, event or matter liable to give rise to a claim (...) but only to the extent that those costs and expenses have been incurred with

²²⁶ EU Committee, *Supra* note 225.

²²⁷ Hirst, *Supra* note 224.

²²⁸ EU Committee, *Supra* note 225.

²²⁹ *Ibid.*

²³⁰ Bruce, *Supra* note 219.

²³¹ Hirst, *Supra* note 224.

*the agreement of the Managers or to the extent that the Directors in their discretion decide that the Owner should recover from the Association.*²³²

Should not help in the payment due to its interest in the safety of the crew? In the opinion of Jonathan Bruce, Sue and labour expenses could well be covered in the relevant P&I rules/cover in any event.²³³ However, the reimburse to the members for Sue and Labour costs only occur where approved in advance or under the omnibus rule (at the discretion of the P&I club Board of Directors;²³⁴ and provided that is not recoverable under any other insurance and cannot be recovered from any other source.²³⁵

General Average:

*There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure. General average sacrifices and expenditures shall be borne by the different contributing interests as the basis hereinafter provided”*²³⁶

If the shipowner declares GA, “it has been traditionally accepted adjusting practice and upheld by the English courts that a ransom payment made to obtain the release of a hijacked vessel/cargo is a general average expense for which shipowners are entitled to recover contributions.”²³⁷ The P&I club does not contribute in to GA primary because the clubs are not involved with property, but if the contribution to GA of the cargo cannot be recovered due to the shipowners’ breach of the contract of carriage (for instance, the ship is unseaworthy), then P&I clubs will be liable for that contribution.²³⁸

Nowadays, there is a trend between the insurers to cover piracy under war risk policy. In the words of Nick Riddle, Senior Vice President at Marsh Limited:

*Many insurers now require that the peril of piracy is moved from the marine hull policy to the war risks policy as part of renewal discussions, regardless of the original policy conditions. The payment in war risks policies of an additional premium when ships are considered to be at high risk is one of the reasons for this decision.*²³⁹

Therefore, the P&I War Risk cover may be triggered in the payment of ransom if the incident fall under its scope (for example, the pirates used “weapons of wars”); The P&I War Risk is an excess cover only, so the members of the P&I clubs must maintain their primarily war risk insurance; in a circular extended to all P&I clubs of the IG, the IG established that the

²³² Section 25 (A) Sue an Labour and Legal Cost, UK P&I Club Rule Book 2011.

²³³ Bruce, *Supra* note 219.

²³⁴ Hirst, *Supra* note 224.

²³⁵ IG P&I, *Supra* note 222.

²³⁶ York Antwerp Rules 1994; Rule A.

²³⁷ IG P&I, *Supra* note 222.

²³⁸ IG P&I, *Supra* note 222.

²³⁹ Nick Riddle, *Piracy* Published on February 10, 2011 by Mark Lowe, Maritime Security Review, online at: www.marsecreview.com/2011/02/piracy/ (last visit 16/05/2011).

limit of cover remains at USD 500 million in excess of the market value of the vessel or USD100 million.²⁴⁰

To avoid the gap between P&I, Hull and War Risk insurance, the K&R (Marine Kidnap and Ransom Insurance) is being used. With this insurance, the ransom payments, the cost related with negotiation and the delivery of the cash to the drop point, etc, are covered.²⁴¹

Regarding the claims that the crew may present against the shipowner after a piracy attack, they are entitled to present claims for:

- Injury and death
- Loss of effects
- Mental anguish (not only the crew, also their families).

In words of Harry Hirst:

*As a matter of English law, if you have failed to properly prepare the crew for entering an area with high piracy risk, and for facing the threat of attack and hijacking, then where things go wrong and the ship is hijacked, the Crew will be entitled to claim for any personal injuries they may sustain, as well damages for mental anguish, that is, post traumatic stress. Again therefore, you may have to show that you exercised proper care.*²⁴²

From the mentioned quotation is evident that the only legal defence against the mental anguish is that the shipowner exercise a proper care; this duty of care consist in made the preparations and take the precautions to minimize the risk of a pirate attack and a subsequent hijack of the vessel and the crew.²⁴³ In the case of the GoA and the horn of Africa, the shipowners should follow the recommendations made in the Industry Best Management Practices 3 (BMP3) guide. The purpose of this guide is:

*The purpose (...) is to assist ships to avoid, deter or delay piracy attacks off the coast of Somalia, including the Gulf of Aden (GoA) and the Arabian Sea area. Experience, supported by data collected by Naval forces, shows that the application of the recommendations (...) can and will make a significant difference in preventing a ship becoming a victim of piracy.*²⁴⁴

Also, the vessel should transit inside the Internationally Recognised Transit Corridor (IRTC), established by the IMO and where naval forces patrol and protect the area. The vessels can use the convoy system for ships using the IRTC; to use it the shipowners just need to join the Group Transit Scheme.²⁴⁵

²⁴⁰ IG P&I Circular: War Risks P&I Excess Cover And Bio-Chem Cover 2011/2012, January 2011.

²⁴¹ Hirst, *Supra* note 224.

²⁴² *Ibid.*

²⁴³ *Ibid.*

²⁴⁴ Section 1 of the BMP3 june 2010, Witherby Seamanship International Ltd.

²⁴⁵ Hirst, *Supra* note 224.

Another recommendation is to register with the MSCHOA (Maritime Security Centre Horn of Africa) website. In order to coordinate support and protection to mariners effectively, MSCHOA needs to know about merchant vessels approaching, transiting or operating in the region.²⁴⁶

Other organisations which are providing invaluable assistance and information specific to the Somalia/Gulf of Aden the UK Maritime Trade Operations centre in Dubai (UKMTO), the EU Naval Task Force (EUNAVFOR) and the International Maritime Bureau.²⁴⁷

6.3.3 Guards and security personnel: effect on the P&I coverage

Some shipowners employ private armed guards to protect their ship, crew and cargo. These measure have as advantage that reduce the risk of the ship to be hijacked, but increase the risk of the damage to the ship and injury to the crew in case of confrontation.²⁴⁸ However, the view of the industry, most states and the IG P&I is that the crew and/or security personnel should not be armed, to avoid the mentioned increase of the risk and the predictable escalate of violence and use of more potent weapons by the pirates. In the UK, the prohibiting and licensing provisions of the Firearm Legislation are extended to UK flag vessels.²⁴⁹ But the allowance or the prohibition will depend on the flag state and port state legislation.

Regarding the cover of the P&I Clubs, it must be differentiated when the guards are armed or not:

- Guards unarmed: the cover is not prejudiced
- Armed guards: if they are used in breach of the applicable legislation, it could result in prejudice the cover

The liabilities acquired by the shipowners in the moment when they contract a security company “may not be fully covered by their clubs and may be excluded if they would not have arisen but for the terms agreed where these are not permissible in accordance with the governing principles in the Pooling Agreement relating to contracts and indemnities.”²⁵⁰ This terms embody the principle of that any contract from which arise special liabilities to the member must be approved by the club.

²⁴⁶ UK P&I Club, *Maritime security and piracy; essential precautions and preparations*.

UK P&I web page, at: www.ukpandi.com (last visit 15/05/2011).

²⁴⁷ IG P&I, *Supra* note 222.

²⁴⁸ Hirst, *Supra* note 224.

²⁴⁹ IG P&I, *Supra* note 222.

²⁵⁰ *Ibid.*

7 Criminalisation of seafarers

What is it? In words of François Laffoucrière the criminalisation is:

Criminalization(...)It is a process consisting in transferring the qualification of damage from a different category to a criminal one. For the Pilot, it means that in the past another person was prosecuted – either the Captain or the Ship-owner – or no prosecution was carried out – minor offence or less pressure - or else the qualification upheld was civil – what mattered was repair. From civil liability requiring damage directly linked to a cause, criminalisation establishes penal liability for which a material fact, the actus reus – a law infringement even without any damage – must be accompanied in principle by a psychological element, the mens rea – intention or recklessness. Even in a criminal offence of “strict liability”, which is normally minor, some elements of the crime require mens rea²⁵¹

Prof. Proshanto Mukherjee states that:

Criminalisation in reference to a person means turning someone into a criminal by making his activity illegal. Thus, a person is criminalised if his conduct or act is criminal. It is the imposition of penal sanction that essentially defines a crime and distinguishes it from a civil wrong characterized by a tort or delict.²⁵²

The criminalisation should be motivated when there is evidence of criminal negligence committed by the seafarer. Many times the courts use a scapegoat to expedite the process or simply to not get into a trouble as in the case of political campaigns, in which politicians seek to gain the sympathy of the people assuming that they protect the environment, and they criminalise to foreign seafarers.²⁵³

This trend is unfair for the seafarers, bad for the industry (since it is decreasing the number of young people who decide to be seamen)²⁵⁴, and also for the society, which is not conscient about the importance of the maritime trade, that carry out 90% of the world trade.²⁵⁵

²⁵¹ F. Laffoucrière. *Criminalisation of the Maritime Pilot*, 24/11/2009, available online at the International Maritime Pilot Association website www.impahq.org/news_archive.cfm (last visit 13/05/2011).

²⁵² P. K. Mukherjee. *Criminalisation and unfair treatment: the seafarer's perspective*. *Journal of International Maritime Law*, 2006, VOL 12; ISSU 5, pages 325-336; *See also* Judy Pearsall (ed), *The New Oxford Dictionary of English*, Oxford University Press, Oxford, 1998 at 2001, p 2.

²⁵³ *Ibid*, p 6.

²⁵⁴ Efthimios Mitropoulos, *Criminalisation in the maritime context*, online at: [www.epandi.com/ukpandi/resource.nsf/Files/mitropoulos/\\$FILE/mitropoulos.pdf](http://www.epandi.com/ukpandi/resource.nsf/Files/mitropoulos/$FILE/mitropoulos.pdf) (last visit 13/05/2011).

²⁵⁵ ILO web page, online at: www.ilo.org/global/standards/maritime-labour-convention/lang--en/index.htm (last visit 13/05/2011).

There are three layers that must be analysed to have a global picture of the criminalisation of the seafarers in case accidental discharge of oil: international conventions, community level and domestic law.²⁵⁶

The international context, the rules 4.2 of Annex I and 3.2 of Annex II of the International Convention for the Prevention of Pollution From Ships, 1973 as modified by the Protocol of 1978 (MARPOL 73/78 Convention) refer to the Captain or the Ship-owner (not the crew), and solely for pollution damage they wilfully caused, or due to “recklessness knowing that such damage will probably occur”.²⁵⁷ Also the UNCLOS, in its art.230.2 (Monetary penalties and the observance of recognized rights of the accused) stipulates that:

2. Monetary penalties only may be imposed with respect to violations of national laws and regulations or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment, committed by foreign vessels in the territorial sea, except in the case of a wilful and serious act of pollution in the territorial sea.

In Europe two cases were key factor in the change of the European legislation and the creation of the “criminalisation Directive”: The case of the Erika in France (1999) and the Prestige in Spain (2000):

In the case of The Erika, on 12 December 1999 the 37,238-dwt tanker Erika broke in two in heavy seas off the coast of Brittany, France, while carrying approximately 30,000 tonnes of heavy fuel oil. Although the crew were saved, some 14,000 tonnes of oil were spilled and more than 100 miles of Atlantic coastline were polluted.²⁵⁸ “By 27th of December, about 15,000 dead or oiled birds had been washed ashore along 400-500 kilometres of the French coast between Finistere and Charente-Maritime. Not less than 10,000 tonnes of fuel was said to have come ashore between Christmas Eve and the end of March 2000. An official report of the European Commission blamed the poor condition of the ship, which was then 25 years old and single-hulled, for the spill”.²⁵⁹

As a result of the Erika disaster, proposals were submitted to the MEPC to accelerate the phase-out of single-hull tankers contained in the 1992 MARPOL amendments.²⁶⁰

Regarding The Prestige, the captain, due to the condition of the ship and the weather, asked for help to the Spanish authorities, with the intention of arriving to the nearest Spanish port and save the vessel and the cargo. Unfortunately,

²⁵⁶ Laffoucrière, *Supra* note 251.

²⁵⁷ Laffoucrière, *Supra* note 251.

²⁵⁸ IMO web page, online at: www5.imo.org/SharePoint/mainframe.asp?topic_id=231#9 (last visit 13/05/2011).

²⁵⁹ Anthony, Olagunju G, *Criminalization of seafarers for accidental discharge of oil: is there justification in international law for criminal sanction for negligent or accidental pollution of the sea*, 37 *Journal of Maritime Law and Commerce*, 219 (Apr 2006).

²⁶⁰ IMO, *Supra* note 258.

in Spain the authorities, pushed by politicians (at that time there were elections in Spain), refused the petition and order the captain to lead to high seas. The engines of the prestige did not work , and the vessel was at the mercy of the sea; Tugs were sent, but finally the ship collapsed. “An estimated 5,000 tons of fuel oil were reportedly initially spilled in the incident. However, in the subsequent months, more than eighty percent of the tanker's 77,000 tons was reported to have leaked into the Spanish waters from the wreck, costing several millions of dollars to clean up”.²⁶¹

In both case the captains were treated as scapegoats: Captain Mathur, master of the Erika was initially imprisoned, and detained for three months in France.

In the case of Captain Magouras of the Prestige, he was jailed for 83 days, and the Spanish authorities only let him go after a 3 million Euros bail was paid; even after the bail was paid, he could not leave Spain for two years after the Prestige accident.

The political answer in Europe after the prestige was the protection of the environment through a directive (“criminalisation directive” of Maritime safety, prevention of ship-source pollution: penalties for infringements (amend. Directive 2005/35/EC)) through criminal liability. The directive establishes the punishment of the pollutant in case of “gross negligence or wilful misconduct”. The question is what is gross negligence, which is not defined in the directive, or in other words, the line between the civil negligence and the criminal act.

Finally, **in the UK** MARPOL is strictly implemented, and it seems that only the Captain or the Shipowner can be criminally prosecuted for pollution, and only if it is intentional.²⁶²

In England, an Industry coalition led by Intertanko went to Court since they believe that the Directive is against the MARPOL Convention. The case went to the European Court of Justice.²⁶³ The final decision of the ECJ was delivered on 3 June 2008 and in brief, the ECJ ruled that the Directive:

1. Cannot be assessed by reference to MARPOL as the Community itself (unlike its Member States) is not a party to MARPOL.
2. Cannot be assessed by reference to UNCLOS as, although the Community is a party to UNCLOS, that Convention does not give individuals rights or freedoms on which they can rely against States.

The Court held that the use of the term ‘serious negligence’ does not infringe the requirement of certainty in Community legislation. Therefore, the directive must be implemented. The case must be referred back to the

²⁶¹ Olagunju G, *Supra* note 259.

²⁶² Laffoucrière, *Supra* note 251.

²⁶³ Intertanko webpage online at www.intercargo.org/criminalisation.html (last visit 14/05/2011).

English High Court for conclusion, either on a contested, or an agreed basis. In addition, there is the option to refer the matter to the International Tribunal for the Law of the Sea in Hamburg.²⁶⁴

Regarding the question of “who pays?” and the relation between the P&I clubs and the seafarers rights, Laffoucrière states that

*P&I Clubs usually pay the fines inflicted on Captains when there is an absence of will in the offence, but there is little chance to see this happening for pilots. This could lead to over cautiousness with a damaging effect on the fluidity of the traffic which in turn would have negative economic consequences.*²⁶⁵

P&I Club covers do not extend to criminal liabilities. The club’s ‘omnibus’ rule may cover it but on a ‘case by case’ basis and certainly requiring Board approval. Therefore the question is that a substantial legal bill perhaps exceeding millions of USD will have to be settled at some stage and this may only be recoverable at a later date, if at all.²⁶⁶ Thus, the clubs can:

- Arrange for legal representation of the crew members and possible bail, if the Board approves it;
- Cover fines related to the scope of the cover of the P&I clubs rules,
- Pressure through publicizing the crew situation together with other industry bodies.²⁶⁷

To conclude, so far there is no solution, except for the recourse of a legal protection insurance, which is an option in the event that a seafarer faces a case of criminalisation since it is sure that he will need a lawyer to defend himself, and as has been pointed out, it can be very expensive process.²⁶⁸

²⁶⁴ Intertanko, *Supra* note 253.

²⁶⁵ Laffoucrière. *Supra* note 251.

²⁶⁶ Hirst, *Supra* note 224.

²⁶⁷ Collins William, *P&I cover for crew followin and accident*, presentation of the Steamship Insurance Management Limited, in the Conference for the “year of the Seafarer” for the World Maritime Day held in Vancouver in 2010, online at: www.worldmaritimedayna.org/ (last visit 13/05/2011).

²⁶⁸ Laffoucrière. *Supra* note 251.

8 Analysis and Conclusion

The relation between the P&I clubs and the seafarer's rights is indirect: the P&I clubs cover the liability of the shipowners in (*inter alia*) their relation with the crew; in fact this was in the very beginning of the P&I clubs: the crew cover was the answer of the shipowners to the claims of the seafarers.

The relation between the seafarers rights and the P&I cover on the crew, as has been explained in previous chapters, is complex, due to the liability comes from different sources, as contract, CBAs, articles, statutory law and common law.

A seafarer's claim may come contractually; in that case, when the injury is stipulated in one clause of the contract, will be enough for the claimant prove the injury. However, in England, if the seaman chooses to claim in tort, he will need to prove that the negligence of the shipowner caused the injury; in other words, the shipowner had a duty of care, he breached his duty, and that breach was the cause of injury. A much more difficult way compared to the contractual.

The reason why a seafarer may choose to claim in tort could be, for instances, in case of an accident that end in permanent disability. The permanent disability compensations are contractually fixed, but the seafarer may get more claiming in tort.

Regarding the contractual liability, which arises from the individual contracts, collective agreements, articles and statutory law, the liability of the shipowners is increasing in the same proportion that the rights of the seafarers. This is something certainly good for the seafarers, and even when is increasing the cost of the industry, in the author opinion it will have a positive impact in the long term. The biggest advance in this area has been done with the ILO Maritime Labour Convention of 2006.

This convention replaces 68 existing international maritime labour instruments. It is divided into three different parts: Articles, Regulations and the Code.

The code is two part (Part A mandatory standards and the Part B recommendations). The UK will not make The provisions of the Part B compulsory in its legislation.

The ILO Maritime Labour Convention of 2006, which is being implemented in the UK in preparation for the time when it enter in force, is certainly a big step, and will fill the gap not covered by the SOLAS, STCW and MARPOL, complementing those conventions.

The convention establishes standards for the minimum requirements for seafarers to work on a ship, conditions of employment, accommodation, recreational facilities, food and catering, health protection, medical care, welfare, social security protection, and one of the best points of the convention: compliance and enforcement. These are the “teeth” of the convention: the flag state inspection system and the port state inspection system.

The system of inspections and certification are in its chapter 5. It contains provisions for complaint procedures available to seafarers; also, the flag state shall issue a Maritime Labour Certificate, and will have to maintain and to keep on board a Declaration of Maritime Labour Compliance –as evidence of compliance with the requirements of the convention. The port inspections will review the certificate and the declaration.

In other words, the flag state inspections and certification are to ensure that the ships flying the flag of the State Member comply with the ILO MLC 2006, and the Port State inspections are part of international collaboration to check if the foreign vessels calling at the port comply with the convention, being the evidence of the DMLC and the Maritime Labour Certificate.

The inspections, for an easier implementation, are designed to be carried out at the same time as the Safety Management Certificate. Furthermore, the guidelines will make the system of inspection and certification of the Convention are carried out in the different Member States in an harmonized and standard way.

It is expected to enter in force in 2012, and the ratifying countries will have protection against the non ratifying countries which may use substandard ships to win advantage, thanks to the “no more favourable treatment clause”. The ratifying countries will also benefit from certification system, which will make it easier to carry out the inspections in foreign ports, and consequently less time for the inspections will be needed.

Regarding the impact of the convention on the coverage of the P&I Clubs regarding the crew, there are two issues to highlight:

- First, the shipowners will not have any other defence under the convention than the wilful misconduct of the seafarer.
- Second, the financial security for the abandonment of seafarers that will be required to shipowners, which the P&I Clubs do not cover at the moment:
 - right of direct action against the financial security provider
 - the cost of repatriation and reasonable expenses incurred by the seafarer from the time of abandonment until the time of repatriation,

- outstanding wages and other contractual entitlements, limited to a period of four months

Which documents will be acceptable by the Member States as financial security? If finally the P&I clubs change their cover comply with all these requirements, a copy of the ship's certificate of entry may be an evidence; but meanwhile, it is only a partial evidence.

As was stated above, the P&I coverage of the crew has been developed to respond to the liabilities of the shipowner, on the basis of legal liability derived of the approved contracts of employment or CBAs. Having said that, for a Seafarer, the knowledge that medical treatment on board is granted, and if necessary that the seaman will be sent ashore (because a more serious illness or injury), and that the cost are covered, gives confidence and peace of mind.

The P&I club cover, regarding the crew:

- Damages or compensation for death, injury or illness
- Medical or funeral expenses
- Repatriation
- Crew substitutes
- Shipwreck unemployment indemnity
- Deviation expenses
- Loss of baggage and personal effects

Also, at discretion of the directors board, the P&I clubs can cover any incident not named in the club rules (omnibus rule).

Normally the P&I club cover insurer the shipowner, but it may cover also a crew member if he is targeted and the shipowner is vicariously liable for his actions, or if benefit to the legal position of the shipowner.

So, the aim of the P&I clubs is to protect their members and indemnify them for the losses that they suffer; in other words, the member must pay first to be indemnified for his loss by the P&I club (pay to be paid rule). This means that in the case of insolvency of the shipowner, the seafarers which claims falls in the scope of the cover of the P&I club, will be left without compensation, because they have action against the member, not against the P&I club.

In England the situation was in that way until the Third Parties (Rights Against Insurers) Act 1930; the purpose of this act was to protect the third parties in case that they have action against the insured, and this one becomes bankrupt. The way to make it was by subrogation: the third party has the same rights as the insured against the insurer, and the insurer has the same defences, with limitation on the excess of liability.

This Act stipulates as a condition that there must be a legal liability between the parties (insurer → assured → third party); and it prohibits clauses that make the contract void in case of insolvency of the assured.

The application of the 1930 Act regarding the P&I clubs was tested with two cases: “The Fanti” and “the Padre Island”; the House of Lords finally held that the clubs can rely in the “Pay to be paid” rule, *inter alia*, because “an insured with a good defence against the assured has the same defence in the case of the 1930 Act subrogation”.

The Third Parties (Rights Against Insurers) Act 2010 changed this, in the claims related to loss of life or personal injury, and nowadays in English law the “pay to be paid” rule is useless as a defence (in other cases not related to loss of life or personal injury it is still a valid defence). This change in the direct action against the clubs is part of the preparation for the implementation of the MLC 2006, which as was mentioned above, will leave the defences of the shipowner reduced to the wilful misconduct of the seafarer.

Another issue that has been discussed, and that will be influenced by the MLC 2006, is piracy, due to the potential danger to the seafarers' physical integrity, and the scope of the cover of the P&I clubs regarding the crew in case of a pirate attack.

A priori, pirate attacks can produce quite a lot of the named risks covered by the P&I clubs, as injury, illness or death of the seafarers, loss or damage to their effects, substitution and repatriation.

However, the attack will fall out of the scope of the cover if the War Risk Exclusion is applicable (terrorism, war weapons). Regarding the terrorism, the question is if the attack has a political background.

The “weapons of war” are, basically, explosives like torpedoes and mines. Here an interesting question is what will happen once the MLC 2006 enters into force. In principle it will affect the defences of the shipowners, reducing their defence to the wilful misconduct of the seafarer, even in cases of war and terrorism. Therefore the exclusion and the differentiation between the terrorist and piracy, at least for the crew claims related with injury, death, illness and repatriation, will be irrelevant.

Piracy attacks can lead to the hijacking of the vessel and the crew by the pirates, in order to demand a ransom. The first issue to solve is if it is legal or not to pay the ransom. In English law ransom pay is legal, as long as the money is not used for terrorist purposes or the ransom payment complies with the Money Laundering Legislation.

Normally the ransom is paid by the Hull insurance as Sue and Labour expenditure, and when there is cargo on board, as General Average expenditure. The Sue and Labour expenditure may be paid by the Club

under the omnibus rule, provided that it cannot be recovered under any other source.

General Average is normally not covered by the club unless the contribution of the cargo cannot be recovered.

The P&I clubs may contribute to the payment of the ransom if the insurers cover piracy under the war risk policy; in this case, if the pirates use “weapons of war”, the P&I war risk (which is an excess cover) will contribute, up to USD 500 million in excess of the market value of the vessel.

Anyway, the market insurance has an option for this problem: the Marine Kidnap and Ransom Insurance (K&R), which covers the ransom payments and the costs related.

Regarding the claims, a particular one can arise in the case of a pirate attack: the post-traumatic stress of the crew even when they are physically well (that can also affect the family of the seafarers), in case of entering the area with high risk like the GoA, in facing the threat of pirate attack, and if the ship is hijacked.

Harry Hirst stated that in English law the only defence for claims related with the mental anguish that may arise from pirate attacks, is to exercise the proper care in preparing the crew for the possibility of a pirate attack; this is, follow the latest Best Management Practice and the recommendation, like transit within the International Recognised Corridor, or register the ship in the Maritime Security Centre of the Horn of Africa.

Certainly these kinds of measures decrease the risk of pirate attacks, but the defence against a mental anguish claim will depend on the circumstances. The post-traumatic stress claims from the seafarers may be unavoidable even to the most careful shipowner in case that nonetheless all the measures taken, a pirate attack happens.

The possibility of the attack is why some shipowners contract security personnel. This has advantages as it reduces the risk of the ship being hijacked, but it increases the risk of injury to the crew and the damage to the ship, and the foreseeable escalation of violence and weapons.

The UK legislation prohibits armed guards, and with unarmed guards the P&I club cover is not prejudiced.

The author agrees with the view of the IG P&I and of most states that the fight against piracy with armed guards will lead to a worse situation, and not only that; is a measure that does not solve the problem. The roots of the piracy, in the case of the Somalia coast, come from inland, and it has something in common with other piratical spots like the south of China or south America: the problem of piracy is the lack of a strong authority able to

enforce the law. Therefore, the measures like armed guards are futile, with counterproductive effects as have been mentioned.

Last but not least, from pirates attacks to seafarers to the criminalisation of the seafarers. The criminalisation in case of pollution is another problem that affects the seafarers. This trend has been developed after various accidents like the Erika in France and the Prestige in Spain. The process developed basically because after these accidents, the public opinion was asking for responsibilities, and the politicians targeted the seafarers as scapegoats, turning the criminal liability as it is stated in the MARPOL (to be criminal, the liability must derive from a wilful act, and must produce a serious act of pollution). This was changed with a Directive (known as “Criminalisation Directive”); with its application, the requisite for the criminal liability was “gross negligence”, a concept vague and not defined within its text. Therefore the boundaries between civil negligence and criminal acts turn blurred.

In the UK, where MARPOL applies strictly, a legal battle is being carried out by (inter alia) Intertanko in the tribunals regarding the legality of the Directive in its relation with MARPOL. The first battle was lost in the ECJ, but there is the opinion to refer the same matter to the International Tribunal of the Law Of the Sea.

Is this criminalisation of seafarers covered somehow by P&I clubs? Well, P&I Clubs do not cover criminal liabilities, but they have the omnibus rule, with which they could cover it, if the Board of Directors approves it. Particularly for the Captains, the P&I clubs usually pay the fines when there was no will in the offence.

A final thought related to the piracy and the criminalization: The shipping is moving 90% of the world trade, so it is key piece of the international commerce, and the seafarers are critical to the shipping industry. The criminalization and the piracy are making the sea-going profession less attractive, to not say dangerous, for the needed new generations.

This can be changed by the governments, starting with the review of the criminalisation of the seafarers, and changing such measures for other more positive from the perspective of effectiveness; in other words, the criminalisation maybe calm the public opinion, and be useful for the politicians to look like they are fighting the problem, but is not useful in the prevention of the accidents resulting in pollution.

The argument in favour of the criminalization is well known: since that seafarers (crew, captain..) can be punished with deprivation of liberty, they will act as watchdogs of the compliance of the ships with the international standards. This is completely unfair for the seafarers, who are bearing criminal liability in cases that should lead only to civil liability, with the add that this difference have as consequence the fall out of the scope of the cover of the P&I Clubs.

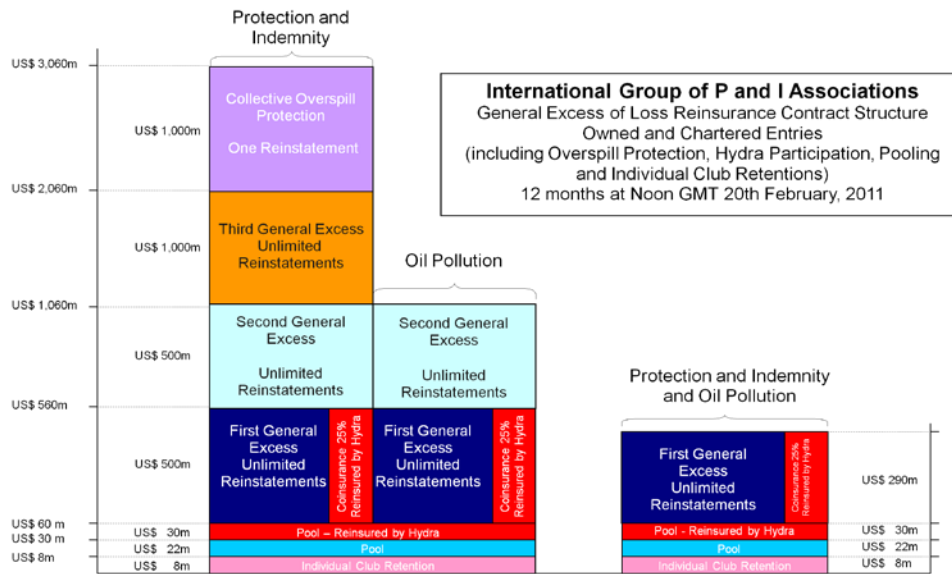
The application of the four pillars of the shipping regulations, SOLAS, MARPOL, STCW and the new ILO MLC 2006, will do much more in the prevention of the accidents than the punishment of the seafarers in case of accident as if they were criminals.

The piracy issue is more complex and difficult, because the problem came from the lack of authorities to enforce the law, or in other cases, to the lack of resources of the existing authorities to combat piracy.

The solutions will come from the creation of the government and authorities in the places needed –like in Somalia-, and the assistance from the EU, USA and the Industry to the local authorities with finance, logistic and training to combat the piracy.

Supplement A

Fig.1



Source: International Group P&I Clubs Web Page

Supplement B

Cross-references Between Maritime Labour Convention and UK legislation²⁶⁹

Regulation 1.1 Minimum age

Statutory Instruments

- 1991 No. 2144: The Merchant Shipping (Crew Agreements, Lists of Crew and Discharge of Seamen) Regulations 1991
- 1995 No. 972: The Merchant Shipping (Employment of Young Persons) Regulations 1995
- 2002- No. 2055: The Merchant Shipping (Medical Examination) Regulations 2002
- 2004 No. 1469: The Merchant Shipping (Hours of Work) (Amendment) Reg. 2004
- 2005 No. 1919: The Merchant Shipping (Medical Examination) (Amendment) Regulations 2005

Merchant Shipping Act 1995 (c.21)

- 55: Young Persons

Regulation 1.2 Medical certificate

Statutory Instruments

- 2002- No. 2055: The Merchant Shipping (Medical Examination) Regulations 2002
- 2005 No. 1919: The Merchant Shipping (Medical Examination) (Amendment) Regulations 2005

Regulation 1.3 Training and qualifications

Merchant Shipping Act 1995 (c. 21)

- 50: Production of certificates and other documents of qualification.
- 51: Crew's knowledge of English.
- 127: Training in safety matters.

Regulation 1.4 Recruitment and placement

Merchant Shipping Act 1995 (c. 21)

- 82: Maintenance of Merchant Navy Reserve
- 83: Supplementary provisions

Regulation 2.1 Seafarers' employment agreements

²⁶⁹ American Bureau Of Shipping, *Guidances Notes on the ILO Maritime Labour Convention*, 2006, May 2009 (updated October 2010)

Statutory Instruments

- 1991 No. 2144: The Merchant Shipping (Crew Agreements, Lists of Crew and Discharge of Seamen) Regulations 1991
- 1995 No. 972: The Merchant Shipping (Employment of Young Persons) Regulations 1995
- 2006 No. 630: The Race Relations Code of Practice Relating to Employment (Appointed Day) Order 2006

Regulation 2.2 Wages

Merchant Shipping Act 1995 (c. 21)

- 30: Payment of seamen's wages
- 31: Account of seaman's wages
- 32: Regulations relating to wages and accounts
- 33: Power of superintendent or proper officer to decide disputes about wages
- 34: Restriction on assignment of and charge upon wages
- 35: Power of court to award interest on wages due otherwise than under crew agreement
- 36: Allotment notes
- 37: Right of person named in allotment to sue in own name
- 38: Right, or loss of right, to wages in certain circumstances
- 39: Protection of certain rights and remedies
- 40: Claims against seaman's wages for maintenance, etc. of dependants
- 41: Remedies of master for remuneration, disbursements and liabilities
- 58: Conduct endangering ships, structures or individuals
- 59: Concerted disobedience and neglect of duty
- 61: Inquiry into fitness or conduct of officer
- 62: Disqualification of holder of certificate other than officer's
- 63: Inquiry into fitness or conduct of seaman other than officer
- 64: Re-hearing of and appeal from inquiries.
- 65: Rules as to inquiries and appeals
- 66: Failure to deliver cancelled or suspended certificate.
- 67: Power to restore certificate
- 68: Power to summon witness to inquiry into fitness or conduct of officer or other seaman
- 69: Procedure where inquiry into fitness or conduct of officer or other seaman is held by sheriff
- 70: Civil liability for absence without leave
- 71: Civil liability for smuggling
- 72: Civil liability for fines imposed under immigration laws
- 110: Payments of seamen's wages
- 111: Regulations relating to wages: deductions
- 112: Accounts of wages and catch
- 113: Restriction on assignment of and charge upon wages
- 114: Right, or loss of right, to wages in certain circumstances

Regulation 2.3 Hours of work and hours of rest

Statutory Instruments

- 2004 No. 1469: The Merchant Shipping (Hours of Work) (Amendment) Regulations 2004

Merchant Shipping Act 1995 (c. 21)

- 115, Hours of work

Regulation 2.4 Entitlement to leave

None identified at time of publication

Regulation 2.5 Repatriation

- Merchant Shipping Act 1995 (c. 21)
 - 28, Seamen left behind abroad otherwise than on discharge
- Discharge of seamen when ship ceases to be registered in United Kingdom
 - 73, Relief and return of seamen, etc., left behind and shipwrecked
 - 74, Limit of employer's liability under section 73
 - 75, Recovery of expenses incurred for relief and return, etc.
 - 76, Financial assistance in respect of crew relief costs

Regulation 2.7 Manning levels

Merchant Shipping Act 1995 (c. 21)

- 47: Manning
- 48: Power to exempt from manning requirements
- 49: Prohibition of going to sea undermanned

Regulation 3.1 Accommodation and recreational facilities

Statutory Instruments

- 1989 No. 102: The Merchant Shipping (Provisions and Water) Regulations 1989
- 2005 No. 1643: The Control of Noise at Work Regulations 2005
- 2006 No. 2739: The Control of Asbestos Regulations 2006

Merchant Shipping Act 1995 (c. 21)

- 43: Crew accommodation
- 44: Complaints about provisions or water
- 85: Safety and health on ships
- 94: Meaning of "dangerously unsafe ship"
- 95: Power to detain dangerously unsafe ship
- 96: References of detention notices to arbitration
- 97: Compensation in connection with invalid detention of ship
- 98: Owner and master liable in respect of dangerously unsafe ship

Regulation 3.2 Food and catering

Statutory Instruments

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- 45: Expenses of medical and other treatment during voyage
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Regulation 4.2 Shipowner's liability

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