

PAWEŁ KRĘŻEL*

THE MEANING AND EVOLUTION OF THE ‘GENUINE LINK’ CONCEPT AND ITS PRACTICAL IMPLEMENTATION 40 YEARS AFTER THE ADOPTION OF THE 1982 UN CONVENTION ON THE LAW OF THE SEA

Abstract

This article examines the meaning and evolution of the practical implementation of the ‘genuine link’ concept over the years since the rise of the flag-of-convenience (FOC) registries in the 1920s. The author notes that while the competition between Flag States become fiercer, the regulations on ship safety, pollution prevention or shipboard working and living conditions are becoming standardized and ubiquitous. By being regulated by international instruments, in effect restricting regulatory powers of Flag States. Likewise, the enforcement of these provisions is becoming internationalized – with the omnipresence of classification societies and introduction of PSC regimes. At the same time, author identifies a lack of adequate regulations in respect of employment of seafarers, most notably wages and social security contributions, both at the national (Flag State) and international level. This legal loophole encourages Port States to introduce local solutions, irrespective of Flag State regulations. Such developments weaken the ‘genuineness’ of the ‘genuine link’ between ship and its Flag State.

Keywords: genuine link, Flag State jurisdiction, UNCLOS, FSC, Recognized Organizations, RO Code, seafarers’ social security

INTRODUCTION

After the First World War, U.S. shipowners began to circumvent the alcohol prohibition and the new requirements of the Merchant Marine Act of 1920 (or ‘Jones Act’), which inter alia broadened seaman’s rights, by transferring their

* Paweł Krężel attorney-at-law, pkrezel@outlook.com

vessels to more lenient registries (e.g. Panama or Liberia). Such registries offered low taxes and other public levies and fees, no crew nationality requirements, skeletal safety regulations and regulatory environment. This phenomenon increased rapidly worldwide after the Second World War. According to the study by the Maritime Transport Committee of the Organisation for Economic Co-operation and Development on Flags of Convenience¹, at the end of June 1971, ships flying the flags of countries considered as FOC, i.e. Liberia, Panama, Lebanon, Somalia, Cyprus and Singapore made up 19.3% of the total world fleet, with a total of 47.6 million GRT (Gross Registered Tonnage).

The problem had then progressed, heavily affecting traditional European maritime nations such as Denmark, Italy, the Netherlands, Norway, Sweden or the UK. While in 1970, 32% of the world tonnage sailed under the EU (then EC) Member States flags, by 1995 this share had decreased to 14%. The share of the FOC registries increased over the same period from 19% to 38%. Declining competitiveness of the European registries triggered efforts towards the adoption of more 'lenient' regulatory environment (e.g. in respect of crew nationality or minimum wages) and state aid measures, such as tonnage tax.² Such measures were perceived as politically controversial, hence often were conditional upon registering in so-called 'offshore registers' (established in the overseas territories with some degree of autonomy on the relevant issues, such as taxation) or parallel 'international registers', limited to ships in international navigation. In many cases, the proliferation of such 'second registers' had only further weakened the 'genuine link' between ship and a country which flag she's flying.³ As prof. Mirosław H. Koziński rightly noted, for many developing countries a flag has become a commodity.⁴

The lack of a 'genuine link' between the real owner of a vessel and the flag the vessel flies has long been denounced by the International Transport Workers'

¹ Reproduced in the annex to ILO (International Labour Organization) document ILO-JMC/21/4. Available at: http://www.ilo.org/public/libdoc/ilo/1972/72B09_387.pdf (accessed: 19.12.2023).

² More on the origins and specific state aid measures in: 'Financial and fiscal measures concerning shipping operations with ships registered in the Community', SEC(89) 921 final, 3.8.1989 or 'Community guidelines on State aid to maritime transport' (97/C 205/05) (OJ C 205, 5.7.1997).

³ More on the development of Flags of Convenience in: E. Osiekie, *Flags of Convenience Vessels: Recent Developments*. *American Journal of International Law*, 73(4), 1979, p. 604. The problem of declining competitiveness of European shipping in the face of global competition is elaborated on in: S. Tenold, J. Ojala, *How to Sail a Sinking Ship, Adapting to the Declining Competitiveness of the European Shipping Industry*, 2018.

⁴ M.H. Koziński, *Koncepcja prawna drugiego rejestru okrętowego w Rzeczypospolitej Polskiej*, *Prawo Morskie*, 2002, t. XVII, p. 117. The article contains an in-depth analysis of the legal concept of a 'second register', including classifications of such registries, as well as the legislative proposal for introduction of such second register in the Polish legal system.

Federation (ITF). The ITF argues that the practice of using FOC registries fuels 'rush to the bottom', making it more difficult for seafarers and other industry stakeholders to hold shipowners to account. As they rightly point out, in many cases the FOC registries are not run from the country of the flag and their link to the flag State they are representing is as weak as the link between the register and its ships.⁵

At the same time, such regulatory environment leave no choice to shipowners but to seek the most competitive register, in order to avoid a competitive disadvantage over their rivals.

1. THE 'GENUINE LINK' CONCEPT

According to Article 91 of the 1982 UN Convention on the Law of the Sea (UNCLOS), 'There must exist a 'genuine link' between the State and the ship'. In this respect the UNCLOS literally replicates Article 5 (1) of the Convention on the High Seas, 1958⁶ (the High Seas Convention). Neither convention contain a definition of the 'genuine link' concept or stipulate any consequences of its absence. Tellingly, Article 5 of the first draft of the High Seas Convention, prepared by the International Law Commission, consisting of independent legal experts appointed by the UN, stated that:

'Each State may fix the conditions for the registration of ships in its territory and the right to fly its flag.

Nevertheless, for purposes of recognition of its national character by other States, a ship must either:

1. Be the property of the State concerned; or
2. Be more than half owned by:
 - (a) Nationals of or persons legally domiciled in the territory of the State concerned and actually resident there; or
 - (b) A partnership in which the majority of the partners with personal liability are nationals of or persons legally domiciled in the territory of the State concerned and actually resident there; or
 - (c) A joint stock company formed under the laws of the State concerned and having its registered office in the territory of that State.⁷

Such wording was drafted on the basis of analysis of national requirements for the ship registration. However, at a later stage it was decided that existing

⁵ <https://www.itfglobal.org/en/sector/seafarers/flags-of-convenience> (accessed: 19.12.2023).

⁶ The Convention on the High Seas was adopted at the First United Nations Conference on the Law of the Sea, held at Geneva in 1958. The Convention came into force on September 30, 1962.

⁷ Yearbook of the International Law Commission, 1955, Vol. II, p. 20.

practice in various States is too divergent. The Commission decided that ‘it’s best to confine itself to enunciating the guiding principle that, before the grant of nationality is generally recognized, there must be a genuine link between the ship and the State granting permission to fly its flag. The Commission does not consider it possible to state in any greater detail what form this link should take’⁸

The High Seas Convention specifies however, in Article 5, that in order to ascertain that there exist a ‘genuine link’ between the State and the ship ‘(...) in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag’. This phrase was omitted in the UNLCOS, which contains a separate Article (Art. 94) on the duties of the flag States, most notably a duty to ‘effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.’ Such change may provoke a question whether the effective exercise of flag State jurisdiction is no longer an element of the ‘genuine link’ concept.⁹

As pointed out by prof. R.R. Churchill, there is no clear consensus on the issue – neither in academia, nor in judiciary practice. The opinions differ from those who claim that the new wording of the UNLCOS has weakened the concept of the genuine link, those who feel that it has made no difference, to those who feel that it has strengthened the ‘genuine link’ requirement. As the author rightly concludes, ‘it appears that the sole reason for this change was to avoid repetition with the first paragraph of Article 94, which contains an extensive list of flag State duties. It may therefore be concluded that the requirement of the genuine link has the same meaning in the 1982 Convention as it has in the High Seas Convention, even if this meaning is not made explicit in either convention’¹⁰.

Growing popularity of the FOC registries and its rather negative impact to both economies of many countries and the quality of shipping and employment of seafarers triggered the UNCTAD and its Committee on Shipping to start working on the adoption of an international agreement on the conditions for registration of ships. ‘Prompted by the desire among sovereign States to resolve in a spirit of mutual understanding and co-operation all issues relating to the conditions for the grant of nationality to, and for the registration of, ships’¹¹, the

⁸ *Ibidem*, 1956, Vol. II, p. 279.

⁹ E.D. Brown, *The International Law of the Sea*, Vol. I, 1994, p. 288.

¹⁰ R.R. Churchill, *The meaning of the ‘genuine link’ requirement in relation to the nationality of ships* - A study prepared for the International Transport Workers’ Federation, p. 53-55. Available at: <https://orca.cardiff.ac.uk/id/eprint/45062/1/ITF-Oct2000.pdf> (accessed: 21.11.2023).

¹¹ Preamble to the UN Convention on Conditions for Registration of Ships, 1986. Available at: https://treaties.un.org/doc/Treaties/1986/02/19860207%2008-58%20AM/Ch_XII_07p.pdf (accessed: 19.12.2023).

States Parties adopted the UN Convention on Conditions for Registration of Ships, 1986. The Convention contains extensive provisions and criteria regarding the participation by nationals in the ownership and manning of ships (Art. 7-9). However, the Convention is hardly a success. As of April 2023, the Convention has only 15 ratification, mostly by developing countries with no major fleets.¹²

The above analysis shows that international law instruments contain no binding provisions on elements necessary for the 'genuine link' to be established in order to register a ship. According to Article 91 of the UNCLOS, "every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag" and the practice among States differ from very stringent requirements of ownership and manning to open registries with virtually no requirements except an administrative act of formal registration.

This interpretation was confirmed on July 1st, 1999 in the *m/v SAIGA* judgment of the International Tribunal for the Law of the Sea, where the Tribunal stated that: 'Article 91 leaves to each State exclusive jurisdiction over the granting of its nationality to ships. In this respect, Article 91 codifies a well-established rule of general international law (...). Determination of the criteria and establishment of the procedures for granting and withdrawing nationality to ships are matters within the exclusive jurisdiction of the flag State.'¹³

Furthermore, any restriction to registration under national flag on the basis of ownership requirements would be incompatible with the EU law, in particular Articles 49-55 of the Treaty on the Functioning of the European Union (TFEU) stipulating the freedom and right of establishment under the same conditions as those laid down by the law of the Member State concerned regarding establishment for its own nationals. This standpoint was held by the Court of Justice of the European Union (CJEU) in the judgment of 27 November 1997 – *Commission of the European Communities v Hellenic Republic*, Case C-62/96.¹⁴

It is then evident, that in fact the main element of the 'genuine link' principle is the obligation of a State to effectively exercise its jurisdiction and control over a ship. In such case, the 'genuine link' is not a prerequisite for registration but emerges as a result of such formal registration of a ship.

¹² https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=XII-7&chapter=12&lang=_en

¹³ *The M/V 'SAIGA' (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, 1 July 1999, p. 36 – 37. <https://www.itlos.org/en/main/cases/list-of-cases/case-no-2/> (accessed: 27.12.2023).

¹⁴ Judgment of 27 November 1997, *Commission / Greece (C-62/96, ECR 1997 p. I-6725)* ECLI:EU:C:1997:565

2. IMPLEMENTATION OF AN OBLIGATION OF FLAG STATES TO EXERCISE EFFECTIVE JURISDICTION AND CONTROL OVER ITS SHIPS AS THE MAIN ELEMENT OF THE 'GENUINE LINK'

Although nowadays several of the FOC's are considered high quality registries, at first many of the States setting up such registries were hardly known for the quality public administration. It was also the case with a number of countries regaining or attaining independence from their former colonial rulers after the Second World War, which were tasked with building a public administration, including maritime administration, from the scratch. It is thus no wonder that the emergence of the new maritime administrations in the XX Century gave rise to concerns about safety of such registered ships and lack of proper and adequate supervision. These concerns, *inter alia*, gave impetus to the development of a plethora of international regulations, most notably the International Convention for the Safety of Life at Sea, 1974 (SOLAS 74)¹⁵, which was supplemented by the International Convention for the Prevention of Pollution from Ships (MARPOL), International Convention on Standards of Training, Certification and Watchkeeping (STCW) and the Maritime Labour Convention 1996 (MLC 96).

It was also reflected in Article 94 of the UNCLOS, which stipulates the scope of jurisdiction and control of a State over its ships and obliges each State to take all measures necessary to ensure safety at sea with regard, *inter alia*, to:

- (a) the construction, equipment, and seaworthiness of ships;
- (b) the manning of ships, labour conditions and the training of crews;
- (c) the use of signals, the maintenance of communications and the prevention of collisions.

Furthermore, the UNCLOS requires each ship to be surveyed by a qualified surveyor before registration and thereafter at appropriate intervals.¹⁶ Such growing raft of regulations and technical standards lead to the expansion of classification societies – specialized entities responsible for establishment, implementation and enforcement of technical standards and requirements of maritime safety and environmental protection.¹⁷ It also soon became a norm for Flag States to delegate authority to such classification societies to perform inspections and statutory certification in accordance with the relevant international conventions (such as SOLAS or MARPOL) on behalf of that State.¹⁸

¹⁵ More on the evolution of the law on maritime safety in: D. Pyć, *100 lat od katastrofy Titanica – rozwój prawa bezpieczeństwa morskiego*, Prawo Morskie, t. XXVIII, 2012, p. 35–50.

¹⁶ More on the obligations of flag states in: D. Pyć, *Bezpieczeństwo jako funkcja morskiego prawa publicznego*, Prawo Morskie, t. XXXVI, 2019, p. 119–131.

¹⁷ <https://iacs.org.uk/about/>

¹⁸ D. Lost – Siemińska, *Bezpieczeństwo morskie a działalność instytucji klasyfikacyjnych*, Prawo Morskie, vol. XXIII, 2007, p. 186.

The classification societies offer not only expertise but also global coverage in all major ports, which would be very difficult to provide even by the biggest maritime administrations. In effect, currently more than 90% of the world's cargo carrying tonnage is covered by the classification design, construction and through-life compliance rules and standards set by the eleven classification societies affiliated with IACS (the International Association of Classification Societies). It is a common practice for flag administrations to authorize all major classification societies. It is in effect easier to change flag (register), which can be done within hours than to change classification society (the class' of a vessel) on any given ship. Such practice may raise some doubts in respect of the genuineness of a 'genuine link' in today's shipping. It however needs to be emphasized that authorization of a classification society by flag State does not exonerate State and its maritime administration from the responsibilities and obligations arising from the international conventions. Thus, in principle maritime administrations perform additional inspections by their own inspectors (however, they often employ a local inspector, who represents more than one flag).

In order to assist Flag States with oversight of the classification societies, the International Maritime Organization (IMO) adopted in 1993 Guidelines for the authorization of organizations acting on behalf of the Administration. The Guidelines envisage i.a. minimum standards for such organizations and elements to be included in an agreement with such organization to act on behalf of flag State administration.¹⁹ After numerous amendments, the Guidelines morphed into a comprehensive Code for Recognized Organizations (RO Code), covering all aspects of authorization and oversight of such organizations.²⁰

As the membership of the IMO and the number of States – Parties to IMO instruments have grown, some States and stakeholders voiced concerns over the inadequate implementation and enforcement of these instruments. In order to ensure that all Parties carry out their obligations as required by the IMO conventions, the IMO Assembly adopted a resolution on the development of a Voluntary IMO Member State Audit Scheme²¹, which lead to the adoption

¹⁹ Res.A.739(18) adopted on 4 November 1993. Available at: [https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/IndexofIMOResolutions/AssemblyDocuments/A.739\(18\).pdf](https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/IndexofIMOResolutions/AssemblyDocuments/A.739(18).pdf) (accessed: 21.12.2023).

²⁰ Res.MSC.349(92) adopted on 21 June 2013. Available at: [https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/IndexofIMOResolutions/MSCResolutions/MSC.349\(92\).pdf](https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/IndexofIMOResolutions/MSCResolutions/MSC.349(92).pdf) (accessed: 21.12.2023).

²¹ Res.A.946(23) adopted on 27 November 2003 - Voluntary IMO Member State Audit Scheme. Available at: [https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/IndexofIMOResolutions/AssemblyDocuments/A.946\(23\).pdf](https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/IndexofIMOResolutions/AssemblyDocuments/A.946(23).pdf) (accessed: 21.12.2023).

of the resolution A.9724(24) – Framework and Procedures for the Voluntary IMO Member State Audit Scheme (VIMSAS)²², describing the objective, principles, scope, responsibilities and capacity-building aspect of the Voluntary IMO Member State audit. The objective of the audit is to determine to what extent Member States are implementing and enforcing the applicable IMO instruments. The auditors selected by the IMO Secretariat from the pool of auditors from the IMO Member States assess i.a. whether the Member State has enacted legislation implementing applicable IMO instruments relating to maritime safety and prevention of pollution, analyzes enforcement of such applicable laws and regulations, as well as the mechanism and controls, by which the delegation of authority by a Member State to recognized organizations is affected.

On January the 1st, 2016 the voluntary audit scheme (VIMSAS) became mandatory (IMSAS).²³

3. THE WEAKENING OF THE ‘GENUINE LINK’

The increase of the number of ship registries and their internationalization resulted in the fierce competition between flags. In order to counter the ‘rush to the bottom’, as discussed in the introduction to this article and assure a level playing field, the IMO conventions envisage the inspections of foreign ships by local inspectors in ports to verify that the condition of a ship and its equipment

²² Available at: [https://wwwcdn.imo.org/localresources/en/OurWork/MSAS/Documents/MSAS/Basic%20documents/A%2024-Res.974%20-%20Framework%20And%20Procedures%20For%20The%20Voluntary%20Imo%20Member%20State%20Audit%20Scheme%20\(Secretariat\).pdf](https://wwwcdn.imo.org/localresources/en/OurWork/MSAS/Documents/MSAS/Basic%20documents/A%2024-Res.974%20-%20Framework%20And%20Procedures%20For%20The%20Voluntary%20Imo%20Member%20State%20Audit%20Scheme%20(Secretariat).pdf) It was replaced in 2013 by the Res.A.1067(28). Available at: [https://wwwcdn.imo.org/localresources/en/OurWork/MSAS/Documents/MSAS/Basic%20documents/A.1067\(28\)%20Framework%20and%20Procedures.pdf](https://wwwcdn.imo.org/localresources/en/OurWork/MSAS/Documents/MSAS/Basic%20documents/A.1067(28)%20Framework%20and%20Procedures.pdf) (accessed: 21.12.2023).

²³ On that date the majority of amendments to IMO instruments, adopted for the institutionalization of the Scheme, entered into force: the International Convention for the Safety of Life at Sea, 1974, as amended (SOLAS 1974) (Res.MSC.366(93)); the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended (STCW 1978) (Res.MSC.373(93)); the Seafarers' Training, Certification and Watchkeeping (STCW Code) (Res.MSC.374(93)); the Protocol of 1988 relating to the International Convention on Load Lines, 1966 (1988 Load Lines Protocol), as amended (Res.MSC.375(93)); the Convention on the International Regulations for Preventing Collisions at Sea, 1972, as amended (COLREG 1972) (Res.A.1085(28)); the International Convention on Load Lines, 1966 (LL 1966) (Res.A.1083(28)); the International Convention on Tonnage Measurement of Ships, 1969 (TONNAGE 1969), (Res.A.1084(28)); the Annex of the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973 (Res.MEPC.246(66)); Annex of the Protocol of 1997 to Amend the Convention for the Prevention of Pollution from Ships, as Modified by the Protocol of 1978 relating thereto (Res.MEPC.247(66)).

comply with the requirements of international regulations – Port State Control (PSC) inspections. PSC inspections are intended to be a backup to flag State implementation and are deemed a 'second line of defense' against substandard shipping.²⁴ As a rule, the IMO conventions provide that no more favourable treatment is to be given to ships of countries which are not Party to the relevant convention.²⁵ Such practice in effect restricts the jurisdiction and control exercised by flag States, which cannot enact national laws that are not compliant with the international standards. Nevertheless, it discourages the race to the bottom and ensures compliance with the standards set in the international conventions and thus contributes to safe and clean shipping.

Regrettably however, one crucial aspect remains largely unresolved – the conditions of employment and most notably social security of seafarers. The issue has only partially been addressed by the adoption of the Maritime Labour Convention²⁶ in 2006 (the MLC 2006, which entered into force on 20 August 2013).

The challenges posed by the proliferation of registries and competition between them are exacerbated in the European Union, with the abolition of restrictions on the provision of maritime transport services. Curiously enough, Council Regulation No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) envisages in Article 3 that for vessels carrying out mainland cabotage and for cruise liners smaller than 650 GT a host State (State in which the vessel is performing a maritime transport service) may apply national conditions in respect of manning. Furthermore, 'for vessels carrying out island cabotage, all matters relating to manning shall be the responsibility of the State in which the vessel is performing a maritime transport service (host State)'.

Another interesting example of such weakening of the ties between ship and flag and restricting jurisdiction of a flag State over a ship is British Seafarers' Wages Act 2023²⁷, which requires shipowners operating ships 'between a place outside the United Kingdom and a place in the United Kingdom' to remunerate seafarers working on such ships at a rate equal or exceeding the national minimum wage in the UK.

²⁴ <https://www.imo.org/en/OurWork/IIIS/Pages/Port%20State%20Control.aspx> (accessed: 21.11.2023).

²⁵ e.g.: Article 5(4) of MARPOL or Article X(5) of STCW.

²⁶ Text and preparatory reports of the Maritime Labour Convention, 2006: <https://www.ilo.org/global/standards/maritime-labour-convention/text/lang-en/index.htm> (accessed: 21.12.2023).

²⁷ Available at: <https://bills.parliament.uk/bills/3310> (accessed: 21.12.2023).

CONCLUSIONS

As we can see, the standards of ship safety, pollution prevention or shipboard working and living conditions are regulated by the international instruments, restricting regulatory powers of Flag States to a narrow scope of mostly technical issues that are left in the relevant conventions 'to the satisfaction of the Administration'²⁸. Enforcement of these provisions too is becoming more and more internationalized – with the omnipresence of the classification societies and the introduction and strengthening of the PSC regimes.²⁹ The choice of flag is then often being made on the basis of a simple calculation of fees nad tonnage tax rates for a given type of ship (as some flags offer better rates for e.g. ferries, while other for tankers) at any given moment and may be changed within hours when such fees change.

One significant area that remains unregulated (or rather underregulated) is labour costs – such as level of wages or social security contributions. These issues are mostly left to the jurisdiction of Flag State, which historically was justified when a crew was usually domiciled in a Flag State. Nowadays however, it is quite common for a seafarer to work on short time contracts under different flags, with different employers in any given year. Usually neither Flag State nor the legal domicile of the employer is the same as the country of residence of a seafarer. Furthermore, a crew of a ship usually comprises of different nationalities, with different places of residence, which makes the harmonization of wages very difficult.³⁰ This phenomenon and lack of international harmonisation only stimulate some port states to introduce local solutions in order to discourage unfair competition, such as the above-mentioned Seafarers' Wages Act in the UK, envisaging the UK minimum wage irrespective of Flag State regulations on the subject.

²⁸ e.g.: SOLAS Chapter II-1 - Construction - Structure, subdivision and stability, machinery and electrical installations - Part A-1 - Structure of ships - Regulation 3-6 - Access to and within spaces in, and forward of, the cargo area of oil tankers and bulk carriers: The construction and materials of all means of access and their attachment to the ship's structure shall be to the satisfaction of the Administration. However even in such case, the prevailing practice of maritime administrations in such cases is to accept the requirements of the Class Rules of the classification society.

²⁹ Currently, there are ten PSC regional regimes - Europe and the north Atlantic (Paris MoU); Asia and the Pacific (Tokyo MoU); Latin America (Acuerdo de Viña del Mar); Caribbean region (Caribbean MoU); West and Central Africa (Abuja MoU); Black Sea (Black Sea MoU); Mediterranean Sea (Mediterranean MoU); Indian Ocean (Indian Ocean MoU); Persian Gulf (Riyadh MoU) and the United States Coast Guard PSC regime.

³⁰ Hence e.g. the special provisions on seafarers in the directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union – Art. 1 § 5.

Likewise, the scope of social security coverage varies between flags – from full coverage, on an equal footing with shore-based workers (which however raises the costs of employment and lowers competitiveness of such Flag State) to virtually non-existent in many FOC registries. Consequently, the MLC 2006 Convention provides that each Member State shall take steps to provide the complementary social security protection to all seafarers ordinarily resident in its territory.³¹ Although justified by the need to assure decent salary and social security protection to seafarers, such constructions further weaken the link between ship and a Flag State and limit regulatory roles of Flag States.

ZNACZENIE I EWOLUCJA KONCEPCJI *GENUINE LINK* ORAZ JEJ PRAKTYCZNE WDROŻENIE – 40 LAT OD PRZYJĘCIA KONWENCJI NZ O PRAWIE MORZA Z 1982 ROKU

Słowa kluczowe: rzeczywista więź, jurysdykcja państwa bandery, UNCLOS, FSC, uznane organizacje, Kodeks RO, zabezpieczenie społeczne marynarzy

Abstrakt

W artykule zbadano znaczenie i ewolucję praktycznego wdrożenia koncepcji rzeczywistej więzi na przestrzeni lat, jakie upłynęły od powstania rejestrów wygodnej bandery (FOC) w latach dwudziestych XX w. Autor zauważa, że w miarę zaostrzania się konkurencji między państwami bandery, przepisy dotyczące bezpieczeństwa statków, zapobiegania zanieczyszczeniom czy warunków pracy i życia na statku stają się ujednolicone i wszechobecne, stanowiąc instrumenty międzynarodowe, w efekcie ograniczające uprawnienia regulacyjne państw bandery. Podobnie egzekwowanie tych przepisów ulega umiędzynarodowieniu – wraz z wszechobecnością towarzystw klasyfikacyjnych i wprowadzeniem reżimu PSC. Jednocześnie autor wskazuje na brak odpowiednich regulacji w zakresie zatrudniania marynarzy, w szczególności wynagrodzeń i składek na ubezpieczenia społeczne, zarówno na poziomie krajowym (państwo bandery), jak i międzynarodowym. Ta luka prawna zachęca państwa portu do wprowadzania rozwiązań lokalnych, niezależnie od przepisów państwa bandery. Takie zmiany osłabiają „autentyczność” rzeczywistej więzi pomiędzy statkiem a państwem bandery.

³¹ Standard A4.5 – Social security, § 3 of the MLC 2006 Convention.

BIBLIOGRAPHY

- Brown E. D., *The International Law of the Sea*, Vol. I, 1994, p. 288
- Churchill R.R., *The meaning of the 'genuine link' requirement in relation to the nationality of ships - A Study prepared for the International Transport Workers' Federation*, p. 53-55
- Community guidelines on State aid to maritime transport'(97/C 205/05) (OJ C 205, 5.7.1997)
- Financial and fiscal measures concerning shipping operations with ships registered in the Community, SEC(89) 921 final, 3.8.1989
- Koziński M.H., *Koncepcja prawna drugiego rejestru okrętowego w Rzeczypospolitej Polskiej*, Prawo Morskie, 2002, t. XVII, p. 117
- Osieke E., *Flags of Convenience Vessels: Recent Developments*, American Journal of International Law, 73(4), 1979, p. 604
- Pyć D., *100 lat od katastrofy Titanica – rozwój prawa bezpieczeństwa morskiego*, Prawo Morskie, t. XXVIII, 2012
- Pyć D., *Bezpieczeństwo jako funkcja morskiego prawa publicznego*, Prawo Morskie, t. XXXVI, 2019
- Lost-Siemińska D., *Bezpieczeństwo morskie a działalność instytucji klasyfikacyjnych*, Prawo Morskie, t. XXIII, 2007, p. 186
- Tenold S., Ojala J., *How to Sail a Sinking Ship, Adapting to the Declining Competitiveness of the European Shipping Industry*, 2018