Labour threat in China

William Leung and **Cao Lin** look at the labour regulations and conflict of law rules in relation to Chinese crews

During recent years, there have been increasing numbers of Chinese seafarers working on board foreign ships. However, the laws and regulations in China are not mature in the field of seafarer service. As a result, disputes frequently arise. This article, therefore, combines the judicial practice in China with the actual situation of Chinese seafarer service abroad and discusses the nature of and the legal relationships of parties involved and the relevant applicable law.

I. The procedure of Chinese crew service and relevant legal issues

According to the Management Measures on Seafarer Output which was promulgated by the Ministry of Communication in 1992:

'Seafarer output means the dispatch of Chinese seafarers to foreign shipping companies to work on foreign ships by the Foreign Co-operation of Labour Service Companies (FCLSC) with the foreign shipowners paying for the services of seafarer.'

Foreign labour collaboration is part of the international trade service regulated by the Foreign Trade Law and seafarer service output is a kind of foreign labour collaboration.

According to art 3 of the Supervision Measures on the Qualification of Managing Foreign Labour Collaboration promulgated by both the Ministry of Commerce and the State Administration for Industry and Commerce on 26 July, 2004:

'Foreign labour collaboration refers to the economic activity when an enterprise in China concludes contracts with the foreign companies, intermediaries, and private employers which are allowed to recruit and employ foreign servicemen and to systematically employ, select, dispatch Chinese citizens to foreign providing labour service to foreign companies.'

In art 4(2) of the Supervision Measures: 'Foreign enterprises, individuals and foreign organisation in China have no right to directly recruit servicemen from China.'

Hence, the procedure of seafarer service involves three parties and two written contracts.[1] The three parties are (1) the seafarer; (2) the FCLSC; and (3) the foreign shipowner.

The first written contract is the 'labour contract' (as regulated by the Labour Law of China) to be concluded between seafarer and the FCLSC and the second written contract is the ship manning agreement to be agreed by the FCLSC and the foreign shipowner.

Seafarer output, as a form of offering labour services, is different from offering labour services through the contract concluded directly between the labourers and the employing unit in accordance with the Labour Law in China (promulgated on 5 July 1994). Instead, the seafarer offers labour services to the foreign shipowner through the FCLSC without having a written contract between them.

There are a great number of cases involving disputes concerning seafarers' employment issues reaching the Maritime Court in China each year because the issues are complicated and there is no specific law regulating the seafarer's labour relationship. The laws and regulations that do regulate the rights and obligations of the seafarer are very few.

Even in the Maritime Code of China (promulgated on 7 November 1992), there are only some simple provisions referring to the

qualification of the seafarer and the responsibility of the captain.

The Labour Law, as a specific law in regulating the domestic labour relations, labour market and labour management relationship, does not regulate Chinese citizens working outside China. So lacking a specific law regulating the said relationship, China instead regulates by means of administrative regulations.

II. Modes of seafarer services output in China

Currently, the market of the Chinese seafarer service output is in a state of confusion. There are various seafarer service output companies, seafarer service agents and intermediaries. There are different modes in administrating the seafarer service output as follows:

1. The mode when the seafarer establishes a labour contract directly with Chinese shipping enterprises

This includes big Chinese shipping companies, which are mostly state-owned corporate entities with the majority of ships registered in China but with a few ships registered under the flag of convenience states. These Chinese shipping companies recruit and train their seafarers themselves. The labour contracts are to regulate the rights and obligations between these shipping companies and the seafarer, except when the Chinese vessels reach another country in the contract period or when the seafarer works on ships registered under the flag of convenience states. These exceptions occur because the labour contracts do not have any international character. The contents of the seafarer's labour protection, working condition, welfare, insurance etc are more or less the same with those of the workers ashore.

Under this mode, problems emerge when the Chinese shipping companies send the seafarer to work on their ships registered under the flag of convenience states because international labour conventions entered into by the country of flag of convenience states may be different from that which China has entered into. Also there may be a difference between the Chinese law and the law of the country of flag of convenience states. Notwithstanding the fact that the shipowner is not a citizen of the country of flag of convenience states or even its resident but because the ship is registered in that country, that country has become the ship's nationality. Although the country of flag of convenience states does not adopt essential control or inspect the ships registered under it, it may still result in the application of the law of the country of flag of convenience states and hence the labour law of that country.

2. The mode when the seafarer is sent to work in foreign vessels through FCLSC

At present, this is the most popular mode in the market of seafarer services output in China. Also, most of the disputes arise from this mode.

3. The mode when a seafarer service contract is to be concluded between the seafarer and the foreign shipowner through a seafarer service agent or an intermediary

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This mode only takes up a small portion in the seafarer services output market at present. However, after China's entry into the World Trade Organisation and hence its obligation to provide free trade in services under GATS, this mode will become a common and dominant mode in the market in the future.

In this mode, the Chinese seafarer establishes a contract via an intermediary between the seafarer and the foreign shipowner. As between the contracting parties, they assume contractual rights and obligations while the intermediary does not become a contractual party.

The intermediary provides information about the labour market to the shipowner. If successfully forming a contract, the intermediary will receive a commission payment. If unsuccessful, it will just be paid some expenses.

In China, the applicable law of the contract involving foreign elements can be seen in both the General Principles of Civil Law and the Contract Law. Article 145 of the General Principles of Civil Law states:

'If the parties to a contract involving foreign interests have not made a choice, the law of the country to which the contract is most closely connected shall be applied.'

The Contract Law also has the similar provision. Article 126 of the Contract Law states that (save and except '... contracts for Chinese-foreign equity joint ventures, for Chinese-foreign contractual joint ventures and for Chinese-foreign co-operative exploration and development of natural resources to be performed within the territory of the People's Republic of China shall apply the laws of the People's Republic of China'):

'.... parties to a contract involving foreign interests may choose the law applicable to the settlement of their contract disputes, except as otherwise stipulated by law. If the parties to a contract involving foreign interests have not made a choice, the law of the country to which the contract is most closely connected shall be applied.'

As the seafarer services contract is a kind of civil contract, the General Principles of Civil Law should apply. But, owing to the seafarer's occupation and the peculiarities of the contents of the labour services to be provided by the seafarer compared to that in an ordinary civil contract, many countries usually make specific laws to regulate the seafarer services contract.

In Chapter XIV ('Application of Law in Relation to Foreign-related Matters') art 269 of the Maritime Code of China states:

'The parties to a contract may choose the law applicable to such contract, unless the law provides otherwise. Where the parties to a contract have not made a choice, the law of the country having the closest connection with the contract shall apply.'

This is in line with the provisions in both the General Principles of Civil Law and the Contract Law. Since there is no specific legislation on the seafarer services contract, such a contract involving foreign interests will be regulated by the specific provisions in Chapter XIV of the Maritime Code. However, the applicable law decided by the rules of conflict of law may differ from the general understanding of the connecting factors; disputes often arise in practice.

When the parties have made their choice as to the applicable law in the seafarer service contract involving foreign interests, by virtue of the principle of autonomy of parties' intention, the parties to the seafarer service contract should be allowed to make a choice of the applicable law.

If the law of China is chosen, then both art 142 of the General Principles of Civil Law and

art 268 of the Maritime Code stipulate the priority of international conventions with the supplement of international practice. In Chapter VIII ('Application of Law in Civil Relations with Foreigners') art 142 of the General Principles of Civil Law states (save and except '... the provisions are ones on which the People's Republic of China has announced reservations'):

'If any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those in the civil laws of the People's Republic of China, the provisions of the international treaty shall apply ... International practice may be applied on matters for which neither the law of the People's Republic of China nor any international treaty concluded or acceded to by the People's Republic of China has any provisions.'

Similarly, in Chapter XIV ('Application of Law in Relation to Foreign-related Matters') art 268 of the Maritime Code makes similar provisions.

As China has no specific legislation on the subject of the seafarer services contract, only the provisions in the General Principles of Civil Law and the Contract Law apply and the Labour Law will not apply.

When the parties did not make a choice as to the applicable law in the seafarer service contract involving foreign interests and although according to the international private law, when the parties to a contract did not choose the applicable law, the most suitable way is to use the principle of closest connection in ascertaining the applicable law. But the theory in international maritime law is that the law of the flag state is a part of the nationality law – namely the national law of the flag state has a direct relationship with the ship's nationality and the flag flown by the ship is an external symbol of the nationality of that ship.

As China does not have specific legislation on seafarer services contracts, the issue of the applicable law of the seafarer services contract is generally thought to be that of art 269, Chapter 14 of the Maritime Code in regulating the normal seafarer services contract which involves foreign interest.

The Supreme People's Court's Interpretation of the Foreign Economic Contract Law states: 'The applicable law of a labour contract will generally be the law where the labour services are to be performed.' As to the seafarer services contract, the law where the services are to be performed is the law of the flag state.

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Although this judicial interpretation is no longer valid after the promulgation of the Contract Law, in the situation when there is a lack of correlative legislation, its spirit could be referenced in practice.

Meanwhile, besides the definite merits of the law of the flag state, the Chinese seafarers are mostly sent to work on board ships run by owners from developed countries. These nations have a higher protection standard and usually offer more benefit to the seafarer than Chinese law.

IV. Expectation of legislation for Chinese seafarer employment

Owing to the peculiarity of the occupation of seafarer, many countries invariably make special laws to regulate it. Yet, until now, China has not formulated seafarer law to protect the seafarer. Our present regulations of seafarer's rights and obligations are far from meeting their realistic needs.

Together with the difficulty and the danger of a shipping career, as well as the rapid closing of the gap between the seafarer's wage and ashore wage, the seafarer profession is not adequately attractive. As a result, the number of people who embark on the seafarer profession has largely decreased.

Huge numbers of excellent seafarers have decided to work in other disciplines. The seafarer profession is totally different from the ordinary professions: the people who embark this job not only demand systemic training, but also need favourable mental and physical qualities, as well as long-term accumulation of experience, especially for a senior seafarer.

The seafarer contract for employment is the main base to solving disputes among seafarers, shipowners and the FCLSC. Legislation can make the seafarer contract for employment become fairer.

By establishing seafarer law, prescribing compulsive clauses which protect the seafarer, appointing a specific government department in charge of prescribing norms and standards and examining the seafarer employment contract, a great number of disputes will disappear. It will stabilise the seafarer output services market and promote its development.

The shipping industry continues to expand and in order to maintain its place as a deliverer of seafarers, the Chinese government should not only make a long-term plan, but should also establish seafarer law and other related regulations as soon as possible. ■

[1] Lin Junxin, The essay on the compensation of seafarers' personal injury and death, Chinese maritime law annual publication (1994).

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