

THE PROBLEMS DERIVED FROM APPLYING A SOCIAL SECURITY SYSTEM TO PERSONNEL SERVING ON BOARD VESSELS*

LA ACTIVIDAD DEL PERSONAL QUE PRESTA SERVICIOS A BORDO DE BUQUES Y SUS PROBLEMAS FRENTE AL ENCUADRAMIENTO EN UN RÉGIMEN DE SEGURIDAD SOCIAL

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ABSTRACT

EC Regulation 883/2004 on the Coordination of Social Security Systems contains special provisions regarding its application to personnel serving on board ships. This is also true of the Multilateral Ibero-American Agreement on Social Security. The criteria laid down to determine the law applicable to seafarers are different from those established for other workers. With certain exceptions, the system is based on application of the flag State's legislation. The aim of the present paper is to highlight the possible problems that may arise as a consequence of this criterion, which is based on a legal fiction that requires an in-depth review given the increasingly frequent use of flags of convenience.

KEYWORDS: Freedom of movement, coordination of Social Security, ships.

RESUMEN

La aplicación del Reglamento de coordinación de sistemas de Seguridad Social 883/2004 presenta reglas especiales para el personal a bordo de buques. Esta misma circunstancia se manifiesta en el Convenio multilateral iberoamericano de Seguridad Social. Los criterios previstos para establecer la ley aplicable a los trabajadores del mar, son distintos de los que se establecen para otros trabajadores. Se trata de un sistema basado (con ciertas excepciones) con la aplicación de la norma correspondiente al Estado de pabellón. El presente trabajo pretende poner de manifiesto las posibles disfunciones que se pueden ocasionar con la utilización de dicho criterio, basado en una ficción jurídica que, en la actualidad, con el recurso cada vez más frecuente de la utilización de pabellones de conveniencia, requiere de una revisión en profundidad.

PALABRAS CLAVE: Libre circulación, coordinación de Seguridad Social, buques, Reglamento 883/2004, Convenio Multilateral Iberoamericano de Seguridad Social.

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I. INTRODUCTION

Social security laws are based on the principle of territoriality, whereby the place of service provision is used for the purposes of determining to whom their provisions apply. Similarly, the majority of social security systems require the completion of a period of professional employment and/or residence, in other words, an economic contribution to the system, before the right to receive certain benefits is recognised. However, globalisation of the economy, migratory phenomena and the transnational mobility of workers have together introduced elements that have led States to draw up agreements or conventions establishing rules to coordinate the various systems and protect their citizens. Thus, in order to ensure the effectiveness of the principle of free movement, the European Union (EU) has drawn up regulations intended to prevent any loss of rights for migrant workers as a result of a change in their place of work or residence. Currently, the rules consist of Regulation 883/2004 of the European Parliament and of the Council of 29 April 2004 on the Coordination of Social Security Systems, and its Implementing Regulation 987/2009 of the European Parliament and of the Council of 16 September 2009, which establishes the rules for application of Regulation 883/2004. The rules are completed with Regulation 1231/2010 of the European Parliament and of the Council of 24 November 2010, which expands the scope of the aforementioned regulations to citizens of third countries who, solely because of their nationality, are not covered by the same.

Contrary to what might appear to be the case at first glance, when the Regulation on the Coordination of Social Security Systems was drawn up within the framework of the European Union, it was not intended to constitute a common welfare regime or system for Member States¹. In fact, it is a “complete and uniform system of rules on conflict of laws”² aimed at determining the national law applicable to the social security regime. Thus, the regulations establish actions for integration, and even harmonisation, the purpose of which is to “create the framework necessary to allow the synchronisation of transnational legal relations”³.

Similarly, South American States, taking the regulation established in the EU as their model, have adopted the Multilateral Ibero-American Agreement on Social Security⁴. This agreement is a multilateral instrument for coordination of social security laws, in the same sense as that of the EU instrument.

Finally, it should be noted that besides the abovementioned instruments, the system is completed with numerous international treaties that Spain has signed with various States. These consist of general social security agreements that are usually of a bilateral nature, the purpose of which is also to protect workers whose activity is carried out

¹Regardless of terminology see Miranda Boto, J.M., “El estadio previo: algunos problemas terminológicos de la Seguridad Social Comunitaria”, in (Sánchez-Rodas Navarro, C.; coord.), *El Reglamento Comunitario 1408/71. Nuevas cuestiones, viejos problemas*. Sevilla. Laborum. 2008, pp. 11-28.

² Judgment in *Van Poucke/Rijksinstituut voor de Sociale Verzekeringen der Zelfstandigen and others* (mber), C-71/93, EU.C.1994:120, paragraph 22.

³See Miranda Boto, J.M., “El estadio previo: algunos problemas terminológicos de la Seguridad Social Comunitaria”. *Op. cit.*; p.27.

⁴The convention was adopted on November 2007 by Latin America Summit in Santiago de Chile.

beyond Spain's borders. In their entirety, these make up the International Treaty Law on Social Security⁵, an extensive and complex body of legislation intended to ensure that workers "travel with their social security"⁶.

As indicated previously, performing activities in a given country in principle results in application of that country's social security rules. However, when aspects of internationalisation arise, which may entail conflict between regulatory systems, it is necessary to draw upon coordination regulations or bilateral or multilateral agreements in order to establish the applicable national social security legislation. For this purpose, social security rules, coordination regulations and the various agreements alike all use the place of service provision, or *lex loci laboris*, as the criterion to determine the applicable law. However, this criterion is not easy to apply to merchant navy activity. Seafarers provide their services in mobile workplaces, and thus the criterion of place of service provision requires clarification. This issue is specifically addressed in all applicable instruments, and in these cases, the applicable legal system is deemed to be that of the flag State.

The aim of the present paper is to highlight the complications entailed in determining the social security regime applicable to seafarers on board merchant ships, focusing exclusively on the situation of employed personnel and leaving aside the question of those who sail on fishing boats or who are self-employed. In particular, we will analyse the problematic situation of such personnel resulting from consideration of the flag State as the place of service provision on board vessels. First, we will analyse Spanish social security provisions and their application criteria, followed by those envisaged in bilateral or multilateral agreements between Spain and other countries, as well as the rules established by the EC Regulation 883/2004 on the Coordination of Social Security Systems and the Multilateral Ibero-American Agreement on Social Security, with respect to seafarers. Second, we will examine the difficulties entailed in maintaining this criterion to determine connection given the emergence of the use of flags of convenience. Lastly, we will analyse the reasons which in our view justify the need for a change of criterion when determining which State's social security system should apply to merchant navy personnel, substantiating this stance with a recent ruling made by the Court of Justice of the European Union (CJEU) on this issue and drawing the corresponding conclusions.

II. MERCHANT SHIPS AND SOCIAL SECURITY: THE CRITERION OF TERRITORIALITY APPLIED TO FLAG STATES

Prior to discussing the rules on conflict of law that involve an element of internationalisation, it is necessary to refer to the provisions laid down in Spanish regulations to determine workers' entitlement to inclusion in the Spanish social security system.

⁵This is a different regulatory system but multilateral or uniform International Social Security Law, which aims to define the rights secured to the workers force as ILO C102 Social Security (Minimum Standards) Convention, or 1961 European Social Charter.

⁶See Vida Soria, J.; Monereo Pérez, J.L.; Molina Navarrete, C.: Quesada Segura, R.; Manual de Seguridad Social. Madrid. Tecnos. 2010, p. 57.

Under Spanish social security legislation, those entitled to contributory benefits are Spanish citizens residing in Spain and non-Spanish citizens who are legally residing or staying in Spain, provided that in both cases they are carrying out their activities on Spanish national territory, which implies the application of a personal, territorial and professional criterion⁷. However, due to their particular circumstances⁸, a special social security regime is applied to seafarers. The recently amended Law 47/2015 of 21 October regulates the social protection of workers in the naval and fishing sector⁹, and includes within its scope workers serving on Spanish-flagged merchant ships whose activities, by their very nature, may be carried out in locations other than Spanish territory.

Registration under a flag is an administrative act that grants nationality to a ship, and this determines the rules applicable both to the ship itself and to the workers who provide their services on board. This may be especially significant depending on the flag flown¹⁰, because the choice of one flag or another can yield a substantial saving in costs related —among other things— to labour and social security, and as we shall see, this effect is magnified in the case of flags of convenience¹¹.

Thus, it is the flag flown that determines the applicable social security system. Consequently, seafarers providing services on a Spanish-flagged ship will be included in the Spanish social security system. However, in contrast to the previous regulation, a new feature of Law 47/2015 is that it incorporates an exception to the principle of territoriality according to the flag State¹². This rule allows for the additional inclusion in

⁷ However the Spanish Constitution set up as a right to all citizens, the scope of application of the Spanish Social Security Act (article 2) specify that the very principle of the system is universality.

⁸The preamble of the Spanish Act 47/2015, 21th October, about the social protection of seafarers workers stablish specificities based in the working place, the harsh living conditions on board, the isolation and homesickness of crew, and very high morbidity and mortality rates

⁹BOE No 253, 22 October 2015. This Law repeals the Decree 2864/1974, of 30 August, which approves the revised text of the Laws 116/1969, of 30 December and 24/1972, of 21 June, which stablished and regulated the special Social Security Scheme for seafarers, BOE No 243, 10 October 1974. (BOE is Spanish acronym for "Official Bulletin of the State" which is the official gazette of the Government of Spain).

¹⁰Every State shall fix the conditions for the grant of its nationality for ships. In Spain is set up in Royal Decree 1027/1989, of 28 July, sobre abanderamiento, matriculación de buques y registro marítimo, BOE No. 194, 15 August 1989. That rule provides that the flag, which carries the fiction that the ship is an integral part of the state that grants flag, is done through an administrative act, by which and after the procedure provided for in Royal Decree cited above, authorizing the ship flies the national flag.

¹¹About flags of convenience sed Arias Domínguez, A.; "Problemática socio-laboral de los pabellones de conveniencia". *Revista de Estudios Financieros* 260/2004, pp. 65-90; Ruiz Soroa, J.M.; y Díaz Sánchez, J.; "Reflexiones sobre banderas de conveniencia y Derecho Marítimo y Laboral Español". *Anuario de Derecho Marítimo*, vol. IV, 1986, pp. 91-155. Sempere Navarro, A.V.; "Pabellones de conveniencia y Seguridad Social". *Revista Doctrinal Aranzadi Social* 6/2002. BIB 2002/816. Carril Vázquez, X.M.; "Aspectos laborales y de seguridad social de los pabellones de conveniencia". *Revista Española de Derecho del Trabajo* 108/2001, pp. 909-927. It is also available on the ITF website the countries which have been declared FOCs by the ITF's Fair Practices Committee <http://www.itfseafarers.org/foc-registries.cfm/languageID/1>.

¹²Article 6, which includes the provisions of article 11.4 of Regulation 883/2004 but without reference to the flag of the ship.

the special Spanish regime of those workers residing in Spanish territory but who provide their services on board a ship flying the flag of a European Union Member State or a State with which Spain has signed a bilateral or multilateral social security agreement¹³, provided that these workers are paid by a company that has its headquarters or domicile in Spain¹⁴. This may either mean that should not apply to seafarers enrolled in flag of convenience vessels of countries without Social Security Agreements.

At the same time, in an attempt to compete with the phenomenon of flags of convenience, developed States have also allowed the creation of second registers within their territories that have a more beneficial tax and labour regime but do not reduce social security cover, which in Spain is regulated by the Law on State Ports and the Merchant Navy¹⁵. To this end, the sixteenth additional provision of the aforementioned rule establishes regulation of the Special Register of Ships and Shipping Companies, located in the Canary Islands, which includes a section regarding social security provisions for non-Spanish workers employed on board vessels registered in the Special Register. These relations shall be regulated by the legislation to which the parties freely submit, provided that this respects the rules established by the International Labour Organisation or, in the absence of express choice, by the provisions of Spanish labour and social security regulations, all without prejudice to the application of European Community legislation and the international agreements signed by Spain¹⁶. This possibility of freedom of choice regarding the law applicable to the employment contract may be null for the determination of social security legislation unless bilateral agreements exist on this question, since the system is based on “the mandatory inclusion of those who personally provide their services under certain duly regulated conditions not subject to the will of the affected party (...), there being no provision for opting out”¹⁷.

Pursuant to multilateral or bilateral agreements, application of Spanish social security legislation may be waived in the case of workers who are citizens of the signatory

¹³About bilateral social security agreement signed by Spain vid. http://www.seg-social.es/Internet_1/Masinformacion/Internacional/Conveniosbilaterales/index.htm

¹⁴To give effect to this inclusion, another exception is introduced in the Act regarding vessels can be registered as workplaces and therefore registered with the Social Marine Institute (ISM). Until now only the registration was allowed in the Register of ISM boats to vessels registered in the Register of Ships Merchant Marine -and therefore standard bearers in Spain, however, from now on should also register foreign vessels when crews must be framed in our Social Security Scheme under Article 6 of the Law 47/2015.

¹⁵Royal Legislative Decree 2/2011, of 5 September, approving the Codified Text of the Law on State Ports and the Merchant Navy, BOE No. 253, of 20 October 2011.

¹⁶Paragraph 7, Additional provision No.16 of the Law on State Ports and the Merchant Navy.

¹⁷In this regard, but to establish the inability to opt for Spanish workers who perform activities in FOC vessels, Carril Vázquez, X.M.; “Aspectos laborales y de seguridad social de los pabellones de conveniencia”. Op. cit., p. 927, referring two Judgements of Spanish Courts of Law (Tribunales Superiores de Justicia), both Bask Country ruling of 6 May 1997 (Ar. 2164) and Galicia ruling of 18 December 2000 (Ar. 4041).

States, in accordance with the pacts included in these instruments¹⁸. More specifically, Spain has signed a large number of agreements that contain provisions for seafarers, which maintain the general rule of application of the flag State's legislation¹⁹. Other agreements permit exceptions to this rule by establishing that if the company paying the seafarer has its headquarters or domicile in the seafarer's country of residence, then that country's rules shall apply, regardless of whether the vessel is flying the Spanish flag²⁰, or allowing in this case the possibility of choosing the social security rules of either of the two States²¹; another possible exception to application of the flag State's law is also envisaged in favour of the place of residence of the seafarer if this coincides with the place of recruitment²².

In accordance with the above, firstly, with regard to Spanish or foreign seafarers on board Spanish ships, no rules of conflict exist, since they are covered by the scope of the Spanish social security system, except in the case that an international agreement provides for exceptions to the rule of the law of the flag State. Secondly, the Spanish

¹⁸Without any disposition about seafarers: Social Security Agreement of 9 November 2001 between Spain and Andorra (BOE No 290, of 4 December 2002); Social Security Agreement of 31 January 2002 between Spain and Australia (BOE No. 303, of 19 December 2002); Social Security Agreement of 20 May 1988 between Spain and Philippines (BOE No. 244 of 11 October 1989).

¹⁹ Art. 5.3 Social Security Agreement of 30 September 1986 between Spain and USA (BOE No 76, of 29 March 1986), art. 3.1 c) Social Security Agreement of 1 April 1960, between Spain and Ecuador (BOE No. 254 of 23 October 1962), art. 7 Social Security Agreement of 11 April 1994, between the Spain and Russia (BOE No. 48 of 24 February 1996), art. 7.3 Social Security Agreement of 12 May 1988 between Spain and Venezuela (BOE No. 162 of 12 July 1990).

²⁰Thus art. 6.4, paragraph 2º Social Security Agreement of 25 April 1994 between Spain and Mexico (BOE No. 65, 17 March E1995); art. 7.3, paragraph 2º Social Security Agreement of 25 April 1991 between Spain and Brazil (BOE No. 13, 15 January 1996); art. 7.3, paragraph 2º Social Security Agreement of 28 January 1997 between Spain and Chile (BOE No. 72, 25 March 1998); art. 7.1 c) paragraph 2º Social Security Agreement of 1 December 1997 between Spain and Uruguay (BOE No. 47, 24 February 2000); art. 7.d) paragraph 2º Social Security Agreement of 26 February 2001, between Spain and Tunisia (BOE No. 309, 26 December 2001); art. 6.1 e) paragraph 2º Social Security Agreement of 6 November 1979 between Spain and Morocco (BOE No. 245, 13 October 1982), modified 27 January 1998 (BOE 24 November 2001); art. 7.1 c) paragraph 2º Social Security Agreement of 28 January 1997 between Spain and Argentina (BOE No. 297, 10 December 2004); art. 8.1 f) paragraph 2º Social Security Agreement of 16 June 2003, between Spain and Peru (BOE No. 31, 5 February 2003); art. 7.1, 3º paragraph 2º Social Security Agreement of 24 June 1998 between Spain and Paraguay (BOE No. 28, 2 February 2006); art. 9.1, f) paragraph 2º Social Security Agreement of 1 July 2004 between Spain and Dominican Republic (BOE No. 255, 12 June 2006); art. 8.1 f) Social Security Agreement of 1 December 2013 between Spain and Cape Verde (BOE No. 255, 24 October 2013); art. 9.2 Social Security Agreement of 1 December 2013 between Spain and Korea (BOE No. 110, 8 May 2013); art. 8.1 Social Security Agreement of 12 November 2008 between Spain and Japan (BOE No. 236, 30 September 2009 and BOE No. 270, 9 November 2009).

²¹ Art. 7.4, paragraph 2º Social Security Agreement of 7 October 1996 between Spain and Ukraine (BOE No. 81, 4 April 1998).

²²In the case of art. 6.4, Social Security Agreement of 10 November 1986 between Spain and Canada (BOE No. 287 de 1 December 1987), established "A person employed as a member of the crew of a ship who, but for this Convention, would be subject to the legislation of Spain as well as to the Canada Pension Plan in respect of that work shall, in respect thereof, be subject only to the Canada Pension Plan if that person resides and is hired in Canada, and only to the legislation of Spain if that person resides and is hired in Spain. When the circumstances of the previous sentence do not apply, the person shall be subject only to the legislation of Spain if the ship flies the flag of Spain." This criterion has been incorporated as a consequence of the Protocol of 19 October 1995 (BOE No. 34, de 8 February 1997).

system also covers workers resident in Spain who are paid by a company with its headquarters or domicile in Spain, and who provide their services on board a ship flying the flag of a European Union Member State or a State with which Spain has signed a bilateral or multilateral social security agreement. As a result, the Spanish social security system covers seafarers of all nationalities who provide their services on board Spanish-flagged ships, as well as seafarers of all nationalities resident in Spain and embarked on foreign-flagged vessels (only if they are EU Member State or State with which Spain has signed an agreement) who are paid by companies with their headquarters or domicile in Spain.

This situation does not seem to pose difficulties as regards establishing the application of national rules since there is direct connection between State and worker; however, we shall see what happens when seafarers move between different States, and how the applicable social security regulations are then determined.

A. EC REGULATION 883/2004 ON THE COORDINATION OF SOCIAL SECURITY SYSTEMS

As mentioned above, Regulation 883/2004 and other regulatory instruments establish rules to govern the system applicable to situations in which workers who are citizens of EU countries or of third countries with legal residence in a Member State²³ (except Denmark and the United Kingdom²⁴) provide services in other EU countries²⁵.

The system does not replace national social security systems, but rather works on the basis of five fundamental principles. The first is the unification of the rules of private international law on social security of all States, to ensure that a Member State's legislation is only applied when an individual exercises the right to freedom of movement. According to this principle, the applicable regulation is determined by the place of service provision, or *lex loci laboris*. The second permits the aggregation of periods of contribution in different States; the third allows the export of benefits or the suppression of residence clauses; the fourth ensures equal treatment; and lastly, the fifth establishes administrative cooperation between the authorities of different States²⁶. Together, these rules guarantee through their provisions that the right of free movement

²³The Regulation 1231/2010 extended the provisions of Regulation 883/04 to this group.

²⁴It should be noted that in Denmark, nationals from third Countries cannot be subject to EU Regulations on Social Security. In UK nationals from third Countries are subject to Regulations (EEC) No 1408/71 and (EEC) No 574/72.

²⁵This standards form a modernize package which replace Regulation (EC) No. 1408/1972 of 14 June, together with its Regulation 574/1972 of 21 March, that established coordination rules to address the concurrence of legislation on social security, occasioned by geographical displacement of protected individuals. About its origin see Montoya Melgar, A.; Galiana Moreno, J.M.; y Sempere Navarro, A.V.; Derecho Social Europeo. Madrid. Tecnos. 1994, pp. 189-300. About the change of Regulations, see Sánchez-Rodas Navarro, C.; "Sinopsis de las reformas en el ámbito de aplicación personal y material de los Reglamentos de Coordinación de Regímenes de Seguridad Social", in (Sánchez-Rodas Navarro, C.; dir.), La coordinación de los sistemas de Seguridad Social. Los Reglamentos 883/2004 y 987/2009. Sevilla. Laborum. 2010, pp. 23-38, by the same author "El Derecho de Libre Circulación y la Supresión de Cláusulas de Residencia". Temas Laborales 130/2015, pp. 395-417.

²⁶See Asín Cabrera, M.A.; "La dimensión exterior de la coordinación en materia de Seguridad Social de la Unión Europea y su impacto en los acuerdos internacionales bilaterales concluidos por España con terceros Estados africanos". Documentación Laboral 103/2015, vol. I, Ediciones Cinca.

of workers and people²⁷ inside the European Union is effective in practice, as the cornerstone that it was—and is—in the construction of the European Union. The criterion used to determine the applicable social security system is that of territoriality, i.e. that of the place of service provision. However, taking into account the particular circumstances of work on board ships, the regulation incorporates special rules to establish the applicable legislation²⁸.

First, as an *ad hoc* rule for the merchant navy sector, the regulation lays down that when an activity is habitually carried out in an employed capacity on board a vessel at sea flying the flag of a Member State, this activity shall be considered as being performed in that Member State. Once again, the rules on conflict refer to the flag State. However, European legislators have attempted to introduce other points of connection that could present closer ties with the subject in question. Thus, if the seafarer is paid by a company or a person whose headquarters or domicile is in another Member State, the worker shall be subject to the legislation of the latter if also resident in that State. Therefore, the company or person that pays the remuneration shall be considered as a business owner, for the purposes of said legislation. Thus, although the criterion of the place of service provision is enshrined through the legal fiction of the flag State, this may be transferred from the *lex loci laboris* to the State where the company is domiciled when this coincides with the worker's place of residence²⁹. In effect, this principle enshrines a rule similar to that incorporated in Spanish social security regulations regarding seafarers.

However, suppose that a seafarer resident in Spain is hired by a company with its headquarters in France, and is successively sent to work on board German, Italian and Belgian-flagged vessels. In such a case, it would be necessary to consider the provisions of article 13 of the regulation, which establishes rules to determine the applicable legislation for itinerant personnel, i.e. those whose activity is performed simultaneously in several States³⁰. Initially, the rule stipulates that the legislation of the Member State

²⁷The right of free movement of workers is enshrined in Articles 45 to 48 the Treaty on the Functioning of the European Union (TFEU), and regulated by various regulations such as Regulation 492/2011 on freedom of movement for workers within the Union and Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. The social Security coordination provides rules to protect the rights of people moving within the EU.

²⁸Although it is not a provision in order to establish rules for identifying the applicable law in cases of conflict, but the material scope, and therefore the branches of social security on Regulation shall apply also Article 3 states in paragraph 4 a specialty of work on board ships, since the provisions of title III shall not affect the provisions of the legislation of the Member States relating to the obligations of the ship owner, as was provided in the previous Regulation 1408/1971 of 14 June. That means the ship owner or employer, keep Social security and social protection obligations allocated under its national legislation, but may elude accordance with the rules of coordination. About this matter Vicente Palacio, A.; "El Reglamento 883/2004 y las obligaciones de los armadores en el ámbito de la Seguridad Social", in (Sánchez-Rodas Navarro, C.; Dir.), La coordinación de los sistemas de Seguridad Social. Los Reglamentos 883/2004 y 987/2009. Op.cit.; pp. 65-90.

²⁹About the personal scope of the Regulation, Rodríguez Cardo, I.A.; "Problemas de aplicación de la Seguridad Social en el espacio: el conflicto de leyes en el Reglamento 883/2004", in (Sánchez-Rodas Navarro, C., dir.), La coordinación de los sistemas de Seguridad Social. Los Reglamentos 883/2004 y 987/2009. Op. cit., pp. 39-63.

of residence shall be applicable, provided that a substantial part of the worker's activity is performed in that Member State, or that the worker has been hired by two or more companies or employers at least two of which have their headquarters or domicile in Member States other than the Member State of residence. However, if these conditions are not met, the legislation of the Member State where the company or employer is primarily headquartered or domiciled becomes applicable. Consequently, according to the rules described, in the case of the proposed example it would be French legislation that would be considered applicable. On the other hand, article 14 of the regulation incorporates a remedial rule for the case that this activity is only performed sporadically. This establishes that a person who performs an activity in an employed capacity in one Member State on behalf of an employer whose activities are habitually carried out in that same State, and who is sent by this employer to perform work in an employed capacity in another Member State, will continue to be subject to the legislation of the first Member State, provided that the envisaged duration of this work does not exceed twenty-four months and that this person has not been sent to replace someone else who was likewise sent. Similarly, the social security legislation deemed applicable will remain the same in the case of a seafarer working on board a Spanish-flagged ship who is sent to another vessel flying a different flag, provided that this situation is temporary. The hypothetical situations described above may seem implausible, but the truth is that the need to reduce the costs of maritime transport has rendered such situations more frequent than one might imagine.

B. THE MULTILATERAL IBERO-AMERICAN AGREEMENT ON SOCIAL SECURITY

The Multilateral Ibero-American Agreement on Social Security is a regulation on coordination that is used to determine the social security legislation applicable in the case of workers³¹ moving between Ibero-American States that have ratified the agreement and that also subscribe to the Implementation Agreement³². The regulation is intended to establish a system of coordination similar to the one implemented in Europe, although modified in accordance with the differences that exist between the European Union, as a supranational entity, and the Ibero-American States³³. This multilateral agreement is based on the same principles as Regulations 883/2004 and 987/2009, which have also influenced its articles³⁴, although the difficulties in wording

³⁰The regulation provided for in this article is separated from the under Regulation 1408/1971 where the regulation for mobile staff in international shipping companies and serving in other companies differed, *vid.* Art. 13.

³¹It applies to people (of any nationality) who are or have been subject at some time to the Social Security legislation of two or more States parties thereto, as well as their families, beneficiaries and dependents, apply to financial benefits from the Social security, disability, old age, survival, accidents and occupational disease.

³²About the origin and meaning of the Convention see Sanchez-Rodas Navarro, C., "El Convenio Multilateral Iberoamericano de Seguridad Social". *Revista General de Derecho del Trabajo y de la Seguridad Social* 26/2011, pp. 201-222.

³³ Currently only Spain, Paraguay, Portugal, Uruguay, El Salvador, Brazil, Chile, Ecuador and Bolivia, as they are the only ones that have ratified the Convention and signed the Implementing Agreement.

³⁴*Vid.* Sánchez-Rodas Navarro, C.; "El Convenio Multilateral Iberoamericano de Seguridad Social". *Op. cit.* p. 206. Even the differences are evident between both systems coordination, we note that within the

which are still apparent in the European regulations have been overcome³⁵. The agreement establishes full application in the party States, provided that there are no bilateral or multilateral social security agreements in force, in which case the provisions most favourable to the possible beneficiary shall be applied. Consequently, the agreement does not supersede other international agreements in force which may have been signed by the party States, and thus if the provisions contained in these agreements are more favourable to migrant workers they shall prevail over the Multilateral Agreement³⁶.

As has become customary, the agreement establishes the place of service provision as a general rule to determine the applicable social security legislation³⁷, and the special rules make express mention of activity on board ships, revealing once again the influence of Regulation 884/2003. To this end, its scope includes dependent activities performed on board a vessel at sea flying the flag of a party State, and such activities are considered as being performed in the flag State. The agreement also incorporates a remedial rule similar to the European one for cases where a worker is paid by a company or person headquartered or domiciled in another party State, whereby the legislation of the latter shall apply provided that the seafarer is resident in that same State. Similarly, the company or person that pays the remuneration shall be considered as a business owner or employer for the purposes of applying the corresponding legislation.

Hence, the above demonstrates that the law of the flag State is the preferential criterion employed to determine the inclusion of workers on board ships in a given social security system. As regards determining the applicable law should several regimes enter into conflict, this criterion is thus applied in Spanish regulations, European regulations, Ibero-American regulations, and even bilateral social security system agreements. In our opinion, this criterion is appropriate in cases where the vessel maintains some connection with the place that granted it nationality. However, consider the case of an Uruguayan seafarer (nationality of the worker) who lives in Spain (place of residence) and works for a Swiss shipping company (domicile of the employer) on a vessel flying

material scope of the Multilateral Convention has a lower since it merely confined to contributory social security benefits, unlike Community Regulations comprising Social security schemes, whether contributory or non-contributory, general and special, as well as those relating to the obligations of the owner, including sickness benefits; maternity benefits and equivalent paternity; invalidity benefits; old-age pensions; survivor benefits; benefits of accidents at work and occupational diseases; death grants; unemployment benefits; pre-retirement benefits and family benefits.

³⁵This difficulty already existed on Regulation 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community. The Regulation has repeatedly been rated by the doctrine as diabolical instrument by its complexity and by successive modifications suffered, none of them intended to clarify its content. See about this perspective Carril Vázquez, X.M.; "La seguridad social de los trabajadores del mar en el Derecho internacional y comunitario", in (Fotinoupolou Basurko, O.; coord.), *Jornada sobre la Seguridad Social de los Trabajadores del Mar*. Bilbao. Servicio de Publicaciones del Gobierno Vasco. 2007, p.71.

³⁶Using a "gleaning" technique, which will increase the possibility of litigation according to Sánchez-Rodas Navarro, C.; "El Convenio Multilateral Iberoamericano de Seguridad Social". *Op.cit.*, p.219.

³⁷Article 9 Multilateral Convention which provides "las personas a quienes sea aplicable el presente Convenio estarán sujetas exclusivamente a la legislación de seguridad social del Estado Parte en cuyo territorio ejerzan una actividad, dependiente o no dependiente, que dé lugar a su inclusión en el ámbito de aplicación de dicha legislación", but article 10 establishes some exceptions to this rule.

the Panamanian flag (flag of the ship) that is sailing in the Persian Gulf (place where service provision occurs)³⁸. Evidently, in accordance with the rules established by international and European law, only one legislative regime must be applied, and in cases where an element of internationalisation arises, these laws without exception apply the criterion of the place of service provision, understood as the flag State. However, are these rules adequate to regulate the situation described above? It is clear that this sector requires special rules, but in our view, application of the law of the flag State does not solve the problems that can arise from the emergence of the phenomenon of flags of convenience.

III. LEX LOCI LABORIS AND FLAGS OF CONVENIENCE

In this scenario, the use of flags of convenience to some extent perverts the rules for determining the social security legislation applicable in maritime transport scenarios³⁹. Ship owners who register their vessels in these flag States, which apply reduced taxation, clearly obtain a significant competitive advantage⁴⁰. These flag States reduce the operating costs of the activity, leveraging a legal fiction to permit registration and thus endow nationality to a ship without the need for a connection between the ship owner and the flag State, since vessel ownership and control can be located in any other country. The economic savings associated with flags of convenience are based on the leniency of such States, allowing owners to sail poorly maintained ships in substandard condition operated by a poorly paid, less qualified skeleton crew, and avoid paying social security or social costs. These countries permit registration of a vessel without it having to meet the requirements laid down in Western countries regarding crews, among other things, since the corresponding authorities exercise limited or no control over the fleets they admit in their registers. Under these circumstances, it is evident that the working conditions of crew on board ships registered with a flag of convenience present a lack of physical as well as social security⁴¹.

Although the international community has attempted to redress this problem by drawing up regulatory solutions, these have not encountered the desired success⁴². Each State is free to establish its own requirements for registration, although the Geneva Convention on the High Seas of 1958 acknowledged the need for an effective link between the person and the flag State. This same provision is contained in the 1982 United Nations Convention on the Law of the Sea, also known in some countries as the Montego Bay Convention, which although it requires effective control on the part of the flag State,

³⁸ It is not so far from reality, these are similar facts in the Judgment in Kik, C-266/13, EU:C:2015:188.

³⁹The historical background of flags of convenience can be consulted in Martínez Landaluze, J.A.; “De las banderas de conveniencia a los segundos registros”. *Tribuna Social* 49/1995, p. 36.

⁴⁰On the effect of using flags of convenience and their impact on Labour and Social Security, vid. inter alia, Ruiz Soroa, J.M.; Díaz Sánchez, J.; “Reflexiones sobre las banderas de conveniencia y Derecho Marítimo y Laboral español”. Op. cit., pp. 91-155. Carril Vázquez, X.M.; “Aspectos laborales y de Seguridad Social de los pabellones de conveniencia”. Op. cit.; pp. 909-927. Arias Domínguez, A.; “Problemática socio-laboral de los pabellones de conveniencia”. Op. Cit.

⁴¹See Ruiz Soroa, J.M.; Díaz Sánchez, J.; “Reflexiones sobre las banderas de conveniencia y Derecho Marítimo y Laboral español”. Op. cit. p. 101.

⁴² Sempere Navarro, A.V.; “Pabellones de conveniencia y Seguridad Social”. Op. cit.

does not envisage that the absence of such control may result in the rejection of the registration of the vessel. Thus, when the ILO found that workers who provided their services on board ships registered under a flag of convenience were affected by the national regulations of the corresponding flag States, which in general consist of countries with a very low level of social and welfare protection that often lack a mandatory social security system, it took steps aimed at regulating seafarers' right to such protection⁴³. As a result, it successively drew up and approved Conventions no. 70 on social security for seafarers (1946), no. 71 on seafarers' pensions (1946), no. 147 on minimum standards on merchant ships (1976) and no. 165 on social security for seafarers (revised) (1987). These rules have now been replaced by the Maritime Labour Convention (2006)⁴⁴, establishing a system of gradual implementation to achieve complete protection for seafarers⁴⁵. Equally, the Maritime Labour Convention instructs members to adopt measures consistent with their national circumstances to provide protection in the field of social security for seafarers who habitually reside in their territory, and recommends that members provide the social security protection envisaged in the convention to personnel on board ship flying their flags. However, we would argue that these provisions not have exerted the desired effect, and workers sailing under these flags remain inadequately protected⁴⁶.

Therefore, although the criterion of *lex loci laboris* is perfectly valid for more stable activities such as those performed on land, reliance on the law of the flag State provides a means to circumvent much more demanding national laws regarding labour and social security obligations. This situation highlights the need to apply other criteria for determining the applicable legislation, as is the case with the seafarer's contract, which would make it possible to link the employment relationship to the legislation with which it has the closest ties.

IV. THE FAILURE OF THE FLAG STATE CRITERION: FLAG OF THE SHIP VS. SUFFICIENTLY CLOSE CONNECTIONS

The CJEU has also had occasion to pass judgement on the problems for seafarers arising from the application of coordination regulations⁴⁷. We refer here to the *Bakker*⁴⁸

⁴³Seafarer means any person who is employed or engaged or works in any capacity on board a ship to which the ILO Conventions applied.

⁴⁴All these Conventions were revised for the Maritime Labour Convention except C-71 ILO Convention.

⁴⁵See paragraph 2 Rule 4.5 MLC 2006. About the effects of the MLC2006 adoption in Social Security protection vid. Carril Vázquez, X.M., "El Derecho a la atención médica y a la protección de Seguridad social y a las responsabilidades exigibles al armador por enfermedad, lesiones y muerte por causas laborales de la gente de mar en el Convenio sobre el trabajo marítimo de 2006", *Revista del Ministerio de Trabajo y Emigración*, No. 82, pp. 383-392. By the same author, "La seguridad social de los trabajadores del mar en el Convenio de Trabajo Marítimo 2006", *Revista General de Derecho del Trabajo y de la Seguridad Social*, No. 36, 2014, Iustel, pp. 248-261.

⁴⁶See Carril Vázquez, X.M.; "Aspectos laborales y de seguridad social de los pabellones de conveniencia". *Op. cit.*, pp. 916-917.

⁴⁷Although referred of the application of Regulation No 1408/1972 the Regulation 883/2004 predecessor. Regarding ECJ rulings about this issues, see Miranda Boto, J.M.: "La Seguridad Social de los trabajadores del mar en los Reglamentos Europeos" in (Cabeza Pereiro, J.; Rodríguez Rodríguez, E.; coord.), *El Trabajo en el Mar: los nuevos escenarios jurídico-marítimos*,. Albacete. Bomarzo. 2015, pp. 265-278, by

and *Kik*⁴⁹ cases, which for different reasons merit examination. The latter case, recently decided by the CJEU, has highlighted the fact that the European Court also harbours doubts about the viability of the principle of territoriality for the application of regulations on coordination, when the service is provided on board ships flying flags of convenience⁵⁰.

The *Bakker* case settled the controversy about application of the regulations on social security system coordination, and concerned Mr. *Bakker*, a Dutch worker resident in Spain who exercised his activity on board dredgers flying the Dutch flag, for a company established in the Netherlands. Mr. *Bakker* considered that neither Dutch legislation nor the coordination regulations were applicable, among other reasons⁵¹ because his activity was performed outside European Union territory, mainly in Chinese territorial waters and in the United Arab Emirates. The Court considered that the fact that the activities were performed outside EU territory had no bearing on the matter, since it was a Dutch-flagged dredger owned by a company established in that State and therefore subject to the laws of the Netherlands. In this case, the Court used the criterion of the flag State to determine the applicable legislation, since it considered that flying the Dutch flag constituted a sufficiently close tie to admit a connection with European Union territory⁵².

However, it is the *Kik* case which in our opinion introduced a new point of special interest, since it highlighted the problem of flags of convenience. Mr. *Kik* was a Dutch national resident in the Netherlands who worked on board a Panamanian-flagged pipe-laying vessel for a company established in the Netherlands. Subsequently, although he continued to provide the same services on board the same ship and under the same flag, he began to perform this activity for a company established in Switzerland. During the time that Mr. *Kik* provided his services for the entity established in Switzerland, his work was performed in areas outside EU territory, such as continental shelves adjacent to a third State, in international waters and nearby the continental shelf adjacent to certain Member States. Therefore, Mr. *Kik* understood that Dutch social security legislation was not applicable. In strict accordance with the articles of coordination Regulation, the applicable social security legislation would be that of the flag State, in this case Panama, and the activity would fall outside the scope of the coordination regulation. However, the Court of Justice made use of a guideline that it had already

the same author “El trabajo en el mar en la jurisprudencia comunitaria”. Revista del Ministerio de Trabajo y Emigración No. 82, pp. 417-434.

⁴⁸ Judgement in *Bakker*, C-106/11, EU:C:2012:328.

⁴⁹ Judgement in *Kik*, EU:C:2015:188.

⁵⁰ Chaumette, P. “Les espaces juridiques du travail maritime”, in: VV.AA. (Cabeza Pereiro, J.; Rodríguez Rodríguez, E.; coord.), *El Trabajo en el Mar: los nuevos escenarios jurídico-marítimos*, Op. cit., pp.15-53.

⁵¹ It was alleged that the board dredgers were not covered by the concept of ‘vessel’ in article 13 (2)c of that Regulation, argument dismissed by the ECJ inasmuch as there is no condition laid down in that provision and the dredgers fly the Netherlands flag and were recorded in the Netherlands maritime shipping register.

⁵² Following the same approach Judgement in *Aldewereld*, C-60/93, EU:C:1994:271.

followed on other occasions, although for other activities⁵³, and understood that there was a sufficiently close tie between the employment relationship and European Union territory due to the worker's place of residence and the company's place of domicile, the Netherlands and Switzerland, respectively. It is significant that the Court equated the situation in which a person has been employed by an undertaking in the European Union to work on a vessel flying the flag of a third State must be treated in the same way as the situation of workers hired by companies domiciled in the EU to perform their activity outside the Union⁵⁴. To this end, the CJEU did not hesitate to apply rules applicable to persons other than mariners, nor did it apply the traditional criterion of flag State as the place of service provision to exclude application of the regulation on coordination⁵⁵. The final decision rested on the elements of a tie with the legislation of the Member States, and established that a Member State citizen who provided services outside EU territory employed on board a ship flying the flag of a third State, but who worked for a company domiciled in EU territory shall be subject to the legislation of the latter State.

Hence, the stance taken by the Court of Justice of the European Union invites us to reflect on the problems entailed in applying the flag State criterion⁵⁶, and on the need to review the criteria for determining the applicable legislation.

V. CONCLUSIONS

Special regulations are applicable to the legal employment relationships of seafarers. Thus, in the case of services provided on board vessels, all regulations that establish a tie with a given social security regime contain specific dispositions linked to the flag State. Obviously, the habitual place of service provision tends to be uncertain, and this legal fiction such as the flag State of the vessel is, makes it possible to circumvent the regulations on social security that would otherwise apply.

The foregoing demonstrates that this circumstance can lead to problems when assigning a worker to a given social security system in the event that there is a connection with more than one legal system, since the activity is by its very nature transnational, a difficulty that also arises with the legislation regulating employment contracts —or seafarers' contracts— that form the basis of the activity. In such cases, Regulation (EC) no. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, has introduced different application criteria based on the law chosen by the parties, although the worker cannot be deprived of the protection endowed by the mandatory rules that would be applicable in the absence of choice. However, in the absence of choice, other criteria must be applied. In the first instance, this would be the law of the country in which the worker habitually performs

⁵³Vid. Judgment in Ingrid Boukhalfa/Bundesrepublik Deutschland, C-214/94, EU:C:1996:174.

⁵⁴See Judgement in Kik, EU:C:2015:188, paragraphs 48-49.

⁵⁵See paragraphs 56, 59 y 60 abovementioned Judgement in Kik, EU:C:2015:188.

⁵⁶In this sense see Fotinopoulou Basurko, O.: "¿Es necesario reformular el art. 7 de la LGSS ante la decadencia del criterio de la ley del pabellón como criterio de conexión de los sistemas de Seguridad Social de la gente de mar?". *Revista de Derecho de la Seguridad Social* 5/2015 pp. 63-96.

his or her work, *lex loci laboris*. In the second instance, it would be the law of the country where the company employing the worker is domiciled, *lex loci celebrationis*⁵⁷. Thirdly and lastly, the legal system with which the contract presents the closest ties would be applied, irrespective of the previous criteria and correcting the regulations of application⁵⁸.

In our opinion, the flag State criterion is appropriate where there is direct connection between the ship and the flag it flies, and consequently there is a close tie between them. For the same reasons, we believe it is appropriate to apply the legislation corresponding to the place of residence of the employer and worker when they both reside in the same State, but still allows circumvention provisions that would otherwise be applicable. Hence, the express mention of principle of territoriality in the amendment in Law 47/2015 of 21 October, regulatory of the social protection of workers in the naval and fishing sector, it is certainly insufficient. The problems can clearly arise with flags of convenience, which do not fall within the scope of the above-cited rule. Therefore, we wonder whether it might not be more appropriate to discard the State flag criterion, which ultimately is no more than a legal fiction, and to introduce the closest ties as a general rule, along the lines indicated by the CJEU. This modification to the existing criteria for determining the applicable social security systems, agreements and coordination regulations, would provide seafarers with more adequate protection.

⁵⁷Judgment in Koelzsch, C-29/10, EU:C:2011:151 and Judgment in Voogsgeerd, C-384/10, EU:C:2011:842. About this matter Fotinopoulou Basurko, O., “What law for the international maritime employment contracts?: between flexibility and reasonableness”, *Diritto marittimo*, Vol. 115, No. 2, 2013, pp. 287-303.

⁵⁸Judgment in Schlecker, C-64/12, EU:C:2013:551. See Fotinopoulou Basurko, O., “Cerrando el círculo: El caso Schlecker y la interpretación de la regla conflictual de los vínculos más estrechos en el contrato de trabajo plurilocalizado”, *Temas laborales: Revista andaluza de trabajo y bienestar social*, No. 123, 2014, pp. 79-108.