International Journal of Law and Society
2024, Vol. 7, No. 2, pp. 76-92
https://doi.org/10.11648/j.ijls.20240702.13

Research Article

Wage Demands and Fair Working Conditions of Seafarers on Cargo Ships Under a Flag of Convenience: Establishment of a Place of Jurisdiction in Switzerland

Nicole Vögeli Galli*, Ainhoa Rossell

School of Management and Law, Zurich University of Applied Sciences (ZHAW), Winterthur, Switzerland

Abstract

This article addresses the question of whether seafarers, regardless of the ordinary international jurisdictions in the country of ship registration or at the domicile of their employer, have a jurisdiction in Switzerland at their disposal to be able to enforce their rights effectively. The significance of maritime trade routes cannot be overstated, and demand continues to be strong. At the same time, many seafarers suffer from precarious working conditions, being often unable to enforce their wage demands and other claims. A key problem is the registration of vessels in flag of convenience (FOC) states which generally lack an effective judicial system or where access to justice may be constrained. Many shipping companies that profit greatly from maritime transport are domiciled in Switzerland, allowing the conclusion that jurisdiction in Switzerland can be established by piercing the corporate veil or, subsidiarily, asserting jurisdiction by necessity. Reasons that justify the registration in an FOC state are hardly apparent and the liability of a benefiting Swiss group company and thus a place of jurisdiction in Switzerland can well be justified. In any case, Switzerland has enshrined the jurisdiction by necessity in positive law and a too restrictive handling by Swiss courts could violate the human right of free access to justice.

Keywords

Employment Law, Flag of Convenience (FOC), International Civil Procedure Law, Jurisdiction by Necessity, Maritime Transport, Piercing the Corporate Veil, Place of Jurisdiction, Seafarers

1. Introduction

1.1. Situation

Water covers about 70 percent of the earth's surface; hence it is not surprising that many trade routes run across water [1]. It is estimated that there are more than 105,000 merchant ships operating internationally [2], employing a total of 1,892,720 seafarers [3].

However, what are the working conditions for these seafarers? Experience shows that seafarers receive little appreciation [1] for their systemically important work [4-6]. Time and again, seafarers are subjected to precarious, if not downright life-threatening working conditions. Nonetheless, seafarers are mostly asked to sign fixed-term employment contracts [7], which are only extended if they do not resist poor working conditions. They are often affected by poverty [8], having run up serious personal debt to pay for their education, so they need to spend at least 10 years at sea to pay it off. This

*Corresponding author: vogc@zhaw.ch (Nicole Vögeli Galli)

Received: 9 May 2024; **Accepted:** 3 June 2024; **Published:** 19 June 2024

makes them dependent on their employers [7].

Seafarers regularly fail to be paid. Between 2020 and 2022 alone, the International Transport Workers' Federation collected over USD 118 million in unpaid wages [9]. Even in the case of life-threatening illness, they do not always receive proper medical care, which can result in their death [10]. Often, they are exposed to great dangers (e.g., the weather, deficiencies on the ship, errors by workers, political tensions, or pirates) [11]. In the worst case, whole vessels, including their crew and freight, may simply be abandoned because their operation is not, or no longer, profitable, or feasible. The crew stays behind on the ship without wages, food, medical care, or a way to pay for the trip home [12, 13].

1.2. Open Registers and Flags of Convenience

A breeding ground for these precarious working conditions is sometimes the availability of open registers. In other words, the possibility of registering a (foreign) ship in a (foreign) state. Often, ships are registered to a flag of convenience (FOC) state.

According to the criteria proposed by the United Kingdom Committee of Enquiry into Shipping under Viscount Rochdale (Rochdale Report, 1970), an FOC contains the following:

(i) The country of registry allows ownership and/or control of its merchant vessels by non-citizens; (ii) access to the registry is easy, and transfer from the registry at the owner's option is not restricted; (iii) taxes on the income from the ships are not levied locally or are low (a registry fee and an annual fee, based on tonnage, are normally the only charges made); (iv) the country of registry is a small power with no national requirement under any foreseeable circumstances for all the shipping registered, but receipts from very small charges on a large tonnage may have a substantial effect on its national income; (v) manning of ships by non-nationals is freely permitted; (vi) the country of registry has neither the power nor the administrative machinery to impose any government or international regulations effectively, nor has the country the wish or the power to control the companies themselves [14].

1.3. Switzerland as a Shipping Company Domicile

Over 70 percent of the world's gross tonnage shipped in 2022 was through open registers [15], of which 42 are considered FOCs [14, 16]. Leading the rankings with the highest tonnage are the flag states of Panama, Liberia, and the Marshall Islands [17], all of which are FOCs.

As a landlocked country, Switzerland may not be a major flag state; it is much more relevant as a shipping location. Among seafaring nations, Switzerland ranks fourth in Europe and ninth worldwide in terms of tonnage [18]. According to the Swiss Federal Council, the Swiss fleet consists of 60 shipping companies (including MSC, Massoel Shipping, ABC Maritime, Suisse-Atlantique Société de Navigation Maritime, Nova Marine CarrieRs, Reederei Zürich, Gearbulk, and Atlanship) with nearly 900 vessels [19, 20]. According to the UNCTAD Review of Maritime Transport 2023, 14 ships registered under the national flag and 602 ships registered under international flags are owned by Swiss nationals or Swiss companies, which puts Switzerland in 15th place worldwide as a shipping location [21]. Switzerland recorded the highest growth in tonnage among the top 25 shipping companies in 2021, ahead of China, ranking 11th globally in terms of trade value of goods transported [22]. The actual figure is probably higher, however [20]. The MSC - Mediterranean Shipping Agency AG alone, which is registered in Basel, Switzerland, calls itself a "Leader in Shipping & Logistics", and is part of the Geneva-based MSC Mediterranean Shipping Company SA group, lists 800 MSC-operated cargo ships [23, 24].

1.4. Key Question and Limitations

Jurisdiction and applicable law follow, simply put, (the law of) the flag state (Art. 90-92, UNCLOS[1]). Furthermore, labour contracts are usually not concluded with the ship owners or shipping companies. According to the afore-mentioned Rochdale criteria, FOCs are characterized, among other things, by the fact that the effective enforcement of rights is severely hampered or even impossible. By registering their ships under FOCs, Swiss shipping companies expose seafarers legally to poor working conditions, and those affected cannot enforce justified claims or can do so only with great difficulty.

If a shipping company is domiciled in Switzerland, to where the profits go as well, the question arises as to whether employment-related claims of seafarers can be enforced in Switzerland. Under discussion in this context is the assertion of direct liability against a company domiciled in Switzerland and, subsidiarily, jurisdiction by necessity. This article aims to show whether, and if so, under what conditions, this is possible.

In assessing this question, only the Swiss legal system is considered. Possible other international jurisdictions or practical difficulties of proof are not the subject of this paper. The focus is on claims under employment contracts that can be assigned to civil law. In Switzerland, this also includes claims based on public occupational health and safety law since employees have a civil law claim to fulfilment in the case of public law protection obligations (Art. 342 (2) CO[2]).

2. Jurisdiction in the Assertion of Direct Liability

2.1. Abuse of Rights

With Art. 2 (2) of the Swiss Civil Code[3], the prohibition of

1 United Nations Convention on the Law of the Sea, signed in Montego Bay on 10 December 1982; entered into force for Switzerland on 31 May 2009 (SR 0.747.305.15).

2 Swiss Federal Act on concerning the amendment of the Swiss Civil Code (Part V: Code of Obligations) dated 30 March 1911 (SR 220, CO).

3 Swiss Civil Code dated 10 December 1907 (SR 210, CC).

abuse of rights applies to the entire legal system in Switzerland [25][4], which is always reserved in the sense of *ultima ratio* (last resort) [26].[5] The prohibition covers cases in which the application of the law in an individual case[6] would lead to blatant injustice or gross unfairness[7] [27].[8] It is intended to prevent the enforcement of rights which, in good faith, are manifestly incompatible with fundamental ethical requirements [27] and must be observed *ex officio* (by virtue of the office) due to its mandatory nature [28]. If such an abuse exists, legal protection must be denied [29].

For the sake of legal certainty, groups of cases have been developed which may indicate an abuse of rights [30]. One of these groups is the improper use of a legal institution [31, 32][9], under which the independence of a legal entity can be subsumed if it acts as a front company in an individual case in the abuse of rights [33]. If there is an abuse of rights[10] in the sense of the front company being improperly invoked, and if the companies concerned are structured in an economically identical way cumulative to the abuse, the abuse of rights can result in (direct or reverse) recourse [34-39].[11] This applies to domestic and foreign front companies [40].

Commercial shipping has many players, and the (legal) relationships are complex and often non-transparent. The shipowner listed in the public registers is often not the legal owner and economic beneficiary of a vessel. Rather, the registered shipowner is an offshore company (*one-ship company* [41]), whose only asset is the registered ship, which in turn is encumbered by a high mortgage [42]. Such a one-ship company is neither an investor, nor does it control operations or is it entitled to the revenues [43]. To determine the "actual" owner of the one-ship company or of the ship itself, the economic perspective (majority shareholding by a private person or by another (shipping) company) must be considered. In the latter case, there is (theoretically) transparency, especially since the shares must be reported [42].

The term "*shipowner*" means the owner of the ship or another organization or person who has assumed the responsibility for the operation of the ship from the owner and who, on assuming such responsibility, has agreed to take over the duties and responsibilities imposed on shipowners in accordance with the Maritime Labour Convention of 2006, regardless of whether any other organizations or persons fulfil certain of the duties or responsibilities on behalf of the shipowner (Art. II (1) (j) Maritime Labour Convention 2006[12]). Frequently, shipowners are managers, operators, or *charterers* [44].

There are different types of charter contracts: (i) voyage charter, where the charterer only pays dues according to the weight loaded and otherwise does not bear any risks; (ii) time charter, where the charterer decides on the use of the vessel for a certain period and pays for the voyage costs; and (iii) the bare boat charter contract. In the latter, the role of the shipowner is reduced to that of an investor and the charterer has complete control [45].

In many cases, seafarers are not hired directly by the one-ship company, shipowner, or charterer but by an intermediary party, a *third-party manager* [46], who acts as a *staff leasing company*.

If, for example, a one-ship company or a third-party manager does not fulfil its obligations to its employees under the employment contract and if it appears impossible for the employees to enforce their claims due to a lack of, or very difficult access to, the legal system inherent in FOCs, the question arises as to whether the legal owners of the ship or its beneficial owners are abusing their rights and can be prosecuted by way of asserting their liability [47-49]. If the conditions of such a "genuine" recourse are met, the corporate entities are no longer protected [50, 51][13]. As a result, the companies, or individuals behind them could be held liable by a tort action [52, 53], even though they are legally independent [54].[14]

In doctrine and jurisprudence, opinions differ as to whether, in an international context and from the perspective of legal dogmatics, piercing the corporate veil must be embedded in the prohibition of abuse of rights of Art. 2 (2) of the Swiss Civil Code or in corporate law. The classification of the abuse of rights in the conflict of laws rules is difficult because the Swiss Private International Law Act[15] does not mention the topic.[16]

2.2. Formal Matters

2.2.1. Applicability of the Lugano Convention

(i). Material Scope of Application

The material scope of application of the Lugano Convention[17] generally includes civil and commercial disputes (Art. 1 (1), LC). According to case law, the term is defined broadly and is based on the existence of a civil law relationship [55]. In the case of the assertion of direct liability, for which the damage is attributable to the employment relationship, it must

4 Swiss Federal Supreme Court Decision, Official Collection, Leading Cases (BGE) 83 II 345 E.2.
5 BGE 45 II 386 E.5.
6 BGE 85 II 111 E.3.
7 BGE 143 III 666 E.4.2, BGE 134 III 52 E.2.1 as well as BGE 143 III 279 E.3.1, BGE 87 II 147 E.5, BGE 85 II 111 E.3.
8 BGE 134 III 52 E.2.1, BGE 123 III 233 E.2e, BGE 113 II 31 E.2c.
9 BGE 140 III 491 E.4.2.4.
10 BGE 85 II 111 E.3.
11 BGE 144 III 541 E.8.3.2.
12 International Labour Organization (ILO) Maritime Labour Convention, 2006, as amended (MLC, 2006); entered into force for Switzerland on 20 August 2013 (SR 0.822.81).
13 BGE 145 III 351 E.4.2, BGE 144 III 541 E.8.3.1 and E.8.3.3, BGE 108 II 213 E. 6a; Swiss Federal Supreme Court Decision, Further Decisions since 1.1.2000 (BGer) 5A_330/2012 17.07.2012 E.3.2.
14 BGer 5A_498/2007 28.02.2008 E.2.1.
15 Swiss Federal Act on Private International Law dated 18 December 1987 (SR 291, PILA).
16 BGE 128 III 346 E.3.1.4.
17 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters dated 30 October 2007; entered into force for Switzerland on 1 January 2011 (SR 0.275.12, LC).

be distinguished whether the claim is based on the employment contract or on tort.

Materially, Art. 18 of the Lugano Convention applies to claims from an individual employment contract under civil law [56]. The Lugano Convention itself does not define what it means by individual employment contract. The definition under Swiss law and that under the case law of the Court of Justice of the European Union (CJEU) are assessed to be congruent: personal performance of work on a temporary basis with subordination to the employer without business risk [57]. If an employee wishes to act against a company or a private individual with which they have not concluded an employment contract, there is no contractual relationship, which is why a tortious basis for a claim must be considered.

The subject matter of Art. 5 (3) of the Lugano Convention are torts in the broad sense: a wide range of matters which are not based on a contractual relationship [58]. According to the settled case law of the European Court of Justice, tort or delict includes all actions which seek to establish the liability of the defendant for damage, and which are not based on a "contract" within the meaning of Art. 5 (1) (1) [59].[18] Art. 5 (3) of the Lugano Convention therefore applies whenever there is liability for damages, there is no contractual obligation, and the damaging event and the damage are causal. Liability for damage is based on a broad interpretation [60]. It also covers breaches of rules that do not reach the threshold of illegality, such as creditor claims of a company against shareholders with a controlling position if the joint company is damaged [61]. The damage must be causally attributable to the damaging event. The theoretical or alleged causality must be sufficient [62]. If contract companies are used as a front company with little liability substrate or based in countries with a barely functioning legal system, this constellation directly results in the potential for damage to the affected employees, whereby the outsourcing of employment relationships to one-ship companies or third-party managers is, at least theoretically, causal to the damaging event.

(ii). Territorial Scope of Application

There must be a connection to a contracting state [63], and the territorial scope of the Lugano Convention must apply [64]. According to predominant doctrine and case law, a foreign connection is additionally required [65]. It is sufficient for the defendant to be domiciled in a contracting state. A reference to several contracting states is not necessary unless the Lugano Convention expressly requires this [66].[19]

The territorial scope of application of the Lugano Convention is thus given in the case of an assertion of direct liability against a defendant domiciled in Switzerland.

2.2.2. Determination of the International and Local Jurisdiction in Application of the Lugano Convention

For actions which are covered by the scope of application of the Lugano Convention, the Lugano Convention provides in Art. 2 et seqq. for general and in Art. 5 et seqq. for special jurisdiction. In addition to the place of jurisdiction in the state in which the head office is located (Art. 2 (1), LC), Art. 5 (3) of the Lugano Convention provides for the place where the harmful event occurred or threatens to occur for actions in tort [67]. Art. 5 of the Lugano Convention is a supplement in relation to Art. 2, whereby the plaintiff has the right to choose between the jurisdictions of these two articles. Neither the defendant nor a court of law can oppose the choice [68]. The constellations of Art. 5 of the Lugano Convention do not cover the situation of seafarers apart from the legal cause, but this is irrelevant. The aim is to include maritime players domiciled in Switzerland in the law, which is why the general, international jurisdiction according to Art. 2 (1) of the Lugano Convention is sufficient.

In Switzerland, the Swiss Federal Act on Private International Law determines local jurisdiction within the country of domicile, which provides for local jurisdiction at the defendant's domicile as a basic rule (Art. 2, PILA). It must be examined whether this is replaced by the jurisdiction of the special part in the Swiss Federal act on Private International Law due to its subsidiarity. There is no mention of the assertion of direct liability issue in the Swiss conflict of laws provisions. Therefore, it is difficult to determine to where in the Swiss Federal Act on Private International Law it should be assigned.

Under the Lugano Convention, this constellation is covered as a tort or an act equivalent to a tort. The Lugano Convention and the Swiss Federal Act on Private International Law do not define tort in the same way [69]. Art. 5 (3) of the Lugano Convention serves as a catch-all provision, which does not apply in the case for Art. 129 et seqq. of the Swiss Federal Act on Private International Law. The concept of tort is interpreted according to *lex fori* (laws of the jurisdiction in which a legal action is brought), is broad, and even covers offenses that are foreign to Swiss substantive law [70]. The substantive legal basis for an action to assert direct liability is Art. 2 of the Swiss Civil Code: the prohibition of abuse of rights. The Swiss Federal Supreme Court generally does not see Art. 2 of the Swiss Civil Code as a protective norm [71][20], which means that there is no special jurisdiction in the context of tortious acts in Switzerland.

In Switzerland, the assertion of direct liability regarding the applicable law is generally assigned to the company statute [72, 73][21], although this is irrelevant for local jurisdiction in Switzerland. Both according to the general (catch-all) juris-

18 CJEU, 24.11.2020, Wikingerhof GmbH & Co. KG, C-59/19, ECLI:EU:C:2020:950, para. 23; BGer 4A_305/2012 06.02.2013 E.2.2.3.

19 CJEU, 1.3.2005, Owusu, C-281/02, ECLI:EU:C:2005:120, para. 24; BGE 135 III 185 E.3.1-3.3.

20 BGE 124 III 297 E.5.c, BGE 121 III 350 E.6.b.

21 BGer 4C.344/2001 07.05.2002 E.3.1 f., BGE 128 III 346 E.3.1, BGE 128 III 201 E.1b; see 2.3.

diction within the meaning of Art. 2 of the Swiss Federal Act on Private International Law, which would apply in the case of the prohibition of abuse of rights, and in the case of an action against the company within the meaning of Art. 151 of the Swiss Federal Act on Private International Law, an action must be brought at the place of the company's registered office [67]. This is subject to the proviso that no valid agreement on jurisdiction has been concluded between the parties (Art. 23 (1) LC; Art. 5 (1), PILA).

2.3. Applicable Law

Succeeding in bringing a case to court at a place of jurisdiction in the case of the assertion of direct liability is not insignificantly connected with the question of which law governs the assessment of the admissibility as well as the prerequisites of the assertion of direct liability in an international relationship.[22] The applicable law affects the assessment of the factual issues and hurdles in the enforcement of the law (in particular rules of evidence with distribution of the burden of proof and consequences of lack of evidence) [74].

In Switzerland, it is largely undisputed that the admissibility of an action to assert direct liability is assessed according to the company statute. Accordingly, the company is subject to the law of the state pursuant to whose regulations it is organized, whereby the scope of application is interpreted broadly. All questions of internal and external relations under company law are covered.[23] The Swiss Federal Supreme Court justified this case law in 2002 by holding that in view of the international facts of the case, the assertion of direct liability could not only be embedded within the abuse of rights in terms of legal doctrine but had to be qualified autonomously.[24] Furthermore, it held that the legal instrument of an assertion of direct liability did not constitute a *loi d'application immédiate* (mandatory applicable legal provision) and, therefore, did not necessarily require the application of Swiss law (positive *ordre public* [reservation in favor of the fundamental domestic regulations], Art. 18, PILA) [75, 76].

Bona fide (good faith) is a general principle of law which must not only be observed throughout the Swiss legal system and has constitutional status (Art. 5 (3), BV[25]) [77], but also forms a cornerstone of international law (Art. 2 (2) (1) UNCh[26], Art. 26 Vienna Convention on the Law of Treaties[27]).[28] In 1992, the Swiss Federal Supreme Court stated in connection with the assertion of direct liability in the case of a legal entity that the conditions of the prohibition of abuse of rights are in any case governed by Swiss law within the meaning of Art. 18 of the Swiss Federal Act on Private International Law, irrespective of which law is applicable in the case.[29] Art. 2 (2) of the Swiss Civil Code, it stated, was, therefore, part of the *ordre public* of the local legal system.[30] The Swiss Federal Supreme Court confirmed this legal opinion in 2002 in the case of a statute of limitations defense.[31] A court can only do justice to the purpose of the prohibition of abuse of rights as a basic protective norm if it does not base fundamental ethical valuations of its own legal system on those of a foreign legal system.[32]

The abuse of rights violates the universally valid principle of acting in good faith, which must be observed either directly in international legal relations or as a *loi d'application immédiate* by Swiss courts (Art. 2 (2), CC; Art. 18, PILA). If the derivation of the assertion of direct liability takes place via other legal bases, it must be agreed with the Swiss Federal Supreme Court that the assertion of direct liability per se does not necessarily require the application of Swiss law within the meaning of the positive *ordre public*.

If the foreign law does not recognize the principle of the assertion of direct liability, the exclusion of the same would remain possible via Art. 17 of the Swiss Federal Act on Private International Law (negative *ordre public*) [78].[33]

The constellation under review aims to be able to reach a company with its registered office in Switzerland by way of asserting direct liability against that company, which would have to be subject to Swiss law. Consequently, Swiss law would be applicable in any case.

2.4. Material Matters

As a prerequisite for the assertion of direct liability against a company, the third party must be in a dominant position vis-à-vis the actual contracting party (economic identity), and at least one company must behave in a manner that is obviously contrary to its purpose [38].[34] Only disadvantaged third parties, such as creditors, have the right to make a claim [38].

2.4.1. Economic Identity

It must be possible to control a legal entity, which therefore implies a relationship of dependence.[35] The latter includes the identity of economic interests between the dominant and controlled subjects.[36] Dependency can take different forms, be permissible or impermissible, be long- or short-term,

22 BGE 128 III 346 E.3, BGer 4C.344/2001 07.05.2003 E.3, BGer 4C.255/1998 03.09.1999, BGer 4C.231/1997 15.09.1998, BGer 4C.392/1994 08.09.1995.
23 BGE 128 III 346 E.1.3.
24 BGE 128 III 347 E.3.1.4, 3.1.5.
25 Constitution of the Swiss Confederation dated 18 April 1999 (SR 101, BV).
26 Charter of the United Nations dated 26 June 1945; entered into force for Switzerland on 10 September 2002 (SR 0.120).
27 Vienna Convention on the Law of Treaties dated 23 May 1969; entered into force for Switzerland on 6 June 1990 (SR 0.111).
28 Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, International Court of Justice (ICJ), Judgment of 11 June 1998, I.C.J. Reports 1998, p. 275, 38.
29 BGE 128 III 201 E.1c with reference to BGer 5C.255/1990 23.04.1992.
30 Ibid
31 BGE 128 III 201 E.1c.
32 Ibid
33 BGE 128 III 346 E.3.1.4.
34 BGer 5A_330/2012 17.07.2012 E.3.1.
35 BGE 144 III 541 E.8.3.2, BGer 5A_330/2012 17.07.2012 E.3.2, BGer 5A_498/2007 28.02.2008 E.2.2.
36 BGer 5A_498/2003 28.02.2008 E.2.1.

random, or planned.[37] Furthermore, it can result from ownership or another connection, such as a legal transaction or family reasons.[38]

In the context of examining economic identity, the Swiss Federal Supreme Court has in the past assessed the following elements in favour of an economic identity: individual signing authority[39], signatory rights[40], ownership share (three out of four[41] and four out of seven with remaining share certificates in cash[42]), privileged arrangement of voting rights in favour of the controlling party[43], fiduciary management[44], sole power of disposition[45], and indirect power of disposition due to personal and business relationships.[46] Depending on the constellation, the composition of the board of directors of an association can also indicate economic identity.[47]

How stakeholders in the shipping industry relate to each other, or are related to each other, is complex and can vary widely. However, the basic pattern is as follows: A shipping company or other (legal) entity establishes an offshore company in an FOC state [41], which fronts as the shipowner. Based on the economic approach (shareholdings) or the actual circumstances, the owner behind the offshore company controls the same [42]. The offshore company is in a direct relationship of dependency with the *de facto* (factual) owner, especially since the economic interests are identical and the latter exercises control [79]. The purpose of the front company is to maximize efficiency (by avoiding taxes as well as employee and environmental protection) and minimize liability substrate [7] and thus optimize profits for the *de facto* owner.

2.4.2. Obvious Contrariety to Purpose

Corporate law is characterized by its organizational and protective function. Accordingly, the use of a legal entity deviates from its purpose if the basic structures are disregarded, there is no overriding legal order, or its ability to survive autonomously is in jeopardy [80]. There are indications which serve as evidence that the economic independence of a company is being used or exploited in an abusive manner [81-84]. According to the Swiss Federal Supreme Court, the following conduct constitutes such evidence: The mixing of the spheres and assets of the shareholder with the legal entity (company gives up its own independence) [80], the lack of an administrative and organizational structure, the realization of interests of the shareholder by the front company [82, 83, 85, 86][48], diverting funds[49], evading payment[50], and undercapitalization to such an extent that it jeopardizes the company's purpose. The viability of a legal entity is not ensured from the outset in the event of undercapitalization [87].[51] Undercapitalization occurs when the relationship between equity, the operating risk, and the corporate activity itself is obviously disproportionate [87, 88].

However, the existence of such circumstantial evidence is not sufficient for piercing the corporate veil [89]. Two additional criteria must be fulfilled for the concrete misuse required for piercing the corporate veil to be affirmed: First, there must be a cumulation of different and extraordinary conduct in the sense of actual machinations[52], a phrase the Swiss Federal Supreme Court uses to create an analogy to fraud in criminal law [90]. The Swiss Federal Supreme Court defines special machinations in criminal law as inventions and devices as well as the exploitation of events which, alone or supported by lies or tricks, can mislead the victim. They are actual stagings characterized by intensive, planned, and systematic devices, but not necessarily by a particular factual or intellectual complexity.[53] Second, qualified damage to third parties[54] is required [89].[55] Whether actual abuse exists is assessed on a case-by-case basis.[56]

The Swiss Federal Supreme Court denied that there was an abuse of rights when a party deliberately ran a transaction through an illiquid company to limit the liability substrate. It protected the social limitation of liability and considered that it was the responsibility of the parties with whom they concluded a contract. A party could not subsequently override a concluded contract by means of piercing the corporate veil.[57] It must be kept in mind that corporate law can and should serve to limit the liability.[58] The same decision was taken when a party admitted that a claim allegedly existing against it had been assigned to a Panama-based company controlled by the creditor in order to be able to plead lack of jurisdiction in an action for recovery. The plaintiff considered this conduct to be an abuse of rights. He argued that there was generally a considerable potential for abuse in the case of foreign companies and that in the present case there had even been a specific intention to abuse the law. The Swiss Federal Supreme Court, however, held that an assignment of a debt could also constitute an investment in another company. In addition, it considered a conduct to be contradictory if a debt is paid and then reclaimed.[59]

In contrast, the Swiss Federal Supreme Court affirmed the abuse of rights when a sole shareholder and co-guarantor of a

37 BGE 144 III 541 E.8.3.2.
38 BGer 5A_330/2012 17.07.2012 E.3.2, BGer 5A_498/2007 28.02.2008 E.2.2.
39 BGer 5A_330/2012 17.07.2012 E. 4.1, BGer 5A_587/2007 28.02.2008 E.4.
40 BGer 5A_587/2007 28.02.2008 E.4.
41 BGer 5A_330/2012 17.07.2012 E.4.1.
42 BGer 5A_587/2007 28.02.2008 E.4.
43 BGer 5A_330/2012 17.07.2012 E.4.1, BGer 5A_498/2007 28.2.2008 E.3.
44 BGer 5A_330/2012 17.07.2012 E.4.1.
45 BGer 5A_498/2007 28.02.2008 E.3.
46 Ibid
47 BGer 5A_587/2007 28.02.2008 E.4.
48 BGE 144 III 541 E.8.3.2, BGer 5A_587/2007 28.02.2008 E.2.2, BGer 5A_498/2007 28.02.2008 E.2.2, BGer 5C.279/2002 14.03.2003 E.5.1.
49 BGer 5A_113/2018 12.09.2018 E.3.
50 BGer 5A_113/2018 12.09.2018 E.3, BGer 5A_498/2007 28.02.2008 E.2.2.
51 BGer 5A_330/2012 17.07.2012 E.3.2, BGer 5C.279/2002 14.03.2003 E.5.
52 BGer 5A_330/2012 17.07.2012 E.3.1.
53 BGE 135 IV 76 E.5.2.
54 BGer 5A_330/2012 17.07.2012 E.3.1.
55 BGE 144 III 541 E. 8.3.2, BGer 5A_587/2007 28.02.2008 E.2.2.
56 BGE 85 II 111 E.3, BGE 108 II 213 E.6a.
57 BGE 108 II 213 E.6b.
58 BGE 108 II 213 E.6a, BGE 85 II 111 E.3.
59 BGer 5C.201/2001 20.12.2001 E.2d.

corporate debt assigned a debt to another company also controlled by it with the intention of enforcing the maturity of the debt against the co-guarantor to drive the latter into financial ruin. Such conduct constitutes a machination in bad faith[60] and legal protection does not apply if a course of action exclusively serves the purpose of acting in bad faith.[61]

It is typical for maritime shipping companies and other stakeholders to establish offshore companies in FOC states. In view of the term, it is questionable whether these companies have a local administrative and organizational structure or whether their actual purpose is to realize the interests of the actual owner. Furthermore, the offshore companies are usually undercapitalized [91], although cargo ships are associated with considerable risks (blocking of sea routes, accidents at sea, etc.), which would be expensive [92]. The negative (financial) consequences for de facto economic beneficiaries can be greatly minimized by a one-ship company and by registering the vessel in an FOC state. Unfortunately, the structures are sometimes so complex that the actual economic beneficiaries cannot even be identified. Those who are entitled to sue, especially employees, do not know against whom they can or should act at all [91].

Thus, in maritime shipping, there are indications of the existence of an improper use or abuse of rights. However, this is not sufficient but requires special machinations and qualified damage to third parties. If employees can neither claim the basic remuneration they are entitled to under their employment contract nor successfully enforce appropriate working conditions, this not only contradicts the basic values of the Swiss legal system for the employment relationship, which in addition to the payment obligations (Art. 322 et seqq., CO) also provides for comprehensive health protection (Art. 6, ArG[62]; Art. 82, UVG[63]; and Art. 328, CO), but it ultimately constitutes a violation of human rights.[64] Thus, a qualified injury can be confirmed. By registering in an FOC state, precisely this protection and further protection standards regarding the environment, financial transparency, etc. are circumvented, which also points to special machinations. In our opinion, such a registration may not necessarily be made exclusively for this purpose since the qualified injury affects a large number of workers and, in the area of environmental protection, the entire world population. In addition, there do not seem to be any factually justifiable arguments in favour of a registration in an FOC state of cargo ships dominated by Swiss owners.

60 BGE 85 II 111 E.3.
61 BGE 85 II 111 E.3, BGE 81 II 455 E.2b.
62 Swiss Federal Employment Act dated 13 March 1964 (SR 822.11, ArG).
63 Swiss Federal Insurance Act dated 20 March 1981 (SR 832.20, UVG).
64 In this context, it is irrelevant whether this considered modern slavery (Art. 8, UN Covenant II [International Covenant on Civil and Political Rights, concluded in New York on 16.12.1966; entered into force for Switzerland on 18.9.1992, SR 0.103.2]; Art. 4, ECHR [Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), concluded in Rome on 4.11.1950; entered into force for Switzerland on 28.11.1974, SR 0.101]; Art. 10 (2) and (3), BV), the right to physical integrity (Art. 7, UN Covenant II; Art. 2, ECHR; Art. 10 (2); BV), the right to a fair trial (Art. 14 (1), UN Covenant II; Art. 6, ECHR; Art. 29-32, BV) or any other protective rights.

3. Jurisdiction by Necessity (*forum necessitatis*)

3.1. Situation

The previous chapter discusses whether a company domiciled in Switzerland, carrying out a transportation mandate, without itself being a legal employer, can be prosecuted for claims under labour law. This chapter aims to clarify whether the Swiss legal system provides (subsidiary) jurisdiction if the foreign legal employer is to be brought to court, for which there is no ordinary international jurisdiction of the Swiss courts under the Lugano Convention (Art. 2 (1), and Art. 19, LC) or the Swiss Federal Act on International Private Law (Art. 2 and 115, PILA). A possible example constellation is when a Swiss shipping company charters a ship registered in the FOC state of Liberia, on which workers are employed whose employment relationship requires legal action in Liberia for the assertion of claims. Such legal action is likely to be factually futile in Liberia, which would lead to an actual denial of justice.[65] Switzerland has the concept of jurisdiction by necessity (Art. 3, PILA), which it is obliged to grant in accordance with Art. 6 of the European Convention on Human Rights [93]. For Art. 6 (1) to apply, there must be a dispute, rights and obligations which are at least recognized under domestic law, and it must be a civil matter. According to the Convention, this concept must be interpreted autonomously.[66]

The Swiss courts are available on a subsidiary basis if the action abroad is impossible or unreasonable, there is a sufficient connection to Switzerland, and the restriction of access to a Swiss court would be disproportionate (Art. 3, PILA).[67] The purpose of Art. 3 of the Swiss Federal Act on International Private Law is to allow a plaintiff access to justice when it would otherwise encounter a substantive denial of justice [94, 95].[68] Art. 3 of the Swiss Federal Act on International Private Law is a safety valve [95] and must be handled restrictively [96].[69]

3.2. Formal Matters

3.2.1. Applicability of the Swiss Federal Act on Private International Law

The question of interest in this context is based on claims arising from an employment contract in an international relationship. In this regard, the Swiss Federal Act on International Private Law does apply, both from a factual and a

65 See 1.2 and 1.3; BGer 4C.379/2006 22.05.2007 E.3.4.
66 ECHR (Grand Chamber, GC), N.L. vs. Switzerland, no. 51357/07, 15.03.2018, para. 106.
67 ECHR (GC), N.L. vs. Switzerland, no. 51357/07, 15.03.2018, para. 117; BGer 4C.379/2006 22.5.2007 E.3.3, BGer 5C.264/2004 15.12.2005 E.3.1.
68 BGer 5C.264/2004 15.12.2005 E.5.1.
69 BGer 4A_486/2021 09.03.2022 E.5.2.2.3, BGer 4C.379/2006 22.05.2007 E.3.4.

spatial-personal perspective (Art. 1 (1), 115 PILA) [97]. The foreign connection, which establishes the internationality of a matter, is given if a party is not domiciled in Switzerland. However, jurisdiction by necessity may also be invoked if all parties have their connecting factor abroad, provided that the dispute is sufficiently linked to Switzerland [98].

According to the Swiss Federal Act on International Private Law, international treaties take precedence (Art. 1 (2), PILA). With regard to contractual labour law, the Lugano Convention applies, provided the respondent in a claim is domiciled in a contracting state (Art. 2 (1), LC).[70] Contracting states include the Swiss Confederation, the European Union, the Kingdoms of Denmark and Norway, and the Republic of Iceland, none of whom are FOC states, which is why the question of Swiss jurisdiction by necessity does not arise within the scope of the Lugano Convention [99]. Even if, in addition, international treaties were to be found that determined the place of jurisdiction in an FOC state, the jurisdiction by necessity according to Art. 3 of the Swiss Federal Act on International Private Law would have to be examined in terms of the principle of favorability [100].

3.2.2. Choice of Forum

It can be assumed that it is common to agree for the FOC state to have jurisdiction, which would be admissible in a labour law dispute (Art. 5 PILA, *e contrario* [conversely] Art. 115, PILA). However, in view of the dependency relationships and the great pressure to which seafarers are subjected when signing contracts, an agreement on jurisdiction is hardly likely to be valid (Art. 5 (2) PILA) [101]. Likewise, elements such as the unusualness rule in the context of general terms and conditions could prevent validity. However, this does not need to be examined further.

Irrespective of whether the ordinary place of jurisdiction in an FOC state is derived from the general legal bases or a jurisdiction agreement, jurisdiction by necessity must be granted if the requirements are met. Otherwise, the sense and purpose of a place of jurisdiction for the protection of one party could be undermined by means of a simple contractual provision. Both parties may then assume that agreeing a jurisdiction facilitates access to justice and does not make it additionally difficult [102].

Decades ago, the German Federal Labor Court (BAG) and the Regional Labor Court (LAG) of Frankfurt am Main held that German jurisdiction could not be validly derogated by means of a jurisdiction agreement in favour of a foreign jurisdiction if legal action abroad is (temporarily) impossible [103].[71] In the case to be decided at that time, the respondent had a branch office in Germany, which was considered a sufficient connection of the facts with the jurisdiction asserted in Germany.

3.3. Material Matters

Besides absolute subsidiarity [104], which is presumed to apply, jurisdiction by necessity presupposes the following in accordance with Art. 3 of the Swiss Federal Act on International Private Law.

3.3.1. Action Abroad Impossible or Unreasonable

Whether or not a case fulfils the criterion of impossibility or unreasonableness can only be assessed by taking full account of the concrete circumstances and evaluating any consequences for the person seeking justice in the individual case; in such cases, judicial discretion must be exercised [105, 106].

(i). Impossibility

The concept of impossibility must be interpreted with regard to its meaning in contract law [107]. This impossibility may be factual or legal [107, 108][72], objective or subjective [107], and may concern both the initiation of proceedings as well as the proceedings themselves [105]. In fact, proceedings abroad are impossible if access to the foreign judiciary is blocked, for example, because of war or an environmental disaster [108, 109]. A legal impossibility of proceedings could apply if the foreign court did not act on a claim due to a lack of sufficient proximity [110] or if the forum does not know any legal basis for the asserted claim, which would result in a legal protection gap, in particular if the Swiss legal system provided for a mandatory legal consequence [108, 111].[73]

Whether the filing of a lawsuit is impossible can only be partially assessed objectively. For example, Liberia was in a civil war for many years, which can represent a case of actual impossibility. The effects of an existing (civil) war [112], whether it has ended, and whether the country has recovered sufficiently for a functioning judiciary to exist (again), would have to be clarified at the time of the appeal to the Swiss courts. The assessment of the legal impossibility then requires precise knowledge of the applicable foreign law.

(ii). Unreasonableness

An action abroad may be possible or at least not conclusively impossible, but it may be so difficult that it must be assumed to be unreasonable for the party concerned [113]. Whether unreasonableness exists is decided by the Swiss courts and authorities at their discretion [113].

In the Swiss Federal Act on International Private Law, the term "unreasonableness" also occurs in connection with home jurisdiction, wherein the content of this term, in the light of jurisdiction by necessity, must not be equated with that of

70 BGer 4C.329/2005 05.05.2006 E.4.

71 BAG JZ (JuristenZeitung, Mohr Siebeck, Tübingen, DE) 1969, 647; LAG Frankfurt am Main RIW (Recht der Internationalen Wirtschaft, Verlagsgruppe Deutscher Fachverlag, Frankfurt am Main, DE) 1982, 524; BAG 29.06.1978 2 AZR 973/77, in JZ (JuristenZeitung, Mohr Siebeck, Tübingen, DE) 1979 (34), pp. 647-649.

72 BGer 5C.264/2004 15.12.2005 E.5.1.

73 BGer 4C.189/2001 01.02.2002 E.5g.

home jurisdiction, which aims to protect Swiss nationals abroad [114]. Jurisdiction by necessity according to Art. 3 of the Swiss Federal Act on International Private Law should, as the name suggests, only be invoked in times of need. Legislators wanted to prevent claimants from forfeiting a vested right simply because they do not have access to justice [115]. The legal or *de facto* denial of justice should be prevented [116].[74] The requirements are high and close to impossible [113].

Examples include the lack of an adequately functioning court system due to corruption, war, unrest, or force majeure [113, 117], lengthy proceedings, political persecution of one party, or lack of recognition of the judgment in Switzerland [117]. In the doctrine, unreasonableness is also affirmed if, due to expected discrimination, it can be assumed that no effective legal protection will be guaranteed [113]. In contrast, a more difficult or costly legal enforcement was not considered to be sufficient [113, 117].[75]

In interpreting Art. 6 of the European Convention on Human Rights in conformity with the treaty, foreign decisions must be considered. In Germany, the Oberlandesgericht (Higher Regional Court) of Frankfurt am Main ruled that a trial in a foreign forum is unreasonable if the foreign court does not guarantee that the dispute will be decided properly and in accordance with the elementary guarantees of the rule of law.[76] Also unreasonable are excessively long proceedings[77]. In the context of the applicability of the 1968 Brussels Convention (EU)[78], the European Court of Justice rejected the disregard of an earlier *lis pendens* (pending suit) by invoking an unjustifiably long duration of proceedings with reference to the system of the Brussels Convention, the absence of a provision to that effect, and the mutual trust of the member states.[79] Because of the protective function of jurisdiction by necessity and in any case, upon ratification of the European Convention of Human Rights by the states of the jurisdictions involved, the reasons listed by the Court are not important. If unreasonableness exists, it must be considered. In the case of the captain of a Lebanese airline, the courts in Lebanon remained inactive due to a civil war, which is why he was successfully appealed to the courts in Germany. The Federal Labour Court's consideration that it was irrelevant whether the courts in Lebanon had only been inactive for a total of eight months is interesting in this context. The duration of the legal hiatus could regularly not be foreseen when the action was filed, and it was therefore not possible to make the issue of international jurisdiction dependent on the (later) realisation that the duration had been only short.[80] The Federal Labour Court, in affirming the temporary impossibility, rejected the validity of the agreement on jurisdiction; the principles have to apply equally to the disregard of the ordinary jurisdiction [118]. Since the civil war had caused the legal hiatus, the case would have had to be classified under unreasonableness, which shows how close this issue is to impossibility and how difficult it is to distinguish the two concepts.

How unreasonableness is assessed is likely to vary among countries with open ship registers.[81] The *Corruption Perceptions Index (CPI)* of Transparency International is the world's leading indicator for measuring perceived corruption in the public sector [119, 120] and can be used as a basis for making legal decisions. In 2022, the index gave Liberia 26 out of 100 points, which corresponds to a very high susceptibility to corruption and put it in 142nd place out of 180 [121, 122]. Panama, another FOC state[82], scored 36 points and ranked 101st, which is better but not very good either [123]. War, civil unrest, force majeure, natural disasters, deficient judicial systems or excessively long proceedings, and political reprisals are additional problems in some FOC states. The courts must determine the limits of what is still reasonable at their discretion. The very low assessment of Liberia regarding susceptibility to corruption argues strongly in favour of the affirmation of the unreasonableness of legal action.

3.3.2. Sufficient Connection to Switzerland

Finally, Art. 3 of the Swiss Federal Act on International Private Law requires a sufficient connection of the facts to the Swiss legal system [105, 124].[83] The standard must be applied in proportion to the severity of the threatened denial of justice [105, 125, 126].

The Swiss Federal Supreme Court rejects jurisdiction by necessity based on the mere presence of the claimant in Switzerland after the relevant events, as the text of the law speaks of "facts" [127].[84] In contrast, it considers the jurisdiction by necessity for a negative declaratory action to be given at the place of enforcement since the corresponding action would not be admissible abroad.[85] The doctrine affirms a sufficient connection if the parties are Swiss nationals or the claimant is domiciled in Switzerland at the time the action is brought [128] and in proceedings for the purpose of creating a precedent or necessary enforcement in Switzerland [125, 126].

According to the Message of the Swiss Federal Council on the Swiss Federal Act on International Private Law, jurisdiction by necessity should be granted even though the facts of the case have little connection with Switzerland, to avoid

74 BGer 5C.264/2004 15.12.2005 E.5.1.
75 High Court of the Canton of Zurich 27.08.1990, in ZR (Blätter für Zürcherische Rechtsprechung, Schulthess Verlag, Zurich, CH) 1990 (89) No. 65 pp. 139-140.
76 Oberlandesgericht Frankfurt am Main 01.10.1998 1 U 163/96 in IPRax (Praxis des Internationalen Privat- und Verfahrensrechts, Ernst und Werner Gieseking, Bielefeld, DE) 1999 p. 247.
77 Deutscher Bundesgerichtshof (German Federal Court of Justice) 26.01.1983 IVb ZR 335/81.
78 1968 Brussel Convention (EU) on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ L 299, 31.12.1972, pp. 32-42; today Regulation (EU) No 1215/2012, OJ L 351, 20.12.2012, pp. 1-32.
79 CJEU, 09.12.2003, Gasser, C-116/02, EU:C:2003:657, paras. 70-73.
80 BAG 29.06.1978 2 AZR 973/77, in JZ (JuristenZeitung, Mohr Siebeck, Tübingen, DE) 1979 (34), pp. 647-649.
81 See 1.3.
82 Ibid
83 BGer 4C.379/2006 22.05.2007 E.3.5, BGer 5C./264/2004 15.12.2005 E.5.1
84 BGer 4C.379/2006 22.05.2007 E.3.5.
85 BGE 132 III 277 E.4.

a denial of justice [105]. As explained, in 2007 the Swiss Federal Supreme Court judged the (later) presence of a party to be insufficient and thus required a stronger connection.[86] This decision was affirmed by the European Court of Human Rights in 2018.[87] The case was a civil claim for damages by a victim of torture against the state of Tunisia, who later fled to Switzerland and whose application for asylum was recognised before the case was filed. During the proceedings, the claimant was also granted Swiss citizenship. In the dissenting opinions, the European Court of Human Rights criticised, among other things, that the Swiss Federal Supreme Court had interpreted a legal basis intended to protect against denial of justice so restrictively that it had itself committed a denial of justice.[88] In view of the nature of jurisdiction by necessity, jurisdiction should be granted in case of doubt.[89] Referring to the dynamics in this field, the European Court of Human Rights has at least clearly reserved future developments.[90]

If shipping companies or other economic beneficiaries are domiciled in Switzerland, there must be a sufficient connection. It would not be justifiable to accept the *de facto* denial of rights in an FOC state while at the same time profiting from money flowing to Switzerland[91], which, as a state governed by the rule of law, must have a great interest in and take responsibility for enabling corresponding rulings with precedent-setting effect.

3.3.3. Proportionality

Court access is not absolute; mutual interests must be weighed up.[92] If the proportionality test results in no access to a court at all, there must be a mistake.[93] Furthermore, restrictions are only compatible with Art. 6 (1) of the European Convention on Human Rights if they pursue a legitimate aim and the end-means relationship is correct.[94]

The courts could put forward various arguments as legitimate objectives, such as accusations of interference in the competences of other states or significant difficulties in gathering evidence.[95] In this regard, it should be noted that it is irrelevant whether other legal systems know jurisdiction by necessity. Important is that Switzerland has enshrined it in positive law and that its application must not be so restrictive as to deny access to a court as guaranteed by Art. 6 (1) of the European Convention on Human Rights.[96]

Even if protecting a smoothly functioning judicial system is a legitimate objective in not entertaining a case, this approach may be disproportionate to the severity of the consequences to an entitled person.[97] Failure to act on a complaint without even examining its substance seriously impairs access to justice and constitutes a denial of justice in violation of Art. 6 (1) of the European Convention on Human Rights.[98]

In terms of appropriateness, it should again be noted that Switzerland profits considerably from the shipping industry.[99] The Swiss Federal Council assumes that the direct contribution by Swiss maritime shipping to the gross domestic product amounts to CHF 2.4 billion [129]. Tax privileges make Switzerland an attractive location for shipping companies in the long term, which underlines the importance of this sector [130]. Denying seafarers access to legal justice for reasons of effectiveness – such as possible difficulties to provide proof – while providing tax concessions to those who benefit from this industry would seem completely inappropriate. Ultimately, as the dissenting opinions of the European Court of Human Rights have rightly pointed out, the argument that Swiss courts may find it difficult to carry out a substantive examination would protect the denial of justice.[100] This cannot be appropriate under any circumstances.

4. Conclusions

In principle, recourse to a company domiciled in Switzerland as a basis for a claim has the potential to establish domicile jurisdiction in Switzerland, whereby recourse would have to be assessed under Swiss law. In the event of a refusal of recourse, action would have to be taken against the legal employer domiciled abroad (usually in the flag state), which would be practically hopeless in the presence of an FOC. If there is no ordinary place of jurisdiction in Switzerland for this purpose, jurisdiction by necessity under Art. 3 of the Swiss Federal Act on International Private Law offers the possibility of preventing a (*de facto*) denial of justice. Depending on the country whose flag has been flown, the impossibility or unreasonableness of foreign jurisdiction must be affirmed. The requirements for a sufficient connection with Switzerland must not be set so high to prevent a risk of a denial of justice and a violation of Art. 6 (1) of the European Convention on Human Rights on the part of the Swiss courts.

Whether or not there is a right of recourse is a question of law. The actual hurdle for the seafarers consists in proving the prerequisites for the assertion against the company, in particular the abuse of rights, meaning the connections between the

86 BGer 4C.379/2006 22.05.2007 E.3.5.
87 ECHR (GC), N.L. vs. Switzerland, no. 51357/07, 15.03.2018, paras. 89, 110 and 112.
88 ECHR (GC), N.L. vs. Switzerland, no. 51357/07, 15.03.2018, DISSENTING OPINION OF JUDGE SERGHIDES, para. 114.
89 ECHR (GC), N.L. vs. Switzerland, no. 51357/07, 15.03.2018, DISSENTING OPINION OF JUDGE SERGHIDES, para. 32.
90 ECHR (GC), N.L. vs. Switzerland, no. 51357/07, 15.03.2018, para. 220.
91 See 1.4 and 2.1.
92 ECHR (GC), N.L. vs. Switzerland, no. 51357/07, 15.03.2018, DISSENTING OPINION OF JUDGE SERGHIDES, para. 102.
93 ECHR (GC), N.L. vs. Switzerland, no. 51357/07, 15.03.2018, DISSENTING OPINION OF JUDGE SERGHIDES, para. 103.
94 ECHR (GC), N.L. vs. Switzerland, no. 51357/07, 15.03.2018, para. 115.
95 ECHR, N.L. vs. Switzerland, no. 51357/07, 21.06.2016, para. 107.
96 ECHR (GC), N.L. vs. Switzerland, no. 51357/07, 15.03.2018, DISSENTING OPINION OF JUDGE SERGHIDES, para. 109.
97 ECHR, N.L. vs. Switzerland, no. 51357/07, 21.06.2016, JOINT DISSENTING OPINION OF JUDGES KARAKAŞ, VUČINIĆ AND KŪRIS, para. 16.
98 ECHR, N.L. vs. Switzerland, no. 51357/07, 21.06.2016, JOINT DISSENTING OPINION OF JUDGES KARAKAŞ, VUČINIĆ AND KŪRIS, para. 18.
99 See 1.3, 1.4 and 3.3.2.
100 See 3.3.2.

de facto or financially entitled persons and the legal employer (Art. 8, CC) [131].[101] When invoking jurisdiction by necessity, all substantive requirements must also be proven [105, 132, 133].[102] The International Transport Workers' Federation (ITF) as well as other trade unions could provide support as they have sufficient financial resources, a large network, and the know-how required to obtain the necessary information and evidence.

Consequently, there is no lack of civil procedural possibilities to help seafarers in Switzerland gain access to the courts and enforce their justified claims. The decisive factor here will be that the Swiss Federal Supreme Court relaxes its excessive strictness, particularly regarding granting jurisdiction by necessity, and recognises Switzerland's responsibility in international maritime shipping.

The conclusions are likely to be transferable to other judicial systems of countries outside FOC states where shipping companies are domiciled, as the discussed decisions of the German labour courts indicate.[103]

Abbreviations

ArG	Swiss Federal Employment Act
BAG	German Federal Labor Court
BGE	Swiss Federal Supreme Court Decision, Official Collection, Leading Cases
BGer	Swiss Federal Supreme Court Decision, Further Decisions since 1.1.2000
BV	Constitution of the Swiss Confederation
CC	Swiss Civil Code
CJEU	Court of Justice of the European Union
CO	Swiss Federal Act on concerning the amendment of the Swiss Civil Code (Part V: Code of Obligations)
CPI	Corruption Perceptions Index
ECHR	European Convention on Human Rights
EU	European Union
FDFA	Swiss Federal Department of Foreign Affairs
FOC	Flag of Convenience
GC	Grand Chamber of the European Court of Human Rights
ICJ	International Court of Justice
ILO	International Labour Organization
ITF	The International Transport Workers' Federation
LAG	German Regional Labor Court
LC	Lugano Convention
MLC	Maritime Labour Convention
MSC	Mediterranean Shipping Company
PILA	Swiss Federal Act on Private International Law
SR	Systematic Compilation of Swiss Federal Legislation
UN	United Nations
UNCh	Charter of the United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UVG	Swiss Federal Insurance Act
ZHAW	Zurich University of Applied Sciences

101 BGE 134 III 52 E.2.1.

102 BGer 4A_486/2021 09.03.2022 E.5.2.2.3, BGer 5A_313/2015 26.05.2015 E.2, BGer 5A_264/2013 28.11.2013 E.3.4, BGer 5A_255/2011 13.09.2011 E.4.2.

103 See 3.2.1 and 3.3.1.(ii).

Acknowledgments

The authors gratefully acknowledge the by the Zurich University of Applied Sciences (ZHAW), School of Management and Law, Institute for Enterprise Law, Winterthur, Switzerland received support.

Author Contributions

Nicole Vögeli Galli: Conceptualization, Funding acquisitions, Investigation, Project administration, Writing – original draft, Writing – review and editing

Ainhoa Rossell: Investigation, Writing – original draft

Funding

This work is supported by the private individuals Klaus Tischhauser and Elgard Schultz, Switzerland.

Conflicts of Interest

The authors declare no conflicts of interest.

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Biography

Nicole Vögeli Galli is head of programs, lecturer, and the head of the unit Social Law at the Zurich University of Applied Sciences (ZHAW), School of Management and Law, Institute of Enterprise Law, Switzerland, as well as a practicing lawyer. She completed her Master of Law degree at the University of Zurich in 1992 and her Doctor of Jurisprudence at the same institution in 1996. 1997 she was admitted to the Bar as attorney-at-law by the Canton of Zurich. Since 2007, she holds the certification as Specialist SBA Employment Law of the Swiss Bar Association. Recognized for her work in the field of gender equality, she was appointed as Vice-president of the Arbitration Commission under the Gender Equality Act for the Staff of the Swiss Federal Administration by the Swiss Federal Council in 2022.

Ainhoa Rossell is an associate research assistant at the Zurich University of Applied Sciences (ZHAW), School of Management and Law, Institute of Enterprise Law, Switzerland, and a lawyer in the socio-legal service of the child and adult protection authority (KESB) of the Canton of Berne. She completed her Master of Law at the University of Lucerne in 2019 and was admitted to the Bar as attorney-at-law by the Canton of Lucerne in 2022.

Research Field

Nicole Vögeli Galli: Swiss and International Employment Law, Public Employment Law, Gender Equality Law, Social Security Law, Private and Public Contract Law, Civil Law, Swiss and International Civil Procedure Law.

Ainhoa Rossell: Antitrust Law, Employment Law, Social Security Law, Private Contract Law, Civil and Administrative Law, Criminal Law, Swiss and International Civil Procedure Law.