THE MARITIME LABOUR CONVENTION 2006:

INTERNATIONAL LABOUR LAW REDEFINED

EDITED BY

JENNIFER LAVELLE

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THE MARITIME LABOUR CONVENTION 2006

With the Maritime Labour Convention's entry into force in August 2013, the shipping industry is faced with a new international convention that has comprehensive implications across all sectors. This vital text provides timely analysis and thought-provoking essays regarding the Convention's application and enforcement in practice.

Hailed as the 'Seafarers' Bill of Rights' and the 'fourth pillar' of the international regulatory regime for quality shipping, the Maritime Labour Convention is set to significantly alter the playing field for key stakeholders. This book offers diverse and interesting commentary in respect of the Convention's impact on core sectors of the shipping industry, identifying both strengths and weaknesses of the Convention, as well as potential hurdles that will need to be overcome. Each chapter focuses on a different aspect of the Convention, ranging from individual rights of the seafarer to challenges of flag State implementation. Special attention is given to enforcement through examination of the innovative measures provided in the Convention itself, along with discussion of domestic enforcement mechanisms in certain States. Furthermore, the book evaluates whether the Convention has filled existing gaps in maritime labour law, resolved prior difficulties or created new problems.

This book expertly addresses issues of fundamental importance to national authorities, shipping professionals and associations, maritime lawyers and academics worldwide.

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Foreword

PROFESSOR HILTON STANILAND

The Maritime Labour Convention of 2006 (MLC) is often described as providing: a 'bill of rights' for seafarers recognised as a special category of worker, enshrining mandatory minimum standards in a truly global industry; a 'fourth pillar' to the international regime regulating ships and complementing the key conventions of the International Maritime Organization; and a 'level playing field' for shipowners, achieving fair competition and equality of treatment for flag States. For these objectives to be realised and for the implementation of the MLC to be successful, a reasonable degree of certainty in the meaning of the Convention and uniformity in its practical application and enforcement are necessary. This work contributes clarity and certainty to the meaning of the MLC, while helpfully drawing attention to issues still to be resolved in the enforcement of the Convention. Published as the MLC enters into force, this diligently edited book of a uniformly high standard will make a major contribution to the vast global endeavour that is currently underway and aimed at achieving the successful implementation of the Convention.

This work makes its contribution in different ways. The book comprises ten chapters (covering the MLC as it relates to the European Union; seafarer protection under a flag State; shipmasters in general; yachts in particular; crewing insurance in general; abandonment and repatriation insurance in particular; piracy; enforcement procedures by flag States, port States and recognised organizations; the determination of the jurisdiction and governing law of seafarers' employment contracts in the European Union; and implementation by a port State), spanning many crucial aspects of the MLC. More specifically, many of the fundamental issues going, for example, to the transposition of the MLC into national legislation; the meaning of seafarers; the meaning of seafarer's contracts; the major change to the role and responsibility of the shipmaster; the unique issues posed by super-yachts, particularly in relation to crew accommodation; the reasons for the growing incidence of abandonment and the mandatory requirement to provide financial security to ensure that seafarers are repatriated; the mandatory requirement for on-board complaint procedures; the delicate and sometimes overlapping relationship between the MLC and other binding international conventions and legal instruments; and the difficult and important issues regarding the proper jurisdiction and applicable law are covered.

All the major rights accorded by the MLC to seafarers receive treatment, sometimes particular rights are considered several times; but this is no redundant repetition since these rights are viewed from the perspective of diverse viewpoints in different chapters, providing as a whole balanced and nuanced coverage. The exploration of

the new and important role that insurance can play in ensuring the quick and direct fulfilment of the rights of seafarers is another unique and valuable contribution made by this work.

The gaps in the MLC, especially in providing adequately and comprehensively for seafarers taken hostage by pirates, are also exposed, suggesting areas for the reform and amendment of the MLC. And where the Convention is vague (it has to be conceded that the Convention is not always a model of pellucid clarity) suggestions for clarification are made. Questions arising out of clearly competing interpretations of the MLC are also identified, explored and properly left for determination, especially by means of enacting legislation intended to give complete effect to the MLC for the purpose of ensuring its effective implementation and enforcement. Since major endeavours are currently underway in the major maritime jurisdictions of the world aimed at the domestic enactment of the MLC, the identification of these questions will be particularly helpful to legal drafters in the Member States whose work will be scrutinised by the Committee of Experts on the Application of Conventions and Recommendations, the independent body composed of legal experts charged with examining the application of the conventions of the International Labour Organization.

Given that this work expertly covers crucial and important subjects from diverse viewpoints, it will be of much assistance to the very wide range of persons professionally engaged in one way or another with the practical enactment, administration, application, implementation, enforcement and even amendment of the MLC. In particular, the work is highly commended to governments, legal drafters, shipowners, seafarers, flag States, port States, recognised organizations, trade unions, insurers, P & I clubs, practising maritime lawyers, academic lawyers and students of the law.

Professor Hilton Staniland
Institute of Maritime Law
University of Southampton

Preface

The idea for an edited collection was, as is the same for many great ideas, the result of conversations over coffee between myself and Johanna Hjalmarsson. Having already satisfied the requirement of 33 per cent of world gross tonnage by February 2009, the ratifications received by the International Labour Organization on 20 August 2012 finally fulfilled the conditions necessary for the Maritime Labour Convention's entry into force. Without hesitation, we immediately set ourselves the task of finding additional contributors and the rather ambitious goal of having the prospective text published by the time the Convention entered into force one year later.

The objective of the collection is not to offer an annotation of the Maritime Labour Convention 2006 (MLC). This is already provided by Moira McConnell, Dominick Devlin and Cleopatra Doumbia-Henry in *The Maritime Labour Convention 2006: A Legal Primer to an Emerging International Regime* (Martinus Nijhoff Publishers 2011). Instead, the authors of the collection aim to review specific aspects of the Convention along with its impact upon different sectors of the maritime industry or with regard to particular areas of law.

Chapter 1 focuses on the European Union as a major actor and stakeholder in the realization of the MLC project. The chapter discusses the competences of the EU and its Member States in the areas covered by the MLC and the complications that may arise from the EU's inability to ratify the Convention, along with the status of the MLC in the EU legal order and the process of transposing the Convention into EU law.

The Republic of Malta, home to the eighth largest flag registry in the world, ratified the MLC in January 2013 and has already transposed the Convention's provisions through the publication of the 2013 Merchant Shipping (Maritime Labour Convention) Rules. **Chapter 2** presents an overview of the 2013 Rules and a discussion of the interplay between the new Rules and existing Maltese shipping legislation.

It is argued in **Chapter 3** that the MLC has fundamentally changed the legal climate for the shipmaster. Accordingly, the duties and responsibilities of the master as a manager are examined, as well as the master's status as a seafarer and his own rights under the Convention.

The impact of certain provisions of the MLC upon yachts, in particular superyachts, is discussed in **Chapter 4**. Due consideration is given to the definitions included in the Convention and the minimum standards in respect of seafarers' employment agreements, manning, hours of work and rest and crew accommodation. The on-board complaint procedure in Title 5 of the Convention is also discussed.

Chapter 5 analyses crewing insurance with respect to employers' liabilities under the MLC. Insurance issues both pre- and post-MLC are considered, along with the potential difficulties and opportunities arising from the obligation under the Convention to provide financial security. The chapter identifies the insurer and insured, and the jurisdiction and governing law for disputes arising out of an insurance policy.

The inclusion of an obligation to obtain financial security to cover the shipowner's liabilities under the MLC caused much debate during the negotiations for the Convention. Even after the adoption of the Convention, various stakeholders are still at odds as to how the obligation can be satisfied in practice. **Chapter 6** discusses these issues and then offers commentary on a new insurance product, which arguably provides a solution to the demands of the Convention.

Given the proliferation of piracy in recent years and the trauma experienced by seafarers who are held as hostages, **Chapter 7** questions why piracy was not specifically dealt with in the Convention. In addition, the chapter evaluates whether certain obligations under the MLC, such as payment of wages and repatriation, would be of assistance to seafarers that are held captive once the Convention is in force.

Chapter 8 provides a detailed analysis of the enforcement provisions in the Convention. It explains and scrutinises flag State enforcement, port State control and the 'ground-breaking' self-enforcement procedures. Consideration is also given to the labour-supplying responsibilities of Contracting States.

Should the Convention's enforcement procedures prove to be ineffective with relations deteriorating to the extent that court proceedings are threatened or commenced, the parties will want to be able to predict with certainty where their dispute will be heard and the law that will govern their obligations. In this regard, **Chapter 9** examines the harmonised conflict of laws system in the European Union for various disputes that may arise out of a seafarer's employment agreement.

Finally, **Chapter 10** provides the transcript of an interview with the UK Maritime and Coastguard Agency on the implementation and enforcement of the Convention by the UK so far.

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Acknowledgements

The publishers and authors wish to thank the ILO for their kind permission to reproduce the text of the Maritime Labour Convention 2006 in the appendix. Readers should note that the text of the Convention and a wealth of related materials are freely available from www.ilo.org, including the ratification status of the Convention. Our thanks also extend to Julie Carlton and Neil Atkinson of the UK Maritime and Coastguard Agency for agreeing to be interviewed for the collection.

I would like to personally thank all of the authors for their hard work and professionalism in realizing this project within such a short space of time. I am particularly indebted to Johanna Hjalmarrson for her never-ending encouragement and dependable guidance, without whom this project would not have been such a success. I am also grateful for the support and patience provided by Faye Mousley, Alexia Sutton and the publishing team at Informa, who have worked tirelessly to allow the collection to be published as close as possible to the time of the Convention's entry into force. Further acknowledgements and thanks are given by the authors in their respective chapters.

At the time of writing, the Convention has been ratified by 39 States, representing almost 70 per cent of world gross tonnage. By the time the collection is published, the Convention will have entered into force and, hopefully, many more States will have deposited their instruments of ratification with the ILO. With each ratification, the Convention's objectives of decent working conditions for seafarers and a level playing field for responsible shipowners are one step closer to being achieved, and the eradication of sub-standard shipping is in sight.

The text of the collection was submitted in June 2013 with only minimal alterations at proof stage, and does not therefore incorporate any developments after this point.

Jennifer Lavelle
June 2013

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CHAPTER 1

The Maritime Labour Convention 2006 in the European Union

ARIADNE ABEL*

INTRODUCTION

1.1 The *Maritime Labour Convention 2006 (MLC)*, consolidating some 68 international maritime labour legal instruments and recommendations of the International Labour Organization (ILO), is an accomplishment and a novelty in its own right. The MLC provides a comprehensive codification of seafarers' rights, as well as health, safety and employment standards; it sets up an enforcement and monitoring mechanism and an innovative amendment procedure. Above all, it enjoys worldwide application and acceptance and this cannot but be characterized as a success story for the ILO and for all States involved in the long process leading to its entry into force on 20 August 2013. However, there is a lot more to be said about the MLC beyond its pioneering role in modern treaty making, which has already been broadly discussed.[1]

1.2 This chapter will focus on the European Union (EU) as a major actor and stakeholder in the realization of the MLC project. While formally the EU does not participate as a full member of the ILO, nor does it have the right to become a Contracting Party to the Convention, it has been instrumental in ensuring a coordinated and common position of its Member States during negotiations, and has strived to ensure high minimum standards and due implementation of those standards at EU level by making full use of the tools and procedures available and competences conferred on it by the EU constituent Treaties.

1.3 The chapter will begin with a discussion on the competences of the EU and its Member States in the areas covered by the MLC and the complications that may arise from the fact that the EU cannot become a Contracting Party to it. The second part of the chapter will focus on the conditions governing the external representation of the EU by Member States when it cannot represent itself; the conclusion of the MLC by Member States alone in the interest of the EU; and, the status of the MLC in the EU legal order under this formula. Then, attention will be drawn to the process of transposing the Convention into EU law by way of a series of directives

* BSc National Kapodistrian University of Athens, LL.M University of Glasgow, Ph.D candidate, University of the Aegean, United Nations Economic Commission for Europe Secretariat. The views expressed here are those of the author and do not necessarily represent those of the United Nations. The author wishes to thank Dr Alexandros Ntovas for valuable input and comments on previous drafts. All remaining errors are attributable to the author.

1. See for example P Bolle, 'The ILO's new Convention on Maritime Labour: an innovative instrument' (2006) 145 International Labour Review 135, and John Issac Blanck Jr, 'Reflections on the negotiation of the Maritime Labour Convention 2006 at the International Labour Organization' (2006) 31 Tulane Maritime Law Journal 35.

under two legal bases provided in the Treaty on the Functioning of the European Union (TFEU); Article 155 for the implementation of the social partners' agreement, covering Titles 1 to 4 of the MLC, and Article 100(2) covering Title 5 of the MLC on enforcement.

EU AND MEMBER STATE COMPETENCES IN THE AREAS COVERED BY THE MLC

1.4 Participation of the EU in an agreement is warranted in certain situations, namely, when competence is exclusive, when competence is shared if the EU has already exercised competence, and when the agreement covers areas that partly fall within the EU's exclusive competence. When competence is exclusive, the EU concludes the agreement alone. In the latter cases, both the EU and its Member States would most likely ratify the agreement, resulting in a mixed agreement. As regards the MLC in particular, the EU's exclusive competence is limited to the coordination of social security schemes,[2] while the bulk of the Convention's provisions fall under shared competences in the field of social policy.[3]

1.5 The coordination of social security schemes provides a legal framework[4] to be observed by all national authorities, social security institutions, courts and tribunals when applying national laws, which was devised to ensure that national social security systems are not an obstacle to the freedom of movement of workers within the EU. It is not a replacement of national laws, nor does it aim to harmonize national social security laws. It merely ensures that EU nationals that reside and/or are employed in an EU country other than their own do not lose the social security rights that they would have had if they had stayed in one country. The coordination as such is based on the principle that persons moving within the EU are entitled to social security but are subject to the social security scheme of only one Member State. Recently this protection has been extended to cover non-EU nationals legally residing in an EU country.[5]

1.6 Since social security protection under this legislation covers all employed EU nationals, as well as nationals of some non-EU countries, it also covers seafarers. Seafarers' social security protection is addressed in the MLC under Title 4.[6] It is on this basis and to this extent that the MLC comes under exclusive EU competence, which thereby necessitates EU participation in the agreement.

1.7 For the remainder of the MLC provisions, the EU and its Member States have shared competence, as the Convention deals with social rights that are listed in Article 153 TFEU. In principle, in a field of joint competence, Member States are free to

2. TFEU, Article 48.
3. TFEU, Title X and specifically Article 153.
4. Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L166/1, as last amended by Regulation (EU) No 465/2012 [2012] OJ L149/4 and Implementing Regulation (EC) No 987/2009, [2009] OJ L284/1.
5. Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality [2010] OJ L344/1.
6. MLC, Title 4, Regulation 4.5.

exercise their competence insofar as the EU has not already exercised its competence, although there are notable exceptions to that rule. In accordance with the doctrine of implied external powers,[7] which was first established by the Court of Justice of the European Union (CJEU) and is currently codified in Article 3(2) TFEU, even where the Treaties provide for shared competences, implied exclusive external powers may still be conferred in cases where common rules have been adopted in pursuit of a common policy that could be hindered by individual external actions taken by Member States. This, for instance, has applied in the fields of transport and maritime safety. However, despite the obvious relevance and proclaimed importance of the MLC for transport, maritime safety and the Integrated Maritime [transport] policy in particular, its substantive provisions do not relate to that aspect of EU policy; conversely, the MLC indisputably falls under the provisions of the TFEU on social policy, where no such conferral of implied exclusive powers has taken place.

1.8 Even though certain aspects of maritime labour have been regulated at EU level, it has predominantly been on a different legal basis, either, for instance, under the Treaty provisions on the freedom of movement and services,[8] or under Article 100(2) TFEU on air and sea transport.[9] This is not surprising since action taken by the EU in the social field has more often than not been integrally linked to common market objectives[10]; that is to say that social legislation of any form would be enacted on the basis of it being necessary in the exercise of exclusive competences or common objectives in the economic, commercial or competition areas. This is especially evident in the early decades of the EU, before social objectives became a priority for the Union. But even in the last couple of decades, despite the ever growing importance of social considerations in EU policy making, Member States have strived to retain primary decision making power over what is deemed a politically sensitive issue, particularly in the maritime sector where, notably, social legislation at EU level has also - in its majority - consistently excluded the maritime sector[11] due to difficulties in reaching agreement and lobbying pressures.

1.9 EU legislation adopted on the basis of social policy provisions that addresses or includes workers on seagoing vessels, either coincides with or is based on ILO standards and conventions,[12] although much the same as the ILO rules, these measures prescribe solely minimum standards. In accordance with the AETR-ERTA case law,

7. The doctrine of implied external powers or 'AETR principle' was first established by the court in AETR-ERTA, Case 22/70 *Commission v Council (AETR-ERTA)* [1971] ECR 263.

8. See, for example, Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications [2005] OJ L255/22.

9. See, for example, Directive 2001/25/EC of the European Parliament and of the Council of 4 April 2001 on the minimum level of training of seafarers [2001] OJ L136/17.

10. K Lorcher, 'Social Competences' in N Bruun, K Lorcher, and I Schomann (eds), *The Lisbon Treaty and Social Europe* (Oxford: Hart Publishing 2012), 166, 182.

11. Maritime exclusions include the 'insolvencies directive', Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer [2008] OJ L283/36, and the 'collective redundancies directive', Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies [1998] OJ L225/16.

12. See, for example, Council Directive 1999/63/EC of 21 June 1999 concerning the Agreement on the organization of working time of seafarers concluded by the European Community Shipowners' Association (ECSA) and the Federation of Transport Workers' Unions in the European Union (FST) [1999] OJ L167/33, Annex: European Agreement on the organization of working time of seafarers. This Directive was adopted on the basis of Article 155 TFEU.

it is the scope of the measure that determines the extent of the duty of abstention,[13] and in that sense minimum standards do not suffice for the conferral of implied exclusive external powers.[14] The CJEU has established, however, that the existence of EU measures covering the subject matter of an international agreement, even when there is no contradiction that could affect common rules or alter their scope, is at least sufficient to limit Member States' competence to the extent that the EU has not exercised its competence.[15] The MLC covers a broad range of issues on which the EU has already legislated in the form of minimum standards; these include but are not limited to the directive implementing the social partners' agreement on seafarers' working times,[16] which in large measure reflects the ILO convention on *Seafarers' Hours of Work and the Manning of Ships, 1996 (No. 180)*, as well as other legislative measures dealing with occupational health and safety[17] and medical care on board ships.[18] It follows that any external action taken by Member States that could commit them to obligations relating to the subject matter of those measures is subject to the duty of loyal cooperation.

The duty of loyal cooperation

1.10 The duty of loyal cooperation, now codified in Articles 4(3) and 13(2) of the Treaty on European Union (TEU), imposes an obligation on both Member States and EU institutions, horizontally and vertically,[19] to take actions to facilitate the attainment of EU objectives and to abstain from taking any action that would jeopardize the fulfilment of those objectives. This obligation guides all external action[20] and is

13. See Case 22/70 *Commission v Council (AETR-ERTA)* [1971] ECR 263, paras 28-29, 'Although it is true that Articles 74 and 75 do not expressly confer on the Community authority to enter into international agreements, nevertheless the bringing into force, on 25 March 1969, of Regulation No 543/69 of the Council on the harmonization of certain social legislation relating to road transport […] necessarily vested in the Community power to enter into any agreements with third countries relating to the subject-matter governed by that Regulation. This grant of power is moreover expressly recognized by Article 3 of the said Regulation which prescribes that: "The Community shall enter into any negotiations with third countries which may prove necessary for the purpose of implementing this Regulation".'

14. P Eeckhout, *EU External Relations Law* (Oxford University Press 2012), 153.

15. See Opinion 2/91 of 19 March 1993 on Convention No. 170 of the International Labour Organization concerning safety in the use of chemicals at work [1993] ECR I-1061, paras 25, 26, 28 and 39. See also Case C-467/98 *Commission v Denmark (Open Skies)* [2002] ECR I-9519, para 82.

16. Council Directive 1999/63/EC of 21 June 1999 concerning the Agreement on the organization of working time of seafarers concluded by the European Community Shipowners' Association (ECSA) and the Federation of Transport Workers' Unions in the European Union (FST) [1999] OJ L167/33. See also Directive 1999/95/EC of the European Parliament and of the Council of 13 December 1999 concerning the enforcement of provisions in respect of seafarers' hours of work on board ships calling at Community ports [1999] OJ L14/29.

17. Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OSH 'Framework Directive') [1989] OJ L183/1 as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 [2003] OJ L284/1, Directive 2007/30/EC of the European Parliament and of the Council of 20 June 2007, [2007] OJ L165/21 and Regulation (EC) No 1137/2008 of the European Parliament and of the Council of 22 October 2008, [2008] OJ L311/1.

18. Council Directive 92/29/EEC of 31 March 1992 on the minimum safety and health requirements for improved medical treatment on board vessels [1992] OJ L113/19.

19. On the duty of cooperation see, for example, Case 204/86 *Greece v Council* [1988] ECR I-5354, para 16, and Case C-65/93 *Parliament v Council* [1995] ECR I-660, para 23.

20. See Opinion 2/91, para 36. See also Ruling 1/78 of 14 November 1978 on the draft *Convention of the International Atomic Energy Agency on the Physical Protection of Nuclear Materials*, Facilities and Transports

particularly relevant in the MLC context, as this is an agreement that covers both EU and Member State competences in its provisions, thus demonstrating the importance of coordination between the actors at the negotiation, conclusion and implementation stages.

1.11 The CJEU's jurisprudence on the duty of cooperation is especially interesting in that it suggests that the treaty making powers of Member States are actually restricted, even in areas of shared competence, to actions that do not impede EU policy or common strategy, even if that policy has not been yet translated into either internal legislative measures or an international agreement.[21] That is to say, that even in areas of joint competence where no EU measures exist, if there are strategic objectives or the intention to act at EU level, Member States are prohibited from taking unilateral external action, almost identically to the case of exclusive EU competences.[22] The CJEU has, furthermore, linked the duty of cooperation with the principle of uniform external representation[23] and, more recently, with the obligation to maintain consistency between the actions of the EU and its international representation.[24]

EU MEMBER STATES ACTING JOINTLY IN THE INTEREST OF THE UNION

1.12 The EU is not and cannot, for the time being, become a full participating member of the ILO, as the ILO constitution is only open for States. This is a significant hurdle when it comes to negotiating and concluding agreements over which the EU has competence. The CJEU has found that, in such situations, EU competence may be exercised through the Member States acting jointly in the EU's interest[25] and that such joint action is to be guided by the duty of loyal cooperation.

1.13 To overcome the practical difficulties of EU participation in the ILO, a mechanism has been set up to allow EU presence as an observer.[26] In combination with the internal consultation processes between the EU institutions and its Member States, this formula ensures coordinated negotiations of EU Member States that coincide with EU objectives, thus ensuring uniform external representation, consistency and

(EAEC Case) [1978] ECR I-2151, para 34; Opinion 1/94 of 15 November 1994 on the competence of the Community to conclude international agreements concerning services and the protection of intellectual property [1994] ECR I-5267, para 108; and, Joined Cases 3, 4 and 6/76 *Cornelis Kramer and others* [1976] ECR 1279, paras 42-45.

21. See Case 804/79 *Commission* v *United Kingdom* [1981] ECR I-1045, para 28, 'Member States are subject to special duties of action and abstention in a situation in which the Commission has submitted to the Council proposals which, although they have not been adopted by the Council, represent the point of departure for concerted Community action'. See also the 'inland waterways cases', Case C-266/03 *Commission v Luxemburg* [2005] ECR I-4805, para 60, and Case C-433/03 *Commission v Germany* [2005] ECR I-6985, para 66.

22. P Eeckhout, *EU External Relations Law* (Oxford University Press 2012), 253.

23. See Opinion 2/91, para 36; Opinion 1/94, para 106; and, Opinion 2/00 of 6 December 2001 on the Cartagena Protocol on Biosafety [2001] ECR I-9713, para 18.

24. See Opinion 2/91, paras 36-38. See also Article 21(3) TEU referring to 'consistency between external action and EU policies'.

25. See Opinion 2/91, para 5.

26. See Memorandum of Understanding concerning the establishment of a strategic partnership between the ILO and the Commission of the European Communities in the field of development of 16 July 2004.

loyal cooperation in the negotiation of agreements, including in the MLC. This however does not solve the problem of the EU not being able to become a Contracting Party to the MLC, or to any ILO convention for that matter.

1.14 When the EU cannot ratify an agreement itself, a practice has developed whereby a Council decision, or sometimes a regulation,[27] expressly authorizes Member States to ratify an agreement for the parts falling within its competence and in the interest of the EU. This has also been the case with the MLC, which was ratified by Member States 'in the interests of the Community'[28] and 'for the parts falling under Community competence'[29] pursuant to Council Decision 2007/431/EC.

1.15 A Council decision is a Union act creating an obligation for those to whom it is addressed to perform a specific action. In the case of Decision 2007/431/EC, it creates a binding obligation for Member States to ratify the MLC. Against this background, it is necessary to first take a closer look at the criteria that determine the existence of such an obligation.

1.16 According to the CJEU, an obligation to ratify exists – and thus can be reflected in a binding decision – when there is a large measure of EU competence on the subject matter of the agreement in point and/or when the subject matter is in large measure covered by EU law.[30] In that respect, the MLC does not quite meet these criteria; as discussed earlier in this chapter, competences in the social sphere are shared and existing relevant EU legislation comprises merely minimum standards that are not affected or altered by the MLC provisions. Furthermore, a vast majority of these standards include seafarers but are not addressed solely to this category of workers and are adopted on a legal basis other than Title X TFEU on social policy. As such, although some measure of competence and scope of legislation does exist, it is not a sufficient basis to require ratification. Put simply, if Member States were left free to decide whether or not to ratify, this would not have implications, as far as EU law is concerned, for the legislation already in place within the EU.

1.17 The existence of exclusive competence over the coordination of social security schemes is arguably the only basis for the EU to become involved to the extent as to create an obligation for its Member States to ratify the MLC. Nonetheless, having Member States ratify the MLC just because the EU cannot ratify it by itself could not on its own be enough to justify an obligation. As discussed later in this chapter, EU Member States anyway cannot bind the Union under international law – unless it is a case of succession,[31] which it is not - and as such it is doubtful that the fact that the EU cannot ratify constitutes reason enough to compel Member States to do so.

27. The use of regulations for this purpose has been abandoned but see, for example, Council Regulation (EEC) No 2829/77 of 12 December 1977 on the bringing into force of the European Agreement concerning the work of crews of vehicles engaged in international road transport (AETR) [1977] OJ L334/11, instructing Member States to ratify the Agreement in the interest and on the behalf of the Community.

28. Council Decision 2007/431/EC of 7 June 2007 authorizing Member States to ratify, in the interests of the European Community, the Maritime Labour Convention, 2006, of the International Labour Organization [2007] OJ L161/63, Preamble, para 8.

29. *Ibid.*, Article 1.

30. Case C-13/00 *Commission v Ireland* [2002] ECR I-2943, paras 16-17.

31. See *International Fruit Company v Produktschap Voor Groenden en Fruit*, Joined Cases 21-24/72, [1972] ECR 1219, paras 14-18. The EU can replace Member States as the bearer of rights and obligations even if the agreement has not been formally concluded by the Union if a full transfer of powers previously exercised by Member States has taken place in an area of exclusive competence such as the common commercial policy, fisheries or pursuant to the AETR-ERTA principle.

1.18 An obligation to ratify may be justified when the provisions under exclusive competence and those of the rest of the Convention cannot be clearly separated for the purpose of implementation.[32] Such an example is that of the *International Convention on Civil Liability for Bunker Oil Pollution Damage 2001*, adopted under the auspices of the IMO. Due to the feeble basis of the obligation to ratify *per se*, the relevant Council Decision expressed the obligation in more flexible terms by stipulating a target date by which EU Member States should, if possible, ratify.[33]

1.19 Coming back to the MLC, as the coordination of social security schemes is actually a quite distinguishable and strictly defined competence, the difficulty in separating the part of the Convention under exclusive EU competence from the rest of the Convention could possibly be based on the EU's intention and expectation to take an active role in implementing the MLC in its entirety, by in fact implementing the relevant social partners' agreement.[34] The agreement of the social partners on the MLC was concluded shortly after Council Decision 2007/431/EC was published, but negotiations had already begun in 2006. As a result, a similar formulation has also been used for the MLC by expressing a preference for ratification by all Member States before 31 December 2010.[35]

Authorization to ratify 'in the interest of the Union' and 'for the parts falling under Union competence': Status in the EU legal order

1.20 Ratification of an agreement by Member States 'in the interest of the Union' does not bind the Union vis-à-vis third States under the substantive provisions of that agreement, as ratification by the Union would[36]; it is the Member States alone, as sovereign States, that enter into these international commitments. On the other hand, the duty of cooperation that characterizes their role as EU Member States creates a twofold responsibility; first, towards third States as regards the agreement entered into, and secondly, towards the EU, whose interests they must safeguard and whose competence they ought to respect in the performance of their obligations under that agreement,[37] which, for the purposes of EU law, has a comparable effect with that of the conclusion of a mixed agreement.[38]

1.21 This does not in any way alter the obligations of EU Member States towards third parties, but does in essence deprive EU Member States of rights they would otherwise have, had they entered into the agreement solely as sovereign States.[39]

32. H Ringbom, *The EU Maritime Safety Policy and International Law* (Leiden: Martinus Nijhoff Publishers 2012), 95-96.

33. Council Decision 2002/762/EC of 19 September 2002 authorizing the Member States, in the interest of the Community, to sign, ratify or accede to the *International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (the Bunkers Convention)* [2002] OJ L256/7, Article 3(2).

34. The social partners' agreement and the EU's implementing legislation are discussed in more detail below.

35. Council Decision 2007/431/EC, Article 2.

36. See A Rosas, 'The Status in EU law of International Agreements concluded by EU Member States' (2011) 34(5) Fordham International Law Review 1304, 1333.

37. For a detailed discussion on the role of EU Member States acting on behalf of the EU see M Cremona, 'Member States Agreements as Union Law' in E Cannizzaro, P Palchetti, R A Wessel (eds.), *International Law as Law of the European Union* (Leiden: Martinus Nijhoff Publishers 2012).

38. H Ringbom, *The EU Maritime Safety Policy and International Law* (Leiden: Martinus Nijhoff Publishers 2008), 137.

39. See B de Witte, 'The emergence of a European System of Public International Law: the EU and its Member States as strange subjects' in J Wouters, A Nollkaemper, and E de Wet (eds), *The Europeanisation of International Law: The Status of International Law in the EU and its Member States (The Hague: TMC Asser Press, 2008)*.

For instance, in *Commission v Greece*,[40] the CJEU found that even though the EU is not bound by the *International Convention for the Safety of Life at Sea 1974 (SOLAS)* – in which case any new international rule would not have any binding effect on the EU – EU Member States are prohibited from unilaterally proposing an amendment, or agreeing to one without previously consulting with EU institutions. According to the Court, 'The mere fact that the Community is not a member of an international organization in no way authorizes a Member State, acting individually in the context of its participation in an international organization to assume obligations likely to affect Community rules promulgated for the attainment of the objectives of the Treaty'.[41]

1.22 The CJEU based its reasoning on the *AETR-ERTA* judgment whereby 'to the extent to which Community rules are promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope'.[42] Even if the international rules concerned do not bind the EU, they do bind Member States and, according to the Court, any unilateral action that could lead to the adoption of an international rule that could potentially interfere or conflict with Member States' obligations under EU law is an infringement of the duty of cooperation.[43] As concerns the MLC in particular, this state of affairs effectively limits the rights of EU Member States as reflected in Article XV of the MLC, whereby any government of a Contracting Party to the MLC may make a proposal for an amendment to the Code, as long as such a proposal is supported by at least five other governments.[44] EU Member States cannot initiate or support an amendment proposal individually without obtaining assurances that such action is not contrary to EU law, policies and objectives.

1.23 From this it can be contended that, except for where there is no EU competence at all, or where there is no intention to exercise competence, solely by virtue of their Membership, EU Member States are bound under the duty of cooperation to act externally in the interest of the Union at practically all times and in all circumstances, regardless of any explicit authorization to that effect in a secondary legislative act. It thus stands to reason to assume that the purpose of the phrase 'in the interest of the Union' contained in the acts authorizing Member States to ratify an agreement, other than it being a formal reiteration and reminder of a Treaty obligation, is also meant to indicate the intention of the EU to consider that agreement a part of its legal order, at the very least for the part that falls within its competence.

1.24 Since an agreement ratified in the interest of the Union is considered to have the same effect as a mixed agreement within the EU legal order, then this would generally mean that the agreement would rank in between primary and secondary law. The authorization to ratify an agreement 'for the parts falling under Union competence' on the other hand, would appear to imply that only the parts of a

40. See Case C-45/07 *Commission v Greece* [2009] ECR I-701.
41. *Ibid.*, para 30.
42. Case 22/70 *Commission v Council (AETR-ERTA)* [1971] ECR 263, para 22, quoted in Case C-45/07 *Commission v Greece*, para 17.
43. For detailed commentary on the case see M Cremona, 'Extending the reach of the AETR principle: Comment on Commission v Greece (C45/07)' (2009) European Law Review, 754-768.
44. MLC, Article XV(2).

mixed agreement that fall under exclusive competence are an integral part of EU law. From a public international law perspective this makes little sense, as an agreement is generally binding in its entirety unless it provides otherwise. The division of competence declared in the context of mixed agreements has a purely internal effect and practical function, for instance, when it comes to voting rights and so on in the organization concerned and does not limit the obligations and responsibilities of Contracting Parties towards third States. The difference would be that the EU has assumed no obligations under international law in the case of an agreement ratified in its interest by Member States. However, such agreements, including the MLC, would reasonably have to rank somewhere in the EU legal order pursuant to the authorization to ratify it in the Union's interest.

1.25 In this context, it is interesting to examine the distinct differences in the status in the EU legal order of agreements ratified under this formula and those ratified pursuant to a recommendation,[45] in which contrary to a binding decision or regulation, there is no obligation to ratify or reference to ratification *in* the Union's interest, but only to the fact that it would be *to* the Union's interest if all Member States ratified the recommended agreement(s).[46]

1.26 The choice to encourage ratification or to authorize it is dependent on whether or not exclusive competence already exists at the time of the act or is assumed later. In this respect, a good example would be the IMO conventions on maritime safety, which generally predate the EU rules and on which EU rules are based or built upon. The ratification of the relevant IMO conventions was encouraged early on in a recommendation, but exclusive competence in the field of maritime safety was subsequently assumed on account of the broad eventual coverage of maritime safety issues in EU legislation. The questions on the status of IMO conventions in the EU are most pertinently reflected in the infamous *Intertanko* case,[47] in which, as one commentator very succinctly summarizes, the Court found that 'the legality of EU measures can only be judged against its own legal framework; that is, against norms that have somehow been incepted in the corpus of EU law'.[48] Seeing as the *International Convention for the Prevention of Pollution from Ships 1973, as modified by the Protocol of 1978 (MARPOL)* did not bind the EU, the validity of the contested EU Directive did not depend on its compatibility with it. It is beyond the scope of this chapter to go further into the questions the judgment gives rise to; suffice it to say that, for the purposes of the MLC discussion, it appears that the *Intertanko* case would have likely gone in a different direction if MARPOL had been ratified in the interest of the EU at a point in time when exclusive competences had been transferred.

1.27 For example, in the *Libor Cipra* case, the CJEU concluded, *inter alia*, that on the basis of Council Regulation (EEC) No 2829/77, which brought the AETR Agreement into force on behalf and in the interest of the Community, 'it must be

45. See for example Council Recommendation 78/584/EEC of 26 June 1978 on the ratification of Conventions on safety in shipping [1978] OJ L194/17.

46. See for example Council Recommendation 79/487/EEC of 15 May 1979 on the ratification of the International Convention for Safe Containers (CSC) [1979] OJ L125/18.

47. Case C-308/06 *International Association of Independent Tanker Owners & Others* [2007] ECR I-4057.

48. J W Van Rossem, 'Interaction between EU law and International Law in light of Intertanko and Kadi: The dilemma of norms binding the Member States but not the Union' (2009) 40 Netherlands Yearbook of International Law 183, 184.

held that the AETR Agreement forms part of Community law and that the Court has jurisdiction to interpret it'.[49] The reasoning that led to this conclusion differs from the MLC circumstances on the basis of the legislative act being a regulation, as well as on account of the content of the regulation which clearly referred to the AETR Agreement and its application under certain conditions instead of the regulation. Nevertheless, the fact that the Agreement was ratified 'in the interest of the Community' was one of the deciding factors considered by the Court.

1.28 In the case of *Commission v Ireland*,[50] the CJEU found Ireland to have failed to fulfil the obligation to ratify the *Berne Convention for the Protection of Literary and Artistic Works (Paris Act of 24 July 1971) (Berne Convention)*; an obligation substantially different in nature than the one that follows from an authorization to ratify an agreement, as it stemmed from the Agreement on the European Economic Area (EEA Agreement), which binds both the EU and the Member States.[51] The EEA Agreement created an obligation for all Contracting Parties to it, including the EU, to ratify the Berne Convention and to comply in their internal legislation with its substantive provisions,[52] although the EU was faced with similar restrictions, namely, the Convention only allowed States to become parties to it. However, EU legislation on intellectual property and copyright makes clear reference to the intention to implement the Berne Convention and an expectation that all Member States will respect its provisions.[53] Additionally, in *Commission v. Ireland*, the CJEU also noted that since 'The Berne Convention creates rights and obligations in areas covered by Community law, there is a Community interest in ensuring that all Contracting Parties to the EEA Agreement adhere to that Convention'.[54]

1.29 A further consideration would be the CJEU's jurisprudence on the principles of implementation and consistent interpretation. In accordance with the principle of implementation, the legality of an EU act may be reviewed in light of international rules not binding the EU when the Union measure in question intends to implement those international rules. The principle of consistent interpretation allows the judicial review of an EU measure against international rules that lack direct effect if those international rules may be violated as a result of compliance with EU law. The principle of implementation was first laid down in the context of the GATT rules, which the Court has established bind the EU but lack direct effect – in this case an EU act ought to have made explicit reference to the provisions it intends to implement in order for the CJEU to have the jurisdiction to review it.[55]

49. Case C-439/01 *Libor Cipra and Vlastimil Kvasnicka v Bezirkshauptmannsch aft Mistelbach* [2003] ECR I-745 para 24.

50. Case C-13/00 *Commission v Ireland* [2002] ECR I-2943.

51. EEA Agreement (1993), Protocol 28, Article 5.

52. *Ibid.*, Article 5(3).

53. See for example Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L195/16; Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art [2001] OJ L272/32; Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society [2001] OJ L167/10; and, Council Directive 92/100/EEC of November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [1992] OJ L346/61.

54. *Supra* n 50, para 19.

55. Case C-149/96 *Portugal v Council* [1999] ECR I-8395, para 49. See also Case C-69/89 *Nakajima v Council* [1991] ECR I-2069, para 31, and Case 70/87 *Fediol v Commission* [1989] ECR I-781, paras 19-22.

The principle of consistent interpretation, however, has been relied upon by the Court even for the interpretation of EU Treaty provisions on equal pay and non-discrimination in light of ILO agreements whose conclusion was not prompted by EU authorization[56] and that had no binding effect. Nonetheless, it may well be that this response has more to do with the importance of equality as a fundamental principle of the EU and the fact that EU legislation in this field has been profoundly influenced by ILO standards.[57]

INTERIM CONCLUSIONS

1.30 In sum, the CJEU has not answered the question on the exact legal effects of a Council decision to authorize ratification in the interest of the Union. In the *Commune de Mesquer* case,[58] the issue was briefly raised but readily dismissed, as it was not pertinent to the merits of the case. From the Court's case law, however, it may be discerned with some certainty that first, Member States are under a Union obligation to adhere to international agreements concluded by Member States in the Union's interest, and second, that such agreements have a status in the EU legal order, although they would most probably have a reduced effect of primacy over secondary legislation due to the EU not having committed to these agreements under international law.

1.31 Against this background, some preliminary conclusions could be drawn as to how the CJEU would react in the theoretical situation of it being faced with a case related to the MLC. It appears that the MLC as a whole would have to be taken into account insofar as it has been concluded in the Union's interest, although the Court would presumably have leeway to avoid difficult conflicts in view of it not having been formally concluded by the Union. As regards the question of direct effect and the right of individuals to invoke MLC provisions as grounds to challenge the validity of EU legislation, the MLC at first glance would not pass the test of its provisions being sufficiently precise and unconditional, although this in principle would not make an agreement any less binding if it had been concluded by the Union. The element to be borne in mind here is that even though the MLC requires additional measures for its implementation, it does principally intend to confer social rights to individuals. As a result, parallels should be drawn with the EU Charter of Fundamental Rights (EUCFR).

1.32 The EUCFR is an amalgamation of the social and economic rights that constitute the general principles of EU law and the fundamental rights reflected in the *European Convention on Human Rights and Fundamental Freedoms (ECHR)*. The Charter is a binding set of principles devised to protect individuals against national and European acts. It is a free-standing instrument that derives its authority from the

56. Case 43/75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [1976] ECR I-455, para 20, and Case 155/80 *Summary proceedings against Sergius Oebel* [1981] ECR I-1993, paras 12-13.

57. E C Landau and Y Beigbeder, *From ILO Standards to EU Law: The Case of Equality between Men and Women at Work* (Leiden: Martinus Nijhoff Publishers 2008), 247.

58. Case C-188/07 *Commune de Mesquer v Total France* [2008] ECR I–4501, para 86.

TEU,[59] and with which the MLC happens to closely coincide as regards the rights it aims to protect. Contrary to the uncertain effect of the MLC in the EU legal order, the EUCFR has the same legal value as the TEU and the TFEU and thus comprises primary EU law with direct effect. It is thus reasonable to expect that if the MLC is found not to have direct effect or if the CJEU is not able to interpret the MLC, the EUCFR would arguably be the alternative route for the Court to reach a ruling that would in effect uphold MLC rights. This is further supported by the explicit reference to the EUCFR in Council Directive 2009/13/EC that implements the social partners' agreement on the MLC, which is discussed in the next section.[60]

1.33 In practice, there is little likelihood that the CJEU would be called upon to decide on a question of compatibility of an EU measure with the MLC, since the usual problem is that of EU measures being stricter than those prescribed in an international agreement. The MLC is to be implemented by Contracting Parties by bringing into force national legislation that will comply with the MLC as to the result to be achieved,[61] much like an EU directive, while it does not preclude measures that would be more favourable for seafarers.[62] As discussed in the next section, the MLC is transposed into EU law by means of a directive that is meant to implement the social partners' agreement, which reproduces most of the MLC provisions unchanged. At the same time, the provisions of the EU's implementing directive are to apply without prejudice to and without prohibiting the introduction of more detailed provisions or provisions granting a higher level of protection, whether these are found in international agreements, EU or national legislation.[63]

TRANSPOSITION INTO EU LAW: COUNCIL DIRECTIVE 2009/13/EC IMPLEMENTING THE SOCIAL PARTNERS' AGREEMENT (TITLES 1 TO 4 OF THE MLC[64])

1.34 As mentioned earlier in this chapter, some EU legislation regarding seafarers' working conditions and working times already existed at the time that the MLC was signed. As a result of the EU's resolve to give effect to the MLC standards in the EU, it promptly took steps towards aligning its existing relevant measures with the MLC. As the MLC relates to Title X TFEU on social policy, in which the values of representative democracy and participation in the social field are given a prominent

59. TEU, Article 6(1).

60. Council Directive 2009/13/EC of 16 February 2009 implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention, 2006, and amending Directive 1999/63/EC [2009] OJ L124/30, Preamble, para 18.

61. See MLC, Article VI(3) and (4) on 'substantially equivalent measures'.

62. MLC, Preamble, 'Recalling paragraph 8 of Article 19 of the Constitution of the International Labour Organization which provides that in no case shall the adoption of any Convention or Recommendation by the Conference or the ratification of any Convention by any Member be deemed to affect any law, award, custom or agreement which ensures more favourable conditions to the workers concerned than those provided for in the Convention or Recommendation'.

63. Council Directive 2009/13/EC, Preamble, paras 13, 16 and Article 3.

64. Title 1 on minimum requirements for seafarers to work on board a ship; Title 2 on conditions of employment; Title 3 on accommodation, recreational facilities, food and catering; Title 4 on health protection, medical care, welfare and social security protection.

position and priority,[65] the European Commission is under an obligation to consult with representatives of management and labour (the social partners) prior to submitting a proposal for legislation.[66]

1.35 Against this background, consultations were already initiated in September 2006 with the social partners, in this case, the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF). This process may, under Article 155(1) TFEU, lead to an agreement concluded between the social partners, which was indeed the result in the case in point, i.e. the ECSA-ETF Agreement on the MLC concluded in May 2008.[67] The Agreement covers Titles 1 to 4 of the MLC and reproduces almost verbatim the MLC Standards and Regulations, without prejudice to more favourable EU legislation and to the *International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 (STCW)*.[68] It excludes the social security provisions, as these are in the exclusive competence of the EU and generally do not relate to obligations that could be fulfilled by the parties to this specific Agreement, as the MLC creates an obligation for governments to enact the necessary legislation to provide for social security coverage of seafarers. The Agreement also excludes parts of Title 5 of the MLC on enforcement and monitoring, which spell out the responsibilities of port, flag and labour-supplying States.[69] Again, this is a public law and public administration issue in the sense that employers and seafarers are not in a position to establish the public authorities or set up the administrative structures for controls and inspections that they themselves will be subject to.

1.36 As the Agreement covers matters listed in Article 153 TFEU for which the EU has a role of supporting and complementing the activities of Member States, the parties to the Agreement requested that the Agreement be implemented at Union level in accordance with Article 155(2) TFEU. The implementing measure selected should adhere to the principles of subsidiarity and proportionality, as per Article 5 TEU. The principle of subsidiarity, codified in Article 5(3) TEU, governs the conditions under which the EU is authorized to intervene by legislating in a field of shared competence. Such intervention is justified by the TEU in cases where the objectives of an action cannot satisfactorily be achieved by the Member States 'due to the scale and effects of the proposed action'.[70] The principle of subsidiarity was formally recognized in Community law by the Maastricht Treaty and it originally has a pre-emptive function in that EU institutions should ensure that the conditions of Article 5(3) are met prior to proposing a legislative act, which is why it has also been generally perceived as a political principle.[71] It also has a judicial function, as the CJEU may apply

65. See B Veneziani, 'The role of the social partners in the Lisbon Treaty' in N Bruun, K Lorcher, and I Schomann (eds); *The Lisbon Treaty and Social Europe* (Oxford: Hart Publishing 2012), 123-161.
66. TFEU, Article 154(2).
67. Agreement concluded by the ECSA and the ETF on the Maritime Labour Convention 2006.
68. *Ibid*. Final Provisions and Annex A, para 5.
69. The only part of Title 5 that is included in the social partners' agreement are the provisions regarding on board complaint procedures. Title 5 of the MLC on enforcement is discussed in detail in Chapter 8 of this work.
70. TEU, Article 5(3).
71. See G A Berman, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States' (1994) 94 Columbia Law Review, 331.

it to determine whether or not an EU action has 'unnecessarily restricted national autonomy in the exercise of its legislative competences'.[72]

1.37 The principle of proportionality limits the scope of an EU act to what is necessary to achieve the objectives of the Treaties. It is derived from German law, and it first appeared in the CJEU's jurisprudence in 1970.[73] The main premise of the principle is that a public authority may not impose obligations on a citizen except to the extent to which they are strictly necessary in the public interest to attain the purpose of the measure. Since then the proportionality test has developed into a central element of EU law and practice and consists of an examination of whether a measure is first necessary, then whether the form of the measure is suitable, and finally, whether the measure imposes an excessive burden on its recipients.[74] In accordance with this principle, the EU ought to make a careful selection of which form of legislative act is appropriate for implementing the social partners' agreement, and to ensure that the content of that act does not go beyond what is necessary in order to achieve its objectives. The preference was given to a directive which amended the previous directive on working times of seafarers[75] to bring it into line with the MLC as reflected in the social partners' agreement and in which it is reiterated that the principles of subsidiarity and proportionality were observed.[76]

1.38 Council Directive 2009/13/EC is, however, addressed to Member States and not to the parties of the Agreement. This is not surprising as directives only ever address Member States; decisions are the legislative act that can address individuals or private entities. The EU elected to adopt a directive as several of the provisions of the agreement require national legislation to be in place for them to be complied with. Nonetheless, Council Directive 2009/13/EC does allow Member States to 'entrust management and labour [...] with the implementation of this Directive, as long as the Member States take all the necessary steps to ensure that they can at all times guarantee the results imposed by this Directive'.[77]

Enforcement: Proposed Directives on port and flag State responsibilities under Title 5 of the MLC

1.39 As Title 5 of the MLC was left out of the social partners' agreement and implementing Directive, a crucial part of the MLC remained beyond the reach of the EU, namely, enforcement. Member States are anyway bound under the MLC to take the required enforcement action by seeing to it that the necessary flag and port State controls and inspections are carried out. Even so, if the EU wants to ensure that the social partners' agreement, which embodies the MLC obligations, will be complied with to the letter, it needs to be able to ensure enforceability of the Title 5 provisions under its own legal system; that is to say, to have the legal grounds to

72. See R Schtze, 'Subsidiarity after Lisbon: reinforcing the safeguards of federalism?' (2009) 68(3) Cambridge Law Journal 525, 533.
73. Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr* [1970] ECR I-1125.
74. T I Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) 16(2) European Law Journal 158, 165.
75. *Supra* n 16.
76. Council Directive 2009/13/EC, Preamble, para 19.
77. *Ibid.*, Preamble, para 12.

initiate infringement proceedings against Member States that do not fulfil their MLC obligations as regards flag and port State responsibilities.

1.40 It was with this in mind that the European Commission submitted proposals for two directives, one on flag State responsibilities[78] and one on port State responsibilities,[79] to be adopted as acts amending or supplementing the existing Directives on port and flag State control (the Maritime Safety packages),[80] in order for them to be aligned with the MLC. As such, the legal basis for those Directives is not Article 155 TFEU, but the original legal basis of the Directives they aim to amend or supplement, that is Article 100(2) TFEU on air and sea transport. The decision to proceed with the proposal in the first place, however, was only enabled because of the social partners' request to implement the social partners' agreement at EU level.

1.41 At the time of writing this chapter, the Directive on flag State responsibilities is still under discussion and the text of the Directive on port State control has been agreed on. The Directive on port State control is set to amend the recast Directive 2009/16/EC, which already makes reference to the MLC[81] and will newly incorporate, *inter alia*, the maritime labour certificate[82] and the declaration of maritime labour compliance[83] into the documents to be presented at inspections. The Directive also extends the scope of inspections to cover all MLC requirements by expressly authorizing inspectors to report, among others, on working and living conditions on board vessels, and the accuracy of other MLC-required documents such as the labour contract signed by both parties for each seafarer.

1.42 The proposed Directive on flag State responsibilities is meant to complement but not amend Directive 2009/21/EC on compliance with flag State requirements, which refers to procedures under the relevant IMO conventions.[84] This means that it will be a standalone new Directive dealing exclusively with MLC-related flag State responsibilities. The text of the proposal as it stands contains five Articles formulated

78. Proposal for a directive of the European Parliament and of the Council concerning flag State responsibilities for the enforcement of Council Directive 2009/13/EC implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention, 2006, and amending Directive 1999/63/EC, 23 March 2012, COM(2012) 134 final 2012/0065 (COD).

79. Proposal for a directive of the European Parliament and of the Council amending Directive 2009/16/EC on port State control, 23 March 2012, COM(2012) 129 final 2012/0062 (COD).

80. The Maritime Safety packages comprise a series of regulations and directives as amended over the years dealing with flag State requirements, standards for ship inspections, port State controls, traffic monitoring, accident investigation, liability of carriers and insurance, for more information see http://ec.europa.eu/transport/modes/maritime/safety/third_maritime_safety_package_en.htm (accessed 3 June 2013).

81. Directive 2009/16/EC of the European Parliament and the Council of 23 April 2009 on port State control (recast) [2009] OJ L131/57, Preamble, para 5 and Annex IV referring to ILO Standards.

82. The document required under Regulation 5.1.3(3) of the MLC that certifies that the working and living conditions of seafarers on the ship have been inspected and meet the requirements of national laws or regulations or other measures implementing the MLC.

83. The document required under Regulation 5.1.3(4) of the MLC that states the national requirements implementing the Convention for the working and living conditions for seafarers and setting out the measures adopted by the shipowner to ensure compliance with the requirements on the ship or ships concerned.

84. Directive 2009/21/EC of the European Parliament and of the Council of 23 April 2009 on compliance with flag State requirements [2009] OJ L131/132. The Directive provides the conditions for ships to be registered under the flag of a Member State and the obligation for flag States to set up a quality management system and internal evaluation in line with international standards. To this end, IMO standards – in particular the mandatory audit plan of national maritime administrations and the IMO Flag State Code – apply.

in somewhat general terms and dealing most notably with the responsibility of the flag State to monitor compliance with Council Directive 2009/13/EC which implements the social partners' agreement and the credentials of those carrying out such checks. What is most interesting about the proposal is that, contrary to the Directive on port State control, there is no reference in the main text of the Directive on flag state responsibilities to implement or implementing the provisions of the MLC, but only to the obligations under Council Directive 2009/13/EC. The MLC is mentioned in the Preamble as being the context and background of the proposal.[85] Furthermore, while the Directive on port State control makes the presentation of the maritime labour certificate and the declaration of maritime labour compliance mandatory documents for a successful inspection, the flag State is not required to provide these documents under the provisions of the proposed Directive on flag state responsibilities.

1.43 The European Commission, in its explanatory memorandum of the proposal, notes that 'The MLC provisions setting up the duty for the ships to bear a maritime labour certificate and a declaration of maritime labour compliance and certifying that all the 14 MLC matters[86] could not be all transposed into EU law for reason of EU competence and political opportunity. Thus, Directive 2009/13/EC does not encompass the full range of matters covered by the MLC. As a consequence, the obligations of the EU flag States are limited to enforce the provisions of Directive 2009/13/EC'.[87]

1.44 At present, the fact that port State controls are formulated in much more strict and unequivocal terms than the flag State requirements seems to create an imbalance between what is required to be presented at a port inspection, and what is required to be provided by the flag State. Essentially, then, the flag State would likely take measures to comply on account of the port State requirements and not on the basis of the Directive on flag State responsibilities. The issue has not gone unnoticed, as the report of the Committee on Employment and Social Affairs has noted that 'flag State control aspects of the Maritime Labour Convention, 2006 (MLC) should be enshrined on the level of EU law in a more detailed and specific way. EU provisions on flag State control should reflect much more what the MLC specifically and expressly requires to avoid different interpretations by Member States, which could lead to unfair competition and social dumping'.[88] The report goes on to note that 'Article 3 of the Commission proposal refers to 'inspection' but not to 'certification' and there should be a requirement for the establishment of an effective system of certification. While the Commission proposal did not include provisions regarding the maritime labour certificate your rapporteur suggests, within the EU legal competency, to do

85. *Supra* n 78, Preamble.

86. Minimum age of seafarers, medical certification of seafarers, qualifications of seafarers, seafarers' employment agreements, use of any licensed or certified or regulated private recruitment and placement service for seafarers, hours of work or rest, manning levels for the ship, accommodation, on board recreational facilities, food and catering, health and safety and accident prevention, on board medical care, on board complaint procedures and payment of wages.

87. *Supra* n 78, n 8 (proposal).

88. See Report of 13 February 2013 on the proposal for a directive of the European Parliament and of the Council concerning flag State responsibilities for the enforcement of Council Directive 2009/13/EC implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention, 2006, and amending Directive 1999/63/EC (COM(2012)0 Rapporteur: Pervenche Berès 134 – C7-0083/2012 – 2012/0065(COD)) Committee on Employment and Social Affairs.

so since MLC provisions on the maritime labour certificate and the declaration of maritime labour compliance are central to the enforcement of the MLC'.[89]

1.45 As a result, it may be expected that the proposal for this Directive on flag State responsibilities is, by mid-August 2013, far from ready to be adopted, and further discussions are to take place over the summer of 2013, which may result in considerable delays in its adoption and entry into force.

CONCLUSIONS

1.46 This chapter has briefly addressed a number of issues as to the division of competences in the areas covered by the MLC, the question of the status of the MLC in the EU legal order by virtue of it having been ratified in the interest of the EU, as well as the methods by which the MLC is transposed into EU law in accordance with the TEU and TFEU provisions and procedures. At this point a few observations or conclusions can be noted.

1.47 In the first instance, the complex process of the transposition into EU law by incorporating the MLC provisions in directives, as well as the consultation with the social partners and consequent agreement would not have been avoided if the EU had concluded the MLC itself. The alignment of existing EU legislation with the MLC would have still been necessary. This in turn would trigger the application of Article 154 TFEU on consultations with the social partners, which would have likely still led to the conclusion of an agreement of the social partners, implemented in exactly the same manner. The fact that the MLC provisions are spread across a number of secondary legislative acts could potentially present some difficulties when the MLC is amended, which will result in a need to amend the relevant Directives.

1.48 In any case, the EU is successfully incorporating the MLC into EU law, which will ensure that the MLC can be enforced in the EU legal order by providing the necessary grounds to initiate infringement proceedings for non-compliance with or failure to (properly) transpose the relevant Directives. This also goes to show how determined the EU is to give full effect to the MLC, which is considered an invaluable addition to its regulatory and policy framework for maritime transport, and which, in addition, reflects the social values of the EU.

1.49 It is noteworthy that in the Directives and in the social partners' agreement, reference to the MLC and the intention to implement it is repeatedly made; an observation that could serve to strengthen the findings of the first parts of this chapter that the MLC does indeed have a status in EU law that would not allow the CJEU to entirely dismiss the MLC as a basis for reviewing an EU measure.

1.50 It is still early days for the MLC and hence its success remains to be seen. This also goes for the EU and its Member States that are clearly filled with best intentions and optimism as to the benefits that the MLC will bring. It is rather logical to expect that since the EU has a measurable interest in ensuring that the MLC is adhered to in its legal order, it will take all the necessary steps to avoid any derogations of its Member States from its substantive provisions. As regards enforcement of the MLC standards via its Title 5, the EU Member States are arguably going to be the most successful in this respect, if only because of the teeth of the EU.

89. *Ibid.*

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CHAPTER 2

Increased seafarer protection under the Maritime Labour Convention 2006: a Maltese flag perspective

ADRIAN ATTARD & PAUL GONZI*

INTRODUCTION

2.1 The Republic of Malta, a small yet highly developed island State situated in the heart of the Mediterranean Sea, boasts a robust shipping registry for ships, bareboat charters, and mortgages comprising of 45.6 million gross tonnage.[1] This is the product of Malta's strategic location with its natural harbours and rich maritime history and tradition, its considerably solid regulatory backbone and its attractive fiscal regime, which together translate into a successful and reputable flag of choice. Indeed, the Maltese Registry has today grown into the eighth largest flag in the world and the second largest within Europe.

2.2 Maintaining such a standing at an international level has required and continues to demand constant stocktaking to guarantee compliance with international standards from a technical, regulatory and enforcement perspective.[2] To this end, Malta has in recent decades ratified a total of sixty-two International Labour Organization (ILO)[3] conventions, many of which are predominantly relevant to the maritime industry and to the safety of seafarers.[4] The most recent initiative was the ratification of the *Maritime Labour Convention 2006 (MLC)*, the provisions of which are transposed into Maltese Law through the publication of a new Legal Notice 145 of 2013 entitled the Merchant Shipping (Maritime Labour Convention) Rules (2013 Rules).

2.3 The scope of this chapter is to present an overview of the 2013 Rules and to provide an understanding as to their interplay with existing Maltese shipping

* Dr Adrian Attard is a lawyer with Fenech and Fenech Associates, where he specialises in maritime law and marine litigation. Dr Paul Gonzi is also a lawyer with Fenech and Fenech Associates, where he specialises in employment, data protection and I.T. law.

1. Geneva (ILO News) 18.01.2013; http://www.ilo.org/global/standards/maritime-labour-convention/WCMS_149716/lang--en/index.htm (accessed 25 March 2013).

2. Malta has, as at 30 April 2013, ratified over thirty International Maritime Organization (IMO) conventions.

3. The ILO is an international organization comprising 185 Member States which seeks to promote and encourage the global codification of measures and standards for the protection of workers and employees, including seafarers.

4. The *Minimum Age (Sea) Convention, 1920 (No. 7)*; the *Unemployment Indemnity (Shipwreck) Convention, 1920 (No. 8)*; the *Medical Examination of Young Persons (Sea) Convention, 1921 (No. 16)*; the *Seamen's Articles of Agreement Convention, 1926 (No. 22)*; *Officers' Competency Certificates Convention, 1936 (No. 53)*; the *Medical Examination (Seafarers) Convention, 1946 (No. 73)*; the *Certification of Able Seamen Convention, 1946 (No. 74)*; the *Seafarers' Identity Documents Convention, 1958 (No. 108)*; the *Merchant Shipping (Minimum Standards) Convention, 1976* as amended by the *1996 Protocol (No. 147)*; and, the *Seafarers' Hours of Work and the Manning of Ships Convention, 1996 (No. 180)*.

legislation and the influence they shall have on seafarers and shipowners. The authors recognize that the MLC and the 2013 Rules cover a wide array of topics, each with their relevance (including, for instance, manning levels, accommodation, port State control, compliance and enforcement, social security protection, amongst others); however, this chapter shall primarily focus on the new obligation to enter into a Seafarer Employment Agreement (SEA) and the mandatory minimum conditions of employment of seafarers and the standards afforded to them on board vessels.

OVERVIEW OF THE MALTESE SHIPPING LEGISLATIVE FRAMEWORK

2.4 Maritime-specific laws must not be seen in a vacuum. On the contrary, areas of law such as employment and industrial laws,[5] health and safety laws,[6] laws for protection against discrimination[7] and laws implementing fundamental human rights, amongst others, consolidate a multifarious network of laws that have a bearing on any shipping operation. Thus, an understanding of the Maltese shipping industry necessitates a grasp of the intricate assortment of Maltese legislation, European Union (EU) regulation[8] and such other laws which, to some extent or another, have an impact on any shipping operation.

2.5 The Maltese shipping industry is primarily regulated by Act XI of 1973, entitled the 'Merchant Shipping Act' (1973 Act),[9] which is presently divided into ten parts governing vessels registering under the Maltese flag and which, at large, apply to any Maltese ship used in navigation, whether self-propelled or not, including barges, pontoons, floating establishments, installations or structures, oil rigs and other similar vessels and, where applicable, even ships that are still under construction.[10] The provisions of the 1973 Act seek to regulate, *inter alia*, the safety of vessels and their equipment, the prevention of pollution, salvage and wrecks and set parameters for shipowners' liability.[11] They also include several conditions for the engagement and accommodation of masters and seamen on board Malta-registered vessels.

2.6 Since 1973 the Act has been amended over twenty-nine times, generally instigated by Malta's ratification of or accession to international instruments, thus aligning Maltese law to newly adopted international standards. Furthermore, the 1973 Act has also been supplemented by an array of subsidiary legislation pertinent

5. Employment law is largely regulated by Chapter 452 of the Laws of Malta by the Employment and Industrial Relations Act, 2002, and related subsidiary legislation.

6. Chapter 424 of the Laws of Malta entitled Occupational Health and Safety Authority Act 2001 together with subsidiary legislation under this Act regulate health and safety standards at the workplace.

7. The protection of fundamental human rights is enshrined in the Constitution of Malta. Moreover, there are several non-discriminatory provisions in Maltese law such as those found in, the Equality for Men and Women Act, 2003, Chapter 456 of the Laws of Malta.

8. Malta joined the EU on 1 May 2004.

9. Chapter 234 of the Laws of Malta as last amended in 2012.

10. The 1973 Act, Article 2.

11. On the other hand, the limitation of liability for maritime claims is regulated by the Merchant Shipping (Limitation of Liability for Maritime Claims) Regulations of 2003, which were enacted to transpose the provisions of the *Convention on Limitation of Liability for Maritime Claims 1976*, as amended by the Protocol of 1996 thereto.

to the maritime industry, today exceeding fifty legislative instruments enacted by the competent authority[12] under the powers granted by the 1973 Act.[13]

THE MARITIME LABOUR CONVENTION 2006 AND MALTESE LAW

2.7 The ILO has, as of May 2013, adopted a total of 396 instruments comprising of 189 conventions, 5 protocols and 202 recommendations[14]; a good number of which relate primarily to the globalised maritime industry. The MLC was adopted by the ILO General Conference in 2006 to update and consolidate a number of maritime-related ILO instruments.[15] The underlying purpose of the MLC is to set out principles, rights and minimum standards to ascertain respectable conditions of work for seafarers, allowing for some flexibility in the way these are implemented by ILO Member States and aiming towards global harmonization for the enforcement of these minimum standards.[16]

2.8 On 18 January 2013, the Government of Malta deposited the instrument of ratification with the ILO to become the 34th Member State (and the 12th EU Member State) to ratify the MLC. The following month, the Merchant Shipping Directorate, the competent body within Transport Malta, published a Merchant Shipping Notice,[17] whereby it confirmed that pursuant to Malta's ratification of the MLC, the newly-drafted Merchant Shipping (Maritime Labour Convention) Rules will serve to transpose the provisions of the MLC. On 10 May 2013, Legal Notice 145 of 2013 was officially published, and therefore the 2013 Rules became entrenched as subsidiary legislation forming part of the Laws of Malta.[18]

2.9 From an EU Law perspective, reference should also be made to Council Decision 2007/431/EC which authorised EU Member States to ratify the MLC[19] and to Council Directive 2009/13/EC,[20] which entered into force on the same date as the MLC. By

12. The Merchant Shipping Directorate within Transport Malta.

13. These also include detailed regulations on the engagement and accommodation of crew, conditions of employment, provisions and stores, medical examinations and safe manning – in many cases emanating from or reflecting the standards provided for in ILO instruments which Malta has ratified.

14. ILO Website; http://www.ilo.org/dyn/normlex/en/fŒp=1000:12000:0 (accessed 31 May 2013).

15. ILO Website; http://www.ilo.org/global/standards/maritime-labour-convention/lang--en/index.htm (accessed 1 March 2013).

16. *Ibid.*

17. *The Guidelines for the Implementation of the Maritime Labour Convention, 2006* published as Merchant Shipping Notice 105 by Transport Malta, 20 February 2013; hereinafter referred to as 'the Guidelines'.

18. The 2013 Rules entered into force on the 20 August 2013, the same day as the entry into force of the MLC; rule 1(2). Whilst the authors are aware that some amendments to the 2013 Rules are being drafted by Maltese authorities, these were not yet enacted when this Chapter was submitted for publishing. It should also be noted that on 6 September 2013, Legal Notice 262 of 2013 was published, thereby enacting a number of minor amendments to the Rules. The provisions of this latter Legal Notice apply retrospectively from the date of the coming into force of the Rules.

19. [2007] OJ L161/63.

20. OJ L124/30; This Directive implements the agreement concluded in 2008 by representatives of management and labour in the maritime transport sector, the European Community Shipowners' Association (ECSA) and the European Transport Workers' Federation (ETF), on the *Maritime Labour Convention*. This Directive amends Council Directive 1999/63/EC of 21 June 1999 concerning the Agreement on the organisation of working time of seafarers concluded by the European Community Shipowners' Association (ECSA) and the Federation of Transport Workers' Unions in the European Union (FST) [1999] OJ L167/33.

virtue of this Directive, EU Member States have a twelve-month period to enact laws, regulations and administrative provisions necessary to comply with the provisions of the Directive, which do not encompass the entire scope of the MLC but deal primarily with working conditions and health and safety of workers. Reference must also be made to Directive 2013/38/EU[21] of 12 August 2013 amending EU Directive 2009/16/EC on port-state control[22] and to Directive 2009/21/EC on compliance with flag State requirements,[23] which must now be read together with EU Commission proposal for a new Directive concerning the responsibilities of flag States in applying the MLC.[24]

2.10 As mentioned, Malta has already ratified the MLC and has published the 2013 Rules to transpose its provisions. That said, Maltese legislators might also need to examine whether any additional measures may be necessary in terms of the proposed EU legislative instruments.[25] To this end, the 2013 Rules state that they are to be read and construed together with the MLC and Council Directive 2009/13/EC.[26]

APPLICABILITY OF THE 1973 ACT AND OF THE 2013 RULES

2.11 The provisions of the 1973 Act, in particular those relating to engagement of crew, discharge, wages and accommodation and provisions amongst other things contained in Title IV therein apply to all sea-going ships registered under the 1973 Act and to the owners, masters, and crews of such ships. These are subject to certain limitations in respect of war ships,[27] pleasure yachts and fishing boats employed in sea fishing for profit.[28] Exemptions to safety requirements also apply in respect of certain ships.[29] The 1973 Act also seeks to regulate certain foreign ships while they are within any port in Malta subject to certain exceptions for vessels that enter port due to stress

21. [2013] OJ L218/1; Directive 2013/38/EU entered into force on 20 August 2013, the date of entry into force of the MLC. EU Member States must bring into force legislation necessary to comply with this Directive by 21 November 2014.

22. [2009] OJ L131/57.

23. [2009] OJ L131/132.

24. Proposal for a Directive of the European Parliament and of the Council concerning flag State responsibilities for the enforcement of Council Directive 2009/13/EC implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the *Maritime Labour Convention, 2006*, and amending Directive 1999/63/EC, European Commission, COM/2012/134 Final, 2012/0065 (COD).

25. In terms of Article 288 of the Treaty on the Functioning of the European Union, OJ C326/47, (formerly Article 249 TEC) to exercise the EU's competences, the EU institutions may adopt regulations, directives, decisions, recommendations and opinions. Whereas EU Regulations have general application and are binding in their entirety and are directly applicable in all Member States, Directives are binding as to the result to be achieved upon each Member State to which they are addressed, but at the same time leave to the national authorities the choice of form and methods to implement the result to be achieved.

26. The 2013 Rules, rule 2(4).

27. See for instance, Article 103 of the 1973 Act.

28. The 1973 Act, Articles 204-206; for instance, with respect to pleasure yachts there is no obligation to enter into an 'agreement with the crew' between the master and the seafarers engaged on the ship and certain clauses relating to retention of official logs, discharge of seamen, account of wages and deductions of fines due by seafarers are also excluded for pleasure yachts. On the other hand, for fishing boats, certain clauses (including those relating to the 'agreement with the crew' and certificates of discharge) apply only to fishing boats of 25 tonnes and upwards.

29. Article 248 of the 1973 Act sets exemptions including for ships of less than 500 gross tonnage and to ships not propelled by mechanical means.

of weather or for a circumstance that the neither master, owner nor charterer could have prevented or forestalled.[30]

2.12 On the other hand, the provisions of the 2013 Rules apply to all Maltese sea-going ships wherever they are and to all other foreign ships while they are in Maltese ports as determined by the MLC as well as to all seafarers serving onboard such ships.[31] However, they do not apply to fishing vessels, ships of traditional build, small ships used exclusively for coastal navigation,[32] yachts in non-commercial use and warships or naval auxiliaries. The Guidelines issued in February 2013[33] confirm that the MLC (and likewise the 2013 Rules) shall not apply to ships that are trading and/or operating exclusively between ports and facilities within Malta, to offshore units whose primary service is drilling operations for the exploration, exploitation or production of resources beneath the sea bed and are not ordinarily engaged in navigation or international voyages, to fishing vessels or yachts in non-commercial use of any size.[34]

2.13 Therefore, at face value, the provisions of the 1973 Act and of the 2013 Rules appear to apply more or less to the same category of vessels, crew and shipowners. Indeed, the Rules are intended to harmonize the existing laws and to bring together updated standards and conditions for seafarers and, as shall be explained, this is being achieved primarily by revoking a number of subsidiary laws which shall now be harmonized into a consolidated set of rules.

2.14 At the outset however, it is necessary to comment that whilst the 2013 Rules shall solve certain ambiguities resulting from the use of diverging terminology in the different laws, some inconsistencies are likely to persist taking into account that these Rules do not envisage any amendments to the provisions of the 1973 Act as currently in force. It is the authors' opinion that further amendments to the 1973 Act may be necessary in order to eliminate any conflicting terminology and provisions and to avoid the duplication of rules or procedures contained therein. By way of example, while the 2013 Rules establish key definitions, they also provide that any words and expressions used but not defined in the same Rules are to have the same meaning assigned to them in the MLC[35] and not as per the definitions contained in the 1973 Act. In fact, the 2013 Rules do not make any direct reference to the applicability of the definitions contained in the 1973 Act and neither, for that matter, do they propose to amend the said definitions. Therefore, in practice, this may give rise to different interpretations for the same terms (or for words having similar meanings).[36]

30. The 1973 Act, Article 248.
31. The 2013 Rules, rule 3.
32. Small ships are defined under Subsidiary Legislation 499.01.
33. See above n 17.
34. In case of doubt as to the nature of vessels or seafarers, the matter shall, in accordance with the proviso to rule 3, be determined by the Maltese Registrar-General of Shipping and Seamen after consultation with the competent organizations concerned.
35. The 2013 Rules, rule 2.
36. For instance, on the one hand the 1973 Act applies primarily to 'seamen', a term which is broadly defined by this Act as meaning 'every person (except masters, pilots and apprentices) employed or engaged in any capacity on board a ship'. In the past, this definition has given rise to practical difficulties as to its applicability or otherwise, in particular for non-technical crew (such as sales-persons in retail shops or hotel staff engaged on cruise-liners). The 2013 Rules, on the other hand, refer to and define the term 'seafarer' as 'any person who is employed or engaged or works in any capacity on board a ship, to which these rules apply, but excluding persons providing non-scheduled or ancillary services to a ship to assist it in its maritime voyage such as, inter alia, shore-based engineers, bunker crew, pilots, members of the Armed forces of Malta or a member of the Civil Protection Department of Malta'. This definition is however subjected to certain

2.15 The authors of this Chapter contend that whilst the 2013 Rules (and the defined terms contained in the same Rules and the MLC) do not make direct reference to the definitions of the 1973 Act, it is in practice inevitable for interested parties to make reference to such definitions and other provisions contained in the 1973 Act, which arguably continue to apply as the main law under the powers of which the 2013 Rules have been published. To this end, the terms of the 1973 Act may have to be fine-tuned to reflect the definitions specified in the 2013 Rules (and/or in the MLC) so as to achieve supplementary legal and practical certainty.

MATERIAL CHANGES INTRODUCED AS A RESULT OF THE MLC

2.16 Although, as previously explained, Malta is already party to a number of ILO and IMO conventions, the ratification of the MLC means that several Maltese laws had to be replaced, revoked or amended accordingly to reflect the position under the provisions contained in the MLC, and in particular those provisions that are mandatory upon the States Parties.[37]

2.17 To this end, the 2013 Rules[38] revoked:

(1) the Merchant Shipping (Distressed Seamen) Regulations of 1973,[39]
(2) the Merchant Shipping (Provisions and Water) Regulations of 2001,[40]
(3) the Merchant Shipping (Medical Stores) Regulations of 2002,[41]
(4) the Merchant Shipping (Medical Examination) Regulations of 2001,[42]
(5) the Merchant Shipping (Minimum Wage) Regulations of 2002,[43]
(6) the Merchant Shipping (Hours of Work) Regulations of 2002,[44]
(7) the Merchant Shipping (Protection of Seamen) Regulations of 2003,[45]

parameters which are aimed at facilitating its interpretation. In fact, the Guidelines refer to Resolution VII adopted by the International Labour Conference at its 94th (Maritime) Session, Geneva, February 2006, adopted 22 February 2006, to assist in determining if a person engaged on board a ship to which the MLC applies is in fact a 'seafarer'. This definition therefore differs slightly from the definition of the term 'seaman' under the 1973 Act. Indeed, a fine-tooth exercise will reveal several other variances in terms used by the 1973 Act and the 2013 Rules and the MLC, including for instance in relation to the terms 'shipowner' (whereby the 1973 Act does not define the term 'owner' (or shipowner) as opposed to the 2013 Rules which provides that an owner means the owner of the ship or another organization or person such as the manager, or the bareboat charterer, 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 2013 Rules) or 'wages' (the term 'wages' is defined in the 1973 Act as 'includes any emoluments' whereas the 2013 Rules define 'wages' as meaning 'the pay, however composed, for normal hours of work but not including overtime worked, bonuses, allowances, paid leave or other additional remuneration').

37. Article VI of the MLC dictates that whereas the provisions of Part B of the Code are not mandatory, the Regulations and the provisions of Part A of the Code are mandatory and if a State Party is not in a position to implement the rights and principles set out in Part A, that State is obliged to take measures or introduce laws that are at least 'substantially equivalent to the provisions of Part A'.

38. The 2013 Rules, rule 130(1).

39. Subsidiary Legislation 234.02.

40. Subsidiary Legislation 234.03.

41. Subsidiary Legislation 234.05.

42. Subsidiary Legislation 234.24.

43. Subsidiary Legislation 234.26.

44. Subsidiary Legislation 234.27.

45. Subsidiary Legislation 234.28.

(8) the Merchant Shipping (Safe Manning and Watchkeeping) Regulations of 2003,[46] and
(9) the Merchant Shipping (Crew Accommodation) Regulations of 2004,[47]

2.18 At face value, the revocation of such subsidiary legislation is expected because a large portion of the regulations contained therein are now consolidated in the 2013 Rules and therefore have not become redundant.

2.19 The above-mentioned legislation was revoked automatically upon the coming into force of the 2013 Rules.

2.20 With the transposition of the MLC into Maltese law, it appears that Malta has increased its standards of seafarer protection. This applies most notably with respect to those branches of protection previously regulated by ILO instruments, which were not ratified by Malta but which are now consolidated as part of the MLC.

ENGAGING AND PLACING CREW

2.21 Until the coming into force of the 2013 Rules, neither the existing provisions of the 1973 Act nor of any Maltese maritime-specific subsidiary legislation explicitly regulated the recruitment and placement of seafarers. Therefore employers of seafarers (including employment agencies) were regulated by means of the general laws which apply to any recruitment (such as the laws on employment, equal opportunities and non-discrimination)[48] and more specifically, the Employment Agencies Regulations.[49] These latter Regulations regulate employment agencies operating in Malta for recruitment of persons in Malta or outside of Malta and which, in respect of the shipping industry, limitedly provide that in the employment of seamen it is the responsibility of the employment agency as well as of the employer to ensure that the provisions of the 1973 Act are complied with.[50]

2.22 Whilst such overarching laws continue to apply, following the introduction of the 2013 Rules, the Maltese Registrar-General now has to closely supervise and ensure that public and private seafarer recruitment and placement services are operated in an orderly manner that protect and promote seafarers' employment rights.[51] Therefore, in practical terms, the 2013 Rules envisage the enactment of new regulations to regulate recruitment services in Malta by ensuring compliance with the provisions of the MLC and, perhaps more importantly, to ensure that shipowners of Maltese-flagged vessels who use recruitment and placement services based in foreign countries or territories (whether or not the MLC is applicable there), ensure as far as practicable, that those services also meet the requirements of the MLC.[52]

46. Subsidiary Legislation 234.31.
47. Subsidiary Legislation 234.39.
48. Namely, the Equality for Men and Women Act 2003, Chapter 456 of the Laws of Malta; the Equal Treatment in Employment Regulations 2004, Subsidiary legislation 452.95; the Equal Treatment of Persons Order, 2007, Subsidiary Legislation 460.15; and, the Equal Treatment in Self Employment and Occupation Order, 2007, Subsidiary Legislation 460.16.
49. Subsidiary Legislation 343.24 enacted in terms of the Employment and Training Services Act, 1990, Chapter 343 of the Laws of Malta.
50. *Ibid.* regulation 11(f).
51. MLC, Standard A1.4.
52. The 2013 Rules, rules 18–20.

2.23 Indeed, this is one area of increased protection of seafarers that has been stepped up with the 2013 Rules coming into force. Summarily, such compliance with the requirements of the MLC would give seafarers access to a more efficient, adequate and accountable system for finding employment on board ships without charge to the seafarer. Private service-providers whose primary purpose is the recruitment and placement of seafarers or which recruit and place a significant number of seafarers must be operated only in conformity with a standardized system of licensing or other forms of regulation which can be established or modified only after consultation with all stakeholders concerned.

2.24 Amongst other things, the new regulations should, as a minimum,[53] serve to prohibit service-providers from using means, mechanisms or lists intended to prevent or deter seafarers from gaining employment for which they are qualified.[54] Moreover, such providers will not be permitted to impose fees or other charges, directly or indirectly, on the seafarer other than the cost of the seafarer obtaining a national statutory medical certificate, the national seafarer's book and a passport or other similar personal travel documents, excluding the cost of visas which must be borne by the shipowner.

2.25 It must be emphasised that the above-mentioned obligations imposed on service-providers who recruit and place seafarers are to be read and construed together with the obligations and responsibilities of shipowners themselves arising under Maltese law.

CONDITIONS OF EMPLOYMENT

2.26 It is clear from a reading of the 2013 Rules that they serve to introduce added protection for seafarers in respect of health, safety and other conditions of employment.

2.27 At present, the engagement of seafarers is predominantly regulated by Articles 112–122C of the 1973 Act, which focus on the execution of a contract between the ship's master and every seaman who is engaged on board a Malta-flagged vessel that does not solely navigate within the Maltese shores. The 1973 Act refers to this as an 'Agreement with the Crew', the clauses of which are in practice represented (or replicated) within the Ships Articles that by law must be registered at the Maltese ship-registry and which must be in accordance with an approved form, dated at the time of its first signature, and signed by the ship's master before it is signed by the seaman.[55] Whilst the current law therefore does not make reference to the requirement for the shipowner and seafarer to enter into an employment-specific contract, the 1973 Act

53. MLC, Standard A1.4.

54. Service-providers should also be required to (i) maintain an up-to-date register of all seafarers recruited or placed through them, to be available for inspection by the competent authority; (ii) make sure that seafarers are informed of their rights and duties under their employment agreements prior to or in the process of engagement and that proper arrangements are made for seafarers to examine their employment agreements before and after they are signed and for them to receive a copy of the agreements; (iii) verify that seafarers recruited or placed by them are qualified and hold the documents necessary for the job concerned, and that the SEAs are in accordance with applicable laws and regulations and any collective bargaining agreement that forms part of the employment agreement; (iv) make sure, as far as practicable, that the shipowner has the means to protect seafarers from being stranded in a foreign port; (v) examine and respond to any complaint concerning their activities and advise the competent authority of any unresolved complaint; and, (vi) establish a system of protection, by way of insurance or an equivalent appropriate measure, to compensate seafarers for monetary loss that they may incur as a result of the failure of the service provider or the relevant shipowner under the SEA to meet its obligations to them.

55. The 1973 Act, Article 114.

does impose upon the master[56] an obligation[57] to sign such an Agreement with the Crew in accordance with the several terms provided in the 1973 Act and which is to include certain conditions of engagement.[58] This must be signed with every seaman who the master carries to sea as one of his crew from any port[59] and the master is then obliged at the commencement of every voyage or engagement to affix a copy of the Agreement in some part of the ship which is accessible to the crew.

2.28 The 2013 Rules provide for the establishment of a new form of contract contemplated under the MLC, this being the 'Seafarers' Employment Agreement' between the shipowner and any seafarer, including the master himself.

2.29 At the outset, it is pertinent to note that the definition of the SEA contained in the MLC states that such a contractual arrangement includes both a 'contract of employment' and 'articles of agreement'.[60] However, as things currently stand, from a strict reading of the 2013 Rules it would appear that the new SEA under these Rules shall not replace the 'Agreement with the Crew' as the same Rules refrain from making any amendments to the provisions of the 1973 Act regulating the Agreement with the Crew.

2.30 Thus, as from August 2013 apart from the Agreement with the Crew, every shipowner of every Maltese ship shall enter into this SEA with every seafarer in order to stipulate the terms and conditions of his employment and non-compliance will constitute an offence. Having such a contract (or evidence of contractual or similar arrangements) shall be necessary even where the seafarer is not an employee *per se*.[61]

2.31 For the sake of clarity, it must be noted that current industry practice has often seen shipowners executing separate employment contracts apart from the Agreement with the Crew, most often referencing or replicating some or all of the terms of the Agreement with the Crew or requiring that the latter agreement must be signed upon commencement of the voyage, with its provisions prevailing over those of the employment contract in case of conflict between them. Indeed, there have been instances whereby the terms of the employment contract do not reflect the Agreement with the

56. It may be argued that the master appears on the Articles on behalf of the shipowner in that, in accordance with Article 347 of the 1973 Act and subject to the provisions of this Part IX of the said Act and to any other exclusion or limitation provided by law in relation to the carriage of goods or otherwise, the owner of a ship is responsible for all obligations contracted by the master in relation to the ship, and is liable for any damages caused by acts or omissions in the navigation or management of the ship.

57. The failure by a master of a ship to carry any seaman to sea without entering into an Agreement with him is an offence liable to a fine in accordance with Article 113(2) of the 1973 Act.

58. The contents of the Agreement with the Crew are to include, *inter alia*, the place at which it is made, the surname and other names of the seaman, his birthplace, and his age or the date of his birth, and particulars relating to the voyage, in particular, the name of the ship on board which the seaman undertakes to serve and either the nature and, as far as is practicable, the duration of the intended voyage or engagement, or the maximum period of the voyage or engagement (which is not to exceed twelve months) and the places or parts of the world, if any, to which the voyage or engagement is not to extend. In addition, it must indicate (i) the number and description of the crew; (ii) if possible, the place and date at which each seaman is to be on board or to begin work; (iii) the capacity in which each seaman is to serve; (iv) the amount of wages which each seaman is to receive; (v) the agreed leave, being agreed leave not less favourable to the crew than that, if any, prescribed under the 1973 Act; (vi) any regulations as to conduct on board and as to approved fines and other lawful punishment for misconduct which the parties agree to adopt; (vii) any regulations as to the provisions to be provided for seamen employed in Maltese ships and, (viii) a list of persons under the age of eighteen years and the dates of their births.

59. The 1973 Act, Article 113.

60. MLC, Article (1)(f).

61. *Ibid*. Standard A2.1(a).

Crew or where the terms of the contract are generally unclear. Therefore the proposal for a minimum SEA in the MLC (and the 2013 Rules) appears at face value to constitute the recognition of a standard practice and an effort to bring harmonization of minimum standards across the Member States at least to an extent. To this end, it appears that the SEA is intended to be signed upon the employment of the seafarer being confirmed, whereas the Agreement with the Crew will be signed prior to the commencement of the voyage on board the vessel.

2.32 Clearly, the MLC has thus served to extend the rights of seafarers, including the master, by placing a requirement on shipowners to bear the responsibility for the working conditions of seafarers.

2.33 It is thus recommended that shipowners retain some form of evidence to show that the seafarer has acknowledged receipt of the SEA as signed. It is indeed advisable for the shipowner to formulate clear procedures as to the notification and storage of employment contracts and related correspondence and clear processes including for payroll issues, for the signing on and signing off and the taking into account obligations in respect of the official log book and certificate of discharge (and the obligation to return certificates of competency).[62]

2.34 Naturally, the MLC (and the 2013 Rules) have also amplified certain rights of shipowners themselves (such as termination rights), and thus implementing clear procedures will ensure that the shipowner shall be able to benefit from such rights in their entirety without impediment.

2.35 As a side note, the authors of this Chapter contend that the provisions of the 1973 Act ought to be amended to reflect the definition contained in the MLC which confirms that the SEA includes both a contract of employment and the ship's articles of agreement. It is maintained that clarifying this point may reduce administrative and financial cost for shipowners. For instance, the 1973 Act currently requires that when the crew is engaged the Agreement with the Crew is to be signed in duplicate, one part retained by the master and the other delivered to the shipping master of the Maltese authorities.[63] In addition, the duplicate of the Agreement with the Crew retained by the master on the first engagement as well as any endorsements made on the Agreement is, on the expiration of the Agreement, to be delivered to the shipping authorities who should retain the same for a period of five years after the expiration of the Agreement. Indeed even after the coming into force of the provisions of the 2013 Rules, these requirements nonetheless continue to be applicable in terms of the 1973 Act.

2.36 Conversely, the 2013 Rules do not impose corresponding obligations upon the shipowner in respect of the SEA but merely require that the master will ensure that clear information as to the conditions of employment can be easily obtained on board by each seafarer and that the SEA is accessible to inspectors in accordance with these Rules. Therefore, the authors question whether, subsequent to the coming into force

62. The 2013 Rules, rule 69.

63. Where a substitute is engaged in the place of a seaman who duly signed the Agreement and whose services are within twenty-four hours of the ship's putting to sea lost by death, desertion, or other unforeseen cause, the master shall, before the ship puts to sea, if practicable, and if not, as soon afterwards as possible, cause the Agreement to be read over and explained to the substitute, and the substitute shall thereupon sign the same in the presence of a witness, and the witness shall attest the signature.

of the provisions of the 2013 Rules, the legislator may want to reconsider the position under the 1973 Act in respect of the Agreement with the Crew.

The master's engagement and responsibility

2.37 A proper reading of the 1973 Act will shed light on a historic difference in treatment between the master and other crew of the vessel, whereby the 1973 Act clearly treats the master as a quasi-representative of the shipowner, technically part of the ship's crew but whose engagement is somewhat of a *sui generis* nature and having obligations for which he may personally be held responsible.

2.38 Apart from laying down numerous duties of masters, the 1973 Act broadly stipulates provisions as to the engagement of the master so that the master is appointed and may be dismissed by the shipowner and any agreement purporting to deprive the owner of the power to dismiss the master has no effect at law.[64] Other than that, there are no provisions relating to the engagement of the master by means of the Agreement with the Crew or a similar agreement for that matter. The 1973 Act seems to point towards a form of engagement whereby the parties, that is the master and the shipowner, owe a higher level of duty towards each other, failing which the shipowner must not be restricted in any manner from terminating the engagement – this on the apparent understanding that the master is the owner's representative who by law acts as a *delegatus* to decide and contract on behalf of the owner.

2.39 On the other hand, the 2013 Rules do not make such a distinction so that the SEA must also be signed with and for the engagement of the master himself – thus ensuring greater protection of the master as a seafarer under Maltese law. Indeed, it is reasonable to argue therefore that the provisions of the 1973 Act may have to be amended to reflect this different stance introduced by the MLC.

2.40 To this end, a point of discussion which arises from the reading of the 2013 Rules, is the extent of the master's responsibility to ensure that such an Agreement is properly signed with the seafarer. Unlike that which is provided in the 1973 Act whereby the master is primarily obliged to ensure that the Agreement with the Crew is executed[65] (albeit that arguably the owner is ultimately responsible under the said Act for the actions contracted by the master),[66] the obligation arising under these Rules applies primarily to the shipowner and not to the master so that 'if the *shipowner* carries any seafarer without entering into a full and valid seafarer's employment agreement he (the shipowner) shall be liable to a fine…'[67]

2.41 Thus, even though under the 2013 Rules the master may sign the SEA on behalf of the shipowner and provide advice on its contents,[68] the shipowner remains

64. To this end, the 1973 Act adds that a master shall not be entitled to any compensation if he is dismissed with good cause or is removed by the court. Where a master is dismissed without good cause he shall, unless it is by agreement otherwise provided, be entitled to an indemnity related to the length of his service with the ship or the owner thereof and, where the master is so dismissed during the course of the voyage, the indemnity shall not be less than his wages for the entire voyage and the expenses of his repatriation; See the 1973 Act, Article 99.

65. The 1973 Act, Article 113(2); failure by a master of a ship to carry any seaman to sea without entering into an Agreement with the Crew is an offence liable to a fine to which the master is himself personally responsible.

66. *Ibid.* Article 346.

67. The 2013 Rules, rule 20(1) (emphasis added).

68. *Ibid.* rule 20(2).

principally responsible and the master shall not be answerable for the shipowner for any deficiencies within the said agreement.

2.42 In any case however, in compliance with new concept of transparency and fairness introduced by the MLC,[69] rule 22(b) provides that the shipowner, recruitment agency or master, as the case may be, is to have the agreement read over and explained to the seafarer, or otherwise ascertain that the seafarer understands the same, before he signs it, and shall also attest each signature. If the contract is signed before the master, the master is to ensure that the agreement is 'understood and signed'[70] by the seafarer, failing which the master shall be liable to a fine. In addition, he must also ensure that clear information as to the conditions of employment can easily be obtained on board by each seafarer at the commencement of every voyage or engagement.

2.43 Therefore, from a general perspective there seems to be an increase in the burden imposed upon the shipowner (and also to an extent upon the master), in that they must both ensure that two separate agreements provided for in the 1973 Act and the 2013 Rules respectively are signed and executed in accordance with the provisions of both the 1973 Act and the 2013 Rules – with the possibility of penalties for separate offences arising under both instruments of law. Indeed, the true extent of the master's responsibility is yet to be clarified particularly taking into account that the intention of the MLC appears to have been to place the master at par with other seafarers.

CONTENTS OF THE AGREEMENTS

2.44 In respect of content, the 1973 Act permits that the Agreement with the Crew includes stipulations adopted at the will of the master and seaman (including in relation to the advance and allotment of wages or otherwise) provided however that such stipulations are not contrary to law.[71] Similarly, the 2013 Rules also allow for the parties to agree to their own terms and conditions provided however that these are not contrary to the provisions of the same Rules; in which case they shall have no effect and the relevant provisions under the Rules shall be deemed to apply.[72] Thus, it can be stated that both the 1973 Act and the 2013 Rules protect seafarers from any unlawful clauses which may be unilaterally imposed by a shipowner.

2.45 As with the Agreement with the Crew, the SEA is also to be signed in duplicate, an original copy to be given to either party; dated at the time of the first signature and signed by the shipowner before the seafarer signs his name. This is to show the date and place at which it is made, the surname and other names of the seafarer, his birthplace and his age or the date of his birth. It shall also have to contain the name of the ship on board which the seafarer shall serve, the name and address of the owner and if possible the place and date at which the seafarer is to begin work (which could arguably be a date other than that on which the intended voyage is to commence).

69. Regulation 2.1 of the MLC introduces the rule that employment agreements are be agreed to by the seafarer under conditions which ensure that the seafarer has an opportunity to review and seek advice on the terms and conditions in the agreement and freely accepts them before signing.

70. The 2013 Rules, rule 20(3).

71. According to Article 116 of the 1973 Act, any terms or conditions adopted by the parties which are contrary to the provisions of this Act in matters relating to wages and conditions of employment of seamen and masters on board ships, such terms and conditions shall have no effect and the relevant provisions of the same Act shall be deemed to apply.

72. The 2013 Rules, rule 24.

The SEA is also to include the capacity in which the seafarer is to serve, the amount of wages the seafarer is to receive, the amount of paid leave or the formula used for its calculation, health and social security protection benefits to which the seafarer is entitled, the seafarer's right to repatriation, reference to any collective bargaining where applicable and rules as to the onboard provisions for seafarers.

2.46 The SEA must also make reference to the nature and as far as is practicable, the duration of the intended voyage or engagement or the maximum period of the voyage or engagement, and the places of or parts of the world, if any, to which the voyage or engagement is not to extend. Although the 2013 Rules do not make explicit reference to the limits of voyage duration stipulated in the 1973 Act, they do however in rule 73 transpose the MLC provisions which stipulate that a seafarer shall, once having served the maximum duration of service on board, this being of not more than 12 months, be entitled to repatriated at the cost of the owner.[73] Arguably such maximum duration does not apply to the length of employment for which the seafarer may be employed under the SEA (which may be for a definite period or indefinite period) but only to the duration of the voyage/s.

2.47 It transpires therefore that both the MLC and the 2013 Rules serve to promote and encourage the importance of transparency and fairness. The terms and conditions of employment must be made amply clear to the seafarer at the start of the engagement by means of the SEA. Needless to say, this is only part of the employment protection afforded to seafarers. As shall be highlighted in further detail, the MLC and the 2013 Rules consolidate, and in some cases strengthen, the minimum standards for each of the conditions which must be inserted in the SEA including, *inter alia*, the conditions on wages and overtime, sick leave entitlement (through shipowner's liability) and vacation leave.

THE MINIMUM AGE FOR SEAFARERS

2.48 An area of protection which is now supplemented by the new Rules relates to employment on board vessels of young persons. The 1973 Act provides that no person under the age of sixteen years shall be employed on any Maltese ship. The 1973 Act adds that there shall be included in every Agreement with the Crew a list of all persons under the age of eighteen years.[74]

2.49 The 2013 Rules reiterate that no person under the age of sixteen years shall be employed on any Maltese Ship thus reflecting the mandatory minimum standard provided for in Regulation 1.1 of the MLC.

2.50 The 2013 Rules also offer additional protection for those seafarers aged between sixteen and eighteen years of age. For instance, persons under eighteen years of age may not be employed for certain posts on board vessels.[75] Additionally, seafarers under eighteen years of age shall not work more than eight hours per day and forty hours per

73. Article 114 of the 1973 Act provides that the maximum period of the voyage or engagement shall not exceed twelve months.

74. The 1973 Act must also be read together with the Young Persons (Employment) Regulations, 2004, as amended in 2012 (enacted under the Employment and Industrial Relations Act, 2002, which provides additional protection for young persons at work).

75. One such example is found under rule 109(5) of the 2013 Rules which provides that no seafarer under the age of eighteen years shall be employed or engaged or work as a ship's cook.

week and they are to be provided sufficient time allowing for meals and a break of at least one hour for the main meal of the day and a fifteen minute rest break as soon as possible following each two hours of continuous work. These latter rules may be suspended in the case of emergencies, in the case of training programmes (which would otherwise be impaired by the mentioned prohibitions), or where the prohibitions are impracticable, when seafarers are assigned watch-keeping duties in the deck, engine room and catering departments or working in a rostered shift-work system.[76]

2.51 With respect to night work by young persons, the Merchant Shipping (Hours of Work) Regulations[77] provide that young persons under the age of eighteen are not permitted to work at night except as part of an established programme of training. This provision is reiterated in the 2013 Rules so that only seafarers above eighteen years of age may work at night. Taking into account the definition of 'night' in these Rules (that is a nine hour period inclusive of the period between midnight and 5 am), a seafarer under the age of eighteen is therefore entitled to at least nine continuous hours of rest at night. An exception to the rule applies if such night work forms part of an established programme of training, or when the specific nature of the duty or training program requires that the seafarers carry out duties at night and the Registrar-General determines that such work will not be detrimental to their health or well-being.[78]

2.52 The 2013 Rules also impose an obligation to maintain, with every crew list, a register of all seafarers under the age of eighteen. Apart from this, a table with shipboard working arrangements is to be posted in a prominent and accessible place on the ship and the records of a seafarer's daily hours of rest are to be maintained by the master (or a person authorized by the master) and completed on a monthly basis in arrears with a copy handed to the seafarer.

2.53 In practice, therefore, the shipowner must continue to verify the age of seafarers prior to employment and, although not obligatory, it is advisable to develop documented procedures on the engagement of seafarers which should be audited periodically to ensure consistency in respect of age verification, working hours and rest periods including compensatory rest. To avoid risks, training programs should ideally be subjected to approval by the national authority.[79]

MEDICAL CERTIFICATES

2.54 In line with Regulation 1.2 of the MLC, the 2013 Rules[80] (which revoked the current Merchant Shipping (Medical Examinations Regulations)[81] provide that no person shall be employed in any capacity on any Maltese ship unless there has been delivered to the master of the ship a certificate granted by a duly qualified medical practitioner certifying that that person is fit to be employed in that capacity. In the eventuality that a seafarer who holds a valid medical certificate suffers a medical

76. The 2013 Rules, rule 44.
77. Subsidiary Legislation 234.27.
78. The 2013 Rules, rules 6–8; these rules comprise an exception to the general provisions of Subsidiary Legislation 452.92, which does not permit persons under eighteen years to work between 10 pm and 6 am except with prior authorization for work carried out outside midnight and 4 am.
79. The burden to prove that night training is essential rests on the shipowner.
80. The 2013 Rules, rules 18–16.
81. Subsidiary Legislation 234.24.

condition which precludes seafaring employment, the 2013 Rules require the said seafarer to undergo an 'additional medical examination' to ensure he is still fit to serve onboard the ship. The 2013 Rules also provide for the right of 'review' in respect of decisions taken to suspend or revoke certificates and for the recognition of other validly issued forms of certificates.[82]

2.55 Medical certificates may be restricted to specific capacity of sea service or geographical areas as the practitioner considers appropriate and in all cases is to contain the personal details of the person examined including the name and surname, nationality, age and relevant identity document number such as the sea service record book or passport number. Summarily, the certificate should confirm that the seafarer is not suffering from any medical condition (particularly in relation to hearing and sight) likely to be aggravated by, or to render the seafarer unfit for, service at sea or likely to endanger the health of other persons on board. The validity of this certificate should not exceed two years.[83]

2.56 In light of the above, whilst not obligatory, it is recommended that shipowners should establish clear procedures to handle medical examinations of seafarers. These should include policies regarding qualified practitioners and the monitoring of validity of such certificates upon signing onto the vessel and thereafter on a regular basis or in cases of urgency or expiry. These procedures should take into account that physical examinations are to be undertaken having regard to the ILO/WHO publication entitled *Guidelines for Conducting Pre-Sea and Periodic Medical Fitness Examination for Seafarers*[84] and should also consider, in particular, the seafarer's age and the nature of the duties to be performed on board the ship.

2.57 This requirement to obtain a medical certificate is exempted only for persons authorized to be employed on the ground of urgency by the Registrar-General. A seafarer in possession of an expired medical certificate may also be exempt, provided that such exemption is limited to a single voyage, which is not to exceed three months.

2.58 Moreover, in scenarios where the period of validity of a medical certificate expires during the course of a voyage, the certificate shall remain in force until the end of that voyage or until the next port of call, whichever is the earliest. However, such a period shall not exceed three months.

TRAINING AND QUALIFICATIONS

2.59 The 2013 Rules dictate that no seafarers are to work on a vessel unless they are trained or certified as competent or otherwise qualified to perform their duties. Therefore seafarers must successfully complete training for personal safety on board ships.

2.60 In fact, shipowners are obliged to ensure that every seafarer assigned to their ships holds an appropriate certificate[85] in respect of any function he/she is to perform.

82. Medical certificates issued in compliance with the *1978 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers* are considered acceptable regardless of applicability of STCW to the seafarer.

83. However, certificates of colour vision may be valid for a maximum six years. Certificates issued for seafarers under eighteen years of age shall be valid for a maximum period of one year.

84. Document ILO/WHO/D.2/1997.

85. As defined in the Merchant Shipping (Training and Certification) Regulations 2001, Subsidiary Legislation 234.17, as amended in 2004, an 'appropriate certificate' is a certificate of competence issued by the Registrar-General.

Furthermore, documentation and data relevant to each seafarer employed should be maintained and readily available for inspection. Thus, it is contended, that shipowners ought to have clear procedures in place to monitor the validity of such certificates throughout the duration of the engagement of the seafarer.

MINIMUM HOURS OF REST

2.61 The minimum hours of rest for seafarers are regulated by means of the Merchant Shipping (Hours of Work) Regulations,[86] which already provided protection at the standard provided for in the MLC and which in essence shall remain the same under the 2013 Rules which repealed these Regulations.

2.62 In fact, the minimum hours of rest have remained ten hours in any twenty-four hour period and seventy-seven hours in any seven day period whereby hours of rest may be divided into no more than two periods, one of which shall be at least six hours in length, and the interval between such consecutive periods shall not exceed fourteen hours. Therefore the shipowner may implement a system of 'four-hours on and eight-hours off' shifts scheduling for seafarers on watch or any other comparable system that meets the above requirement. In any case musters, fire-fighting and lifeboat drills are be conducted in a manner which minimises the disturbances of rest periods and a seafarer who is on call is to be given adequate compensatory rest periods.

2.63 The 2013 Rules do regulate other matters relating to rest periods including for example the requirement imposed on the shipowner to keep rest records, as well as laying down those exceptions to the working hours restrictions in cases of emergencies.

MINIMUM WAGE & OVERTIME

2.64 The 1973 Act regulates the protection of wages of seafarers, in that they are given a privileged status at law.[87] Where any terms or conditions adopted by the parties to an Agreement with the Crew are contrary to the provisions of the 1973 Act in matters relating to wages, such terms and conditions shall have no effect and the relevant provisions of the said Act shall be deemed to apply. Seafarers' wages are to be clearly stipulated in the Agreement with the Crew, and in terms of the Minimum Wage Regulations[88] were not to be less than the minimum basic wage for a calendar month of service for an able seaman.[89]

86. Subsidiary Legislation 234.27.

87. In accordance with Articles 50(h) and 54A of the 1973 Act, any claims for unpaid wages and other sums due to the master, officers and other members of the vessel's crew in respect of their employment on the vessel, including repatriation costs and social insurance contributions payable on their behalf, are afforded a special privilege over the vessel.

88. Subsidiary legislation 23.26, as amended in 2012.

89. At present, the minimum wage is 568 US Dollars. This shall increase to 585 US Dollars as of 31 December 2013. Naturally, if a specific currency is stated in the agreement with the crew, the seafarer is entitled to the equivalent amount in that currency. It should also be noted that the Registrar-General may authorize collective agreements permitting exceptions to this minimum basic wage. It is envisaged that the Registrar-General shall have to reconfirm the minimum basic wage, taking into account the fact that the Minimum Wages Regulations shall be revoked with the coming into force of the 2013 Rules.

2.65 The 2013 Rules introduce the concept of a basic pay as opposed to consolidated wages, and for the first time regulate the payment of overtime worked by seafarers, including masters. In essence, for the purpose of calculating wages, the normal hours of work at sea and in port shall not exceed eight hours per day and without prejudice to more favourable collective bargaining agreements, for the purpose of calculating overtime, the number of normal hours per week covered by the basic pay or wages shall not exceed forty-eight hours per week. In addition, the rate or rates of compensation for overtime shall be not less than one and one-quarter times (x1.25) the basic pay or wages per hour. The authors contend that the introduction of overtime pay can be deemed as a considerable improvement in terms of the working conditions for crew since it essentially gives seafarers a right which most other classes of workers are already afforded.

2.66 Seafarers whose wages are fully or partially consolidated are to have specified in the SEA the number of hours of work expected of the seafarer in return for such remuneration, and any additional allowances which might be due in addition to the consolidated wage. When hourly overtime is payable for hours worked in excess of those covered by the consolidated wage, the hourly rate shall be not less than one and one-quarter times (x1.25) the basic rate corresponding to the hourly rate. In all cases, records of all overtime worked are to be maintained by the master (or a person assigned by the master) and must be endorsed by the seafarer at no greater than monthly intervals. Such hours of work and overtime must always remain within the parameters of the maximum working hours (and minimum rest periods) provided for in the 2013 Rules.

2.67 In addition, the 2013 Rules clearly stipulate that wages are to be paid in legal tender,[90] at intervals of no more than one month.[91] Before paying off or discharging any seafarer, the master of the vessel is to deliver on a monthly basis a full and true account[92] of the seafarer's wages and any deductions made thereon. This must be done not less than twenty hours before the discharge or payment.

2.68 In compliance with the provisions of the MLC, the 2013 Rules also make provision with respect to when the right to wages begins, the right to recover wages and prohibition on waivers, wages in case of termination by wreck, loss of ship, illness, refusal to work and imprisonment and wages in case of improper discharge.

2.69 Therefore it is evident that shipowners should consider the process of how wages and other additional payments (including overtime) are to be allotted and recorded, taking into account different rates of exchange, the minimum rest periods and the transfer of earnings to families as may be requested by the seafarer.

LEAVE ENTITLEMENT

2.70 The MLC 2006 and the 2013 Rules introduce new standards in respect of leave entitlement for seafarers. The principal forms of leave are what is more commonly referred to as 'vacation leave' and 'sick leave'. The minimum leave entitlement for seafarers was regulated by means of the Merchant Shipping (Hours of Work) Regulations,[93] which provided that a seafarer is entitled in each leave year to a period of paid leave of at least four weeks (twenty-eight days), or pro rata where applicable,

90. The 2013 Rules, rule 63.
91. *Ibid.* rule 61.
92. *Ibid.* rule 62.
93. See above n 86.

and such leave could not be replaced by a payment in lieu except where the seafarer's employment was terminated.

2.71 The 2013 Rules provide that the annual paid leave of a seafarer shall be calculated on the basis of a minimum of two and a half calendar days per month of employment and pro rata for incomplete months. Therefore the annual vacation leave entitlement has increased to thirty days in line with the minimum provided for by the MLC.

2.72 The 2013 Rules make several provisions in relation to such entitlement including as to its commencement and accrual. These new Rules also add that 'justified absences' from work shall not be considered as annual leave. The 2013 Rules do not define what constitutes a justified absence. Indeed, although not binding, reference may be made to the MLC which provides examples of such justified absences. These include absence from work to attend an approved maritime vocational training course and absence due to illness, injury or maternity. The MLC also provides that public holidays, periods of incapacity resulting from illness, injury or maternity, temporary shore leave and compensatory leave of any kind should not be counted as part of annual leave with pay. Service off-articles should be counted as part of the period of service during which vacation leave shall accrue.

2.73 As with the old Regulations, any agreement to forgo the minimum annual leave with pay prescribed in these Rules, except were the seafarer's employment is terminated, is prohibited.

2.74 Ratifying members of the MLC must also contemplate minimum standards for the protection of seafarers in case of injury, sickness and disease. The MLC establishes three layers of protection, namely (a) immediate medical care on board and ashore, (b) shipowner's liability for expenses arising out of injury and sickness, subject to certain reasonable exemptions, and (c) the more general social security protection. Each layer of protection is transposed into Maltese law, by means of existing provisions of the 1973 Act and also by means of new provisions in the 2013 Rules.[94]

2.75 The intricacy of this particular aspect of seafarers' protection only allows for a cursory overview of the applicable law in this Chapter. It is however pertinent to note that under Article 168A of the 1973 Act, shipowners of Malta-flagged vessels are obliged to take out insurance which must include adequate cover for injuries and sickness or loss of life (including burial expenses). The extent of the shipowner's responsibility is regulated by the 1973 Act and includes that of covering for medical, board and lodging expenses incurred. With the transposition of the MLC, the 2013 Rules now extend such obligation to include payment of wages whilst the seafarer remains on board until he is repatriated. Furthermore, seafarers are now entitled to a minimum 'sick' leave entitlement on full pay (excluding bonuses), until he is recovered or up to a maximum 16 weeks, whichever the shorter. This added benefit is without prejudice to any other rights the seafarer may be entitled to (such as civil damages in case of injury resulting from the negligence of the shipowner).

TERMINATION

2.76 The termination of a seafarer's employment has always been the subject of debate and concern for both seafarers and shipowners. Indeed the extent to which the parties may choose to terminate the contract during a voyage (or otherwise in

94. The 2013 Rules, rule 112.

between voyages), and the potential liability for such termination have always been contentious issues.

2.77 The MLC[95] requires that SEAs are to include provisions on the termination of the agreement. Indefinite term contracts shall include the conditions entitling either party to terminate as well as the required notice period (which shall not be less for the shipowner than for the seafarer). On the other hand, definite term contracts should stipulate their date of expiration[96] and if the SEA has been made for a voyage, then the contract should specify the port of destination and the time which has to expire after arrival before the seafarer should be discharged. The MLC adds that termination on shorter notice periods (or no notice periods) may be permitted by law or in collective agreements for justifiable causes. In addition, it also specifies that a seafarer should be entitled to terminate prematurely without penalty for compassionate or other urgent reasons.

2.78 At the outset it must be stated that the application of provisions governing termination of employment contracts contained in the general employment laws of Malta, primarily Article 36 of the Employment and Industrial Relations Act,[97] is explicitly excluded for seamen employed on ships under the provisions of the Merchant Shipping Act.[98] Therefore general rules as to unfair dismissals, good and sufficient cause for dismissals, notice of termination, redundancy rules and transfer of business rules found in Maltese employment legislation do not apply for seafarers.

2.79 Having said that, in respect of termination, the Merchant Shipping Act permits the parties to make additional stipulations between them provided these are lawful. The 1973 Act also provides specific provisions so that an Agreement with the Crew terminates automatically either by the mutual consent of the parties, or the death of the seaman, or the loss or total unseaworthiness of the ship, or the sale of the ship, or the expiration of time.

2.80 The 1973 Act provides for levels of compensation to be paid to the seafarer in genuine cases, subject to certain conditions such as in the event of termination caused by wreck or loss of the ship before the date contemplated in the agreement[99] or by illness.[100]

2.81 The 1973 Act adds that if a seaman is discharged otherwise than in accordance with the terms thereof before the commencement of the voyage or before one month's wages are earned, he shall be entitled to receive from the master or owner due compensation for any damage caused to him by the discharge. This shall apply only where the discharge is without the seafarer's consent and where there is no fault on his part justifying that discharge. In any case, the compensation which shall be due in addition to any wages he may have earned, shall not exceed one month's wages.[101]

2.82 To this end, the 2013 Rules do not amend the 1973 Act and thus replicate the above-mentioned causes of termination so that, effectively, a SEA shall terminate automatically on the occurrence of any of these causes.[102] The 2013 Rules also reiterate the rights to receive compensation in certain cases as provided under the 1973 Act. Therefore, such causes mentioned in Maltese law, albeit perhaps generic and subject

95. MLC, Standard A2.1.
96. It is not clear whether definite term contracts may also be terminated by giving notice.
97. See above n 5.
98. Employment and Industrial Relations Act, 2002, Article 39.
99. The 1973 Act, Article 141.
100. *Ibid.* Article 142.
101. *Ibid.* Article 145.
102. The 2013 Rules, rule 21(4).

to interpretation, serve to provide some additional guidance as to possible causes for and consequences of termination beyond that which is provided in the MLC.

2.83 Furthermore, in compliance with the MLC, the 2013 Rules now add that SEAs are to include provisions on the causes of and conditions for termination. Furthermore, they require that any agreement made for an indefinite period must include a notice period which must be of equal length for both parties and which must not be less than seven days if notice is given by the shipowner.[103]

2.84 Rule (3) specifies that notice of termination from the seafarer may be less than seven days or without notice, if for compassionate or urgent reasons, as the Registrar-General may approve through Merchant Shipping Notices from time to time.[104] Fixed-term contracts are to include the date of expiry[105] and contracts for a voyage are to specify the time and destination at which the employment shall terminate.

2.85 In practice there may be several causes for which the shipowner or the seafarer may wish to terminate the engagement. Therefore, it is advisable that the parties should contemplate and expressly stipulate in the contract those causes, which will give rise to the termination of the contract upon their occurrence. It is contended that termination on the basis of such stipulations agreed between the parties should, provided they are lawful, constitute a termination 'by mutual consent of the parties'. However, the lawful parameters of any additional stipulations and the interpretation that shall be given to them by competent authorities and courts is yet to be seen.[106]

2.86 In any case, it is pertinent for shipowners to ensure that there is a nexus between the terms of the SEA, the Agreement with the Crew, any collective agreements, policies and procedures regulating the engagement of a seafarer and the termination of the employment, including in particular applicable notice periods, expiry dates and procedures for discharge.

103. The 2013 Rules, rule 22(3); the wording of this clause is not immediately clear as to whether a shipowner may terminate without giving any notice in the event of justifiable reasons, albeit that this would be a reasonable assumption. In addition there seems to be a departure from standard employment law principles (under Chapter 452 of the Laws of Malta) in that for seafarers, unlike other shore-based employees, an indefinite term contract may be terminated by the mere giving of notice, without the shipowner having to prove good and sufficient cause for termination. Indeed, this is yet to be tested in a court of law and one may envisage awards of compensation for loss of income by way of standard civil law damages if an indefinite term contract is terminated without good cause.

104. To date, no such notices have been issued to determine what constitutes compassionate or urgent reasons.

105. Again, it is not clear whether fixed-term contracts may also be terminated merely by giving notice. Therefore, questions arise as to what the liability would be if the terminating party terminates prematurely without just cause. Indeed, it is perhaps reasonable to assume that the intention of the legislator is to protect employees from immediate dismissal without cause. Thus, any shipowner should act with caution before terminating any seafarer's contract, bearing in mind the principles of natural justice and fair hearing which any court of law would require to see in the procedures leading up to a termination.

106. It is interesting to note that in terms of the 1973 Act, the master of a vessel is appointed and may be dismissed by the owner of the ship and any agreement purporting to deprive the owner of the power to dismiss the master shall have no effect. In addition, a master shall not be entitled to any compensation if he is dismissed with good cause or is removed by the courts. Where a master is dismissed without good cause he shall, unless it is by agreement otherwise provided, be entitled to an indemnity related to the length of his service with the ship or the owner thereof and, where the master is so dismissed during the course of the voyage, the indemnity shall not be less than his wages for the entire voyage and the expenses of his repatriation. The 2013 Rules do not amend these provisions of the Act and therefore one could argue that they shall continue to apply even after these Rules come into force. Indeed, it will be interesting to note developments in the field in respect of the differences in treatment afforded towards the engagement of masters as opposed to seafarers.

REPATRIATION

2.87 Regulation 2.5 of the MLC provides that seafarers have a right to be repatriated at no cost to themselves in the circumstances and under the conditions specified in the MLC Code and ships that fly its flag are to provide financial security to ensure that seafarers are duly repatriated in accordance with the Code. Accordingly, seafarers should be entitled to repatriation: (a) if the SEA expires while they are abroad; (b) when the SEA is terminated by the shipowner or by the seafarer for justified reasons; and also (c) when the seafarers are no longer able to carry out their duties under their employment agreement or cannot be expected to carry them out in the specific circumstances.

2.88 The 1973 Act includes provisions on certain repatriation entitlements for seafarers. Article 168A of the Act obliges the shipowner to maintain an insurance policy issued by an approved insurer to cover, *inter alia*, liability to repatriate.

2.89 Where the service of a seaman is terminated before the expiration of the Agreement with the Crew and without his consent, the master of the ship is obliged to give a certificate of discharge, to pay the wages to which the seaman is entitled to and lastly, to make adequate provision for his maintenance and for his return to a proper return port.[107]

2.90 In addition, if the Agreement with the Crew terminates at a port other than the port of engagement,[108] the master or owner of the ship shall, at their expense, be obliged to make all the necessary arrangements for the repatriation of the seaman to a proper return port.[109] Such expenses include the cost of any maintenance and medical treatment the seaman may need until his repatriation.[110] Such entitlement to repatriation shall not apply to seamen left behind or discharged from their ship as a result of their desertion, imprisonment, or their inability to work owing to a sickness or infirmity which was wilfully concealed from the shipowner at the time of the engagement. Nonetheless, in such scenarios, the master or owner must, at their own expense, make all necessary arrangements to repatriate the seaman as if he was so entitled provided that they may be refunded such expenses out of any outstanding wages due to the seaman at the time he left the ship, or alternatively out of the proceeds from the sale of any of his possessions left on board the ship. If this should not prove sufficient, then the master or owner may seek reimbursement by ordinary process of law.

2.91 Whilst the 2013 Rules do not modify the provisions of the 1973 Act, they add (or rather reiterate) that the SEA is to include a reference to the seafarer's entitlement to repatriation. Thus, similar to the requirement under the 1973 Act, the 2013 Rules

107. The 1973 Act, Article 130.

108. Article 129A of the 1973 Act broadly provides that causes of termination include the effluxion of time, any act of the parties, the shipwreck or sale of the ship, the inability of the seaman to continue with a voyage by reason of sickness or injury or any other cause whatsoever.

109. As stated above, claims for unpaid costs of repatriation of crew constitute a special privilege under Articles 50(h) and 54A of the 1973 Act; see above n 87.

110. Article 158 of the 1973 Act (supplemented by the Merchant Shipping (Protection of Seamen) Regulations 2003, Subsidiary Legislation 234.28) provides that if a master or a seaman receives any hurt or injury in the service of the ship, or suffers from any illness (not due to his own wilful act or to his own misbehaviour), the shipowner is to bear the medical expenses and maintenance expenses until he is cured, dies, or is returned to a proper return port. This should include the payment of such expenses during any period in which he is unemployed after he has been cured but before he has been returned to a proper return port (or his conveyance to the port in the case of death). A shipowner will not however be liable to pay such expenses if he can prove that that seaman failed to accept suitable employment on board a Maltese ship proceeding within a reasonable time to a proper return port or had failed to comply with any other reasonable arrangements made for his repatriation.

specify that where the service of a seafarer terminates otherwise than by his consent, the master must make adequate provision for that seafarer's maintenance and for his repatriation. This applies without prejudice to the requirement to issue the discharge certificate and to pay any outstanding wages.

2.92 Furthermore, as is likewise provided under the Act, if the SEA terminates at a port other than the port of engagement for any cause whatsoever, the seafarer shall be repatriated at the expense of the shipowner. This includes all expenses related to necessary maintenance and medical treatment.

2.93 The 2013 Rules introduce a novelty mechanism aimed at further protecting seafarers' rights. Seafarers shall be entitled to repatriation at the cost of the owner once having served the maximum duration of service periods on board the vessel.[111] A seafarer is further protected by a new obligation on third parties to pay the repatriation costs in certain circumstances. A third party enforcing an executive title against the ship or the shipowner will be liable to pay the repatriation costs of the seafarers in the eventuality that the shipowner defaults in his obligations toward the seafarer with regard to repatriation and other expenses owed to the seafarer.[112] In practice, the authors believe that this will essentially mean that the respective third party may then bring another claim against the ship or the shipowner for these repatriation costs paid.

2.94 Similarly to the 1973 Act, the 2013 Rules clarify[113] that a seafarer shall not be entitled to repatriation at the expense of the owner if he has been left behind or discharged from his ship as a result of his desertion, imprisonment, inability to work due to sickness or infirmity wilfully concealed from the shipowner at the time of the engagement. However, the shipowner must nonetheless make all the necessary arrangements and pay all the expenses incurred for the repatriation subject to the shipowner's right to reimbursement in the same manner as provided under the said Act. To this end it is interesting to note that, unlike the applicable provisions of the 1973 Act, the 2013 Rules no longer refer to the master as being also responsible with the owner for the proper return or payment of expenses incurred.

MEDICAL STORES

2.95 The MLC seeks to ensure that the health of seafarers on board vessels is safeguarded and imposes an obligation on States Parties to regulate the carrying of medical supplies on ships.[114] These new Rules serve this purpose as they deal extensively with the medical stores which are to be kept on board ships falling within the scope of the same Rules.[115]

2.96 Maltese law already dealt with this matter extensively in the 1973 Act and in the Merchant Shipping (Medical Stores) Regulations,[116] enacted to transpose the relevant provisions of Council Directive 92/29/EEC of 31 March 1992 on the minimum

111. The maximum service period on board a vessel is twelve months.
112. The 2013 Rules, rule 73.
113. *Ibid.* rule 72(2).
114. MLC, Regulation 4.1.
115. The 2013 Rules, rules 97–106.
116. Subsidiary Legislation 234.05.

safety and health requirements for improved medical treatment on board vessels,[117] relating to the carriage of medicines and other medical stores.

2.97 Article 152(2) of the 1973 Act states that it is the duty of both the shipowner and the master to ensure that the ship carries medicines, medical stores, equipment, facilities, appliances and books in accordance with the scales laid down in any regulations prescribed under this Act. Likewise, Article 152(3) of the 1973 Act provides that in cases where the medical stores are found to be deficient in quantity or quality, both the master and the owner may be liable to a fine.

2.98 In light of this, it is pertinent to note that the 2013 Rules appear to differentiate between certain obligations of the shipowner as opposed to other duties of the master, thus arguably departing from the approach of joint responsibility under the 1973 Act. For instance, under these Rules the shipowner is obliged to have the medical stores inspected at least annually by a competent person to confirm that the ship is carrying all the required stores, that they are being stored correctly, and that any expired or perishable medicines have been duly replaced. Lastly, the Rules expressly stipulate that the shipowner is the person responsible for the cost of medical stores as well as the expenses associated with store replacements.

2.99 On the other hand, the master has a number of obligations in relation to the management of the stores. It is worth noting that the Rules permit him to delegate the use and maintenance of the stores to a ship officer provided that he ultimately remains responsible for the actual management of the said stores. The Rules also provide that the master or ship officer responsible for the management of the stores should receive special training at least once every five years.[118]

2.100 The 2013 Rules also oblige vessels to carry on board different medical stores according to the category of ship to which they belong.[119] Despite this categorization process, the 2013 Rules permit the Registrar-General to require a ship to carry additional or different quantities of medical stores, taking into consideration a multitude of factors such as the nature of the voyage and its ports of call, the type of work carried out on such a voyage and the nature of the cargo.

2.101 It is also interesting to note that the Regulations imposed the obligation to carry medical stores on board fishing vessels. As explained in the introduction to this Chapter, it is clear that the 2013 Rules are not intended to apply to fishing vessels. Thus, with the coming into force of the 2013 Rules (which revoked the said Regulations) it would appear that owners of fishing vessels shall no longer be required to carry medical stores in terms of the 1973 Act or the 2013 Rules.

117. [1992] OJ L113/19.

118. There appears to be an anomaly in the 2013 Rules. On the one hand, they state that the master may only delegate the use and maintenance of the stores to a ship officer and not the responsibility for the management of the medical stores. On the other hand, the Rules then state that the master 'or a ship officer responsible for the management of the medical stores' must obtain periodical special training.[119] Thus, the wording of this phrase seems to suggest that at face value the management of medical stores may in some manner be delegable. However, the authors contend that, notwithstanding the above, the intention of the legislation would appear to be that the master remains ultimately responsible for the management of the stores, and cannot delegate such responsibility.

119. There are three categories; Category A dealing with sea-going ships with no limitation on length of voyages, Category B for sea-going ships making voyages of less than 150 nautical miles from the nearest port with adequate medical equipment, and Category C for harbour vessels, boats and craft staying very close to shore or with no cabin accommodation other than a wheelhouse.

2.102 The 2013 Rules also impose certain obligations in relation to the maintenance of the medical stores. This includes rules on the packaging and labelling of containers, storage conditions, the replacement of expired medical stores, and rules on the provision of medical guides explaining the use of the stores carried on board the vessel.[120] The 2013 Rules, however, do not explicitly specify whether it is the shipowner or the master, or both, who is responsible to fulfil the aforementioned duties. It may be disputed that these obligations can fall within the management of the stores, and should thus be the responsibility of the master. Nonetheless, to some extent, it is arguable the shipowner is also responsible to fulfil such duties particularly in view of the fact that he must bear the costs related thereto. In any case, the authors contend that these obligations are to fall within the joint responsibilities of the shipowner and the master in terms of the above-mentioned Article 152(2) of the 1973 Act.

PROVISIONS AND WATER

2.103 The 2013 Rules address the duties of an owner and master to provide crew with suitable provisions and water similar to the provisions found in the now repealed Merchant Shipping (Provisions and Water) Regulations.[121] These must be suitable in respect to quantity, nutrition, variety and quality, and must not contain any ingredients which could cause illness or render the food supplies unpalatable. They must also generally be fit for human consumption.

2.104 Moreover, the 2013 Rules introduce new standards of protection primarily requiring that provisions and water are to be given free of charge throughout the engagement of the seafarer. In addition, the owner and master must also strive to give due consideration to the cultural and religious diversity of the crew on board.[122] This inclusion in the law could be described as a tangible example of the protection of basic human rights under the MLC. In practice, such consideration is already given when dealing with food preparation on board, but it is now being enshrined as an obligation under Maltese domestic law.

2.105 The master or a duly authorized officer must check on a weekly basis to ensure that the above requirements are met. This should also include a check of the spaces and equipment used for the storage and handling of food and water as well as the galley used for food preparation and service. Food must be handled and prepared by competently trained persons. To this end, a ship's cook and catering staff should be properly trained and certified. It would therefore appear that these Rules are also raising the standard for food preparation. Another novelty in the 2013 Rules is that they forbid seafarers under the age of eighteen from working as a ship's cook.[123]

2.106 The now repealed Regulations provide that in the event of a shortage of supplies or if a shipowner furnishes bad provisions (including water), he is obliged to pay an allowance to each seafarer. Naturally, this allowance was to be used by seafarers to find alternative sources of food and the shipowner was to fork out a sum not

120. The 2013 Rules, rule 105.
121. Subsidiary Legislation 234.03.
122. The 2013 Rules, rule 107(2).
123. *Ibid.* rule 109(5).

exceeding seventy cents per day to each seafarer. The amount payable varied depending on whether provisions were reduced, reduced significantly, or of bad or deficient quality.

2.107 Whilst the 2013 Rules incorporate the above obligation to pay allowances in such circumstances, they now acknowledge the requirements of contemporary seafarers. In fact, the amounts payable under the 2013 Rules have been increased significantly up to a sum not exceeding six euros and ninety-nine cents per seafarer.[124]

ACCOMMODATION

2.108 There is a tendency to forget that unlike other classes of workers, seafarers live and sleep in the same close quarters where they work. The accommodation of crew on board Maltese ships was previously regulated by the Merchant Shipping (Crew Accommodation) Regulations.[125] The 2013 Rules practically replicate the now repealed Regulations in terms of substance for existing ships and in fact the Schedules of the Regulations have even been incorporated into these Rules. The Rules also include a new Schedule for new ships which transposes the requirements of the MLC into Maltese law.[126]

2.109 One noteworthy change under the 2013 Rules is that when a shipowner (or a shipyard) submits the plans of the proposed accommodation (on a scale of not smaller than 1 in 50) to the certifying authority for approval, he must ensure that the proposed arrangements must take into consideration various aspects including heating and ventilation, lighting, noise, vibrations and other ambient factors. These latter three considerations were not included in the Regulations.[127]

2.110 From a procedural perspective, the 2013 Rules also do away with the requirement for the issuance of a Crew Accommodation Certificate, which was required under the provisions of the above-mentioned Regulations. With the coming into force of the 2013 Rules, compliance with the rules on accommodation,where required, will be attested by the issuance of the Maritime Labour Certificate.

ON-SHORE AND ON-BOARD COMPLAINT PROCEDURES

2.111 It is pertinent to note that the MLC has introduced a new concept requiring shipowners to maintain an on-board complaint procedure for seafarers.

2.112 Article 155 of the 1973 Act merely provides that if a seaman expresses his desire to the master of a ship to make a complaint to the shipping master,[128] or to an appropriate inspector, or to a Maltese consular officer, against the master or any crew member the master is obliged to allow the complainant to go ashore to make his com-

124. The actual amounts payable for allowance under rule 110 of the 2013 Rules are specified in terms of Article 372C of the 1973 Act; a 'unit' is equivalent to two Euros and thirty-three cents.

125. Subsidiary Legislation 234.39, Laws of Malta.

126. The 2013 Rules, Fourth Schedule.

127. Their inclusion is a direct consequence of implementing MLC, Standard A3.1(4)(c) and serves as a means of giving seafarers necessary protection.

128. According to the 1973 Act, a shipping master is a designated officer within the Registrar-General of Shipping and Seaman.

plaint. This should be done as soon as the service of the ship permits. This procedure is similar to the on-shore complaint-handling procedure introduced in Regulation 5.2.2 of the MLC.

2.113 Whilst this entitlement shall continue to apply,[129] rule 122(2) now adds that the master of a ship shall not coerce the seafarer into divulging the identity of persons against whom the complaint is being lodged or the nature of the complaint. This undoubtedly affords seafarers additional protection in the event that the master is involved in the matter giving rise to the complaint. This should encourage more seafarers to lodge a complaint if the need arises.

2.114 Rule 118 also adds that all ships shall have on-board procedures for the fair, effective and expeditious handling of seafarer complaints alleging breaches of the 2013 Rules. This should be without prejudice to a seafarer's right to seek redress through whatever legal means the seafarer considers appropriate.[130]

2.115 The scope of these procedures is to resolve complaints at the lowest level possible, provided that seafarers shall always have a right to complain directly to the master and, where they consider it necessary, to appropriate external authorities. A seafarer's protection is thus increased in that the on-board complaint procedures are to include the right of the seafarer to be accompanied or represented during the complaint procedure. It also safeguards against the possibility of victimization of seafarers for filing complaints which are neither manifestly vexatious nor maliciously made. The seafarers are to be granted a copy of this procedure together with contact information of the competent authority and the name of the persons on board the ship who can provide them, in confidence, with impartial advice.[131]

CONCLUSIONS

2.116 Malta's timely ratification of the MLC bears witness to its re-affirmed commitment to strengthening the reputation of its flag by ensuring that the Maltese register is backed by proper standards for the enhanced protection of the seafarer.

2.117 It is the authors' view that the 2013 Rules aim at realizing an equilibrium between, on the one hand, the rights of seafarers and, on the other hand, the practical needs of shipowners. Effectively, they are consolidating and updating the already comprehensive legal framework applicable to the Maltese flag. Therefore, whereas the practical implications of the 2013 Rules are yet to be seen, the authors do not envisage that the coming into force of the 2013 Rules shall cause much disruption in the operations of ships flying the Maltese flag. Likewise, the authors do not believe that the new Rules will adversely affect the competitiveness of the Maltese Registry. On the contrary, the 2013 Rules appear to bolster the Registry's standing as a reputable flag. This applies all the more, when one considers that the MLC seeks to attain a

129. The 2013 Rules, rule 122(1).

130. *Ibid.* rule 121.

131. Whereas the authors appreciate the protections afforded by this new mechanism, they envisage that in practice, particularly on board vessels having a small crew complement, this latter requirement may prove to be ineffective especially where the complaint relates to the master, as presumably when dealing with small crew complements, it would be the master who would most likely be named as the person from whom to seek guidance.

global level playing field through port State responsibilities in respect to all vessels entering the ports of a State Party.[132]

2.118 As with all legal instruments, certain provisions of the 1973 Act and the 2013 Rules shall remain subject to interpretation by the various players in the industry. However, one cannot but recognize that the original scope of the MLC to further the protection of seafarers without stifling the industry seems to have, to a significant extent, been achieved.

2.119 The 2013 Rules remain subject to the test of time; however, as was once observed, the clearest way to show what the rule of law means to us in everyday life is to recall what has happened when there is no rule of law.[133] With these new Rules in place, the Maltese shipping industry can safely be said to be grounded within a sounder legal and regulatory framework.

132. This applies provided that such vessels do not fall within the ambit of the exceptions of the MLC.
133. Dwight D. Eisenhower (1890–1969), thirty-fourth President of the USA.

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CHAPTER 3

The shipmaster and the Maritime Labour Convention 2006

JOHN A C CARTNER, LL.M, PH.D, MASTER MARINER*

3.1 In an overview of the *Maritime Labour Convention 2006 (MLC)* as to the master, the objective of the instrument was to reflect current international maritime labour conventions, standards, recommendations and related conventions. The MLC contained principles important to the International Labour Organization (ILO)[1] and looked to protect seafarers and therefore masters.[2] From prior conventions,[3] the ILO was '[D]etermined that this new instrument should be designed to secure the widest possible acceptability among governments, shipowners and seafarers [and masters] committed to the principles of decent work, that it should be readily updateable [sic] and that it should lend itself to effective implementation and enforcement'.[4] The in-force Convention asserts how States Parties, Members, in the parlance of the Convention, must enact and enforce the Convention (although there is some vagueness, as would be expected from a politically guided document); how owners comply with the laws; and what rights and responsibilities and duties seafarers, masters, owners and States Parties have under the laws.[5]

3.2 In the current form of the MLC, the States Parties as Members agree to support the rights of seafarers, masters and owners as defined by the Convention. These rights include the freedoms of association and collective bargaining,[6] the elimination of forced labour,[7] of child labour[8] and seafarers' and masters' employment and social

* Member of the Law Society of England and Wales; Member of the District of Columbia Bar Association (USA); Member of the Maritime Law Association of the United States, designated as a Proctor in Admiralty thereby; member of other maritime law associations; Chartered Engineer (naval architecture) (UK); Fellow of the Society of Naval Architects and Marine Engineers (USA); Fellow of the Royal Institution of Naval Architects (UK); Fellow of the Institute of Marine Engineering, Science and Technology (UK); Member of the Nautical Institute (UK).

1. See the *Forced Labour Convention, 1930 (No. 29)*; the *Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)*; the *Right to Organise and Collective Bargaining Convention, 1949 (No. 98)*; the *Equal Remuneration Convention, 1951 (No. 100)*; the *Abolition of Forced Labour Convention, 1957 (No. 105)*; the *Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*; the *Minimum Age Convention, 1973 (No. 138)*; and, the *Worst Forms of Child Labour Convention, 1999 (No. 182)*; MLC, Preambulatory Statements.
2. The Convention rests on the mandate of the ILO, which is to promote decent conditions of work. *Ibid.*
3. The Convention revises other instruments listed in the Convention; MLC, Article X.
4. MLC, Preambulatory Statements.
5. An explanatory note, not a part of the Convention, is a general guide; MLC, Preambulatory Statements.
6. Article III(a).
7. Article III(b).
8. Article III(c).

rights.[9] These aspirations may be met with laws, regulations and collective labour contracts or by 'other [undefined] measures'[10] by the Members. Members agree to enact and enforce laws arising from the Convention and to establish juridical mechanisms for them.[11] A part of these mechanisms is a mandatory Maritime Labour Certificate of compliance with agreement for cross-inspection by Member States and sanctions for violations.[12] Seafarer and master recruitment services[13] are closely regulated by the Convention.[14]

3.3 The Convention changes the legal climate for the master. For the master, the MLC is a substantive step to consolidating the primacy and protection of the master in command and to bring about owners' cooperation with him in best command practices, often with the force of flag State law.[15]

3.4 Under any convention expressed in flag State laws, the master has legal responsibilities to answer for his acts and to repair any caused injury. Such responsibilities may arise without contract by the master or the party injured. The liability may be waived by contract, by statute or regulation. The law gives the injured compensation in damages unless waived. In general, the master is not answerable for the acts of another unless he has concurred in them. If he has concurred, expressly or impliedly, he is responsible, unless by his status under the flag State regime, he is waived or made immune. A master may be civilly responsible for the acts of others when he has done nothing by which he might be seen as participating. In other cases, the master is strictly liable because he is master, especially observable in environmental matters. Penal responsibility is always personal. A person cannot be punished for the commission of a crime if another person, his accomplice or his abettor, has committed it. It follows then that a legal duty is the responsibility to others to act according to the law. Proving the civil duty (such as not to be negligent, to keep the vessel safe, sound and seaworthy or to follow the terms of the Convention) and showing that the duty was breached are required elements of any lawsuit for damages due to negligence or intentional injuries. A duty of care is a requirement that a person act toward others and the public with the awareness, attention, caution and prudence that a reasonable person in the circumstances would employ. If a person's actions do not meet this standard of care, the acts are considered negligent, and any damages resulting may be claimed in a lawsuit for the tort/delict of negligence. In summary, the standard of care for a master is employment of the awareness, attention, caution and prudence that a reasonable master in the circumstances would exercise. If a master's acts do not meet this standard of care, his acts fail to meet the duty of care which all masters have toward others. Failure to meet the standard is negligence and any resulting damages may be claimed in a lawsuit by the injured party. The problem is that the 'standard' is a subjective issue upon which reasonable people can differ.

9. Article III(d).
10. Article IV(5). What 'other measures' means remains to be seen.
11. Article V(2); Article V(5); Article V(6).
12. Article V(4); Article VI(2), *inter alia*.
13. Article II(1)(h).
14. Article V(5).
15. Article I(1); Article I(2).

3.5 Of course, how this all works out between domestic and international laws remains to be seen and the master's situation in the new system defies precise definition. However, the acceptance of the Convention by more than two-thirds of existing tonnage suggests that States are serious about the holistic protection of seafarers and masters and that masters are a key part of making the system work. This new legal climate cannot be underestimated in its effect on the master, both as a manager of labour and his own rights. As part and parcel of the new legal winds brought about by the MLC, port State control memoranda and other major conventions, inspections by both foreign and domestic authorities are ever-present. The master finds himself as the nexus between higher legal authority, higher commercial authority and on-board labour which he commands and manages. In so doing, the master also is responsible for all matters directly or indirectly associable with labour.

3.6 The master is an integral part of the enforcement apparatus. Thus, the master is proximately responsible to the flag State Member for the working and living conditions of labour on his vessel. Under Regulation 5.1.1, each Member is responsible for ensuring implementation of its obligations under the Convention and shall establish an effective system for the inspection and certification of maritime labour conditions, in accordance with Regulations 5.1.3 and 5.1.4, ensuring that the working and living conditions aboard meet the standards in the Convention. In doing so, a Member may, where appropriate, authorize public institutions or other organizations (including those of another Member in agreement) to carry out inspections or to issue certificates or to do both. In all cases, the Member shall remain fully responsible for the inspection and certification of the working and living conditions aboard.

3.7 There are consequences of a master's failure to be prepared. It is a duty of the master in looking after the owner's best interests as commercial agent, to perform his own inspections as listed in Title 5 (discussed later) of the Convention in a disciplined fashion. The master therefore must be prepared for official inspections as a part of his duties under the registry State warrant to enforce flag State law, to prosecute efficiently the voyage for the owner and to preserve and care for the safety of the vessel, the persons aboard, the cargo and the environment. To not diligently inspect, record and report as required[16] or not being prepared for inspections of higher domestic or foreign authority is a failure of these duties for which there are potentially serious consequences for the master.

3.8 The principal change from the disparate State laws heretofore regulating masters[17] is that masters are universally seafarers under the Convention. 'Seafarer means any person who is employed or engaged or works in any capacity on board a ship to which this Convention applies'[18]; 'Except as expressly provided otherwise, this Convention applies to all seafarers [and therefore masters]'.[19]

16. Reporting to higher competent authority directly implicates the master and his duties as illustrated by Guideline B4.3.5. The Guideline implies proximate reports by the master to higher legal and commercial authority where statistics and reports to the ILO as necessary are compiled.

17. For a discussion of the complexities of the master's status and its evolution see John A C Cartner, *et al.*, *The International Law of the Shipmaster* (Informa 2009).

18. Article II(1)(f).

19. Article II(2). Hereinafter, when paraphrasing parts of the Convention where the term seafarer is used, the term master is inserted after a conjunctive to emphasise the master's status as master and seafarer.

3.9 Historically, the master was not a seafarer but a commercial agent and custodian of the vessel for the owner and was often part-owner of the vessel and a participant in profits of the voyage. The demarcation was clear such that the master was distinct and separate from officers and ratings. In the 20th century, a gradual evolution occurred, giving the master certain social welfare benefits of the seafarer in some States. The shift from free-on-board (FOB) lading to cost-insurance-freight (CIF) lading and the rise of labour organizations further shifted the master from a participant in the maritime venture to an employee-at-will of the owner. Hence, in recognition of the master's changed status to that of seafarer, the MLC implies that for any State accepting the Convention, should its laws say otherwise, the master becomes a seafarer with all the rights, duties, responsibilities and liabilities of any other seafarer. The acceptance of the master as a seafarer is a substantial change in recognitive law in many States, which do not necessarily give the master the benefits of being a seafarer. As a seafarer, the master's rights and duties are expanded as well as made uniform by the Convention. He enforces those rights and performs those duties under flag State law for all other seafarers under his command as well as for himself. Thus, the master is recipient of expressed and implied rights and administers the enforcement of those rights in his command.

3.10 The master has additional rights as a seafarer. The distinction between the master as a seafarer, brought into sharp focus by the Convention, brings also into focus to whom or what the master owes his loyalties. As a warrantee of the flag State government, the master owes allegiance to the higher legal authority of the flag State where it exercises its jurisdiction and is competent to do so within the scope of the warrant. He simultaneously owes allegiance in agency to the higher authority of the owner in commercial matters within the scope of the agency or where the owner responds through the master to the flag State within the scope of the State laws. Because the master is a seafarer, the Convention is clear that the master is entitled[20] to all the rights of a seafarer. That is, the master has a right to a safe and secure workplace that complies with safety standards[21]; a right to fair terms of employment[22]; a right to decent working and living conditions aboard[23]; and a right to health protection, medical care, welfare measures and other forms of social protection. These rights heretofore did not necessarily exist in domestic laws for the master except as occasional, ancillary and accidental benefits received by that person as a result of seafarer reforms which effectively began with Samuel Plimsoll (1824–1989).

3.11 The master has clear duties. In reading the Convention, one should recall that the master has six generalized duties, each interactive with the others. His duties are to enforce flag State law, to preserve the vessel, to preserve the lives aboard, to preserve the cargo, to preserve the environment and to prosecute the voyage efficiently,

20. One should take especial care in reading the Convention. In many places, the term 'entitled' is used for a particular matter. This should not be understood, as is often done, with a legal right as that term is elsewhere commonly used. 'Entitled', in this context, simply means that the matter is expressed under a Title in the Convention without further qualification. Hence, a matter which is entitled is expressed with no necessarily attached other attributes or characteristics. Typically this means, within the tenor of the Convention, that an entitled matter will become a part of the flag State domestic law under which the master is warrantee thereof.

21. Article IV(1).

22. Article IV(2).

23. Article IV(3).

all the while as an employee at the will of the owner responsible to his employer and the owner's commercial agent. His duties make the master a fiduciary for the owner, the souls aboard and the contents. In some rare cases the master can become a constructive bailee and a constructive trustee. In so doing, the master has, *inter alia*, the responsibilities within those duties to inspect, maintain and repair, provision, have aboard the requisite chandlery, record, report, operate, plan and manage.[24]

3.12 The Convention should be read as to the master in the context of laws and other conventions. It is thus important to read the MLC as to the master while understanding its context and subtleties. It is safe to say that current international maritime law affecting the master rests on five pillars of which the settled domestic laws are one with the four others being conventions. The MLC is the fourth and latest and integrating addition to the legal structure. One therefore cannot fully understand the master's relationship to labour without understanding the master's statuses as both master in the complexities of commercial law and in flag State domestic law.[25] In the maritime law as set forth in the *International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, [7 July] 1978 (STCW 78/95)*[26]; the *International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 (MARPOL)*[27]; and the *International Convention for the Safety of Life at Sea, 1974, as amended (SOLAS)*[28] are the principal guides for the owner and master. It is from the evolved commercial and statutory laws that the master is proximately empowered to perform his duties and is liable for his acts. It is from these three conventions that the master has developed many of his powers and liabilities. It is from the fourth, the MLC, that he derives many of his labour rights and authorities as integrated with the laws and the other conventions.

3.13 The master is the competent authority afloat. The question arises as to whether or not the master's authority and primacy as master, whilst managing labour and dealing with owners, regulators of the flag State and administrator of the MLC and other labour laws afloat, is diluted by his new status as seafarer under the Convention. Superficial appearances suggest that the shipmaster has two masters: the owner and the flag State. The Convention, however, deals with this in a prophetical fashion by implicitly creating powers in the master where he renders unto the flag State that which is the flag State's and renders unto the owner that which is the owner's. If anything, the status as master is wholly affirmed in his authority wherein the flag State is the warrantor at law and the master is the flag State's warrantee at law because

24. John A C Cartner, *et al.*, (2009).

25. Each of these topics in law is reviewed thoroughly in John A C Cartner, *et al.*, (2009).

26. For differences between the *International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) of 1978 and 1995* see STCW, Code Part B, Table B-I/11. For a discussion of the STCW as to the master see John A C Cartner, *et al.*, (2009), §§ 13.2.11. These are discussed in the MLC as to the master, the master's role in STCW enforcement, the qualifications to serve as master, dispensations by the flag State, standards of medical fitness, standards of navigational experience, navigational safety, communications equipment, deck watches, engineering duties, supplies, pilots, disciplinary liability and training duties. Each has relevance to the MLC.

27. See John A C Cartner, *et al.*, (2009), §§ 12.1.3 for requirements of the master and civil and criminal liabilities. See also §§ B7; B7.2 fn; 12; 12.2; 12.1.1-3; 12.4 and fn; 12.6; 12.7; 13.4. In Part III, Convention Codes.

28. *Ibid.* §§ 1.5; 3.2 fn; 3.2.3; 3.7.3; 7.0; C7.1; C7.1 fn; D7.2; 8.7; 8.7 fn; 9.3; 9.5; 9.10; 9.11.4; 10.0; A101; A10.1.2-.3; B10.1; B10.1 fn; C10.1; 12.1; 13.2.5; 13.2.5 fn; 13.4. Part III, Convention Codes CS1-16 by State.

of the flag State's interests in matters of labour controls under the Convention. The Convention says:

> '1. For the purpose of this Convention and unless provided otherwise in particular provisions, the term: (a) competent authority means the minister, government department or *other authority having power to issue and enforce regulations, orders or other instructions having the force of law in respect of the subject matter of the provision concerned*'.[29]

3.14 The master in the domestic registry laws, having a valid certificate and being appointed master, has the warrant of the flag State[30] to enforce the laws of the flag aboard his vessel. One should carefully distinguish between the power of the master to enforce flag State law on the vessel and the power of the master conferred by his agency principals and their instructions. The owner may give daily guidance and advice; however, the master is the person on the ship on the high seas who makes decisions and applies the flag State law under license or certification or 'document' (US) of the flag State. The distinction is only a matter of words. To be a master for a flag State vessel, the master must have a licence or official document or a Certificate (e.g., UK practice) or in some cases both in the same piece of paper (e.g., Liberian practice of certification and license). The master further has the right of 'on-the-spot decision making'. The master has the authority and duty to judge, on the spot, the situations of the ship, cargo, and sea and weather, and to decide the proper safety measures which need to be taken then and during the voyage to meet his duties. The master may give precedence to measures intended to maintain the safety of the vessel if a conflict should arise between safety and security requirements applicable to the vessel.[31] Safety of the vessel implies the preservation of the contents of the vessel. To do so he gives orders and instructions to his officers thereby delegating his authority.[32] Under the Convention, these orders and instructions come from his

29. Article II(1)(a) (italics added).

30. K X Li and Jim Mi Ng, 'International Maritime Conventions: Seafarers' Safety and Human Rights' (2002) 33 Journal of Maritime Law and Commerce 381.

31. [US] 33 CFR § 104.205(b), (2003).

32. The master must be able to delegate to perform his duties. *The Bonvilston* 30 TLR 311 (1914). Oceanic passage demands the master delegate authority so that the voyage is successful. *Ibid.* Contrary to the old saw that 'the master sleeps with one eye open', he must delegate. The master has paramount power over all persons aboard. *Pietrafesa v. Board of Governors for Higher Education*, 846 F. Supp. 1066 (D.R.I., 1994) referencing University of Rhode Island, *R/V Endeavor: A Manual for Ship Users*, at 21, and John Bourdeau and John Dvorske, *et al.*, *American Jurisprudence* (West 2006) 70 Am Jur 2d Shipping §MERI. See, *Butler v Boston & SSS Co*, 130 US 527, 9 S. Ct. 612, 32 L. Ed. 1017 (1889). A master through his officers enforces proper practices, carries full responsibility for vessel safety and all aboard and, because of these legal responsibilities, is given full legal power over all operations and personnel, aboard and in foreign ports. *Pietrafesa v Board of Governors for Higher Educ.*, 846 F. Supp. 1066, (DRI, 1994). In most cases the master is in charge and responsible for the vessel present or not and if not, must put a qualified officer in charge. It is the master's, not the owner's, duty to see that a competent and qualified officer is in charge. John Bourdeau and John Dvorske, *et al.*, (2006), § 218. *Butler v Boston & SSS Co*, *ibid.* (1889). This requirement appears fraught with danger for the master. If, however, the master procures competent persons with appropriate orders to perform their lawful duties, no guilt is imputed to the master if those persons without the master's knowledge neglect duties assigned. *Ibid.* See *Ellingson v American Mail Line*, 35 Wash. 2d 129, 211 P.2d 491 (1949). *McConnel v Williams*, 65 A.2d 243 (1949). *Commercial Nat. Bank of Chicago v Sloman*, 106 NYS 508 (1st Dep of Chi7), mod. on other grounds, 194 NY 506 (1909). Therefore, although the master may on occasion be liable for the acts of his officers engaged in their usual duties, he is not liable for negligence when he has used reasonable care in their selection and has left the vessel in their charges with proper orders. However, as a general matter, the master may not delegate his agency powers, only his authority.

competent authority by definition and thereby have the force of law.[33] Accordingly, then, the master is the competent authority afloat enforcing Convention regulations.[34]

3.15 The master has ministerial authority afloat. The MLC has both expressed and strongly implied the ministerial duties of the master in his capacity as the competent authority afloat, as well as underlying legal support for his apparent authority.[35] He can exercise such duties in four ways. The first is carrying out an expressed duty according to the Convention. The second is carrying out an implied duty in the Convention under the master's status as the competent, expressed or implied, authority afloat. The master may proscribe, prescribe, affirm or prohibit. For example, the master may permit certain acts aboard, may direct that certain acts be done, may formally agree to certain acts and may prohibit entirely certain acts. As examples, within the law the master may proscribe times and places wherein spirituous liquors may be consumed aboard, he may prescribe watch arrangements, he may affirm with his signature logbook entries or he may prohibit the signing on of a seafarer without the proper credentials. The master also has duties as to himself as a seafarer and therefore master. Thus, he must have the necessary documents for himself identical to the treatment any seafarer. Other duties implied by the Convention are those duties owed to the higher competent flag or owner authority in reporting to it. These categories of duties are obviously neither mutually exclusive nor exhaustive of all possible duties. This all goes to say that, when reading the Convention, one must put oneself in the shoes of the master afloat and to the realities of his commercial existence and duties to the owner as agent, and to the realities of his legal existence to the flag State under its warrant which, in the case of the MLC, are expressed to each and to labour aboard.

33. John A C Cartner, *et al.*, (2009), §§ 6.2–6.11. The Convention seems to clarify the position held in Anglo-American case law, in other Conventions and in many domestic laws.

34. A broad interpretation would presume that he also has similar powers to enforce other maritime-relevant regulations within the flag State domestic regime and in other maritime conventions, as expressed in flag State law. A narrow interpretation would limit such powers to the Convention. That interpretation is both impracticable and cumbersome. The Convention Regulations are important to the Convention, the vessel, the owner's interests and the master's interests. However, there are other competent authorities. To the master, the ultimate competent legal authority is the flag State. Thus, the ultimate competent commercial authority is the owner except where a duty is owed to the cargo, charterer or other third party.

35. See John A C Cartner, *et al.*, (2009), § 8.3. The master's authority to act as an agent of the owner may be actual or apparent. Actual authority may be express or implied and a master may act or not act with express authority if the owner explicitly directs him to carry out a specific act or duty or forbids him to act. Should an act not be expressly directed, a court may find that the master had implied authority to carry out the owner's wishes. The owner's behaviour towards a third party (labour being a third party here) with whom the master has contracted or made representations and statements is evidence that the master had the authority to act on the owner's behalf. *The Restatement (Second) of Agency* (1957) § 8. In contrast, in the triangle of owner-master-third party, for apparent authority to exist the owner must act in some way, by omission or commission, to lead the third party to believe that the master is acting on his behalf and has the authority, granted by him, to contract or speak on his behalf. *Cactus Pipe & Supply Co, Inc. v M/V Montmartre*, 756 F.2d. 1103. (CA5 (Tex.) 1985). Apparent authority is entirely distinct from actual authority, either express or implied, and arises from written or spoken words or any other conduct of the owner which, reasonably interpreted in the situation, causes a third party to believe that the owner consents to have an act done on his behalf by the master purporting and appearing to act for him. *The Restatement (Second) of Agency*, § 8. (cited in *Minskoff v American Exp. Travel Related Services Co, Inc.*, 98 F.3d 703, (CA2 (NY), 1996). The mere fact that the owner has appointed the master and that the master is in the position and acts as a master overall is sufficient by custom and practice, for a necessarymen or any other third party to presume that the master has the owner's authority.

THE MASTER AND TITLE 1: MINIMUM REQUIREMENTS FOR SEAFARERS TO WORK ON A SHIP

3.16 A principal duty of the master is the preservation of the lives aboard the vessel. Preservation of life includes the general welfare of those aboard; the dilution of which may lead to foreshortened lives. Because of the vulnerabilities of young (mid-late adolescent) seafarers, it is incumbent on the master to comply with, and to enforce assiduously as a part of his duties, the Convention Regulations and their derivative rules as to young seafarers.

3.17 The master must be mindful and protective of underage labour. The Convention carefully regulates the management of young or underage labour on ships. The master as competent authority afloat enforces those Regulations aboard. The Convention establishes a minimum age under Title 1[36] for shipboard work. Standard A1.1 as to minimum age is strict.[37] It is clear that, in enforcing higher competent authority's laws, regulations and agreements, the master should prohibit any person under the age of 16 years from working and that he should carefully enforce the language of the Convention for any person under the age of 18 years including the Guideline as to seafarer age.[38]

3.18 The master must be knowledgeable of the requirements for medical fitness. The Convention establishes a system of medical certification. A competent medical authority issues certificates to seafarers and therefore masters. There is reciprocity with STCW 95 certificates for seafarers and masters to present to the employing agency and the master; the MLC certificate is the vessel certificate for authorized inspection. This system, in some respects, takes the master out of medical decisions. In others, it gives him full responsibility and authority. He may merely deny employment to a seafarer without a valid medical certificate. Because the master is also a seafarer, he is unable to work on the vessel without a valid medical certificate. The master may waive the requirement of medical certification under limited circumstances.[39]

3.19 The master must be knowledgeable about training and qualifications. Consistent with STCW 95, the MLC requires that any seafarer or master who works on a ship be trained properly and qualified in the position wherein he works. It is the duty of the seafarer or master to have the necessary credentials attesting to the same. Deference is made to STCW 95 as meeting the requirement. Thus, the master determines training and qualification and ability to perform under the rules of STCW 95 and its certification regime expressed through the flag State's rules of administration and the Convention.

3.20 The master must know about the recruitment and placement of seafarers and masters. The MLC attempts to regularize crewing agencies or recruitment and placement services. This is a core structural change in current practice affecting masters in their statuses as seafarers, and therefore, masters having those same rights.[40]

36. Regulation 1.1.
37. Standard A1.1.
38. Guideline B1.1.
39. Regulation 1.2.
40. It thereby affects masters as employers and managers of seafarers. It further affects masters acting for owners as to seafarers and organizations recruiting and supplying them, whether public, private or under collective bargaining agreements.

Thus, essential rights for seafarers enforceable by the master afloat, are promulgated by the MLC with those self-same rights applying to the master.[41]

3.21 Regulated public and private placement and recruiting services are recognized. The Regulation and guidance are prescriptive, detailed and call for public services in flag State territory at no charge to seafarer or master with visa charges absorbed by owners. Another option to public and private bureaux is placement of seafarer or master through labour organizations using collective bargaining contracts with owners with similar State oversight. A generally worded admonition to ensure that owners have the means to protect and repatriate seafarers stranded on foreign shores has fewer teeth, however. Novel is the requirement for an insurance scheme to cover costs of seafarer or master where crewing agencies fail in their obligations. A complaint and investigation mechanism is required to be established by the flag State. The Convention urges close control of private placement services under certification schemes. States may be parties in public schemes. A warning and notice system is required for non-flag services used by owners of flagged ships and for States which are not Convention Members. The Guidelines for the Regulation require strong data collecting and reporting on labour demand and supply, cooperation among placement services, owners, vessels (masters), competent shoreside authorities (flag administrators) and training entities looking toward increasing safety of operation, seafarer and master privacy and anti-discrimination rules based on gender and other relevant factors and anti-exploitation rules to avoid financial or other exploitation of seafarer and masters. Record keeping for each seafarer (and master) is required with relevant information as to placements, qualifications, certification records, medical records, contacts for emergent matters and family communications (in and out) and personal details relevant to the work. A warning system as to irregularities observed from masters reporting to owners is required. Administrative staff must have maritime and seagoing background and training. Ethical codes must be put into place. A remonstrative system under the principles of 'natural justice' must be put into operation for complaints about discipline or abuse. Inter-flag cooperation and harmonization of labour practices are urged.

3.22 The master has strong *de facto* and *de jure* authority in these matters as the competent authority afloat to reject or accept a seafaring candidate despatched from a crewing agency, whether private or public, and has strongly implied duties in the administration of the laws of the flag State regarding labour aboard his vessel.[42]

THE MASTER AND TITLE 2: CONDITIONS OF EMPLOYMENT

3.23 Conditions of employment are the heart of the legal and economic relationship among owners, masters and other seafarers. Employment agreements, wages, overtime and other compensation, hours of work, rest and manning all come under the master's principal duties previously detailed.[43] In doing so, he is required under

41. Regulation 1.4.
42. Standard A1.4.
43. See Attard and Gonzi, Chapter 3 of this work, detailing the MLC's provisions regarding working conditions including employment contracts, wages, working hours and others.

the Convention and other laws to prudently and carefully inspect all the documents involved, maintain and repair them as necessary, provide for their safekeeping and use, have aboard the requisite equipment to do so, record matters as required by law and the Convention, report to the higher competent legal authority in the flag State and the higher commercial authority of the owner, operate the vessel and prosecute the voyage prudently so as to conform with the seafarer conditions of employment, plan the persons and duties and times necessary to maintain the safety of the vessel and other duties and withal manage the system implicated by his duties and the conditions of employment.

3.24 Under Title 2, 'Conditions of Employment' can be said to be the core of at-sea regulation for the operating vessel and master along with Title 3, 'Accommodation, Recreational Facilities and Food and Catering'. Title 2 is lengthy and detailed and divided into eight Regulations, each of which has implications for the master.

3.25 The master must be cognizant and enforce the rules on written employment agreements. Regulation 2.1 purposes to provide the seafarer and master with a 'fair employment agreement.' In doing so, such agreements must be clearly written and enforceable contracts accepted by the seafarer or master with accommodation for advice. It, as appropriate, incorporates collective bargaining agreements; is in a native language of the seafarer or master as well as in the English language; is executed by the parties; has presented original versions to each party; is kept aboard in copy form with collective bargaining agreement(s); and is kept aboard with a work record for each seafarer and the master containing no qualitative information about performance of the seafarer or master; and is kept with a file with full seafarer or master personal details. The master's responsibilities are implied in enforcing the requirements of the Convention as to record-keeping as documents available for inspection. Also implied and expressed elsewhere, *infra*, is the master's inspection of such records for seafarer and master aboard to see that they are in order and properly rendered by the parties according to the Convention and prepared for subsequent inspection by higher legal and commercial authority.

3.26 Wage administration is an important duty of the master. The wage Regulation[44] attempts to regularize and harmonize how seafarers and masters[45] are paid according to their wage agreements. It is comprehensive and detailed. The master is impliedly and expressly involved in wages, especially overtime wages, which is a perennial problem on all ships, even those well managed. *Inter alia*, pay is monthly and accounted for including exchange rates; allotments are required with reasonable charges; a list of wage definitions lends precision to the Regulation; overtime pay is required to be at least 1.25 times base pay or the State legal rate; base pay is calculated on an eight hour day; base pay and overtime are accounted separately; the master is expressly responsible for maintaining records of the same; deductions are limited to domestic law; wages are paid in legal tender; domestic holiday laws and wage-hour weeks are

44. Regulation 2.2.

45. In most States the master may be a lienor of the vessel for wages and other costs. No rule requires conventions or treaties to have direct and immediate effect as a domestic law. However, some States, through the IMO or through their constitutions, such as the Netherlands and Greece, either permit direct incorporation of conventions or, in the alternative, require enactment of legislation to express a convention domestically, such as the Bahamas. If such a mechanism is available, private citizens such as masters may be able to avail themselves of domestic court jurisdiction to enforce the rights given in a convention. See John A C Cartner, *et al.*, (2009), Pt. III by State.

followed; equal pay for equal work is an aspiration; monetary fines unless allowed by domestic laws are prohibited; and, maritime liens are allowed for failures to pay, as well as actions for insolvency against the owner.[46] Discrimination on the basis of race, colour, sex, religion, political opinion, national extraction or social origin is prohibited; on termination, full pay is made; bank transfers and so forth are allowed; wage agreements are kept on the ship by the master for inspection; wages are paid to the seafarer and therefore master unless otherwise directed; and a minimum wage mechanism is established.

3.27 In the Convention reference is occasionally made to the Joint Maritime Commission (JMC) of the ILO. The JMC is a bipartite standing body that provides advice to the ILO Governing Body on maritime questions including standard setting for the shipping industry. It is composed as follows: Chairman of the Governing Body; two Governing Body Members (one worker, one employer); twenty regular shipowner Members; twenty regular seafarer Members; four deputy shipowner Members; and four deputy seafarer Members. The Standing Orders of the JMC provide guidance on how to deal with the various procedural questions that may arise in the course of the Commission's work. Among the JMC's specific attributes is the updating of the minimum basic wage figure for able seamen in accordance with the *Seafarers' Wages, Hours of Work and Manning of Ships Recommendation, 1996 (No. 187)*. This is the only statutory international wage fixing mechanism and is analogous to the legislative functions for the industry performed by the IMO worldwide. The JMC's Subcommittee on Wages of Seafarers has been established to regularly update this wage figure.[47]

3.28 The master enforces hours of work and rest.[48] Fatigue has become a well-known factor in maritime accidents.[49] Seafarers and masters have a right to rest. The Convention requires regulation of work and rest hours. Hours of work as well as hours of rest are operationally defined. A maximum of a six-day week is prescribed with public holidays. Defined are maximum work periods, rest periods between work periods, minimization of drills and inspections during rest periods, compensatory rest for callouts not otherwise compensated, the posting of work and rest hours for all seafarers and therefore masters, the keeping of records of work and rest, a saving clause for compensation in lieu of rest hours.[50] Young seafarers are protected by special rules.[51] The master's duties are the fair inspection, maintenance, provision, reporting, operating and planning for the time keeping system aboard following the ministerial duties he is assigned by the company as a part of his duties to prosecute the voyage as efficiently as practicable and to perform as directed. The duty to report to higher commercial authority or higher flag authority is clear and obvious in such administration as is enforcing flag State law under his warrant and the owner's policies as an employee at will.

46. Under the *International Convention on Maritime Liens and Mortgages, 1993* and the *Protection on Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173)*.
47. See www.ilo.org (accessed 19 April 2013).
48. Regulation 2.3.
49. See John A C Cartner, *et al.*, (2009) for the master's right to rest and a review of the fatigue literature and the STCW 95 requirements for rest periods.
50. *Ibid.* for the peculiar problems of the master and rest and work periods.
51. Guideline B2.3.1.

3.29 Masters and other seafarers are entitled to leave.[52] Paid annual leave is required at a minimum of 2.5 days per month of work (thirty days per annum). Justified absences including national holidays are not annual leave. Foregoing annual leave is prohibited. Service off-articles, maternity (but curiously, in light of the gender-neutral position taken elsewhere in the Convention, not paternity) leave, illness or injury, compensatory leave and temporary shore leave are counted as service. Leave may be taken at a place convenient to the seafarer and therefore master if not more costly to the owner than the place of repatriation. Recall during leave is exceptional and only with the seafarer and therefore master's consent. Annual leave is uninterrupted and is prorated if less than a year's service or termination is involved. Young seafarers are given special treatment. The master keeps seafarer and master records as a part of his express and implied duties to the flag State and to the owner.

3.30 Masters and other seafarers are entitled to repatriation.[53] Repatriation is the catchall word for the right of a seafarer or master to return home from his work.[54] Masters have an implied duty to facilitate repatriation of seafarers under their command both for the commercial principal as well as for the flag State authority. Further, the Convention expresses a ministerial duty, *infra*. Thus, 'Seafarers [and therefore masters] have a right to be repatriated at no cost to themselves in the circumstances and under the conditions specified in the Code'.[55] This notion led the Members to agree in the Convention that owners flying the flag of a State shall provide financial security for repatriation under the Code when the employment agreement expires; when employment is terminated by the owner or by the seafarer or master for 'justified reasons'; or if the seafarer or master cannot perform his duties under specified conditions. States Parties are required to enact laws on repatriation according to the Code including destinations of repatriation, mode of transport, expense covered and other arrangements made by owners. An advance payment for repatriation or recovery of costs of repatriation from wages is prohibited except in certain specific cases. Members shall not prejudice an owner's right to recover the cost of repatriation under third party contractual arrangements. Where an owner fails to arrange or pay the cost of repatriation the flag State arranges for repatriation, the State of repatriation or nationality may do so. It in turn may recover from the flag State who recovers from the owner. No charge accrues to the seafarer or master. Recovery may be made at law.[56] Members facilitate repatriation and replacement for seafarers or masters on vessels in territorial or inland waters and may not refuse repatriation because of an owner's financial circumstances or refusal. A seafarer's or the master's costs are paid for passage (usually by air), accommodation and food, pay and allowances, transportation of 30 kg of personal luggage and medical treatment during repatriation. Time spent awaiting repatriation and repatriation travel time may not be deducted from paid leave accrued. Notices of the right to repatriation are made available to seafarers and masters, which is an implied duty of the master under various enumerated conditions. Rules of sea service are included in the Convention. Destinations for repatriation are the place of engagement, a place agreed to in collective bargaining, State

52. Regulation 2.4.
53. Regulation 2.5.
54. For further information regarding MLC repatriation requirements see Chapter 6 of this work.
55. *Ibid.*
56. *International Convention on Arrest of Ships, 1999.*

of residence or another mutually agreeable place at engagement, each equally valid. Seafarers and masters are time-barred in a conventional expression of the doctrine of laches from collecting if an unreasonable time passes for a claim. Members should provide for repatriation if a seafarer or master of a foreign flag State is put ashore in a foreign port, reasons for which the seafarer or master is not responsible, to the port of engagement or nationality or residence or another port as agreed among the seafarer, master or owner and approved by the competent authority or for medical care and maintenance if not self-inflicted. Special rules are set out for young seafarers.

3.31 Masters and other seafarers must be compensated for loss or foundering.[57] The purpose of the Regulation is 'to ensure that seafarers, and therefore masters, are compensated when a ship is lost or has foundered.' Thus, a seafarer or master is adequately compensated in the case of injury, loss or unemployment arising from loss or foundering. Each State Party is required to have rules to effect the Regulation requiring the owner to indemnify against unemployment resulting from loss or foundering without prejudice to any other rights a seafarer or master may have from the loss or foundering. Unemployment indemnity is paid for the time unemployed at the same rate as the wages payable under the employment agreement, limited to two months' wages. A seafarer or master has the same remedies for recovering such indemnities as for recovering arrears of wages earned in service. The master's implied duty here is to the seafarer in collecting payments from the owner and facilitating the owner's efforts to make such payments as practicable. His further duty is to cooperate with the flag State authority in ensuring such payments are made and reporting if they are not or are irregular, as a part of his duty to enforce flag State law and to prosecute the voyage, albeit truncated, as efficiently as practicable and duties as an employee at will of the owner or the owner's agent.

3.32 The master should enforce safe manning levels.[58] The purpose of the safe manning language in the Convention is to 'ensure that seafarer and therefore masters work on board ships with sufficient personnel for the safe, efficient and secure operation of the ship.' The Convention is brief as to this requirement[59] apparently relying on other major conventions, discussed elsewhere herein.

3.33 Each Member shall require that all ships that fly its flag have a sufficient number of seafarers on board to ensure that ships are operated safely, efficiently and with due regard to security. Every ship shall be manned by a crew that is adequate, in terms of size and qualifications, to ensure the safety and security of the ship and its personnel, under all operating conditions, in accordance with the minimum safe manning document or an equivalent issued by the competent authority, and to comply with the standards of the Convention. When determining, approving or revising manning levels, the competent authority shall take into account the need to avoid or minimize excessive hours of work to ensure sufficient rest and to limit fatigue, as well as the principles in applicable international instruments, especially those of the IMO, on manning levels. When determining manning levels, the competent authority shall take into account all the requirements within Regulation 3.2 and Standard A3.2 concerning food and catering.

57. Regulation 2.6.
58. Regulation 2.7. See also John A C Cartner, *et al.*, (2009), 159.
59. Standard A2.7.

3.34 However, the master has a right to have sufficient seafarers aboard to operate the ship safely. While owners strive to reduce short-term operating costs, they can lose sight of the long-term large costs caused by those reductions. The effort to reduce costs by reducing manpower leads to seafarers and masters being overworked and fatigued, which puts the ship, the people aboard her and the cargo at risk. This is a direct violation of the master's principal duty. Safe manning is a function of the number of qualified and experienced seafarers necessary for the safety of the ship, crew, passengers, cargo and property, and for the protection of the marine environment.[60] Under SOLAS, all ships are required to have a Minimum Safe Manning Certificate in order to ensure that they are sufficiently manned.[61] Port State control authorities check manning certificates as a part of their safety efforts. It is ultimately the duty of owners or managers to supply the funds or personnel for a ship to ensure that a ship is adequately manned at all positions for safe operation. It is the duty of the master to demand such officers and ratings to permit him to perform his paramount duties for the safety of the vessel and its contents. The master's duties to maintain the safety of the vessel, the souls aboard, the cargo, the voyage and the environment are violated by under manning. As warrantee of the flag State, he must act to sail only with safe manning. As commercial agent of the owner having custody and other duties related to the vessel he must sail only with safe manning. His duties are to inspect the experiences and credentials of all seafarers and to reject those not adequate for safe manning, to maintain the disciplinary and training regimes necessary to continue safe manning, to provide for, record and report safe manning operations and documents as required commercially or legally, to operate, plan and manage manning as an essential part of his duties of command. Curiously, the same Regulation touches on dispute settlement relating to manning issues.[62]

3.35 The master must deal with seafarer skill development and opportunities.[63] The Convention recognizes the need to have an orderly seafarer and master skill development and employment opportunity system as well as an orderly method of seafarer and master recruitment, and it purposes to promote career and skill development and employment opportunities. The language for the most part is merely hortatory.[64] Further, in Standard A2.8, '… in order to provide the maritime sector with a stable and competent workforce… The aim of the policies … shall be to help seafarers [and masters] strengthen their competencies, qualifications and employment opportunities.' After consulting with shipowners' and seafarers' (and masters') organizations, each Member shall establish objectives for the vocational guidance, education of and training of seafarers (and masters) whose duties primarily relate to safe operation and navigation including ongoing training.

60. Principles of Safe Manning, IMO Res. A. 48 (XIII) Article 1, 19 November 1981; see also K X Li and Jim Mi Ng, 'International Maritime Conventions: Seafarers' Safety and Human Rights' (2002) 33 Journal of Maritime Law and Commerce 381.

61. See SOLAS, reg. 13(a)–(b); see also K X Li & Jim Mi Ng, *ibid*.

62. See Guideline B2.7(1), 'Each Member should maintain, or satisfy itself that there is maintained, efficient machinery for the investigation and settlement of complaints or disputes concerning the manning levels on a ship,' and Guideline B2.7(2), 'representatives of shipowners' and seafarer [and therefore masters'] organizations should participate, with or without other persons or authorities, in the operation of such machinery'.

63. Regulation 2.8.

64. Guideline B2.8.1 is hortatory.

THE MASTER AND TITLE 3: ACCOMMODATIONS, RECREATIONAL FACILITIES AND CATERING

3.36 Accommodations, recreational facilities and catering go to the heart of how seafarers and the master live, eat and spend their leisure times. As such, it directly falls under the master's duty to preserve the lives of those aboard. It further implicates all his other duties as to the safety of the vessel, the cargo, the prosecution of the voyage and the preservation of the environment. Without seafarers being healthy and nutritiously fed, housed in comfortable quarters and allowed to do things other than thinking about seafaring, the general welfare of the vessel declines and increases the risk of accidents, illness, chronic disease and thereby increases the risks to the vessel, the persons aboard, the cargo, the prosecution of the voyage, the environment and is not compliant with flag State laws under the Convention. Hence, the master performs all the management and ministerial functions under Title 3 to perform his mandated duties.

3.37 As to accommodation and recreational facilities,[65] the purpose of the Regulation is to ensure that seafarers and masters have decent accommodation and recreational facilities on board. There are requirements in the Regulation outside the master's control and therefore outside his immediate duty. Other things within the Regulation are well within the master's control and duties. There is a grandfather clause where the Convention applies to ships built after a certain date. Hence, items which can only be addressed in design and construction of the vessel are outside the master's control in older ships, and in new ships, construction is within the domain of the State and the owner's classification society, which presumably follows the Convention rules in design and construction oversight. The overarching concepts of safety and decency apply to accommodations and habitable facilities. Members must adopt inspection regulations for ongoing compliance and must consult with seafarers', masters' and owners' organizations in implementing the Regulation. Incorporated is Regulation 4.3 on health and safety and accident prevention and Regulation 5.1.4.[66]

3.38 Accommodations require specific lighting, heating, ventilation, air conditioning, drainage, privacy and modesty, sanitary, laundry, and equipment and have operational implications as to ambient nuisances such as noise and vibration (from engines, steering gear rooms, deck winches, ventilation, heating and air conditioning equipment, other noisy machinery with sound proof control rooms in engine rooms) and chemicals, each under the partial control of the master.

3.39 Consistent with Guideline B4.3.2, 'Exposure to Noise', the Member, along with international organizations and representatives of shipowners' and seafarers' (and masters') organizations, should continually review the problem of noise with the objective of improving the protection of seafarers and masters, in so far as practicable, from the adverse effects of such exposure. The review should take into account the adverse effects of exposure to excessive noise on the hearing, health and comfort of

65. Regulation 3.1.

66. An inspection and compliance rule is incorporated in the Regulation upon registry, change of registry, sale or substantial alteration of a vessel. Design and construction requirements are not mentioned in the present discussion because they are outside the control of the master. However, specific habitability and comfort systems which must be inspected and maintained within the control of the master are discussed.

seafarers and masters and the measures to be prescribed or recommended to reduce noise. The measures to be considered should include instruction of seafarers and masters in the dangers to hearing and health of prolonged exposure to high noise levels and in the proper use of noise protection equipment; provision of approved hearing protection equipment; and assessment of risk and reduction of exposure levels to noise in accommodation and recreational and catering facilities, as well as engine rooms and machinery spaces. Guideline B4.3.3, 'Exposure to Vibration', is similar in language.

3.40 Thus, each of these is within the domain of the master to enforce flag State law in inspecting, maintaining, provisioning, having aboard the requisite chandlery spares, recording and reporting, operating, planning and managing within his duties of preservation of the vessel, souls aboard, cargo, the environment and the voyage. Inspection is required by Standard A3.1(18). Member States and owners must supply the necessary regulatory regime and fitments for the Regulation.

3.41 Standard A3.1 on accommodation and recreational facilities requires initial and ongoing inspections for compliance. These inspections are done by the master or his delegate.[67] Owners are urged to supply sheets and other bedding for use by seafarers and masters returned periodically and on voyage end and assumedly replaced as worn out on the master's inspection. The owner provides towels, soap and toilet paper. Hospital accommodations are required with accommodation minima, as described above, which is also inspectable.

3.42 Recreational facilities should be reviewed frequently to take into account technical, operational and other (assumedly social) developments in the industry. Minimally, a bookcase, facilities for reading, writing and games should be supplied if practicable. If practicable included also should be a canteen, smoking room, television viewing and radio receiving room, cinema showings, sports equipment including exercise equipment, table and deck games, swimming facilities, library of vocational and other books, facilities for recreational handicrafts, electronic equipment (radio, television, video recorders, other-media players), personal computer, software, bar unless contrary to law or religious or social customs, access to ship-to-shore telecommunications, email and internet, with reasonable charges. Efficient mail forwarding at minimal costs should be considered as well as port visitation privileges subject to security concerns and occasional voyage visitation privileges where insurance coverage is carried by the visitor for accident and illness.

67. Thus, such inspections are required of accommodation and recreational spaces for heating, ventilating, air conditioning (and the controls thereof), lighting (natural and artificial and the fittings and their controls), two-source power supplies for operations and emergent states, drainage and necessary hot and cold potable running water for consumption and washing, sanitary facilities with flushable toilets which are heated and drained with privacy separations, tubs and showers, clothes lockers, individual wash basins, laundry facilities with washers, dryers or a drying room and irons and ironing boards, operating or repairable accommodations to reduce excessive noise or vibration, internal environmental accommodations to eliminate the presence of harmful chemicals, berthing with reading lamps, dust-proof berth separators on stacked berths, toiletry accommodations (mirror, cabinet, etc), separation panels for berths and separation of genders in rooms, curtains, writing and seating accommodations, bookracks, coat hooks, recreational accommodations with appropriate group tables and seats, mess utensils, dishwashers, hot and cold beverage services, refrigerator, insect screens, religious accommodation if reasonable, installations for privacy and modesty individually and by gender as necessary and by department, withal inspected and maintained to the appropriate levels of repair for sanitation, ability to clean and disinfect and to prevent vermin infestation, safety and well-being.

3.43 The purpose of the food and catering[68] Regulation is to ensure that seafarers and masters are provided food of good quality and drinking water under regulated hygienic conditions. The flag State is responsible under its laws to ensure that ships carry and serve food and drinking water of appropriate nutritional value and quantity for the requirements of the ship and takes into account differing cultural and religious backgrounds. Food shall be provided free of charge during the engagement. The ships' cooks with responsibility for food preparation must be trained and qualified.[69] It is a duty of the master for the preservation of the souls aboard and the prosecution of the voyage and the enforcement of flag State laws that he inspect, maintain, provide for, record and report, operate, plan and manage, as required, the catering and catering employment system. Each Member must adopt laws and regulations or other measures to provide minimum standards for food quantity and quality and for drinking water and for the catering standards that apply to meals provided on its vessels. The flag State shall undertake educational activities to promote awareness and implementation of these standards.[70] These standards, at their minima, are that food and drinking water supplies shall be suitable in quantity, nutritional value, quality and variety; the organization and equipment of the catering department shall be such as to permit the provision of adequate, varied and nutritious meals prepared and served in hygienic conditions; and that catering staff shall be properly trained and instructed.

THE MASTER AND TITLE 4: HEALTH PROTECTION, MEDICAL CARE, WELFARE AND SOCIAL SECURITY PROTECTION

3.44 A healthy crew is a safe crew. The master cannot be efficient in command and fully carry out his principal duties with a crew which is unhealthy or not provided for medically and in their welfares individually. Proactivity in matters of health is

68. Regulation 3.2.

69. Guideline B3.2.2 provides that a seafarer is qualified as a cook if he has served at sea for a minimum period prescribed in law, passed an examination prescribed in law or at an approved training course where the examination may be conducted and certificates granted either by the Member or by an approved school. The authority should provide for the recognition of certificates of qualification issued by other Members or who have ratified the *Certification of Ships' Cooks Convention, 1946 (No. 69)*, or other approved body. Under Standard A3.2, owners, through the master as required, shall ensure that persons engaged as cooks are trained, qualified and found competent for the position in accordance with requirements set out by law. The training shall include the completion of a training course approved or recognized by the Member. There are exceptions of small crews and exceptions as to cooks for exigencies. The master is required to carry out frequent document inspections as to supplies of food and drinking water; all spaces and equipment used for the storage and handling of food and drinking water; and galley and other equipment for the preparation and service of meals. No seafarer under the age of 18 shall be employed or engaged or work as a cook.

70. The Member should cooperate with other agencies and organizations to collect current information on nutrition and on methods of purchasing, storing, preserving, cooking and serving food as to the requirements of catering aboard and this information should be made available, free of charge or at reasonable cost, to manufacturers of and traders in ships' food supplies and equipment, masters, stewards and cooks, and to shipowners' and seafarers' organizations. Appropriate forms of publicity, such as manuals, brochures, posters, charts or advertisements in trade journals, should be used for this purpose. The Member should issue recommendations to avoid wastage of food, facilitate the maintenance of proper hygiene and ensure the maximum practicable convenience in working arrangements; work with relevant agencies and organizations to develop educational materials and on-board information concerning methods of ensuring proper food supply and catering services; and work in close cooperation with the shipowners' and seafarers' organizations concerned and with national or local authorities dealing with questions of food and catering.

also a duty of the master under his duties to preserve the lives of those aboard and to act as the commercial agent of the owner. If proactive measures as to health are enforced, the owner, in the long run, spends less money on medical costs and reduces the risks of accidents and human error – each of which is costly. Hence, without careful monitoring and proactive decisions by the master, he fails in his duties to the owner. Again, in matters of health and medical care, the master performs all the management and ministerial functions under Title 4 to perform his mandated duties.

3.45 The master must be cognizant of the health protection, medical care, welfare and social security protection provisions of the Convention. Title 4 and its Regulations look to the health and medical needs of seafarers and masters as well as their social welfare and the social security protection of their flag States.[71] The master under his general duty to preserve the lives of those aboard should be especially concerned with Title 4 and its rules, expressly and with strong implications to enforce flag State law, and in so doing to inspect, maintain, provision, have aboard the requisite chandlery, report, operate, plan and manage all those matters which deal with the health, medical care, welfare and social security of those in his employ and under his command. Indeed, the Title touches on all ship functions and all functions of the master's duties.

3.46 Regulation 4.5 is not covered in detail here because it is predominately a State matter. Rules are established for determining which State prevails in social security schemes for the seafarer and master, how disputes are resolved, how such schemes should be stated in employment contracts and how owners should pay into such schemes. Detailed rules are not yet published.

3.47 Medical care must be provided aboard and ashore.[72] The purpose of the Regulation is to protect the health of seafarers and masters and ensure their prompt access to medical care aboard and ashore. The master's duties and functions are brought fully to bear in the enforcement of the Title. Each Member is to ensure that seafarers and masters on their ships have access to prompt and adequate medical care in principle at no cost to the seafarer or master.[73] Thus, Members ensure that afloat and ashore in their territories seafarers or masters in need of immediate medical care may access shoreside medical facilities. The rules for afloat health protection and medical care in principle look toward such care to be as comparable as possible to that generally available ashore.[74] Therefore Members must ensure the application to seafarers and masters of any general provisions on occupational health protection and medical care relevant to their duties, including prompt access to necessary medicines, equipment and facilities for diagnosis, treatment, information and expertise; give seafarers and masters the right to a qualified physician or dentist without delay in port if practicable; ensure, within domestic laws, medical care and health protection services aboard or in a foreign port are free of charge to seafarers and masters and include preventive measures such as health education.

71. For further discussion of social security issues see Chapter 1 of this work.
72. Regulation 4.1.
73. Regulation 4.2. The purpose of the Regulation is to ensure that seafarers and masters are protected from the financial consequences of sickness, injury or death occurring while employed.
74. Under Guideline B4.1.3, shoreside medical facilities should be adequate for the purposes and the medical personnel properly qualified.

The Member must adopt a standard medical report form for the master and relevant shoreside and shipside medical persons, which is confidential and used only to facilitate medical treatment. Detailed rules are required for larger vessels which must carry a physician. Other vessels need not carry a physician but shall carry persons trained under the standards of STCW 95; that medical advice by radio or satellite communication be available around the clock and that such service be free of charge to all ships irrespective of flag.[75] Each Member should adopt measures to secure proper and sufficient medical care for the dependants of seafarers and masters pending the development of a medical care service, which would include within its scope seafarers generally and their dependants where such services do not exist and should inform the International Labour Office concerning the measures taken for this purpose.

3.48 The master must be mindful of and enforce health and safety protection and accident prevention rules. Regulation 4.3 of the Convention takes a proactive position[76] on health and safety and looks at such matters systemically[77] rather than morally, particularly in training.[78] The purpose of the Regulation is to ensure that seafarers', and masters', work environment promotes occupational safety and health. Members protect the occupational health of seafarers and masters by ensuring they live, work and train[79] in safe and hygienic environments. Thus, they are bound to develop and promulgate guidelines for the management of occupational safety and health aboard after consultation with owners', seafarers' and masters' organizations and taking into account codes, guidelines and standards of international States, national administrations and maritime industry organizations.[80] The laws and regulations and other measures referred to in Regulation 4.3(3) shall be regularly reviewed and revised to take account of changes in technology and research. Members shall specify the duties of the master to take specific responsibility for the implementation of and compliance with the ship's occupational safety and health policy and programme, and specify the authority of the seafarer appointed safety representatives to participate in meetings of the ship's safety committee. Such a committee shall be established on board a ship on which there are five or more seafarers. Compliance with the requirements of applicable international instruments on acceptable levels of exposure to workplace hazards and on the development and implementation of occupational safety and health policies and programmes shall be considered as meeting the requirements of the Convention. Occupational accidents, injuries and diseases must be reported to the Member and occupational accidents are investigated.

75. See Guidelines B4.1.1 and B4.1.2 for detailed training requirements, equipment requirements and maintenance, hazardous cargo handling, communication requirements and other requirements as each apply to medical treatment.

76. See, for example, Guideline B4.3.7.

77. The provisions required under Standard A4.3 should take into account the ILO code of practice, *Accident Prevention on Board Ship at Sea and in Port 1996*, and other ILO and international standards and guidelines and codes of practice.

78. The curriculum for the training referred to in Standard A4.3(1)(a) should be reviewed periodically and brought up to date. See Guideline B4.3.10, 'Safety and health education of young seafarers', safety and health regulations 'should specify measures which will minimize occupational dangers to young seafarers'.

79. Training is a necessary adjunct, and especial care is paid to young seafarers in such training.

80. Members shall adopt laws taking into account international instruments and set standards for occupational safety and health protection and accident prevention. The laws are adopted in accordance with Regulation 4.3(3).

Members shall cooperate with shipowners', seafarers' and masters' organizations to bring to the attention of all seafarers and masters information on particular hazards by posting official notices containing relevant instructions.[81] International cooperation is also encouraged.[82]

3.49 Masters and other seafarers should have access to shore-based welfare facilities.[83] The purpose of the Regulation is to ensure that seafarers and masters have access to shore-based facilities and services to secure their health and well-being. Shore leave and services are a necessary adjunct of seagoing. Every effort should be made in port and aboard to facilitate shore leave as soon as possible after a ship's arrival in port. Shore leave is encouraged and welfare facilities should be secure and accessible and provide for welfare, cultural and entertainment needs. Free circulation of information, entertainment media, sports equipment and the like is encouraged. Welfare boards for the supervision of facilities are encouraged as is international cooperation. In developed ports, standards should be high for hotels and hostels and families should be accommodated and in all cases costs should be kept low. Seafarers', masters' and owners' organizations should be involved and consulted. Information should be disseminated on public facilities, transport, welfare, entertainment, educational facilities, places of worship, and facilities for seafarers and masters, as well as special laws and customs, the contravention of which may jeopardize freedom. Adequate, secure means of transport at moderate prices should be available at any reasonable time. Adequate lighting and access roads should be provided, along with signposting and regular patrols. Measures should be taken to facilitate access to consuls and effective cooperation between consuls and local or State authorities.

3.50 Seafarers or masters detained in a foreign port should be dealt with promptly under due process of law with appropriate consular protection. The local authority should request that the flag State and the State of nationality be advised. The State of nationality should promptly notify the next of kin. The competent authority should allow consular officers of these States immediate access to the detained and regular visits thereafter during detention.[84]

THE MASTER AND TITLE 5: COMPLIANCE AND ENFORCEMENT

3.51 Title 5 and its appendices deal with the master as a tripartite seafarer member of three groups equal in the eyes of the law: flag State, owner and seafarer. The Convention is set up to finely balance the rights, duties and responsibilities of these parties all directed to the protection and advancement of seafaring labour. A good part of Title 5 deals with the duties of Members in establishing systems to

81. Guideline B4.3.4. See also, Articles 7 and 11 of the *Guarding of Machinery Convention, 1963 (No. 119)*, and the corresponding provisions of the *Guarding of Machinery Recommendation*, 1963 (No. 118).

82. Guideline B4.3.11 and Standard A4.3 where each Member should have due regard to relevant codes of practice published by the ILO, *inter alia*.

83. Regulation 4.4 and its Standard and Guidelines.

84. There are issues of compensation and repatriation among others related to detention as a result of piracy which can be found in Chapter 7 of this work.

relate to the other two parties. The master's duties and responsibilities expressly mentioned in the Title are outlined in the following areas.[85]

3.52 As per Article II(1)(g), the master's employment agreement is a contract of employment. This statement firmly establishes the relationship between the master and the owner and, at the same time, cements the relationship of the master to the class of labour called seafarers who have similar contracts of employment.

3.53 According to Standard A5.1.3(7), an interim maritime labour certificate may only be issued following verification that (c) 'the master is familiar with the requirements of this Convention and the responsibilities for implementation…' The master here must understand and be certified in his understanding of the Convention before an interim certificate is issued. This means practically that at port State control inspections or any other inspection wherein the document is produced, a record has been made of the master's understanding. That implies that the master, where there are deficiencies on the ship, has intentionally allowed such deficiencies. Thus, the master has failed in his duties as to the flag State and the owner.

3.54 Standard A5.1.4(12) provides that 'Inspectors shall submit a report of each inspection to the competent authority. One copy of the report in English or in the working language of the ship shall be furnished to the master of the ship and another copy shall be posted on the ship's notice board for the information of the seafarer's and, upon request, sent to their representatives'. The master is the custodian of inspection reports and as agent of the owner is responsible for such reports. Reports are a part of the record of the vessel and are therefore evidential. Any spoliation of the report or loss of the report is indicative of the failure of the master in his duties to the vessel, the owner and the flag State.

3.55 Members are required to establish the competent authority for the purpose of receiving information in confidence concerning possible breaches of the requirements of the Convention.[86] This requirement enables seafarers, masters or representatives of the seafarers to request an inspection when they consider it necessary. Reports to the master of deficiencies found are reports to the owner and to the flag State of such deficiencies under the legal and commercial relationships of the master to flag State and owner. Deficiencies must be reported by the master and must be corrected and the corrections recorded. Not to do so is a failure of the master's duties.

3.56 In accordance with Regulation 5.1.5, a Member should establish specific on-board complaint procedures. Essentially this rule sets up a complaint chain of command to the master and thence to higher authority. It is a duty of the master to efficiently prosecute the voyage. To do so he must deal with labour matters as they arise. Failure to follow the rule is a failure of the master in his duty. Attempting to defeat the chain of command of complaints is similarly a failure.

3.57 Appendix B5-I of the Convention details specific responsibilities as they relate to young seafarers as defined in Regulation 1.1. The language is indicative of the administrative detail to which the master pays attention. The concerns about young seafarers are taken seriously in the Convention and the master's ministerial duties are laid out in the exemplar declaration of maritime labour compliance. The Convention

85. For a complete review of enforcement provisions in the MLC see Chapter 8 of this work.
86. Guideline B5.1.4(3).

language suggests that owners too should be serious in their concerns. It is a failure of the master in his duties not to follow the procedure of the document.

CONCLUSION

3.58 The MLC is a major change and consolidation of the master's duties, responsibilities and rights. It is also a clear indication of the consolidation of the master's civil liabilities. The extent to which the States Parties coordinate their laws and efforts will reflect the extent to which new efficiencies will appear in the maritime industry. The extent to which they coordinate port State control activities under the Convention will be the extent to which maritime labour will be treated fairly, openly and directly by all States for the welfare of all seagoing people as well as the master. The extent to which the Convention is abused by Members, owners and masters will be the extent to which seagoing will continue to remain a dangerous, hard and unpleasant life for all seafarers – including masters.

CHAPTER 4

Yachting and the Maritime Labour Convention 2006

MATEUSZ BEK*

INTRODUCTION

4.1 Adoption of the *Maritime Labour Convention 2006 (MLC)* by the International Labour Organization (ILO) marked a long-awaited change with respect to seafarer working and living conditions on board ships. Considerable confusion was caused in connection with the potential effect of the instrument upon the superyacht industry, particularly in relation to the crew accommodation requirements contained therein. Naturally, the size and design constraints of large yachts, the peculiar environment in which they are operated and the nature of their exploitation might render the strict application of any international maritime convention impractical or inappropriate with regard to commercial yachting. It is the purpose of this chapter to examine the impact that certain provisions of the MLC may have upon yachts. Particular emphasis will be placed on superyachts governed by The Large Commercial Yacht Code (LY3).[1]

SHIP

4.2 Pursuant to Article II(4), the MLC 'applies to all ships, whether publicly or privately owned, ordinarily engaged in commercial activities, other than ships engaged in fishing or in similar pursuits and ships of traditional build such as dhows and junks'. It does not apply to warships or naval auxiliaries.

4.3 Accordingly, the MLC will apply to every yacht ordinarily engaged in commercial activities unless it is of traditional build. There is no definition of the phrase 'ordinarily engaged in commercial activities' provided in the Convention. In the *Maritime Labour Convention 2006. Frequently Asked Questions. Revised Edition 2012* it was noted that specifying the meaning of the term would be 'a matter for good faith determination by the country concerned, and subject to the usual oversight role taken by the

* LLB Law, University of Southampton; LLM Maritime Law, University of Southampton.

1. LY3 is a code of practice published by the United Kingdom's (UK) Maritime and Coastguard Agency (MCA) for any yacht of 24 meters and over in load line length, which is in commercial use for sport or pleasure, does not carry cargo and does not carry more than twelve passengers. It superseded the previous edition of the code, known as LY2, on 20 August 2013, the date when the MLC entered into force internationally. It is aimed at adapting the standards imposed by international maritime instruments to the specificity of the superyacht industry, where it is not reasonable or practical to comply, through substantial equivalence, as permitted by these instruments.

Committee of Experts under the ILO supervisory system'.[2] It is worth noting that the European Court of Justice (ECJ) (as it then was) held twice, albeit in the setting of intellectual property law, that use 'in the course of trade' meant 'in the context of commercial activity with a view to economic advantage and not as a private matter'.[3] In *Hayes v James & Charles Dodd*, Staughton LJ treated a commercial activity as a business with a view to profit rather than pleasure or comfort.[4] Such a view was upheld by the House of Lords in *Farley v Skinner (No 2)*.[5] Furthermore, common sense would dictate that a commercial activity ought to involve provision of a service in exchange for remuneration. It is submitted, therefore, that all yachts operating under a charter agreement of any form, such as the MYBA – Worldwide Yachting Association Charter Agreement, are to be regarded as coming within the definition of a ship contained in the MLC. Pleasure craft are thus excluded from the ambit of the Convention.

4.4 In England and Wales, a 'pleasure vessel' is conveniently defined in the Merchant Shipping (Vessels in Commercial Use for Sport or Pleasure) Regulations 1998, as amended.[6] Regulation 2(1) ascribes three possible meanings to a pleasure ship. First, it can be any vessel wholly owned by an individual or individuals, used only for the sport or pleasure of the owner or the immediate family[7] or friends of the owner, which at the time of being operated is on a voyage for which the owner does not receive any money, other than as a contribution to the direct expenses of the operation of the vessel. Secondly, any ship owned by a body corporate, used only for sport or pleasure and on which the persons on board are employees or officers of the body corporate, or their immediate family or friends will also be a 'pleasure vessel' provided that it is on an excursion for which the owner does not receive any money, other than as a contribution to the direct expenses of the operation of the ship. Thirdly, any vessel wholly owned by or on behalf of a members' club formed for the purpose of sport or pleasure which, at the time it is being used, is used only for the sport or pleasure of members of that club or their immediate family, and for the use of which any charges levied are paid into club funds and applied for the general use of the club will constitute a pleasure craft.[8] Accordingly, the guiding criterion is that the owner of a yacht should not derive a profit from the operation of the vessel for it to be classified as a 'pleasure ship'. Such a conclusion is in line with the meaning attributed above to the term 'commercial activity'.

4.5 In addition, under the MLC, a 'ship' is defined as 'a ship other than one which navigates exclusively in inland waters or waters within, or closely adjacent

2. See Question B5. For the text of the document, see http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_177371.pdf (accessed 19 August 2013).

3. See Case C-206/01 *Arsenal Football plc v Reed* [2002] ECR I-10273, [40] and Case C-48/05 *Adam Opel AG v Autec AG* [2007] ECR I-1017, [18].

4. [1990] 2 All ER 815, 824.

5. [2001] UKHL 49; [2002] 2 AC 732, [97]-[98] (Lord Scott of Foscote).

6. SI 1998/2771, as amended by the Merchant Shipping (Vessels in Commercial Use for Sport or Pleasure) (Amendment) Regulations 2000, SI 2000/482.

7. Definition of the term 'immediate family' is also provided under Regulation 2(1) of the Merchant Shipping (Vessels in Commercial Use for Sport or Pleasure) Regulations 1998.

8. See also the definition of 'pleasure vessel' contained in Regulation 4(3) of the Merchant Shipping (Maritime Labour Convention) (Medical Certification) Regulations 2010, SI 2010/737, whereby 'club' is substituted with 'unincorporated association'.

to, sheltered waters or areas where port regulations apply'.[9] It is thought that this can be understood as a definition of a 'seagoing vessel'.[10] Following consultation with a tripartite working group, established to assist in progressing the implementation of the MLC in the UK, the MCA proposed that the Convention should apply to:

- all UK seagoing ships which operate either on international voyages, or from a foreign port;
- all UK ships operating on UK domestic voyages, which operate more than 60 miles from a safe haven[11] in the UK;
- all UK ships operating on UK domestic voyages outside of categorised waters[12] which are 500 gross tonnage or over.[13]

4.6 It was, nevertheless, noted[14] that certain standards introduced by the MLC will be applied to all seagoing ships,[15] whereas the scope of application for other norms 'will be determined by patterns of operation rather than distance from shore'.[16]

4.7 From the proposal put forward by the MCA, it might be deduced that in the UK the phrase 'navigates exclusively in inland waters or waters within, or closely adjacent to, sheltered waters or areas where port regulations apply' will be interpreted to mean 'operating exclusively on domestic voyages within either 60 miles of a safe haven in the UK or categorised waters'. Unless a yacht can properly be so described, it will be covered by the MLC. It is believed that most Short Range Yachts will thus be outside the scope of the Convention, though observance of the relevant code will still be required.[17] Suggestions made by the MCA are, however, yet to become law. Hence, scrutiny of the wording used in Article II(1)(i) of the MLC is desirable.

4.8 Unfortunately, the text of the MLC does not include any precise definition of 'inland' or 'sheltered' waters. Neither does it explicitly define the term 'closely adjacent to'.[18] In the UK, 'inland waters' include any area of water not qualified as 'sea' and are defined according to four categories in Merchant Shipping Notice MSN 1837 (M), given statutory force by Regulation 3(2)(a) of the Merchant Shipping (Categorisation of Waters) Regulations 1992.[19] 'Sheltered waters' are

9. See MLC, Article II(1)(i).
10. See M McConnell, D Devlin, and C Doumbia-Henry, *The Maritime Labour Convention, 2006: A Legal Primer to an Emerging International Regime* (Koninklijke Brill NV 2011), 183.
11. In the context of yachting, 'safe heaven' is defined as meaning 'a harbour or shelter of any kind which affords entry, subject to prudence in the weather conditions prevailing, and protection from the force of the weather'. See LY3, s 2.
12. 'Categorised waters' are to be taken to mean 'inland waters'. For the definition of 'inland waters', see Merchant Shipping Notice MSN 1837 (M).
13. See http://www.dft.gov.uk/mca/lrgtxt/mcga07-home/workingatsea/mcga-healthandsafety/maritime_labour_convention_2006/mcga.ds-ssh-mlc-definitions#seagoingship (accessed 30 June 2013).
14. *Ibid*.
15. For instance, medical certification, hours of work.
16. For example, crew accommodation, food and catering.
17. For the definition of a Short Range Yacht, see LY3, s 2.
18. For a record of discussion regarding the inclusion of these words in the text of the MLC, see ILO: Report of the Committee of the Whole, ILC, 94th (Maritime) Session, Geneva, 2006, available at http://www.ilo.org/public/english/standards/relm/ilc/ilc94/pr-7-i.pdf (accessed 30 June 2013).
19. SI 1992/2356. For more information regarding 'inland waters', see https://www.gov.uk/inland-waterways-and-categorisation-of-waters (accessed 30 June 2013).

not defined under the law of England and Wales. Nonetheless, the Recreational Craft Regulations 2004,[20] implementing Directive 2003/44/EC of the European Parliament and of the Council of 16 June 2003 amending Directive 94/25/EC[21] on the approximation of the laws, regulations and administrative provisions of the Member States relating to recreational craft,[22] define sheltered waters as conditions up to and including wind force four and significant wave heights, with occasional waves of 0.5 metres maximum height. It is understood that Lloyd's define 'sheltered waters' as waters where the fetch is six nautical miles or less. Such description does not, however, have binding legal force. Construction of the term 'closely adjacent to' will be a matter for common sense to be assessed on a case-by-case basis.

4.9 It is to be borne in mind that for a chartered yacht to be excluded from the ambit of the MLC, it would have to operate *exclusively* within the waters described above or areas where port regulations apply. Normally, yachts manoeuvring within inland or sheltered waters are those used for pleasure only, so they are outside the scope of the MLC, anyway. If there is any doubt as to whether a particular ship or a class of vessels are covered by the MLC, the question shall be determined by the competent authority of the Member State in which it arose.[23] Consultation with the shipowners' and seafarers' organizations concerned should form a part of the resolution process.[24]

4.10 'Competent authority' is a term used to indicate the department of the government responsible for implementing the MLC. It is properly defined as meaning 'the minister, government department or other authority having power to issue and enforce regulations, orders or other instructions having the force of law in respect of the subject matter of the provision concerned'.[25] Nonetheless, it might be that more than one department or agency is involved in implementing the MLC in a given country. If so, each one of them is to be treated as the competent authority within the meaning of Article II(1)(a) of the MLC. In the UK, upon ratification of the Convention, the MCA will assume the responsibility of the 'competent authority' within the ambit of Article II(1)(a) of the MLC.[26] It is an executive agency of the Department for Transport (DfT) responsible for implementing both domestic and international maritime law and safety policy.[27]

4.11 Interestingly, it is not entirely clear whether there are any shipowners' or seafarers' organizations within the UK that could be concerned with a question strictly related to yachts. For instance, the UK Chamber of Shipping[28] is not directly

20. SI 2004/1464.
21. Directive 94/25/EC was implemented in the UK by the Recreational Craft Regulations 1996, SI 1996/1353.
22. [2003] OJ L214/18.
23. See MLC, Article II(5).
24. *Ibid.*
25. See MLC, Article II(1)(a).
26. Still, the implementation of some parts of the MLC will be carried out by other government departments. By way of illustration, Regulation 4.5 concerning social security will be the responsibility of the Department for Work & Pensions. See further https://www.gov.uk/government/organisations/department-for-work-pensions.
27. For more information concerning the MCA, see http://www.dft.gov.uk/mca/.
28. For further information about the UK Chamber of Shipping, see http://www.ukchamberofshipping.com/.

concerned with protecting the interest of commercial yacht owners. Correspondingly, the International Seafarers' Welfare and Assistance Network (ISWAN),[29] located in Croydon, and Nautilus International,[30] situated in South Woodford, although dedicated to improving the welfare of seafarers, are not in any way associated with supporting those working on board yachts. Similarly, the Royal Yachting Association (RYA) cannot be said to be even remotely related to the commercial chartering of yachts, not to mention the fact that it is not oriented towards either shipowners or seafarers.[31] It would seem that MYBA – the Worldwide Yachting Association, which possesses unquestionable expertise in the field of yachting, is best suited to advise the competent authority in relation to yachts and seafarers engaged thereon.[32] It is, however, destined to represent the interest of yacht owners better than that of crew working on board. Likewise, Superyacht UK can be considered to be a yacht owners' organization capable of representing that group.[33] On the other hand, the Professional Yachtsmen's Association (PYA), based in Antibes, France, yet with regional offices in the UK, might be in a position to shed some light on a given question from the perspective of yacht crew.[34]

4.12 In any event, where a representative organization of shipowners or of seafarers does not exist within a Member State, decision by the competent authority may only be made through consultation with the Special Tripartite Committee.[35] Such a body shall consist of two delegates nominated by the government of each Member State which has ratified the MLC, and the representatives of shipowners and seafarers appointed by the governing body of the International Labour Office following consultation with the Joint Maritime Commission.[36]

SEAFARER

4.13 According to Article II(2), the MLC is applicable to any seafarer, i.e. 'any person who is employed or engaged or works in any capacity on board a ship' covered by the Convention.[37] Therefore, any person working on a yacht would be considered to be a seafarer, regardless of whether engaged specifically for the time of the charter by the shipowner or the charterer, or employed on a permanent basis with the former or the latter.

4.14 Undoubtedly, any member of the crew, including, *inter alia*, a captain, chief engineer, engineer, second engineer, assistant engineer, first mate, second mate, officer, bosun, chef, crew chef, deckhand, chief stewardess or chief steward, and stewardess and/or steward will be within the definition of 'seafarer'. Interestingly, with a commercial yacht being operated, managed and maintained by a range of

29. For more information regarding ISWAN, see http://www.seafarerswelfare.org/.
30. For more information with respect of Nautilus International, see https://www.nautilusint.org/.
31. For an overview of the RYA, see http://www.rya.org.uk/.
32. See generally http://www.myba-association.com/.
33. For more information regarding Superyacht UK, see http://www.superyachtuk.com/.
34. For more information in respect of the PYA, see http://www.pya.org/.
35. See MLC, Article VII.
36. See MLC, Article XIII.
37. See MLC, Article II(1)(f).

different personnel, it is possible that a person whose nature of work is not part of the routine business of the ship will, nevertheless, be held to be a seafarer. Consequently, apart from the obvious, the definition might include, in certain circumstances, a professional babysitter, cleaning personnel, entertainer, casino personnel, kitchen staff, bar staff, massage therapist, esthetician, fitness instructor or bodyguard present on board a yacht to render specialist services required or requested.

4.15 In case of doubt as to whether a particular category of person is to be regarded as a seafarer for the purpose of the MLC, the question shall be determined by the competent authority in each Member State following consultation with the shipowners' and seafarers' organizations concerned with that question.[38]

4.16 When adopting the MLC, the 94th (Maritime) Session of the International Labour Conference also issued seventeen resolutions aimed at assisting in rapid and widespread ratification of the Convention combined with effective implementation at the national level.[39] Resolution VII concerning information on occupational groups adopted on 22 February 2006[40] sought to ensure uniform construction of Article II(1)(f) of the MLC. Annex I to the Resolution provides international tripartite guidance on the application of the definition of a seafarer contained in the MLC to assist the competent authority in finding a solution to any problem that might arise. It was recognized that, in resolving a doubt as to whether a particular person is a seafarer, account should be taken of the extent to which his or her national legal and social system provides protection compared to that established under the MLC. Rationale behind such a statement is that, under the MLC, seafarers are afforded with significant rights and benefits in relation to their working and living conditions, which might not otherwise be available to them in their respective countries. Moreover, three categories of persons working on board who may, nonetheless, not fall under the definition of a seafarer were identified. These are:

a. persons whose nature of work is not part of the routine business of the ship (for example, scientists, researchers, divers, specialist offshore technicians, etc);
b. persons who although trained and qualified in maritime skills, perform key specialist functions that are not part of the routine business of the ship (for example, harbour pilots, inspectors or superintendents);
c. persons whose work on board is occasional and short term, with their principal place of employment being onshore (for example, guest entertainers, repair technicians, surveyors or port workers).

4.17 It was, however, emphasised in Resolution VII that a person or a category of persons should not be automatically excluded from the definition of a seafarer solely on account of falling within one or more of the categories listed therein. Bearing in mind the equivocal nature of the wording within each category enlisted, the burden placed upon the competent authority, entrusted with assessing the status of a given

38. See MLC, Article II(3).
39. See ILO: *Reports of the Selection Committee*, second report, *Provisional Record* No 3-1(Rev.), ILC, 94th (Maritime) Session, Geneva, 2006, available at http://www.ilo.org/public/english/standards/relm/ilc/ilc94/pr-3-1.pdf (accessed 30 June 2013).
40. Available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_088130.pdf (accessed 30 June 2013).

person engaged on board a ship, is not an easy one to discharge. In order to facilitate the process of determining whether a particular person or a class of persons is to be regarded as a seafarer under the MLC, a set of criteria for consideration was also provided in the Resolution. These are:

a. the duration of the stay on board of the persons concerned;
b. the frequency of periods of work spent on board;
c. the location of the person's principal place of work;
d. the purpose of the person's work on board;
e. the protection that would normally be available to the persons concerned with regard to their labour and social conditions to ensure they are comparable to that provided for under the Convention.

4.18 It is important to remember that all five factors should carry an equal weight when determining whether a person or a category of persons qualifies as a seafarer within the meaning of Article II(1)(f) of the MLC. Still, any resolution adopted by the International Labour Conference addressed to Member States is a non-binding instrument, as opposed to a resolution concerning or regulating the internal administration, structure and procedure of the ILO.[41] Therefore, ensuring a uniform approach to the definition of a seafarer is subject to the willingness of each Member State to implement the guidance in the manner specified in Resolution VII. It is understood that derogation from the very wording of such resolutions is common practice. Panama Maritime Authority, for instance, excluded criterion (e) from the set of factors to be considered when resolving a dispute pursuant to Article II(3) of the MLC.[42] Determination of the status of a given person or class of persons will always proceed on a case-by-case basis, whereby the shipowner or the operator of a ship would bear the burden of proving that such an individual or a category of persons should be excluded from the definition of a seafarer under the MLC. It is worth noting that some States, including the Republic of the Marshall Islands, consider factor (e) as the decisive one if the person engaged or working in any capacity on board a ship for the business of that vessel is *contractually* provided with legal and social protection by the shipowner, operator or a third party equivalent to or greater than that required by the MLC.[43] Consequently, in the context of the yacht industry, much will depend on the precise structure and content of each employment agreement associated with the charter of the vessel.

4.19 In order to smooth the process of establishing a uniform interpretation of the definition of a seafarer contained in the MLC, Article II(7) made it obligatory for each Member State to communicate any such determination made to the Director-General of the International Labour Office for the purpose of notifying other Member States.

41. See E Osieke, *Constitutional Law and Practice in the International Labour Organization (Legal Aspects of International Organization)* (Springer 1985), 186-190.
42. See PMA: *Merchant Marine Circular MMC-251*, the Republic of Panama, 24 July 2012, available at www.segumar.com/wp-content/…/03/MMC-251_March20131.pdf (accessed 30 June 2013).
43. See, for instance, Office of the Maritime Administrator: *Marine Notice No 2-011-33*, the Republic of the Marshall Islands, February 2013, available at http://www.register-iri.com/forms/upload/MN-2-011-33.pdf (accessed 30 June 2013).

SHIPOWNER

4.20 'Shipowner' is defined under the MLC as meaning

> the owner of the ship or another organization or person, such as the manager, agent or bareboat charterer, 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 this Convention, regardless of whether any other organization or persons fulfil certain of the duties or responsibilities on behalf of the shipowner.*[44]

4.21 The definition of 'shipowner' contained in Article II(1)(j) is almost identical to the meaning attributed to 'company' under the *International Management Code for the Safe Operation of Ships and for Pollution Prevention 1993 (ISM Code)*, as amended[45]; the *International Convention on Standards of Training, Certification and Watchkeeping for Seafarers Convention 1978 (STCW)*, as amended[46]; and, the *International Convention for the Safety of Life at Sea 1974 (SOLAS)*, as amended.[47] It was noted in *Maritime Labour Convention 2006. Frequently Asked Questions. Revised Edition 2012* that this comprehensive definition was adopted to reflect the idea that irrespective of the particular commercial arrangement regarding the operation of a ship, there must be a single entity responsible for any potential breach of the MLC.[48]

4.22 In the UK, the MCA proposed not to include in the relevant implementing legislation the part of the definition written in the italic type above. It is thought that such a broad wording could 'allow room for an argument that a person who has generally assumed responsibility for the operation of the ship from the owner has not specifically agreed to take over the duties and responsibilities imposed on the shipowner by the Convention and so should not be considered as the shipowner for those purposes'.[49] In fact, as a matter of policy and the proper interpretation of the MLC, there should be a single 'shipowner' for each ship who bears responsibility for the vessel's operation. Furthermore, the MCA asserted that, in practice, there should be no ambiguity as to who is 'the shipowner' of a given ship, because he will be named both on the Maritime Labour Certificate and the attached Declaration of Maritime Labour Compliance (DMLC) – Part II,[50] as well as on each Seafarer

44. See MLC, Article II(1)(j) (emphasis added).
45. See ISM Code 1993, para 1.1.2.
46. See STCW, Annex, Chapter I, regulation I/1, para 1.25. Some colloquially refer to the Convention as 'STCW 1995' due to a major revision of the text, which took place in that year. It is, however, to be borne in mind that it was amended on a number of occasions, most recently in 2010 by the so-called 'Manilla Amendments'.
47. See SOLAS, Chapter IX, regulation 1.2.
48. See http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_177371.pdf, [B14], (accessed 30 June 2013). For a record of discussion concerning the definition of 'shipowner' for the purpose of the MLC, see ILO: *Report of the Committee of the Whole*, ILC, 94th (Maritime) Session, Geneva, 2006, [125]-[151], available at http://www.ilo.org/public/english/standards/relm/ilc/ilc94/pr-7-i.pdf (accessed 30 June 2013).
49. See http://www.dft.gov.uk/mca/lrgtxt/mcga07-home/workingatsea/mcga-healthandsafety/maritime_labour_convention_2006/mcga.ds-ssh-mlc-definitions#seagoingship (accessed 30 June 2013).
50. See MLC, Appendix A5-II.

Employment Agreement (SEA) concluded.[51] Consequently, according to the MCA, omitting those words from the definition of shipowner does not affect the substance of the definition.

4.23 With respect, deleting the italicised expression might have a severe consequence upon a bareboat charterer of a yacht not exempted from the application of the MLC. Undoubtedly, it would be fair to treat a bareboat charterer as a shipowner for the purpose of observing the Convention with regard to the conditions of employment contained in Title 2, since he would be responsible for recruiting and hiring the crew for the period of the charter.[52] Nevertheless, at the same time, it would be unjust to hold him liable for breach of the accommodation and recreational facilities requirements provided for in Regulation 3.1 under Title 3. Clearly, a bareboat charterer could not possibly have had any influence on the design of the yacht chartered. Were the italicised expression to be retained as part of the definition of a shipowner in the UK, it could be argued that a bareboat charterer does not agree to assume the obligations of a shipowner under Regulation 3.1 at the moment of contracting with the yacht owner. As a result, a bareboat charterer would not fall within the definition of 'shipowner' under the MLC. The gravity of the problem arising out of deletion of the italicised wording is, however, mitigated by the proposed amendment to the MLC, which would exempt yachts from the application of Regulation 3.1.[53] In addition, even in the absence of any such amendment, it would still be the actual shipowner who would be named on all relevant documentation prescribed by the Convention, especially considering that in yachting a bareboat charter is usually for a relatively short period of time.

4.24 In the context of superyacht chartering, even though time charters are not leases, it is common to describe the agreement between the owner and the charterer as one 'to let and hire' a vessel.[54] By way of example, clause 1 of the MYBA Charter Agreement has indeed adopted such terminology.[55] As a consequence, the yacht is said to be 'delivered' to the charterer at the beginning of the charter period[56] and 'redelivered' to the owner prior to or at the end of that period.[57] These terms of art, according to Rix LJ in the Court of Appeal in *The Achilleas* are 'something of a metaphor',[58] as they do not signify any transfer of possession of the yacht from the owner to the charterer. 'The vessel remains in the possession of her owner, albeit at the disposal of her charterer within the limits agreed in their contract'.[59] Therefore, it

51. For a model format for a SEA published by the MCA, see http://www.dft.gov.uk/mca/mcga07-home/workingatsea/mcga-healthandsafety/maritime_labour_convention_2006/mcga-ds-ssh-mlc-sea.htm (accessed 30 June 2013).

52. For a detailed analysis of the nature of a bareboat charter, see M Davis, *Bareboat Charters* (2nd edn, Informa Publishing 2005), [1.1]-[1.17].

53. The exact extent of any possible amendment is yet unknown. See http://www.dft.gov.uk/mca/lrgtxt/mcga07-home/workingatsea/mcga-healthandsafety/maritime_labour_convention_2006/mcga.ds-ssh-mlc-definitions#seagoingship (accessed 30 June 2013).

54. See T Coghlin, *et al.*, *Time Charters* (6th edn, Informa Publishing 2008), [I.9].

55. Other standard form contracts for the chartering of yachts adopt similar wordings in equivalent provisions. See, for instance, the ISYBA-YTIME (edn 2011).

56. See MYBA Charter Agreement 2009, cl 2.

57. See MYBA Charter Agreement 2009, cl 3.

58. *Transfield Shipping v Mercator Shipping (The Achilleas)* [2007] EWCA Civ 901, [21]. The decision of the Court of Appeal was overruled on other grounds by the House of Lords, [2008] UKHL 48.

59. *Ibid.*

is indisputably the owner of a yacht who will be, at all relevant times, responsible for potential breach of any provision of the MLC.

EMPLOYMENT

4.25 Regulation 2.1 of the MLC was devised to ensure that seafarers have a fair employment agreement.[60] Each crew member must have a clear, written and legally enforceable contract with the shipowner.[61] Importantly, a person should be given an opportunity to review and seek advice on the terms and conditions in the agreement and freely accept them before signing.[62] Both the shipowner and the seafarer concerned should also have a signed original of the SEA.[63]

4.26 It is the responsibility of a Member State to specify what ought to be included in a SEA. Standard A2.1(4) lists, however, a number of particulars which the agreement must contain, namely (a) the seafarer's full name, date of birth or age, and birthplace; (b) the shipowner's name and address; (c) the place where and date when the SEA is entered into; (d) the capacity in which the seafarer is to be employed; (e) the amount of the seafarer's wages or, where applicable, the formula used for calculating them; (f) the amount of paid annual leave or, where applicable, the formula used for calculating it; (g) termination provisions; (h) the health and social security protection benefits to be provided to the seafarer by the shipowner; (i) the seafarer's entitlement to repatriation; (j) reference to the collective bargaining agreement, if applicable; and (k) any other particulars which the national law of the flag State concerned may require.

4.27 Requirement (k) should be construed in light of Article III(d) of the MLC, providing for each Member State to respect the right of a seafarer not to be discriminated against on the basis of employment and occupation. Every Member State is thus bound to ensure that seafarers are not disadvantaged in comparison with shore-based workers with respect to the content of the employment contract.

4.28 Interestingly, Standard A2.1 does not contain any express provision with regard to the employment agreement of a seafarer legally employed by an employer other than the shipowner or the operator of the vessel. For instance, an employment business might be responsible for hiring and placing seafarers on various ships on either a short-term or long-term basis. Such an employer could only sign the SEA as a representative of the shipowner pursuant to an agency agreement. It will then be necessary for the shipowner to state in the DMLC that the employment business is authorized to sign SEAs in respect of service on the ship. Still, the shipowner will bear the ultimate responsibility vis-à-vis the seafarer for a breach of any standard imposed by the MLC. Therefore, every shipowner should ensure that an indemnity clause or other contractual arrangement of similar effect is incorporated into the contract with an employment business. Otherwise, a shipowner might endure severe consequences without the right to seek redress.

60. For the definition of 'SEA', see MLC, Article II(1)(g).
61. See MLC, Regulation 2.1(1).
62. See MLC, Regulation 2.1(2) and Standard A2.1(1)(b).
63. See MLC, Standard A2.1(1)(c). Both the seafarer and the shipowner or a representative thereof must sign the SEA. It is, however, understood that the MCA will tolerate a SEA signed on behalf of the seafarer only, provided that the shipowner's signature is added at a later stage.

4.29 If a person working on board a ship is not an employee, he must have evidence of a contractual or other arrangement providing him with decent working and living conditions on board the vessel.[64] However, there is no provision in the MLC related to the content or the form of such evidence. In the absence of a specific requirement under the law of the flag State concerned, nothing short of a copy of the actual contract for services, under which the self-employed individual is engaged on board a ship, would suffice to discharge the burden placed upon him by Standard A2.1.1(a) of the MLC.

4.30 In the UK, section 25 of the Merchant Shipping Act 1995 (MSA) requires a single employment agreement to be in place between the owner of a ship and the crew of the vessel, with the content and form of any such contract to be approved by the MCA.[65] It must be carried on the ship to which it relates whenever that vessel goes to sea, failing which the master or the employer will be liable to a fine and the ship, if in the UK, may be detained.[66] The Secretary of State might make regulations permitting exemptions from the requirements of section 25 of the MSA in respect of descriptions of the ship, areas of operation, certain voyages or classes of seamen.[67] In addition, an exemption might be granted where the MCA is satisfied that the seafarer to be employed otherwise than under a crew agreement will be adequately protected.[68] Generally, self-employed seafarers rendering services on board vessels are sufficiently safeguarded, especially if dealing on their own specific terms and conditions.

4.31 Regulation 4(1) of the Merchant Shipping (Crew Agreements, Lists of Crew and Discharge of Seamen) Regulations 1991[69] exempted from the application of section 1 of the Merchant Shipping Act 1970[70] any pleasure yacht engaged on a coastal voyage or any other voyage, provided that not more than four crew members receive wages for their employment, as well as any ship of less than 80 GT involved solely in coastal voyages. Every sea-going yacht of more than 80 GT flagged in the UK should thus carry a crew agreement on board.

4.32 Detailed guidance on the form and content of a crew agreement, as well as a model crew agreement approved by the MCA for use on private pleasure yachts and commercially operated yachts, is provided in Marine Guidance Note MGN 149 (M).[71] Even the slightest alteration of the standard form contract would, however, necessitate submission of the crew agreement to the MCA for approval before use.

4.33 It is understood that the MCA will implement Standard A2.1 through introduction of the Merchant Shipping (Maritime Labour Convention) (Seafarer Employment Agreement) Regulations 201x, amending the relevant provisions of both the MSA and the Merchant Shipping (Crew Agreements, Lists of Crew and Discharge

64. See MLC, Standard A2.1.1(a).
65. With the approval of the Secretary of State (in practice, the MCA), agreements with seafarers can be contained in more than one crew agreement and a single crew agreement might relate to more than one ship. See MSA, s 25(2).
66. See MSA, ss 25(4) and 25(8).
67. See MSA, s 25(5).
68. *Ibid.*
69. SI 1991/2144.
70. Section 1 of the Merchant Shipping Act 1970 was the equivalent of section 25 of the Merchant Shipping Act 1995.
71. See LY3, Annex 5 (UK National Annex), s 29. For corresponding guidance in relation to other ships, not exempted from the application of MSA, s 25, see Marine Guidance Note MGN 148 (M).

of Seamen) Regulations 1991.[72] Pursuant to Regulation 9(1) of the draft Merchant Shipping Regulations, the particulars listed in Part 1 and Part 2 of Schedule 1 have to be included in a SEA where a seafarer is an employee. Following consultation with a tripartite working group, it was decided that hours of work, pension benefits and complaint procedures should be added to the list of matters required to be addressed in a SEA by Standard A2.1.4 of the MLC. It was believed that such an addition was necessary to ensure equal treatment of seafarers and shore-based workers with respect to the content of the employment agreement.[73] Alternatively, if a seafarer is not an employee, provision on matters contained in Part 1 and Part 3 of Schedule 1 must be included in a SEA. Annex 2 of the draft Marine Guidance Note MGN XXX (M), which is going to replace Marine Guidance Note MGN 149 (M),[74] contains a model format for a SEA of an employed seafarer together with a non-exhaustive list of provisions which, if not included in SEAs, could result in refusal to issue, or cancellation of, a Maritime Labour Certificate.

4.34 Essentially, in the context of commercial yachting, it is unlikely that a standard form contract for employment of seafarers will ever be used across the industry. Instead, unless a crewing agency is involved in the engagement of a seafarer, a bespoke SEA, tailored to the particulars of the yacht and/or the charter concerned, will be used most frequently. Therefore, a prospective crew member might reasonably be expected to seek either legal advice or an opinion of a trade union regarding the terms and conditions of the SEA. Since such assistance is not readily available at every yachting hub, it might be that crew will start to be engaged in fewer ports.

4.35 Regrettably, Regulation 2.1 of the MLC does not specify the length of time which the seafarer should be afforded for the purpose of examining the SEA. It is believed that the Marine Guidance Note accompanying the draft Merchant Shipping (Maritime Labour Convention) (Seafarer Employment Agreement) Regulations 201x will contain a provision advising shipowners to allow, wherever practicable, reasonable time for the seafarer to obtain an independent opinion concerning the SEA. Such wording is, however, too vague to constitute valuable guidance with respect to the application of the standard imposed by the MLC.[75] Some suggest that for seafarers who have sufficient time prior to travelling for embarkation, sending an electronic copy of the proposed SEA for review would discharge the burden. On the other hand, those based in yachting hubs who often commence employment shortly after receiving a job offer might still be under pressure to immediately accept the terms and conditions put forward. Indeed, the prospect of prolonged unemployment may well be exploited by dishonest yacht owners. It is clear from the wording of Regulation 2.1.2 and Standard A2.1.1(b) that a seafarer is not to be coerced into concluding a SEA and that no undue pressure is to be placed upon him to sign.

4.36 Nonetheless, it is submitted that inclusion in Regulation 2.1 or Standard A2.1.1(b) of an express provision regarding the minimum time to be allowed for a

72. Text of the draft legislation can be accessed on the MCA's website at http://www.dft.gov.uk/mca/mcga07-home/shipsandcargoes/consultations/mcga-currentconsultations/mcga-ds-ssh-consultation-mlc/merchant_shipping_maritime_labour_convention_sea_.htm (accessed 30 June 2013).

73. See MLC, Article III(d). See, generally, the Employment Rights Act 1996, as amended.

74. Marine Guidance Note MGN 148 (M) is also going to be replaced by the new MGN.

75. See MLC, Regulation 2.1.2 and Standard A2.1.1(b).

seafarer to investigate the content of a SEA would potentially hinder the commercial operation of some yachts.

MANNING

4.37 Regulation 2.7 of the MLC imposes an obligation upon each Member State to require vessels flying its flag to 'have a sufficient number of seafarers employed on board to ensure that ships are operated safely, efficiently and with due regard to security'. Consequently, the MLC does not set a specific number of seafarers who must be working on board a ship at any particular time, leaving that matter for determination by the competent authority in the flag State concerned. Seafarer fatigue and the particular nature of the voyage are to be taken into account when determining the requisite level of manning. Interestingly, the requirements within Regulation 3.2 and Standard A3.2 concerning food and catering are also to be considered by the administrator. Crucially, Standard A2.7.1 provides that

> [e]very ship shall be manned by a crew that is adequate, in terms of size and qualifications, to ensure the safety and security of the ship and its personnel, under all operating conditions, in accordance with the minimum safe manning document or an equivalent issued by the competent authority, and to comply with the standards of this Convention.

4.38 In the UK, the basis for the law related to manning can be found in the MSA, as amended.[76] It applies to every UK ship, as well as any vessel registered in any other country carrying passengers either within UK waters or on a voyage beginning and ending at the same place in the UK with no port of call outside of the UK.[77] Furthermore, the Secretary of State is empowered to make specific regulations in accordance with section 47 of the MSA, and may exempt any ship or a description of a vessel from the application of any regulation introduced.[78]

4.39 Effectively, the Merchant Shipping (Safe Manning, Hours of Work and Watchkeeping) Regulations 1997, as amended,[79] impose an obligation on every shipowner to ensure the sufficiency, in terms of number, training and certification, of the manning level on each vessel for the purpose of safe and efficient operation of a ship. Regulation 5(1) made it obligatory for the owner of any UK seagoing ship, and other vessel when within UK waters, of 500 GT or more, pleasure craft excluded,[80] to obtain, carry on board and observe the content of a Safe Manning Document (also known as a Minimum Safe Manning Document).[81] Additionally, it is the duty of an owner applying for a Safe Manning Document in respect of a UK-flagged vessel to submit to the MCA a proposal as to the number and grade of personnel it considers should be carried so that the ship would be safely manned if it proceeded

76. See MSA, ss 47-51.
77. See MSA, s 46.
78. See MSA, s 48.
79. SI 1997/1320. See Regulation 3 of the Merchant Shipping (Training, Certification and Safe Manning) (Amendment) Regulations 1997, SI 1997/1911, and Regulation 2 of the Merchant Shipping (Safe Manning, Hours of Work and Watchkeeping) (Amendment) Regulations 2000, SI 2000/484.
80. See Regulation 3(b) of the Merchant Shipping (Safe Manning, Hours of Work and Watchkeeping) Regulations 1997, as amended. For the definition of a 'pleasure ship', see above.
81. Owners of ships below 500 GT may also choose to hold a Safe Manning Document.

to sea.[82] Description of the procedure for obtaining a Safe Manning Document can be found in Merchant Shipping Notice MSN 1767 (M).[83] In practice, the Merchant Shipping (Safe Manning, Hours of Work and Watchkeeping) Regulations 1997 transposed into the law of England and Wales the overriding obligation included in Regulation 14 in Chapter V of SOLAS.

4.40 With regard to commercial yachting, section 26 of LY3 contains detailed guidance on the level of manning required for the safe and efficient operation of a superyacht. Predictably, the requirement contained in Regulation 5(1) of the Merchant Shipping (Safe Manning, Hours of Work and Watchkeeping) Regulations 1997 is reiterated in LY3.[84] Consequently, every superyacht registered in the UK must carry a Safe Manning Document issued by the MCA. Obtainment of such a Document can be regarded as fulfilment of the duty enshrined in Regulation 2.7 of the MLC, provided that the criteria for the assessment of the necessary level of manning, determined by the competent authority of each Member State, are substantially consistent with the standard imposed by the MLC.

4.41 Surprisingly, the latest revision of the Large Commercial Yacht Code, which focused on making it compatible with the MLC, did not result in any meaningful change to section 26. Accordingly, the provision in Standard A2.7.3 of the MLC, whereby the competent authority should take into account Regulation 3.2 and Standard A3.2 concerning food and catering, when determining the requisite level of manning, was not incorporated into LY3. As a result, obedience by the owner to a Safe Manning Document issued in relation to a yacht governed by LY3 might not meet the standard set by the MLC. Nevertheless, the impact of the omission, if any, is going to be marginal due to the peculiar nature of the superyacht industry. Compliance with section 21B.10.1 and section 21B.10.2 of LY3 ought to be sufficient for a yacht owner to demonstrate adherence to both Regulation 3.2 and Standard A3.2 of the MLC.[85]

4.42 It is important to bear in mind that under LY3 the minimum level of manning should be such as is required for all reasonably foreseeable circumstances to permit the safe operation of a yacht under normal conditions.[86] It would be impracticable to oblige the owner to supply sufficient crew to deal with 'the worst case scenario', as it would entail an undue and disproportionate cost compared to the risk involved. Observance of the ISM Code by owners of yachts of 500 GT and over,[87] or the safety management system described in Annex II to LY3 for those owning vessels under 500 GT,[88] should be considered as *prima facie* evidence of mitigation against both every event not reasonably foreseeable and any abnormal condition.

4.43 It is, however, apparent that section 26.2.4 of LY3 is at variance with Standard A2.7.1 of the MLC, quoted above. Pursuant to the former, the minimum

82. See Regulation 5(3) of the Merchant Shipping (Safe Manning, Hours of Work and Watchkeeping) Regulations 1997, as amended.
83. See MSN 1767 (M), ss 19 and 20.
84. See LY3, s 26.2.5.
85. It should, however, be borne in mind that LY3, s 21B is applicable only to yachts of 200 GT or over constructed on or after the date of entry into force of the MLC, i.e. 20 August 2013. For identical food and catering provisions in respect of vessels of 200 GT or less constructed on or after the date of entry into force of the MLC, see LY3 ss 21A.8.1 and 21A.8.2.
86. See LY3, s 26.2.4.
87. See LY3, s 30.1.
88. See LY3, s 30.2.

manning level is to be suitable for the safe working of a ship in '*reasonably foreseeable* circumstances [...] under *normal* operational conditions'.[89] On the other hand, the latter stipulation requires it to be adequate 'under *all* operating conditions'.[90] Put differently, in accordance with the MLC, in determining the minimum safe manning level necessary for a particular ship, any eventuality that may arise in connection with the operation of the vessel should be taken into account, whereas under LY3 only usual and ordinary occurrences are to be considered. Therefore, it appears that a mere adherence by the owner to a Safe Manning Document issued in respect of a yacht covered by LY3 will not satisfy the standard set by the MLC.

4.44 LY3 further specifies a range of factors to be considered in determining the safe manning level of a yacht.[91] These include

- frequency of port calls, length and nature of the voyage;
- cruising area;
- size, type and layout of the yacht as well as equipment present on board;
- emergency response planning;
- compliance with the STCW Convention 1978, as amended;
- method of maintenance and repair system used.

4.45 Due consideration should also be given to the number of hotel staff required.[92] Although LY2 did not contain an equivalent requirement, it could be implied from the definition of the term 'seafarer' provided for the purpose of establishing the necessary manning level in section 26.1.2. In addition, owners are encouraged to undertake formal safety risk assessments with the aim of facilitating the ascertainment of minimum safe manning levels for their yachts.[93] It is worth noting that section 26.2.4 of Annex 5 (UK National Annex) to LY3 makes it obligatory for UK-flagged vessels to have a Risk Assessment and Safety Policy in place.

4.46 Interestingly, the indicative manning scale for a motor yacht contained in section 26.2.8 of LY2 was not retained in LY3.[94] Bearing in mind that it constituted barely a suggestion as to the appropriate manning level rather than the actual commitment required of the owner, no detriment is caused by the non-inclusion of the information in the revised version of the Code. On the contrary, holding on to the recommendation could lead to a false and undesirable impression that such level of manning as was specified would be enough to discharge the obligation imposed by Standard A2.7.1 of the MLC.

4.47 Crew should also be properly qualified if the manning of a vessel is to be sufficient for the purpose of Standard A2.7.1. Regulation 1.3.1 of the MLC prohibits a seafarer from working on board a ship unless he is trained or certified as competent to perform the duty. By way of illustration, clause 6(a) of the MYBA Charter Agreement puts a corresponding obligation upon the owner of a yacht to

89. Emphasis added.
90. Emphasis added.
91. See LY3, s 26.2.3.
92. See LY3, ss 26.2.2.5 and 26.2.4.
93. See LY3, s 26.2.4.
94. LY2, s 26.2.9, containing the indicative manning scale for a sailing yacht, was also omitted from the revised version of the Code.

furnish suitably qualified and properly trained crew. Compliance with the relevant International Maritime Organization legislation will be considered as meeting that requirement.[95] Needless to say, observance of the STCW Convention is a necessity.

4.48 Effect was given to the STCW Convention in the UK by the enactment of the Merchant Shipping (Training and Certification) Regulations 1997, as amended.[96] Importantly, the UK made use of Article IX of the STCW Convention, permitting a flag State to adopt other training and certification arrangements adapted for use on a special type of ship, provided that such standards are at least equivalent to those of the Convention. Following consultation with the 'large yacht' industry, the MCA introduced the Merchant Shipping (Vessels in Commercial Use for Sport or Pleasure) Regulations 1998, which brought into force the Code of Practice for the Safety of Large Commercial Sailing and Motor Vessels,[97] the predecessor of LY2.

4.49 Both Marine Guidance Note MGN 156 (M) and Merchant Shipping Notice MSN 1802 (M) are listed under section 26.2.4 of Annex 5 (UK National Annex) to LY3 as containing specific information concerning qualifications necessary for an engineer officer and a deck officer, respectively, working on board a yacht.

4.50 Revising LY2, the MCA decided to remove the requirement to carry 'a sufficient number of qualified Yacht Ratings' from section 26.1.1 of LY3. Accordingly, reference to Marine Guidance Note MGN 270 (M), providing for mandatory certificates for yacht ratings serving on LY3 class yachts, in section 26.2.4 of Annex 5 was deleted. It was thought that such an amendment would be advantageous to the yachting industry by offering a less complex manning standard.[98]

4.51 Crew will thus be adequately qualified for the purpose of manning a yacht if each seafarer concerned complies with the relevant statutory instrument, as discussed above. Nonetheless, pursuant to Regulation 5 of the Merchant Shipping (Training and Certification) Regulations 1997, as amended, the MCA might, upon request, issue a Certificate of Equivalent Competency to any officer not holding a UK Certificate of Competency, yet possessing an equivalent license, compliant with the STCW Convention, produced in another Member State.

4.52 Doubt can, however, arise as to whether the particular wording of a manning clause in a superyacht charter agreement is in line with the standard imposed by Regulation 1.3.1 of the MLC. Should a charterparty fail to include any specific requirement as to the adequacy of the crew, the owner would still be obliged to comply with the relevant code and Regulation 1.3.1 when manning the vessel. On the other hand, a contract might stipulate for a more onerous burden to discharge by the owner. For instance, under clause 1A of the widely used American Yacht Charter Association (AYCA) Vessel Services Agreement, the owner is bound to supply a 'competent' captain. It will not necessarily be enough to rely on any certificate of

95. See MLC, Regulation 1.3.3.

96. SI 1997/348. See Merchant Shipping (Training, Certification and Safe Manning) (Amendment) Regulations 1997, Regulation 2; and, Merchant Shipping (Training and Certification) (Amendment) Regulations 2000, Regulation 2. See also the Merchant Shipping (Training and Certification and Minimum Standards of Safety Communications) (Amendment) Regulations 2006, SI 2006/89.

97. See Merchant Shipping (Vessels in Commercial Use for Sport or Pleasure) Regulations 1998, Regulation 4.

98. See LY3, Annex 7.

qualification held by the seafarer.[99] The owner of a yacht would be obliged to take care to see that the master is 'a suitable man for the post'.[100]

> [E]ven when told that the person to be employed in a position involving responsibility held a qualifying certificate [he] would scarcely fail to make further inquiries as to his ability and experience. Even after making such inquiries he would […] inquire how far the man's experience fitted him for service in the particular ship and take steps to see that the man was adequately instructed with respect to any features of the particular ship with which it was necessary for him to be familiar to properly discharge the duties of his position and to avoid damage to the ship.[101]

4.53 By way of example, it is not reasonable to expect an ordinarily competent master, when visiting a foreign port, to know all about local light signals or to check the pilot for local knowledge.[102] Furthermore, the owner must conduct a careful inspection, studying the history of the applicant, interviewing him and inquiring from the previous employer about his personality so as to be reasonably satisfied that the seafarer is reasonably fit to occupy the post to which he is appointed.[103] As put by Cresswell J in *The Eurasian Dream*, 'a man may be well qualified and hold the highest grade in certificates of competency and yet have a disabling lack of will and inclination to use his skill and knowledge so that they are well-nigh useless to him'.[104] Consequently, clause 1A of the AYCA Vessel Services Agreement imposes a more burdensome obligation upon the contractor than that enshrined in Regulation 1.3.1 of the MLC.

4.54 It is worth noting that each member of the crew must have successfully completed training for personal safety on a yacht before commencing employment.[105] Such an obligation is placed upon every seafarer, irrespective of the duty performed on board. The owner should thus ensure that hotel staff, in particular, have been properly trained in that respect if yachts are to be adequately manned for the purpose of the MLC.[106]

HOURS OF WORK AND REST

4.55 Regulation 2.3 of the MLC was devised to ensure that members of the crew have regulated time of work and rest. Customarily, they are to be given an eight-hour long working day, one day off duty per week and rest on public holidays.[107] Each Member State must fix either a maximum number of hours of work *or* a minimum number of hours of rest.[108] Hours of work must not exceed 14 hours in any

99. See *Robin Hood Flour Mills Ltd v N M Paterson & Sons Ltd (The Farrandoc)* [1967] 2 Lloyd's Rep 276.
100. See *Moore v Lunn* (1922) 11 Lloyd's Rep 86, 93 (Bailhache J).
101. See n 99, n 282 (Thurlow J).
102. See *The Hans Hoth* [1952] 2 Lloyd's Rep 341.
103. See *The Makedonia* [1962] 1 Lloyd's Rep 316, 337 (Hewson J).
104. See *Papera Traders Co Ltd and Others v Hyundai Merchant Marine Co Ltd and Another (The Eurasian Dream)* [2002] 1 Lloyd's Rep 719, 737.
105. See MLC, Regulation 1.3.2.
106. For the definition of 'seafarer' under the MLC, see above.
107. See MLC, Standard A2.3.3.
108. See MLC, Standard A2.3.2. Emphasis added.

24-hour period, and 72 hours in any seven-day period.[109] Contrariwise, hours of rest must not be less than ten hours in any 24-hour period, and 77 hours in any seven-day period.[110] Additionally, hours of rest may be divided into no more than two periods, one of which should be at least six hours in length, and the interval in between should not exceed 14 hours.[111] It should be recalled that Standard A2.3.5 reproduced the text of Article 5 of the *Seafarers' Hours of Work and the Manning of Ships Convention, 1996 (No. 180),* adoption of which was subject to an extensive debate and a delicate compromise. It was not in the interest of the ILO to reopen the negotiation on a recently agreed provision. Interestingly, choosing the former option would result in a more beneficial arrangement from a seafarer's perspective than adopting the latter. Mathematically, a 72-hour working week means 96 hours of rest in any seven-day period, compared to 77 hours off duty offered by Standard A2.3.5(b) of the MLC.

4.56 Statistically, as revealed by the Seafarers International Research Centre (SIRC) in a study concerning 'Living and Working Conditions in the Large Yacht Sector', yacht crew members work on average 8.6 hours per day when in port with no guests on board and 14.3 hours per day when at sea with guests on board.[112]

4.57 Previously, section A-VIII/1 of the STCW Convention provided that an officer in charge of a watch or a seafarer on watch was merely entitled to a minimum of ten hours of rest in any 24-hour period. Accordingly, it was consistent with variant (a)[113] and irreconcilable with option (b)[114] in Standard A2.3.5 of the MLC. Nevertheless, that obligation was recently supplemented by an additional restriction ensuring that a seaman in charge of or on watch ought to be given a rest period of not less than 77 hours in any seven-day term.[115] As a consequence, a flag State that is party to both the MLC and the STCW Convention can no longer adopt the 'hours of work' formulation in the manner specified in Standard A2.3.5(a) of the MLC, unless it does so solely in respect of seafarers other than the watchkeeping personnel.

4.58 In the UK, the substantive regime related to time of work and rest for seafarers can be found in the Merchant Shipping (Hours of Work) Regulations 2002,[116] which implemented the requirements of Convention No. 180 into the law of England and Wales. Consequently, the wording of Regulation 5 contained therein is conveniently identical to that of Standard A2.3.5(b) of the MLC. Formulation based on 'hours of rest', as opposed to 'hours of work', was also retained by the MCA in LY3.[117] On that account, each owner should ensure that, as far as practicable,[118] every seafarer

109. See MLC, Standard A2.3.5(a).
110. See MLC, Standard A2.3.5(b).
111. See MLC, Standard A2.3.6.
112. N Bailey, N Ellis, H Sampson, 'Living and Working Conditions in the Large Yacht Sector', SIRC Symposium, Cardiff University, 6-7 July 2011, available at http://www.sirc.cf.ac.uk/Uploads/Symposium/SIRC%20Symposium%20Proceedings%202011.pdf (accessed 30 June 2013).
113. Practically, the 'hours of work' provision in Standard A2.3.5(a) guarantees a seafarer at least 96 hours of rest in any seven-day period, while the unamended section A-VIII/1 of the STCW Convention provided for a minimum of 70 hours of rest per week (seven times the daily allowance of ten hours).
114. Although, the unamended version of section A-VIII/1 of the STCW Convention stipulated for the same number of hours of rest per day as Standard A2.3.5(b), it was inconsistent with the latter in not providing an augmented weekly rest period.
115. See STCW Convention, section A-VIII/1, para 2.2.
116. SI 2002/2125.
117. See LY3, s 26.1.6.
118. See LY3, s 26.1.7.

working on board a yacht is allowed at least a ten-hour rest in any 24-hour period and a minimum of 77 hours off-duty in any seven-day term. Rest might only be split into two periods, one of which should be at least six-hours long. Importantly, any time spent on a 'short break' shall not be counted toward the 'hours of rest'.[119] It is submitted that visiting a lavatory or having a cigarette break, if smoking is not prohibited, or satisfying any other reasonable personal need, could be included within the definition of 'short break'.

4.59 It is the responsibility of the shipowner and the master to ensure, 'so far as reasonably practicable', that the latter and the crew are properly rested when they begin work and can obtain adequate rest when not on duty.[120] Therefore, in order to discharge that obligation, both the yacht owner and the captain would have to prove that they have done everything reasonably practicable to meet the standard imposed by section 26.1.3 of LY3. It was held by the Court of Appeal in *Edwards v National Coal Board* that 'reasonably practicable' should be taken to imply that 'a computation must be made by the owner in which the quantum of risk is placed in one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other, and, if it be shown that there is a gross disproportion between them - the risk being insignificant in relation to the sacrifice – [the owner] discharges the onus on him'.[121] Such construction of the phrase was recently confirmed, in the context of the safety and health of workers Directive,[122] by the ECJ (Third Chamber) in Case C-127/05 *Commission of the European Communities v UK*.[123]

4.60 Interestingly, it is also the responsibility of all seafarers to ensure that they are properly rested 'when they begin duty on the vessel and that they obtain adequate rest when not on duty'.[124] Doubtless, although the owner and the master of a yacht might use best endeavours to arrange for a crew member to have a break from work, whether adequate rest is obtained will depend solely on the seafarer. Should he fail to secure appropriate repose, that provision is likely to exonerate the owner and the master from responsibility under section 26.1.3 of LY3. Moreover, it is submitted that the particular wording used in the third paragraph of section 26.1.3 of LY3, compared to that employed in the first paragraph of this section, might also be taken to suggest that a member of a yacht crew should secure appropriate rest before the commencement of any given charter. If so, such an obligation would be regarded as supplementary to the one placed upon the owner and the master of a yacht.

4.61 During a charter of a commercial yacht, it is the charterer whose instruction regarding the management, operation and movement of the vessel must be followed. Nonetheless, in accordance with LY3, it is the owner who is responsible

119. For the definition of 'hours of work' and 'hours of rest', see Merchant Shipping (Hours of Work) Regulations 2002, Regulation 2(1). It is assumed that the definition of 'hours of rest' contained therein is applicable in the context of LY3. Despite an omission to provide a definition of 'hours of rest', the MCA, rather surprisingly, ascribed a meaning to the term 'hours of work' in section 26.1.4 of LY3, albeit a different one than that given under either the Merchant Shipping (Hours of Work) Regulations 2002 or the MLC. It is, however, unlikely for the difference in wording to have any meaningful consequence.

120. See the first paragraph under section 26.1.3 of LY3.

121. [1949] 1 KB 704, 712 (Asquith LJ).

122. Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L183/1 (safety and health of workers Directive).

123. [2007] ECR I-4651, [31].

124. See the third paragraph under section 26.1.3 of LY3.

for ensuring that seafarers are properly rested. Therefore, yacht charter agreements commonly place an obligation upon each party to the contract to respect the right of the crew to be provided with adequate rest. By way of illustration, clause 6(b) of the MYBA Charter Agreement might be regarded as an acknowledgement that the crew are entitled to a minimum amount of rest as specified in the yacht's code of practice. Clause 4(a) further stipulates for the charterer to restrict time under way to an average of six hours per day, thus limiting the working time of the seafarers directly involved in the navigation of the yacht.

CREW ACCOMMODATION

4.62 Crew accommodation is governed by Regulation 3.1 of the MLC. Specifications related to ship structure and equipment apply only to vessels constructed[125] on or after the date when the MLC comes into force for the flag State concerned.[126] It is further stated that ships constructed before that date shall comply with the *Accommodation of Crews Convention (Revised), 1949 (No. 92)* and the *Accommodation of Crews (Supplementary Provisions) Convention, 1970 (No. 133)* to the extent that they were applicable, prior to that date, under the law or practice of the relevant Contracting State.[127] It is important to bear in mind that any MLC Standard not related to the structure or equipment of a ship will apply to every vessel, regardless of the date of construction.

4.63 Until ratification of the MLC by the UK, the Merchant Shipping (Crew Accommodation) Regulations 1997[128] will continue to govern seafarer accommodation of any ship registered in the UK under Part II of the MSA. It is to be recalled that the 1997 statutory instrument revoked and replaced the Merchant Shipping (Crew Accommodation) Regulations 1978, as amended,[129] which had given effect to both Convention No. 92 and Convention No. 133. However, the former legislation is still applicable to any ship built before 1 July 1979 which has not been substantially reconstructed or altered since that date.[130]

4.64 Nonetheless, existing UK legislation is not currently in compliance with the MLC in respect of crew accommodation standards. Consequently, upon ratification of the MLC, the MCA will introduce a new set of regulations dealing with seafarer accommodation. Unsurprisingly, the Merchant Shipping (Crew Accommodation) Regulations 1997 will be revoked for any ship built on or after the date of the entry into force of the Convention. It may be deduced from the text of the proposed statutory instrument and an associated Merchant Shipping Notice together with a Marine Guidance Note that only the minimum mandatory requirements of the MLC related to crew accommodation will be implemented.[131]

125. MLC, Regulation 3.1(2) provides that a ship is deemed to have been constructed on the date of laying the keel or when it is at a similar stage of construction.
126. See MLC, Regulation 3.1(2).
127. *Ibid.*
128. SI 1997/1508.
129. SI 1978/795.
130. See Merchant Shipping (Crew Accommodation) Regulations 1997, Regulation 3(3).
131. Text of the draft legislation can be accessed on the MCA's website at http://www.dft.gov.uk/mca/mcga07-home/shipsandcargoes/consultations/mcga-currentconsultations/mcga-ds-ssh-consultation-mlc/mcga-ssh-consultation-crew-accommodation.htm (accessed 30 June 2013).

4.65 In any event, the effect of the obligatory part of the MLC on existing UK legislation, as shown in the Impact Assessment on 'Merchant Shipping (Maritime Labour Convention) (Crew Accommodation) Regulations 201x', prepared by the MCA, is going to be marginal, except in relation to provisions concerning size of rooms and other accommodation spaces.[132] It was also noted in the Impact Assessment that many non-compulsory Guidelines contained in the MLC are already mandatory under the law of England and Wales.

4.66 Detailed analysis of Standard A3.1 of the MLC is beyond the scope of this chapter. It will, however, be valuable to consider the most controversial issue, namely requirements related to the size of cabins. Currently, as revealed in a robust study prepared by the SIRC, only 48% of crew members on board luxurious yachts are satisfied with cabin sizes, whereas 21 per cent of those employed aboard such vessels expressed dissatisfaction with the floor area of the sleeping accommodation provided.[133]

4.67 Broadly, there should be adequate headroom in all seafarer accommodation. In accommodation where full and free movement is necessary, the minimum permitted headroom cannot be less than 203 cm, although the competent authority may allow some limited reduction if reasonable and not resulting in crew discomfort.[134]

4.68 Each sleeping room shall, in general, be of adequate size and properly equipped so as to ensure reasonable comfort and to facilitate tidiness.[135] Moreover, an individual sleeping room shall be provided for each seafarer, although exemption might be granted by the competent authority in respect to ships of less than 3,000 GT.[136] Such a derogation would have to take into account Standard A3.1.9(h) of the MLC, whereby any sleeping room may be occupied by a maximum of two seafarers and should not have a floor area of less than 7 m^2. Floor area of a single berth sleeping room cannot be less than 4.5 m^2 in ships of 3,000 GT or below, 5.5 m^2 in vessels of 3,000 GT or over but less than 10,000 GT, and 7 m^2 in ships of 10,000 GT or over.[137] Nevertheless, in order to provide single berth sleeping rooms on vessels of less than 3,000 GT, the competent authority may allow a reduced floor area.[138] Each officer cabin should have the floor area per person of not less than 7.5 m^2 in ships of 3,000 GT or below, 8.5 m^2 in vessels of 3,000 GT or over but less than 10,000 GT, and 10 m^2 in ships of 10,000 GT or over, assuming that no private sitting room or day room is available on board for use by officers.[139] It is a requirement for the master, the chief engineer and the chief navigating officer to be provided with a day room adjoining to their sleeping rooms, yet an exemption might be granted by the competent authority in respect of ships of less than 3,000 GT.[140] Regrettably, the MLC does not

132. See Table 1 and Table 2 in Impact Assessment No DFT00030 on 'Merchant Shipping (Maritime Labour Convention) (Crew Accommodation) Regulations 201x', 7 March 2012, available at http://www.legislation.gov.uk/ukia/2012/31/pdfs/ukia_20120031.pdf (accessed 30 June 2013).

133. See n 112. See also N Bailey, N Ellis, H Sampson, 'SIRC Report to the PYA on Living and Working Conditions Aboard Yachts', commissioned by the Professional Yachtsmen's Association, August 2010, available at http://www.sirc.cf.ac.uk/Uploads/Publications/Living%20&%20Working%20Conditions%20Aboard%20Yachts.pdf (accessed 30 June 2013).

134. See MLC, Standard A3.1.6(a).

135. See MLC, Standard A3.1.9(c).

136. See MLC, Standard A3.1.9(a).

137. See MLC, Standard A3.1.9(f).

138. See MLC, Standard A3.1.9(g).

139. See MLC, Standard A3.1.9(k).

140. See MLC, Standard A3.1.9(m).

specify what the floor area of an officer's cabin should be where there is a day room or an equivalent additional space on board a ship designated for use by the officer. It is submitted that in such a case the combined floor area of the two rooms cannot be less than that provided by Standard A3.1.9(k) of the MLC.

4.69 Separate sleeping rooms must be provided for men and women.[141] Each seafarer ought to in all circumstances be given a separate berth, the minimum inside dimensions of which should be at least 198 cm by 80 cm.[142] Every sleeping cabin should be fitted with a washbasin having hot and cold running water, except where such is situated in the private bathroom provided.[143] Sleeping accommodation is to be lit by natural light and supplied with adequate artificial light.[144]

4.70 It is worth noting that each Member State may exempt ships of less than 200 GT from the application of provisions prescribing the minimum floor area in a given cabin where it would be reasonable to do so having regard to the size of the vessel and the number of persons on board.[145]

4.71 Crew accommodation standards imposed by the MLC were subject to criticism from the yachting industry. It was thought that compliance with the mandatory section of the instrument could hinder the commercial viability of yacht chartering. Interestingly, a comprehensive study conducted by International Council of Marine Industry Associations (ICOMIA),[146] the Superyacht Builders Association (SYBAss),[147] the MYBA and the PYA concluded that yachts of 1,000 GT or less constituted a class most likely to be adversely affected by the mandatory provisions of the MLC related to crew accommodation. Meanwhile, an independent analysis by the PYA revealed that applying Standard A3.1 of the MLC in respect of a 44-metre long yacht would result in the elimination of two guest cabins aboard and a small reduction of the floor area in the engine room. Furthermore, thorough research undertaken by BMT Nigel Gee Ltd provided intriguing data about the impact that implementation of the MLC would have on yachts of 200 GT or over. It was found that yachts of 1,150 GT (approximately 65 m in load line length) or below formed a category upon which the MLC would have critical impact. Particularly, yachts of up to 35 m in load line length were noted to currently have crew cabins of roughly 65 per cent of the area required by the Convention. It was further established that yachts of 3,000 GT and over[148] could be affected by the requirement to provide an individual sleeping room to each seafarer, which was held not to be in line with the existing industry practice.[149]

4.72 In order to accommodate the requirements of Standard A3.1 of the MLC in the context of commercial yachting, the MCA devised substantially equivalent arrangements which were subsequently implemented as section 21A (for yachts of less than 200

141. See MLC, Standard A3.1.9(b). It is estimated that approximately 40 per cent of crew members employed on board of yachts are female. It is often the case that a cabin is shared with a member of the opposite sex.
142. See MLC, Standard A3.1.9(d) and Standard A3.1.9(e).
143. See MLC, Standard A3.1.11(d).
144. See MLC, Standard A3.1.9.
145. See MLC, Standard A3.1.20.
146. For more information, see http://www.icomia.com/.
147. See further http://www.sybass.org/.
148. Such yachts were previously not covered by LY2. See further below.
149. See MLC, Standard A3.1.9(a).

GT) and section 21B (for yachts of 200 GT or over) of LY3.[150] Effectively, there are five sets of sleeping accommodation specifications, each applying to a particular category of yachts defined by gross tonnage (less than 200 GT, 200-500 GT, 500-1,250 GT, 1,250-3,000 GT, and 3,000 GT or over). It should be borne in mind that both section 21A and section 21B apply only to yachts the keel of which was laid or was at a similar stage of construction on or after the date of entry into force of the MLC, i.e. 20 August 2013.[151]

4.73 Generally, headroom in seafarer accommodation for yachts of 200 GT or below should be adequate and reasonable taking into consideration the size and operation of the vessel.[152] It should not, however, be lower than 190 cm in any space where crew members might be expected to stand for prolonged periods, though the competent authority may allow reduced height in certain locations if not resulting in discomfort to the seafarers concerned.[153]

4.74 Unsurprisingly, there is no specific requirement as to the size of any cabin on board, with the exception of a general obligation for sleeping accommodation to be of adequate size and properly equipped so as to ensure reasonable comfort and to facilitate tidiness.[154] Bearing in mind the actual size of useable space on yachts of 200 GT or below, any absolute determination of the minimum area of crew cabins could have a potentially crippling impact on their commercial operation. Therefore, the decision to exempt that class of yachts from the sleeping accommodation size requirements of the MLC is to be welcomed as a reasonable one.[155]

4.75 Equally, there is no obligation to provide each seafarer with an individual sleeping room[156] or to offer separate accommodation for men and women.[157] Berths for seafarers must have a minimum inside dimension of not less than 198 cm in length and not less than 80 cm in width.[158] Nevertheless, berths of minimum dimension of not less than 190 cm by 70 cm will be permitted if reasonable and not resulting in discomfort to the crew.[159]

4.76 Headroom in crew accommodation on yachts of 200 GT or over should not be less than 203 cm, although limited reduction in any space, or part thereof may be permitted if reasonable and not resulting in discomfort to the seafarer concerned.[160] It is not necessary to furnish each crew member with an individual sleeping cabin, although separate rooms must be provided for men and women.[161] It is worth noting that in relation to yachts of 1,250 GT or over but below 3,000 GT it is not expected that

150. Articles VI(3) and VI(4) of the MLC permit adoption by Member States of a substantially equivalent arrangement if the general object and purpose of the provision concerned are achieved. Such derogation is not, however, allowed in respect of the mandatory Standards contained in Title 5 of the MLC. See MLC, Title 5, introductory paragraph 2.

151. For the accommodation standard required of yachts of less than 200 GT that do not trade internationally and yachts of traditional build, see LY3, s 21. It is also worth noting that yachts which have been or are currently under survey to LY1 or LY2 may continue to be considered under the accommodation standards in force at the time of initial survey – see LY3, s 3.3.3.4.

152. See LY3, s 21A.3.1.

153. See LY3, s 21A.3.2.

154. See LY3, s 21A.10.1, which is the same as MLC, Standard A3.1.9(c).

155. See MLC, Standard A3.1.20.

156. See LY3, s 21A.10.3.

157. See LY3, s 21A.10.4.

158. See LY3, s 21A.10.5(2).

159. See LY3, s 21A.10.5(1).

160. See LY3, ss 21B.3.1 and 21B.8.5.

161. See LY3, ss 21B.8.2.3, 21B.8.3.3, 21B.8.4.3 and 21B.8.5.

officers should share a cabin.[162] Each seafarer ought to, in all circumstances, be offered a separate berth, the minimum inside dimensions of which should be at least 198 cm by 80 cm for yachts of 200 GT but below 1,250 GT,[163] and not below 198 cm in length and not less than 80 cm in width; over half the length of the berth for yachts of between 1,250 and 3,000 GT.[164] Yachts belonging to the former category might be permitted to benefit from berth requirements stipulated for the latter class in relation to sleeping rooms occupied by only one seafarer or cabins where en-suite sanitary facilities are provided.[165] In addition, a taper is allowed from half the length toward the foot of a berth but, under no circumstances, is the berth permitted to be narrower at any point than 50 cm.[166] Moreover, every sleeping room should, if practicable, be lit by natural light. Otherwise, adequate artificial light might be acceptable.[167] It is understood that a deck prism is regarded by the MCA as a legitimate means of providing natural light.

4.77 For yachts of over 200 GT but below 500 GT, a single berth crew cabin should not have a floor area of less than 3.6 m^2, unless it is provided with sanitary facilities, in which case the combined minimum area required ought to be 4.5 m^2.[168] Every double berth cabin without a bathroom is to have the floor area of at least 7 m^2.[169] If furnished with en-suite sanitary facilities, it should have not less in total than 6.2 m^2.[170] Importantly, the minimum free floor area in the sleeping accommodation of any cabin should not be less than 1.45 m^2 per seafarer.[171] However, if arrangements in the room allow for a free movement of the upper part of the body equivalent to an area of 1.45 m^2, the free floor area might be reduced with the permission of the MCA, but not below 1 m^2 per crew member.[172] Assuming that such consent is obtained, the en-suite sanitary facilities are expected to not be less than 1.2 m^2 in size. If larger, a smaller cabin floor area may be permitted, yet not below the minimum of 1 m^2 per seafarer.[173]

4.78 For yachts of over 500 GT but less than 1,250 GT, a single berth seafarer cabin should have a floor area of not less than 3.6 m^2.[174] If such a room is provided with sanitary facilities, it shall not be below 4.5 m^2 in size.[175] Each double occupancy seafarer cabin without sanitary facilities ought to have the floor area of at least 7 m^2.[176] For a yacht of 500 GT, a double sleeping room provided with a bathroom should have the combined floor area of not less than 6.2 m^2. For a yacht of 550 GT, such a cabin is to be of at least 7 m^2 in size. For a vessel of intermediate gross tonnage, the floor area should be determined by linear interpolation.[177] Single berth officer cabins, where no adjoining sitting room, day room or equivalent space is provided, should be not less than 4.5 m^2 for a yacht of 500 GT and at least 7.5 m^2 for a ship of 1,250 GT

162. See LY3, ss 21B.8.2.11 and 21B.8.2.12.
163. See LY3, ss 21B.8.3.4 and 21B.8.4.4.
164. See LY3, s 21B.8.2.4.
165. See n 163.
166. See n 163. See also n 164.
167. See LY3, s 21B.5.1.
168. See LY3, ss 21B.8.3.8 and 21B.8.3.9.
169. See LY3, s 21B.8.3.10.
170. See LY3, s 21B.8.3.11.
171. See LY3, s 21B.8.3.12.
172. See LY3, s 21B.8.3.13.
173. See LY3, s 21B.8.3.14.
174. See LY3, s 21B.8.4.8.
175. See LY3, s 21B.8.4.9.
176. See LY3, s 21B.8.4.10.
177. See LY3, s 21B.8.4.12.

or over. Similarly, the floor area of a yacht of intermediate gross tonnage ought to be determined by linear interpolation.[178] En-suite sanitary facilities, if present, form part of the floor area required.[179] Every double occupancy officer cabin with en-suite sanitary facilities, where no adjoining sitting room, day room or equivalent space is provided, should have the floor area of at least 6.2 m^2 for a yacht of 500 GT and not less than 15 m^2 for a vessel of between 1,150 and 1,250 GT. Likewise, for a yacht of intermediate gross tonnage the floor area should be determined by linear interpolation.[180]

4.79 For yachts of over 1,250 GT but below 3,000 GT, the floor area of a single berth cabin should not be less than 4.5 m^2, whereas every double occupancy room is to be of at least 7 m^2 in size, regardless of whether sanitary facilities are provided.[181] Officer cabins should not have the floor area of less than either 4.5 m^2 (in cases where adjoining sitting room, day room or equivalent space is provided) or 7.5 m^2 (in the event that no such additional facility is present) per seafarer. En-suite sanitary facilities, if available, are to be included in the calculation of the minimum area required for officer sleeping accommodation.[182]

4.80 Yachts of 3,000 GT or over constructed on or after the date on which the MLC enters into force will have to fully comply with Standard A3.1.[183] It is thought that compliance with the requirements of the Convention will not be problematic for a yacht of that size, except for the requirement to provide an individual sleeping cabin for each seafarer.[184] It is worth noting that such yachts were excluded from the ambit of the previous edition of the Large Commercial Yacht Code (LY2).

4.81 Implementation of substantially equivalent arrangements to the crew accommodation requirements imposed by the MLC will eliminate, or at least reduce, the negative impact that the international instrument could have upon the yachting industry. In order to minimise the effect of the sleeping accommodation specification contained in Standard A3.1, it was necessary to distinguish between LY3 class yachts by reference to gross tonnage when devising the substantially equivalent arrangements.

COMPLAINT PROCEDURE

4.82 Undoubtedly, an important aspect of the compliance system established in the MLC is the availability of an on board seafarer complaint procedure. Whenever a deficiency in observance of any requirement imposed by the Convention is identified by an individual seafarer or a section of the crew, safety of raising a concern should be guaranteed, without fear of reprisal. Consequently, each Member State must ensure that ships flying its flag have an on board procedure for fair, effective and expeditious handling of seafarer complaints alleging breaches of the obligations imposed by the MLC.[185]

178. See LY3, s 21B.8.4.11.
179. *Ibid.*
180. See LY3, s 21B.8.4.12.
181. See LY3, ss 21B.8.2.9 and 21B.8.2.10.
182. See LY3, ss 21B.8.2.11 and 21B.8.2.12.
183. See LY3, s 21B.8.5.
184. See above.
185. See MLC, Regulation 5.1.5(1).

4.83 Victimization of a seafarer for filing a complaint should be prohibited and penalised.[186] Standard A5.1.5(3) of the MLC rather helpfully defines 'victimization' as 'any adverse action taken by any person with respect to a seafarer for lodging a complaint which is not manifestly vexatious or maliciously made'. Introducing a common definition of the term is likely to ensure a uniform application of the mandatory provision across Member States. It was also noted during the Tripartite Intersessional Meeting on the Follow-up to the Preparatory Technical Maritime Conference that reference to 'adverse action' was crucial in the definition of 'victimisation'. Were it not for such formulation, 'the term "victimisation" could cover, for example, action by a master to commend particular seafarers for their courage in lodging a complaint about a situation of which the master had been kept in ignorance'.[187]

4.84 Even though the complaint procedure should seek to resolve any matter at the lowest level possible, seafarers must in all cases have a right to lodge a complaint directly to the master of the vessel and, if considered necessary, to an appropriate external authority.[188]

4.85 Prior to the ratification of the MLC, there was no mandatory requirement for a comprehensive on board complaint procedure to be in place, although most shipowners regarded it as good practice to have one.[189] Regulation 13 of the Merchant Shipping (Maritime Labour Convention) (Survey and Certification) Regulations 2013 makes it obligatory to have an on board complaint procedure. It is worth noting that the implementation instrument does not use the term 'victimization'. Instead, the shipowner and the master have been put under an obligation to ensure that a seafarer is 'not subjected to any '*detriment*' as a result of lodging a complaint.[190] Nevertheless, since the definition of '*detriment*' contained in the Merchant Shipping Notice MSN 1849 (M) is exactly the same as that of 'victimization' under the MLC, the difference in the wording employed will be meaningless.[191] Shipowners are also advised to take into account Advisory, Conciliation and Arbitration Service (ACAS) Code of Practice 1, entitled 'Disciplinary and Grievance Procedures', when developing an on board complaint procedure.[192]

4.86 Setting up an on board complaint procedure in the context of a superyacht may cause an organizational headache. Perhaps, it will add to the excessive amount of paperwork that is already required aboard a superyacht, which is often operated by five dozen seafarers. Nonetheless, if established properly, such a procedure should facilitate the complaint handling process without placing an undue burden on any officer. It might, however, be necessary in extreme cases to appoint an executive human resources officer to deal with any seafarer complaint that may arise. Undoubtedly, the impact of Regulation 5.1.5 upon the yachting industry is yet to be seen.

186. See MLC, Regulation 5.1.5(2).

187. See ILO: *PTMC/2005/1 Unresolved issues for the Draft Consolidated Maritime Labour Convention*, Tripartite Intersessional Meeting on the Follow-up to the Preparatory Technical Maritime Conference, Geneva, 2005, Note 12(5), available at http://www.ilo.org/public/libdoc/ilo/2005/105B09_55_engl.pdf (accessed 30 June 2013).

188. See MLC, Standard A5.1.5(2).

189. See, however, MSA, s 44, addressing complaints about food and water. See also MSA, s 33, dealing with disputes concerning wages.

190. See Merchant Shipping (Maritime Labour Convention) (Survey and Certification) Regulations 2013, Regulation 13(5) (emphasis added).

191. See MSN 1849 (M), s 2(5).

192. See MSN 1849 (M), s 4(4).

CHAPTER 5

Crewing insurance under the Maritime Labour Convention 2006

JOHANNA HJALMARSSON*

5.1 Ahead of the entry into force of the *Maritime Labour Convention 2006 (MLC)* on 20 August 2013, a new niche opened in the market for crew insurance tailored to employers' liabilities under the Convention. The new insurances were specifically designed to cover the liabilities that a shipowner or crewing agent might encounter in dealing with seafarers under the MLC. With these new insurances, new issues also arose. This chapter is dedicated to looking at insurance issues predating the MLC, as well as new issues foreseeable under the Convention.

THE MLC AND INSURANCE

5.2 The MLC does not expressly require insurance, but insurance is a convenient way of fulfilling some of its requirements. In this it differs from the pollution conventions that contain provisions on compulsory insurance requiring the shipowner to procure and maintain 'insurance or other financial security'.[1] Those provisions are implemented in national law by a Blue Card system – the insurer issues a Blue Card evidencing the insurance which enables the flag State to issue a certificate of compliance under the respective convention.[2] A small number of provisions in the MLC stipulate that financial security must be provided,[3] but there is by no means a comprehensive insurance obligation. Permissible forms of financial security are not limited to insurance, as will be further explained in the following, and indeed it is

* Informa Senior Research Fellow in Maritime and Commercial law; Member, Institute of Maritime Law; Member, Insurance Law Research Group; Southampton Law School, University of Southampton. The author wishes to thank Robert Veal, Research Fellow, Institute of Maritime Law for his assistance and Jennifer Lavelle and Dr Andrea Lista of Southampton Law School, University of Southampton for valuable input. Any remaining errors are attributable to the author.

1. Compulsory insurance is required by provisions such as the *International Convention on Civil Liability for Oil Pollution Damage (CLC), 1992*, Article 7, implemented via Merchant Shipping Act 1995, s 163; the *International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunkers Convention), 2001*, Article 7, implemented via Merchant Shipping Act 1995, s 163A; the *International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention), 2010*, Article 12, implemented via Merchant Shipping Act 1995, s 182; and, the *Nairobi International Convention on the Removal of Wrecks, 2007*, Article 12. Provisions for implementation of the Nairobi Convention have been made in the Merchant Shipping Act 1995, s 255J.

2. For an illustration of how the system works and what may happen when it does not, see *Islamic Republic of Iran Shipping Lines v Steamship Mutual Underwriting Association (Bermuda) Ltd* [2011] 1 Lloyd's Rep 195, especially at [33].

3. In particular, MLC, Regulations 2.5 and 4.2. See further below.

arguable that other forms of financial security may be preferable for some risks; in particular those that are aggravated by the employer's insolvency. Nevertheless, this chapter is restricted to the discussion of insurance issues arising in relation to crewing insurance and the MLC.

5.3 It is appropriate to start this chapter by discussing the basic components of the equation, namely by identifying the insurer, defining the employer and understanding who is a relevant employee.

WHO IS THE INSURER?

5.4 Protection and Indemnity (P&I) clubs and fixed premium insurers alike provide the type of cover required under the MLC, and nothing turns on what type of insurer is used for the purpose. Given the very large number of potential insurers – theoretically any insurance company in the world, not to mention providers of bank guarantees – the first problem for a direct claimant is to find out which insurer provides the cover for their employer, or where their employer is now defunct, who provided the cover for the period in question. For the United Kingdom (UK), there has recently been reform intended to resolve this issue that may assist seafarers, namely the creation of employers' liability insurance registers. Such registers have become mandatory: employers' liability insurers in the UK are, since 2011, obliged to keep a register of the employers that they insure under the Financial Services Authority's Employers' Liability Insurance: Disclosure by Insurers Instrument 2010.[4] The Instrument amended the precursor of the Financial Conduct Authority Handbook[5] by adding ICOBS 8.4: Employers' liability insurance and ICOBS 8 Annex 1.[6] The purpose of these rules is stated to be:

> to assist individuals with claims arising out of their course of employment in the United Kingdom for employers carrying on, or who carried on, business in the United Kingdom, to identify an insurer or insurers that provided employers' liability insurance (other than certain co-insurance and excess cover arrangements) by requiring insurers to produce an employers' liability register. In particular it aims to assist ex-employees whose employers no longer exist or who cannot be located.[7]

5.5 The UK-based employees of UK employers may be a relatively small group of claimants among seafarers; nevertheless, for example, the publicly available Employers' Liability Register of Britannia P&I Club encompasses as many as 2,775 pages and a very large number of ships and policy years.[8] Another P&I insurer, Steamship Mutual, has taken the approach of issuing Employers' Liability Registers on an annual basis.[9] Non-UK seafarers are equally able to access and benefit from the information in these registers for

4. Subsequently amended by the Employers' Liability Insurance: Disclosure by Insurers (No. 2) Instrument (2012).

5. Originally the Financial Services Authority Handbook; from 1 April 2013 the Financial Conduct Authority Handbook.

6. ICOBS is the *Insurance Conduct of Business Sourcebook*, part of the Financial Conduct Authority Handbook and sets the standards by which insurers must carry out their business.

7. ICOBS, 8.4.

8. Available at http://www.britanniapandi.com/en/current_issues/employers-liability-insurance/index.cfm (accessed 6 April 2013).

9. http://www.steamshipmutual.com/liabilities-and-claims/EmployersLiabilityRegister.htm (accessed 6 June 2013).

the purpose of identifying the right insurer and lodging a claim.[10] Given the importance to the shipping industry of policies issued by UK insurers, this recent development is of incomparable potential importance to seafarers with claims under past policies.

WHO IS THE INSURED?

5.6 The words 'the insured' may in some contexts denote the seafarer or other crew member who is a named insured, or is included in a class intended to be covered or is otherwise intended to benefit from the insurance; however, here the words 'the insured' refer to the insurer's contractual counterparty under the policy. 'The insured' under a maritime employer's liability policy is likely to be either the shipowner itself or a crewing management company acting under a contract with the disponent owner. The two may be insured under the same policy, commonly because the shipowner includes the crew manager under its P&I policy against a suitable impact on the management fee. The shipowner is defined in the MLC as

> the owner of the ship or another organization or person, such as the manager, agent or bareboat charterer, 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 this Convention, regardless of whether any other organization or persons fulfil certain of the duties or responsibi[l]ities on behalf of the shipowner.[11]

5.7 The definition in the MLC therefore encompasses shipowners and crew managers alike, where the latter have undertaken to perform some of the shipowner's duties. Although they are defined together, and although the disjunctive 'or' is used rather than 'and' in the first line of the quoted definition, it must arguably be the case that the actual shipowner cannot escape its responsibilities and liabilities by delegating them – otherwise crucial parts of the Convention could fairly easily be rendered quite toothless. Crewing managers also have independent obligations in particular under Regulation 1.4.

5.8 Shipowners and crewing agents will in this chapter be collectively referred to as 'the employer' or 'the insured', unless some other nomenclature is called for in the particular instance. They can each procure independent cover or joint cover and may well be able to claim under each other's insurance policies, where there is more than one policy in place.

'SEAFARERS'

5.9 The MLC contains its own definition of seafarer: '*Seafarer* means any person who is employed or engaged or works in any capacity on board a ship to which this Convention applies'.[12]

10. Information may also be obtained through the Employers' Liability Tracing Office (ELTO) at http://www.elto.org.uk (accessed 7 April 2013).
11. MLC, Article II(1)(j).
12. MLC, Article II(1)(f).

5.10 This definition is extremely wide. It is capable of encompassing not only seamen in the traditional sense but potentially also security personnel, surveyors, pilots and perhaps others who would in ordinary parlance not be referred to as seafarers, such as medical personnel on board to supervise the management of a casualty.[13] It is noteworthy that the definition of seafarer does not refer to the definition of 'seafarer's employment agreement',[14] so that a person performing work on board without possessing a contract of employment can also be deemed a seafarer.[15] From an insurance perspective, this gives rises to practical issues in that the employer, in order to obtain the desired flag State certificate, may need to demonstrate compliance in respect of all potential categories of personnel on board. It might for instance become necessary to give written assurances that no persons from other categories will regularly be allowed to 'work in any capacity' on board the ship.

5.11 Insurers for their part will be reluctant to change the language of their policies where they have previously been using other terminology, such as seaman, crew, crew member or employee, and the different expressions may give rise to an opportunity also to define seafarer differently, either explicitly or by inference. The onus is upon the employer to make sure that the cover they obtain is complete and fulfils statutory or regulatory requirements of financial security, at the risk of not obtaining the compliance certificate from its flag State. However, if the proposing employer specifically requests 'MLC compliant' or 'MLC risks' cover, the insurer or broker might under at least some legal systems be accused of mis-selling should the cover then prove non-compliant due to a discrepant, narrower definition.

THE LEGAL FRAMEWORK AND THE CHARACTER OF THE POLICY

5.12 Under the law of England and Wales, the general situation is that insurance is compulsory under the Employers' Liability (Compulsory Insurance) Act 1969 to ensure that employees who are injured or suffer illness as a result of their work obtain adequate compensation from their employer. It is also compulsory to use an insurer authorized under the Financial Services and Markets Act 2000. The Employers' Liability (Compulsory Insurance) Act 1969 is of limited relevance to the application of the MLC, because it applies only to employees working in the UK – an employer whose employees are mostly abroad is currently not obliged by UK law to insure them. While offshore workers on oil platforms and other installations are covered by the Employers' Liability Act, seafarers in general are not, unless they work in the UK.[16]

13. For issues arising from the presence of non-navigational types of staff on board, see further Bek, Chapter 4 of this work.

14. MLC, Article II(1)(g): '*seafarers' employment agreement* includes both a contract of employment and articles of agreement'.

15. This is discussed in greater detail by Bek in Chapter 4 of this work.

16. See *Diggins v Condor Marine Crewing Services Ltd* [2009] EWCA Civ 1133. On the issue of whether a seafarer is considered to be working in the UK, see generally Lavelle, Chapter 10 of this work.

5.13 The shipowner's insurance cover for seafarers may variously and legitimately be described as marine or transport insurance, employers' liability insurance or general liability insurance. The insurance could equally be classed as life or health or personal injury insurance, or plain liability insurance, depending both on the definitions used by the applicable law and the exact composition of the policy and the risks insured. Different legal systems would certainly treat these policies differently, and it might even be that the law, the regulatory system and the internal rules of an insurance market such as Lloyd's would apply different (if not conflicting) classifications depending on the context. As noted above, insurance such as that required by the MLC may be classified in various ways. For the purposes of European Union (EU) law, it seems clear that the class of insurance that arises under the MLC is properly regarded as life insurance, pursuant to the definition in the recast Life Assurance Directive:

> (a) life assurance, that is to say, the class of assurance which comprises, in particular, assurance on survival to a stipulated age only, assurance on death only, assurance on survival to a stipulated age or on earlier death, life assurance with return of premiums, marriage assurance, birth assurance; [...]
> (c) supplementary insurance carried on by life assurance undertakings, that is to say, in particular, insurance against personal injury including incapacity for employment, insurance against death resulting from an accident and insurance against disability resulting from an accident or sickness, where these various kinds of insurance are underwritten in addition to life assurance.[17]

5.14 It is appropriate next to discuss some of the potential implications of classifying the insurance in the aforementioned categories. The consequences may be very important – where the law exempts marine and transport insurance from mandatory legislation, it will be crucial to determine whether the policy qualifies as such, as it would otherwise not be exempt from the mandatory legislation.[18] Such exemptions may not apply to liability insurance for crew members, however marine the business context may be. As for the Marine Insurance Act 1906, the definition of a marine insurance contract in section 1 of the Act is certainly capable of encompassing crew cover, but the Act itself is designed mainly for the insurance of transport of ships and goods, and may not in all parts be directly relevant to insurance of the repatriation, health or medical needs or life of seafarers. In English and Welsh law, an example of the impact of characterisation is that, with marine insurance, the proposer is not obliged to disclose previous rejections of the risk by other underwriters.[19] With non-marine insurance, such rejections must be disclosed as part of a full and fair disclosure. This is a relatively obscure rule of law which is nevertheless the difference between the insurance policy becoming void or surviving a failure to disclose. Equally, employers'

17. Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance [2002] OJ L345/1, Article 2(1)(a) and (c).

18. A typical example is the Swedish Insurance Contracts Act (2005:104), section 7 of which makes application of the Act non-mandatory for 'marine insurance, transport insurance and insurance of aircraft, unless it is consumer insurance'. The Act will apply mandatorily to employers' liability insurance even if specifically designed for seafarers.

19. *Glasgow Assurance Corp Ltd* v *William Symondson Co* (1911) 16 Com Case 109 and *North British Fishing Boat Insurance Co* v *Starr* (1922) 13 Ll L Rep 206.

liability insurance carries with it protective measures such as that described above which are not relevant to a policy characterised as one of marine insurance.[20]

5.15 In many States Parties to the MLC, employers' liability policies would thus be subject to the general law, which usually includes stringent mandatory requirements of the insurance contracts act of the governing legal system designed to protect insurance consumers and 'weaker party' beneficiaries. Therefore, although insurers occasionally provide insurance on a policy without any reference to applicable law, and upon the assumption that the 'law of the insured' will be applied in the event of a dispute, that will not be a workable approach for this type of policy. A legal system closely based on freedom of contract may be the best choice of law for the parties, but a close second best would be to choose as the applicable law of the policy a system whose impact is clear and calculable.

5.16 There is a further distinction to be made as to whether the policy is a liability policy or one that benefits seafarers directly. A liability policy may require the employer first to pay claims in order then to be indemnified by the insurer, but may not according to its own terms permit seafarers to claim directly under the policy. Allowing direct claims by seafarers would obviously be a very elegant solution to the employer's duties arising under the MLC. Claims management would nevertheless be more efficient for both the insurer and the employer if claims were shepherded by the employer who would claim under the policy and then make a payment to the individual employee. From the perspective of the injured seafarer, the promptness of the compensation is surely the only priority. The characterisation of the policy and what legal framework will be applied as a result will ultimately be a sensitive question, and will require careful and precise drafting.

INSURABLE INTEREST

5.17 By way of example of the importance of classifying the policy correctly, under English law, different types of policies will be subject to different rules on insurable interest. Policies related to the lives and health of seafarers may be framed as third party liability policies or life policies.[21] Under a third party liability policy, the insurer must pay when a duty to pay has accrued. Under a life policy, it is the event itself, the death of the crew member that triggers the duty to pay.

5.18 *Feasey v Sun Life Assurance Corporation of Canada*[22] was a case where the policy muddled the lines between these two forms of policy. The original arrangement was a liability policy issued by Syndicate 957 (whose representative underwriter was Mr Feasey) to the P&I insurer Steamship for the liabilities to its shipowner members for the insurance of seafarers' lives and against personal injury. The liabilities of the syndicate were reinsured with Sun Life and other reinsurers. Following a rule change at Lloyd's in relation to the reserves required to be held for accident and personal

20. Page 94.

21. This is not the place to review the law on insurable interest – for a comprehensive statement, see Clarke, *The Law of Insurance Contracts* (4th edn, Informa 2012), Chapter 4; Birds, Lynch, Milnes, *MacGillivray on Insurance Law* (12th edn, Sweet & Maxwell 2012), Chapter 1.

22. At first instance reported at [2002] EWHC 868 (Comm); [2002] Lloyd's Rep IR 807; in the Court of Appeal [2003] EWCA Civ 885; [2003] 1 Lloyd's Rep 637.

injury cover, the terms of the policy were modified by the parties so that Steamship's and the Syndicate's liabilities were triggered by the death or accident of a seafarer, that is by the accidental event itself, instead of by proof of Steamship's liability. The intention was that there should be no change in the overall amount of the losses under the policy and the calculation of the amounts due was made accordingly. However, this revised construction would permit the insurers to avoid holding large amounts in reserve by complying with the rules for personal accident insurance. When larger than expected losses were incurred, the reinsurers rejected the claim, saying that the change in the policy had brought it within the ambit of the Life Assurance Act 1774 by being an insurance upon the lives of the seafarers. According to that Act, the reinsurers argued, Steamship had to have an insurable interest in the lives of the seafarers at the time the policy was made.

5.19 At first instance, Mr Justice Langley focused on whether the reclassification converted the policy into one of gaming and wagering and held that the fact that the parties had intended the policy to yield approximately the same compensation meant that there was no element of gambling and no complete lack of interest as prohibited by section 1 of the Life Assurance Act 1774.[23] In any case, Steamship had an interest and was therefore not prevented from recovering under section 3 of the 1774 Act, which only prevented recovery of excessive amounts.

5.20 The Court of Appeal dismissed the appeal. The majority put its judicial foot down to say that where the insurer has been involved in crafting the precise terms of the policy, no point of insurable interest should arise, citing previous judicial statements to that effect.[24] Having taken that stance, the majority went on to agree with the judge that although the policy was subject to the Life Assurance Act 1774, it fulfilled its requirements as Langley J had held.[25]

5.21 The moral of this case for present purposes is the importance of structuring the policy correctly. When it was initially structured as a liability policy, no problems arose in relation to a requirement for an insurable interest. It was the direct connection to the lives of the seafarers that brought it within the scope of the Life Assurance Act 1774 and its strict requirements. The Law Commissions have proposed changes to the regime on insurable interest, but in line with market desires, they propose to leave intact the insurable interest requirement in relation to life insurance for present purposes.[26]

JOINT OR COMPOSITE POLICY?

5.22 The existence and nature of the requirement for an insurable interest is of great importance to the question of fraud and failure to disclose. Where there are many insureds under a single contract of insurance, the actions of one insured may affect the ability of other insureds to recover. The question to ask is whether the policy is joint or composite. A composite policy may be described in simple terms as separate policies within a single contract, whereas a joint policy is two (or more) insureds

23. [2002] Lloyd's Rep IR 807, [144].

24. [2003] 1 Lloyd's Rep 637, [6]-[7] with reference to Mance J in *The Capricorn* [1995] 1 Lloyd's Rep 622 and to Brett MR in *Stock* v *Inglis* (1884) 12 QBD 564.

25. Ward LJ, dissenting, said that he was 'extremely disgruntled' to find himself allowing the appeal, saying that it did 'scant justice' [2003] 1 Lloyd's Rep 637, [199].

26. See the Joint Consultation Paper of the Law Commissions of 20 December 2011, *Insurance Contract Law: Post Contract Duties and Other Issues* (Law Com No 20, 2011; Scot Law Com 152, 2011).

sharing the same insurance. Whether a particular contract of insurance is a joint or composite policy is a question of construction in each case.

5.23 Insurable interest provides a key factor to distinguish between joint and composite policies. If the parties possess the same, or perhaps better expressed a single insurable interest, the policy is likely to be a joint one. If so, the fraud or failure to disclose of one party will operate to defeat the ability of the other to claim. On the contrary, if the parties have separate insurable interests and the policy is therefore composite, the fraud or failure by one of them to disclose information to insurers does not affect the ability of the others to claim.[27] This is of particular importance where the shipowner may have failed to disclose information to the insurer when making the insurance. There are cases providing that in English law, if the policy is composite, only the policy of the person who failed to provide accurate information is avoided, and the policies of the other persons are unaffected. A joint policy will be avoided if one of the parties has failed to disclose information, or where one party has made a fraudulent claim the policy will be forfeit. Outside England and Wales, the law may instead provide that although the parties' interests are separate, the contract is indivisible so that the whole of a composite policy is defeated by the insured's failure to disclose.[28]

APPLICABLE LAW AND JURISDICTION

5.24 The MLC itself does not provide for direct actions against insurers, nor does it compel States Parties to enact rules providing for such direct actions. It will therefore be up to individual States to determine whether direct actions are appropriate to their legal systems, for which reason the framework on choice of law and jurisdiction becomes essential. Again, the MLC does not dictate the choice of law or jurisdiction of the employment contract; rather, it is up to the parties to choose the law of a particular State. These were indeed issues that could not have been addressed in the Convention, if ratification by individual EU Member States was desired. The fact that issues of choice of law and jurisdiction are reserved for the EU level precludes EU Member States from becoming parties to any convention containing choice of law and jurisdiction provisions.[29] The EU has a detailed regulatory framework in place that will determine what country's law applies to the contract. It will also determine what jurisdiction is to deal with the fallout if there is a dispute, an issue dealt with in the following.[30]

ROME I AND II AND THE EMPLOYMENT CONTRACT

5.25 The EU has adopted detailed rules governing the choice of law for the employment contract that regulates the relationship between the employer and the seafarer.[31]

27. *P Samuel & Co Ltd v Dumas* (1924) 18 Ll L Rep 211; [1924] AC 431.
28. *Law of Insurance Contracts*, para 27.2C6 (issue 26).
29. See further Lavelle, Chapter 9 of this work.
30. Lord Collins *et al.* (eds), *Dicey, Morris & Collins on the Conflict of Laws* (15th edn, Sweet & Maxwell 2012).
31. What follows is a cursory introduction for the purposes of this chapter – for a more detailed review of the choice of law in employment contracts, see *ibid*, Chapters 32 and 33 and especially Lavelle, Chapter 9 of this work.

The framework applicable to the employment contract is enshrined in the Rome I Regulation.[32] The main provision remains the rule respecting the freedom of choice of the parties in Article 3 but that choice is subjected to the rule in Article 8(1) which provides that the parties' choice cannot afford the employee reduced protection compared to mandatory provisions in the law that would have been applied in the absence of choice. Similarly, Article 4 is supplanted by Article 8(2) of Rome I which offers added protection in the absence of choice:

> To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.

5.26 The other major Regulation is Rome II[33] governing the choice of law in non-contractual relations. Rome II is of minimal relevance to the core employer-seafarer relationship, as most issues and liabilities should be governed by the contract and therefore by the choice of law provided by Rome I. Nevertheless, non-contractual liabilities may arise. Thus, when there is a non-contractual obligation such as an accident attracting the liability of the employer towards the seafarer in the absence of any contract, Rome II will be applicable. This might be the case when the contract has terminated or not yet come into effect; where an employer incurs a liability as a result of an accident to a seafarer who is not his employee; or if the contract is automatically terminated as a consequence of the seafarer's death and a liability for repatriation of the seafarer's body or liabilities to his family arise through the operation of law. In such cases, the choice of law for the resulting non-contractual obligation is governed by Rome II. Rome II also applies to liability resulting from industrial action. The choice of law is then the law of the country of the industrial action; arguably an unpredictable entity in the case of seafarers.[34]

ROME I AND II AND THE INSURANCE POLICY

5.27 The above is what applies to the employment contract. The insurance contract is also regulated by Rome I and II. These choice of law rules have been termed 'ill-suited for maritime claims'[35] and indeed they are not designed for freely moving risks like ships or goods.

5.28 In addition, the choice between Rome I and Rome II for direct actions against the insurer is not a completely resolved issue on a conceptual level.[36] Indeed, it is possible that direct actions fall entirely outside the established framework. This all depends on whether a direct action against the insurer is characterised as

32. Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations [2008] OJ L177/6 (Rome I).
33. Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations [2007] OJ L199/40 (Rome II).
34. Rome II, Preamble recital 27 as well as Article 9.
35. Ulfbeck, V, 'Direct Actions Against the Insurer in a Maritime Setting: the European Perspective' (2011) LMCLQ 293-306, 306.
36. See especially Ulfbeck, *op. cit.*

a 'contractual' or 'non-contractual' obligation. While one method of determining which choice of law framework to adopt is to use the conflicts rules of the forum, the principle of primacy dictates that concepts in EU law should be interpreted independently of Member States' law. That being the case, the division between contractual obligations in Rome I and non-contractual obligations in Rome II will not always be a self-evident one.[37]

Rome I

5.29 In Rome I, Article 7 governs the law applicable to insurance policies. The law in this respect has been explored in general works on Rome I and can be covered relatively briefly here.[38] The first rule is that the parties' freedom of choice is respected also in relation to insurance contracts. In the absence of choice, protective rules perhaps designed primarily for the consumer insurance market are activated, limiting the choice to a list of five.[39] The list of five is not particularly restrictive. It includes first the law of any Member State where the risk is located at the time of conclusion of the contract – the location of a risk related to liability insurance for a ship may be the place of operation of the ship if for instance it is localised to a specific port or geographical area, or it may be the jurisdiction of registry of the ship. The second permissible choice is the law of the country where the policy holder has its habitual residence. Third, in the case of life assurance, the law of the Member State where the policy holder is a national is available. Fourth, for insurance contracts covering risks limited to events occurring in one Member State other than the Member State where the risk is situated, the law of that Member State is also available. Finally, where the policy holder pursues a commercial or industrial activity and the insurance contract covers two or more risks which relate to those activities and are situated in different Member States, the law of any of the Member States concerned or the law of the country of habitual residence of the policy holder may be chosen.[40] It is worth reiterating that the countries whose law may come to apply under this Article are the various Member States' law only.

Rome II

5.30 As for Rome II, there is a conundrum inherent to the choice of law where a non-contractual liability arises that is covered under an insurance policy. Is the law applicable in such a case the law of the liability, or the law of the insurance policy? Rome II answers this question for non-contractual liabilities. For the purpose of employer-seafarer relationships, such liabilities include *culpa in contrahendo*, that is, loss arising from pre-contractual dealings; tort arising from a pre-existing relationship between the parties, such as a contract; and liability arising from industrial action.

37. *Ibid*, where the author points out that Scandinavian countries have viewed a direct action against the insurer as an action in tort, because there is no contract between the third party and the insurer, whereas English law would consider it an action in contract – the insurance policy.

38. See Lavelle, Chapter 9 of this work

39. Large risks are subject to specific rules found in Article 7(2) – in the absence of choice, the insurer's habitual residence provides the applicable law.

40. Rome I, Article 7(3).

The applicable law in the first two cases is that of the contract[41] (whether or not it in fact came in to being) and, in the case of industrial action, the law of the location of the industrial action.[42]

5.31 Thus, in case some such non-contractual liability arises, the seafarer may be entitled to a direct action against the insurer of the employer:

> The person having suffered damage may bring his or her claim directly against the insurer of the person liable to provide compensation if the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides.[43]

5.32 It will be noted that this is not only a choice of law rule but also a permissive rule about rights of action. It should also be noted that if the action is brought in one country, the courts of that country may well have to apply the law of another country. This has happened in motor insurance cases where persons injured in France – which thus provides the law of the tort and has very permissive rules about direct action against the insurer – have brought suit in England, so that the English courts have applied French law and permitted the suit.[44]

JURISDICTION IN MATTERS RELATING TO INSURANCE

5.33 The Jurisdiction Regulation provides for special rules in relation to insurance contracts.[45] The preamble includes insurance contracts among those contracts where 'the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for'.[46] Like employment contracts, insurance contracts are allowed only 'limited autonomy to determine the courts having jurisdiction'.[47] The rules for insurance contracts are found in Section 3 of the Jurisdiction Regulation which is the sole regime in force for direct insurance contracts.[48]

5.34 If the insurer is not domiciled in any EU Member State, the national court must assess the question of jurisdiction according to national rules.[49] The claimant's nationality does not matter, but he must be domiciled in a Member State for this rule to apply.[50]

5.35 There is an obvious opportunity for forum shopping here, given that some Member States are very generous in allowing third party actions against insurers and others are very restrictive. The UK counts among the restrictive jurisdictions allowing direct actions only where the insured is insolvent; also Germany which allows such

41. Rome II, Article 12(1) and Article 4(3). See further Lavelle, Chapter 9 of this work.
42. Rome II, Article 9.
43. Rome II, Article 18.
44. See, for example, *Maher & Anor v Groupama Grand Est* [2009] EWCA Civ 1191; [2010] WLR 1564.
45. Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1 (Jurisdiction Regulation). Changes in the recast version, which will enter into force in 2015, are dealt with at the end of this segment.
46. Jurisdiction Regulation, Preamble recital 13.
47. Jurisdiction Regulation, Preamble recital 14.
48. Section 3 does not apply to reinsurance contracts; *Group Josi Reinsurance Co SA v Universal General Insurance Co, Case C-412/98* [2001] Lloyd's Rep IR 483. Nor does it apply to third party dealings between insurers; *GIE Reunion europeenne v Zurich Espana, Case C-77/04* [2006] Lloyd's Rep IR 215.
49. Jurisdiction Regulation, Article 8 and Article 4.
50. Jurisdiction Regulation, Article 8 and Article 4.

actions only where insurance is compulsory.[51] The more generous are for instance France, which allows third party actions in all cases. If the insurer has its domicile in one EU Member State it can also be sued in other Member States where it has a branch, agency or other establishment.[52]

5.36 For claimant seafarers who are not domiciled in any EU Member State, including many seafarers with a cause of action against their employer's insurer, the rules in Section 3 do apply when suing insurers domiciled in an EU Member State. Also, where non-EU insurers have a branch, agency or establishment in a Member State, they will be deemed to be domiciled in that State, thus triggering the application of Section 3.[53]

5.37 Section 3 contains several rules that are alternative and, given the protective role of the section,[54] can all be applied at the choice of the claimant. The claimant effectively has the choice between the domicile of the insurer, the employer or its own domicile. The court of the insurer's domicile is available as a result of Article 9, which also makes available the courts of the claimant's domicile and those of the domicile of the leading insurer on a co-insurance policy. It is noteworthy for the seafarer context that the claimant whose domicile is relevant may be the policyholder, the insured, where that is a different person, or a beneficiary under the policy.[55] It has been held by the European Court of Justice (ECJ) (as it then was) that policyholder, insured or beneficiary includes an injured third party.[56]

5.38 Given that the policies under which seafarers may wish to sue are likely to be liability policies, it is important that there is an additional rule for liability insurance. The 'insurer may be sued' in the courts for the place where the harmful event occurred. Such suit may be commenced by any of the parties specified in Articles 8, 9 or 10, which includes a seafarer injured in the territory of a Member State; but it is national law which decides whether such action is permitted.[57] A seafarer will therefore in principle be in a very different situation depending on whether he was injured in an accident in port in France, where he can claim directly against the liability insurer or in England, where he cannot. [58] The policyholder can be joined to the action, again depending on national law.[59] If the seafarer has chosen to sue the employer, national law will govern whether the insurer can be joined to the action.[60]

5.39 To pre-empt positive action by a third party, the insurer may wish to seize the initiative by bringing an action for a negative declaration of liability under the policy in a jurisdiction that is permissive when it comes to avoiding the policy, for instance in the UK for pre-contractual misrepresentation or failure to disclose. The insurer is not entitled to the jurisdiction of the accident under a liability policy but it is entitled to the jurisdictions of the policyholder, the insured or the beneficiary; a fairly generous choice.[61]

51. Third Parties (Rights Against Insurers) Act 1930.
52. Jurisdiction Regulation, Article 8 and Article 5(5); but see below in respect of Article 9(2).
53. Jurisdiction Regulation, Article 9(2).
54. Jurisdiction Regulation, Preamble recital 13.
55. Jurisdiction Regulation, Article 9(1)(b).
56. Case C-463/06 *Odenbreit v FBTO Schadeverzekeringen NV* [2007] ECR I-11321.
57. Jurisdiction Regulation, Article 11(2).
58. See above on the Third Parties (Rights Against Insurers) Act 1930 and Article 124-3 of the French Code des assurances.
59. Jurisdiction Regulation, Article 11(3).
60. Jurisdiction Regulation, Article 11(1).
61. Jurisdiction Regulation, Article 12(1).

5.40 The insurance section takes precedence over any other provisions of the Jurisdiction Regulation, including the general provisions on jurisdiction clauses.[62] However, Section 3 itself contains a vent in Article 13 allowing for jurisdiction clauses to operate by mutual agreement between the parties.[63] Most interesting to seafarers of the five options available in Article 13 is that of agreeing upon a jurisdiction after the fact,[64] and also agreements with policyholders not domiciled in a Member State.[65] Even if the insurer is domiciled in a Member State, but the employer (policyholder) is not, the insurer and the employer are therefore free to agree on any jurisdiction they wish for their policy and indeed to agree that EU fora should not be available.[66] Such agreement would exclude the applicability of the provisions in Section 3 in their entirety and the seafarer would not have any rights of direct action in respect of the policy under the Jurisdiction Regulation, unless a court applying the law of a Member State declined to recognize the agreement and gave precedence to more protective national rules. This would for example happen in a State where the insurance of all seafarers was compulsory[67] and where direct action was permitted in respect of compulsory insurance.[68] Article 13(5) adds to the scope for valid jurisdiction clauses, insofar as the contract of insurance covers the risks listed in Article 14. The words "insofar as" should not be interpreted too narrowly: in *Standard Steamship Owners' Protection and Indemnity Association (Bermuda) Ltd v GieVision Bail & Ors*,[69] it was held that a duty free shop operator that had been joined to the ship owner's P&I cover was bound by the jurisdiction clause in the Club Rules, although the cover required by the duty free shop operator was purely for liabilities arising out of the employment of shop staff. The insurance was a joint insurance in respect of a multiplicity of risks, the vast majority of which fell within Article 14, and it did not matter that the duty free shop operator did not itself operate the ships. The risk in question was maritime and therefore a liability arising out of the use or operation of ships per Article 14(2)(a). Generally, an agreement that provides for jurisdiction somewhere other than in the insurer's domicile is enforceable, so long as the choice is that of the policyholder or insured,[70] but this has not always proved effective to found the jurisdiction of preference for the insurance claimant.[71]

62. Cf Jurisdiction Regulation, Article 27 and Article 28. The exception is that under Article 24, a defendant who enters an appearance before a court cannot subsequently contest its jurisdiction (unless the purpose of the appearance was to contest jurisdiction).
63. Jurisdiction Regulation, Article 13.
64. Jurisdiction Regulation, Article 13(1).
65. Jurisdiction Regulation, Article 13(4).
66. Jurisdiction Regulation, Article 13(4).
67. Some States would not consider such insurance compulsory – it is compulsory under the MLC only to a minor extent, see elsewhere in this chapter, and national legislation may well make exception for non-domiciled seafarers under general employment law much like the UK Employers' Liability (Compulsory Insurance) Act 1969.
68. Jurisdiction Regulation, Article 13(4).
69. [2004] EWHC 2919 (Comm).
70. Jurisdiction Regulation, Article 13(2).
71. In *Sherdley v Nordea Life & Pensions SA* [2012] EWCA Civ 88, the insurance claimants failed to establish that there was a valid jurisdiction agreement meeting the requirements of Article 13(2) and also failed to convince the Court of Appeal that Article 9 could found English jurisdiction when the claimants' domicile at the time litigation commenced was not in the UK.

5.41 In 2015, when the recast version of the Jurisdiction Regulation[72] enters into force, a court which is seised according to Section 3 will not be required to stay its proceedings or decline jurisdiction where another court has been first seised under a jurisdiction agreement that is not valid under Section 3.[73]

RISKS A POLICY SHOULD COVER

5.42 Under the MLC, there is no general compulsory insurance arrangement with rights of direct claim as there is under the CLC or the Bunkers Convention. Nevertheless, from a few provisions there arises the need for the employer to take out insurance or indeed to provide for some other form of financial security to cover liabilities towards a seafarer.

5.43 The relevant provisions are all found in the Code, under Title 2 in respect of repatriation and Title 4 in respect of health and life benefits. The main, new feature of the MLC requiring attention from insurers is repatriation so it will be appropriate to begin by addressing this obligation. There then follows an overview of the requirements of the MLC in respect of health benefits.[74]

REPATRIATION

5.44 The previous source of rights to repatriation was the *Repatriation of Seafarers Convention (Revised), 1987 (No. 166)*,[75] itself a revision of the earlier *Repatriation of Seamen Convention, 1926 (No. 23)*.[76] It is rather pleasing to note the progress that has been made in relation to seafarers' rights to repatriation over the past century as reflected in the three conventions at issue.[77]

5.45 Thus, in Convention No. 23, the default position was that the seafarer must himself bear the costs of repatriation, except in situations of (a) injury sustained in the service of the vessel; (b) shipwreck; (c) illness not due to his own wilful act or default; or (d) discharge for any cause for which he cannot be held responsible.[78] By 1987, the default position had switched to the shipowner bearing the costs of repatriation other than in cases of serious default by the seafarer. The range of costs had also expanded somewhat. The very practical problem remains however that the very reason for seafarers being stranded is frequently that the shipowner is insolvent. Seafarers may be stuck on board in port for many months, unable to leave and no longer getting paid by the impecunious defunct shipowner. The MLC attempts to resolve this problem by stipulating that financial security, and evidence of such security, is to be provided.

72. Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1 (Recast Regulation).
73. Recast Regulation, Article 32.
74. For the situation in respect of unpaid wages, see Seacurus, Chapter 6 of this work.
75. The Convention entered into force on 3 July 1991.
76. The Convention entered into force on 16 April 1928.
77. For the mechanism by which one ILO convention replaces another, see Convention No. 166, Article 20.
78. Convention No. 23, Article 4.

5.46 Under the MLC, in Title 2, Regulation 2.5, the right to repatriation enjoyed by the seafarer under paragraph 1 is supported by paragraph 2 which provides that 'Each Member shall require ships that fly its flag to provide financial security to ensure that seafarers are duly repatriated in accordance with the Code'.[79]

5.47 The MLC does not require legislation in this regard so this may be done simply by the body issuing certificates stipulating that evidence of financial security is required. Insurance, a guarantee or self-insurance are possible ways of providing financial security – the Convention does not stipulate in what form it should be provided. The UK Marine and Coastguard Agency (MCA) has said that 'P&I cover, commercial insurance, a bond scheme or self-insurance' will be allowed.[80] The reason why the Convention expressly provides that financial security is required in respect of repatriation is that if the shipowner should become insolvent, the seafarers will be stuck. In such a case, the financial security will kick in and supply the financial means, if not the logistical assistance, to send the seafarers home.

5.48 The monies paid for the repatriation of the seafarer can be recovered by the shipowner if the seafarer is in serious default of his obligations.[81] There is no guidance for what constitutes serious default, nor any assistance on who is to decide that issue, which might allow opportunities for abuse. In line with the developments in the law over the 20th century outlined above, there is no other defence available to the shipowner. An insurer or other guarantor who has paid for repatriation will be subrogated to sums paid where the seafarer is in default; but unless there is an opportunity to set off, it may not be worth recovering relatively small sums from seafarers living in odd jurisdictions where litigation may not be straightforward.

5.49 The insolvency of the shipowner will be the most common situation for the financial security for repatriation to be utilised. The guarantor will therefore be keenly interested in the shipowner's financial solvency. Indeed, the right to repatriation in the case of the employer's insolvency is made explicit in the Guidelines segment of the Code.[82] Where insurance is made for this purpose, there are rules of disclosure that may prove apposite.

5.50 In *The North Star*,[83] the Court of Appeal decided, following conclusions to opposite effects in the first instance judgments, on the one hand, by Colman J in the same case[84] and, on the other, by Richard Siberry QC in *O'Kane v Jones*,[85] the issue of whether the insured's past failure to pay the insurance premium is subject to a duty of disclosure as a part of the moral hazard. Waller LJ in his speech, with which Lloyd LJ and Longmore LJ both agreed, declined to reach a concluded view but nevertheless reasoned both assertively and, with respect, convincingly on the matter:

> As regards non-payment of premium, it is not absolutely clear that the judge would have found this fact alone to be material. He seems to conclude it is material when

79. For a more general overview of the rights to repatriation, see pp 4-5 of *Conventions*, available at http://www.britanniapandi.com/en/news_and_publications/conventions/index.cfm (accessed 9 April 2013).
80. See http://www.dft.gov.uk/mca/mcga07-home/workingatsea/mcga-healthandsafety/maritime_labour_convention_2006/mcga-ssh-mlcfaq.htm#title4 (accessed 8 April 2013).
81. MLC, Standard A2.5.3.
82. MLC, Guideline B2.5.1 (b)(iii).
83. *North Star Shipping Ltd v Sphere Drake Insurance Plc* [2006] EWCA Civ 378; [2006] 2 Lloyd's Rep 183.
84. [2005] EWHC 665 (Comm); [2005] 2 Lloyd's Rep 76.
85. [2003] EWHC 3470 (Comm); [2004] 1 Lloyd's Rep 389.

> taken with other factors. In so far as those other factors relate to the financial position of the owners, that is a matter which it has been agreed should not be dealt with by us at this stage. In so far as the judge … seeks to suggest the non-payment of premium could become material as a result of the other matters such as the Greek criminal proceedings, I doubt whether that is a legitimate approach. The non-payment of premium is either material on its own or not, and since it seems to go to the owner's credit risk, and not to the risk insured, I would have thought it was not material.[86]

5.51 The case was decided on a different point. The Court held that the failure to disclose pending criminal proceedings was a failure in the duty of disclosure, which had the effect of avoiding the insurance contract. Although the reasoning on the point was obiter, the conclusions on the materiality of past failures to pay premiums are both logical and sensible and therefore also persuasive, should the issue come before the courts again. The conclusions apply to all forms of insurance, whether P&I or some other form of liability policy. For other types of security, first and foremost for a bank guarantee, there is no duty of pre-contractual disclosure like in insurance contract law. These rules are intimately connected with good faith and insurance contracts.

5.52 While standard P&I cover even previously extended to some of the risks dealt with in the following, it did not encompass repatriation in the event of the shipowner's insolvency. The International Group of P&I Clubs agreed to extend standard cover to such situations and in a circular issued in March 2013 stated 'all thirteen International Group (IG) Clubs have agreed to extend the scope of standard P&I cover to include repatriation in cases of insolvency and in other circumstances listed in the MLC where seafarers should be entitled to repatriation (as contained in Guideline B2.5.1 of the MLC). These changes to the scope of Club cover will take effect in advance of the entry into force of the Convention on 20 August 2013'.[87] The International Group of P&I Clubs also state that early indications are that at least some flag States will accept a certificate of entry from an IG Club as sufficient evidence of financial security, where the cover includes crew risks.

HEALTH PROTECTION

5.53 Meanwhile, in Title 4, Regulation 4.2 is entitled 'Shipowners' liability'. The Title as a whole is concerned with 'Health protection, medical care, welfare and social security protection' and this particular Regulation specifies to shipowners precisely to what extent they must provide financial security for their duties under the MLC.[88,89]

86. [2006] 2 Lloyd's Rep 183 at [50].
87. See for instance Steamship's version of the agreed circular, http://www.simsl.com/Circulars-Bermuda/B.599.pdf (accessed 8 April 2013).
88. For a more general overview of the rights to health protection etc, see pages 6-7 of *Conventions*, available at http://www.britanniapandi.com/en/news_and_publications/conventions/index.cfm (accessed 9 April 2013).
89. The shipowner as before is defined as 'the owner of the ship or another organization or person, such as the manager, agent or bareboat charterer, 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 this Convention, regardless of whether any other organization or persons fulfil certain of the duties or responsibi[l]ities on behalf of the shipowner'.

5.54 The MLC revises the *Sickness Insurance (Sea) Convention, 1936 (No. 56)*.[90] This Convention post-dated similar conventions for industry and agriculture by some nine years and unlike those conventions was never followed up with invalidity, old-age or survivors' conventions.[91] Convention No. 56 does not use the term seafarer but talks instead of 'insured persons' and where necessary, but not by way of definition, of 'seamen'. It provides for compulsory insurance for sick seafarers:

> Every person employed as master or member of the crew or otherwise in the service of the ship, on board any vessel, other than a ship of war, registered in a territory for which this Convention is in force and engaged in maritime navigation or sea-fishing, shall be insured under a compulsory sickness insurance scheme.[92]

5.55 Convention No. 56 foresees a safety net, whether set up in the form of independent compulsory insurance or an independent provider linked to government. The Convention does not contain any provision for the employer's liability, except insofar as there is a duty to pay the contributions or premiums. Under Convention No. 56, the seafarer is entitled to cash benefits in cases of sickness or death[93] and medical treatment[94] and it is thus one of the several precursors to the MLC.

5.56 Article X of the MLC provides that the entry into force of the Convention revises Convention No. 56. One of the operative provisions is Guideline B4.2, which provides that:

> 2. National laws or regulations may provide that a shipowner shall cease to be liable to bear the costs of a sick or injured seafarer from the time at which that seafarer can claim medical benefits under a scheme of compulsory sickness insurance, compulsory accident insurance or workers' compensation for accidents.
> 3. National laws or regulations may provide that burial expenses paid by the shipowner shall be reimbursed by an insurance institution in cases in which funeral benefit is payable in respect of the deceased seafarer under laws or regulations relating to social insurance or workers' compensation.

5.57 These provisions mirror the rights provided by Convention No. 56, which are non-compulsory under the MLC, being included in the Guidelines rather than the Standards. The importance of National Insurance schemes is therefore arguably reduced in the scheme of the MLC, compared to in the earlier Convention, and the primary reliance on commercial insurance is a characteristic innovation.

5.58 Under Standard A4.2, 'Shipowners' liability', there are certain things that the employer is required to provide for, which may give rise to liability, and the employer is therefore also under a duty to ensure that there is financial security in the form of insurance in case there is a failure to provide. The list of shipowners' liabilities in Standard A4.2 is fairly long, but strictly speaking financial security is mentioned only in Standard A4.2(b), which deals with compensation in the event of the death or long-term disability of seafarers due to an occupational injury, illness or hazard. For the rest of the shipowner's liabilities listed in Standard A4.2, the shipowner is liable but not strictly speaking under a duty to provide additional, external financial security

90. As of 18 March 2013 having 19 ratifications following the denunciation of Spain.
91. 'Survivors' being orphans and widows of workers.
92. Convention No. 56, Article 1.
93. Convention No. 56, Article 2.
94. Convention No. 56, Article 3.

such as insurance. It is of course desirable for the protection of seafarers to provide financial security for any and all of the obligations listed and the risks as such are of an insurable nature.

5.59 Security can be provided in the form of insurance. The system is only somewhat analogous to the Blue Card system in place under the CLC and the Bunkers Convention. It is up to the flag State to decide what proof of financial security the shipowner must supply for the Maritime Labour Certificate to be issued. The certificate must be carried on board to satisfy both seafarers and potential port State inspectors.[95]

5.60 The risks listed are first, according to Standard A4.2, 'sickness and injury of the seafarers occurring between the date of commencing duty and the date upon which they are deemed duly repatriated, or arising from their employment between those dates'.[96] The language is not apt to include long-term sickness and injury such as sickness resulting from asbestos on board. An insurance policy would need to cover only the dates of the employment.

5.61 Next, financial security must be provided for the event of 'death or long-term disability of seafarers due to an occupational injury, illness or hazard'.[97] The MLC does not define what is meant by these concepts but leaves it to national law, the employment agreement or collective bargaining to establish the precise parameters of the compensation required.

5.62 The shipowner must further 'defray the expenses of medical care, including medical treatment and the supply of the necessary medicines and therapeutic appliances, and board and lodging away from home until the sick or injured seafarer has recovered, or until the sickness or incapacity has been declared of a permanent character'.[98]

5.63 The employer has a limited range of defences at its disposal. The flag State may in its law and regulation excuse the employer from liability in respect of injury incurred otherwise than in the service of the ship; injury or sickness due to the wilful misconduct of the sick, injured or deceased seafarer; and sickness or infirmity intentionally concealed when the engagement is entered into. The State 'may' do so but does not have to.[99]

FOUNDERING

5.64 The MLC obliges States Parties to create rules protecting seafarers in the case of loss of the ship.[100] The rule refers to 'members' but seems clear that it is the flag State that must have such rules for its registered ships. The rules should oblige the employer to pay compensation to each seafarer on board. The right of compensation should apply irrespective of the individual seafarer's nationality.

95. On the certificates system, see notably Chapter 10 of this work.
96. MLC, Standard A4.2(1)(a).
97. MLC, Standard A4.2(1)(b).
98. MLC, Standard A4.2(1)(c).
99. This follows from MLC, Standard A4.2.5.
100. MLC, Standard A2.6.

5.65 The MLC does not explicitly require financial security to be presented to support the shipowner's discharge of his duties, but it seems evident that some reassurance that there is a plan in place is as appropriate here, as in the case of the obligations discussed above.

5.66 The shipowner will thus be liable for providing compensation to seafarers when the ship sinks: 'Seafarers are entitled to adequate compensation in the case of injury, loss or unemployment arising from the ship's loss or foundering.'[101] The definition of loss in the Marine Insurance Act 1906 is an intricate set of rules for when a ship is considered an actual or a constructive total loss.[102] The MLC does not replicate these rules, which is unsurprising as they are a feature of national law in only a small number of countries.[103] Nor does the MLC provide any alternative definition of loss.

5.67 In a policy covering seafarers' rights in relation to foundering, it might be appropriate to use the definitions of loss of the vessel provided for by marine insurance law, so that, from the shipowner's and his insurer's point of view, the loss of the ship and the liability to seafarers for wages go hand in hand. There is nothing preventing such usage; indeed the loss of the ship must be defined in some way or other for the purposes of the policy.

5.68 The problem arises where, if a ship sinks, a one-ship company owning it will not have any assets or be in any position to pay any compensation and there will be no opportunities for insurers to be subrogated to the seafarer's claim, which will contribute to increasing the premium. It might therefore be that a bank guarantee or self-insurance is a better solution to fulfilling the shipowner's obligations in this case.

RIGHTS OF SEAFARERS TO CLAIM DIRECTLY UNDER THE POLICY IN THE ENGLISH SYSTEM

5.69 Given that the MLC does not provide for a fully-fledged Blue Card system of compulsory insurance and direct action, national law determines whether a seafarer can claim directly against a provider of financial security, including an insurer. Policies applying English law are likely to exclude the application of the Contracts (Rights of Third Parties) Act 1999. The effect of this is to exclude any contractual right of the seafarer to claim compensation directly from the insurer. Other legal systems may well allow direct claims generally. By way of example, French law permits direct claims against any insurer under any policy of insurance.[104] Other systems may permit direct claims only in the event of the insured's insolvency or in the case of compulsory insurance.[105]

5.70 In the case of an insolvent insured, under English law, the Third Parties (Rights Against Insurers) Act 2010, which has been fully enacted but at the time of writing

101. MLC, Regulation 2.6 – Seafarer compensation for the ship's loss or foundering.
102. Marine Insurance Act 1906, ss 56, 57 and 60.
103. Notably Australia, Canada, Hong Kong, New Zealand and Singapore.
104. French Code des assurances, Chapter IV Liability insurance, Article 124-3 states 'Le tiers lésé dispose d'un droit d'action directe à l'encontre de l'assureur garantissant la responsabilité civile de la personne responsable'.
105. Hjalmarsson, J, 'Direct claims against marine insurers in the English legal system' (2010) 18(2) Asia Pacific Law Review, 259-276.

is not yet in force,[106] provides that insured parties should be able to claim directly against the insurer without first establishing the liability of the insured in a separate suit. This includes seafarers who have suffered personal injury or death.

5.71 However, the 2010 Act and its predecessor, the Third Parties (Rights Against Insurers) Act 1930, which is in force at the time of writing, apply only in the event of the insured shipowner's insolvency and other events of the same type such as voluntary winding-up.[107] Again, many other legal systems provide for a general right to claim directly against the insurer under third party liability policies.

5.72 If the 2010 Act does not enter into force, effective implementation of the MLC would require a supporting revision of the Merchant Shipping Act 1995, as there has been with the Bunkers Convention and the CLC. Otherwise seafarers will lack the statutory framework to activate the financial security supplied by an insolvent ship owner under the 1930 Act. This is for two reasons – first, in order to claim directly against an insurer, the 1930 Act requires that a judgment or arbitration award first be obtained against the insured and second, while claims for death and personal injury are generally paid by P&I clubs and other marine insurers, there is technically no legal obligation for them to do so other than that provided by the P&I club rules. This is because of a House of Lords case from 1990, discussed below.

5.73 *The Fanti and the Padre Island*[108] involved two cases in respect of damaged cargo, where the cargo owners claimed against the carrier's P&I insurer. Having obtained judgment against the carriers, the cargo interests had them wound up by order of the Court, so that the Third Parties (Rights Against Insurers) Act 1930 became applicable. Following judgments with opposite conclusions at first instance, where Saville J found for the clubs and Staughton J for the cargo interests, the cases were joined and the Court of Appeal allowed the claims against the clubs. The House of Lords held that the pay-to-be-paid clause traditionally included in P&I cover prevented insurers from recovering under the Third Parties Act. The clause in one of the two cases read 'Protect and indemnify members in respect of losses or claims which they as owners of the entered vessel shall have become liable to pay and shall have in fact paid …'[109]

5.74 The House of Lords upheld this clause and said that P&I clubs were entitled to apply it so as to reject claims where the member had not first paid the claimant. That this was an exclusive privilege for P&I clubs was made clear by the House of Lords a few years later in *Charter Re v Fagan* where a similar clause in respect of direct claims payable under reinsurance was not upheld.[110] Although the pay-to-be-paid clause in *The Fanti and the Padre Island* was upheld, Lord Goff in his additional speech made clear that the decision of the House of Lords had its roots in the shipping economy and its finely balanced liabilities and that if P&I clubs were ever to default on the payment of claims for death and personal injury, legislative action should be consid-

106. As of 8 April 2013.

107. The listed events include bankruptcy, a composition or arrangement with creditors, a winding-up order, an administration order, a resolution for a voluntary winding-up; see section 1, Third Parties (Rights Against Insurers) Act 1930, as amended.

108. *Firma C-Trade SA v Newcastle Protection and Indemnity Association (The 'Fanti') and Socony Mobil Oil Co Inc and others v West of England Ship Owners Mutual Insurance Association (London) Ltd (The 'Padre Island') (No. 2)* [1990] 2 Lloyd's Rep 191.

109. [1990] 2 Lloyd's Rep 191, 194.

110. *Charter Reinsurance v Fagan* [1996] 5 Lloyd's Rep IR 411.

ered. Such legislative action came in the shape of the Third Parties (Rights Against Insurers) Act 2010.[111]

THE 2010 ACT

5.75 The Act received Royal Assent on 25 March 2010 and it will enter into force on a date stipulated by the Secretary of State.[112] The 2010 Act repeals the 1930 Act and effectively reverses the ruling in *The Fanti and the Padre Island* for all forms of insurance.[113]

5.76 However, the 2010 Act exempts marine insurance from this reversal by providing that 'in the case of a contract of marine insurance, subsection (5) applies only to the extent that the liability of the insured is a liability in respect of death or personal injury'.[114] A 'contract of marine insurance' means 'a contract whereby the insurer undertakes to indemnify the assured, in the manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to a marine adventure'.[115] Personal injury is defined as including any disease and any impairment of a person's physical or mental condition.[116] Other marine losses than personal injury and death are therefore not encompassed by the reversal.

CONCLUSION

5.77 The MLC, like any corpus of legislation, is likely to throw up unexpected challenges at all levels of implementation, especially given the multifaceted nature of its implementation mechanisms. This chapter has explored the potential difficulties and opportunities arising from the insurance obligations under the Convention. It is clear that varying classification of crewing insurance as maritime and transport or employers' liability creates the incentive for forum shopping between legal systems that regulate these forms of insurance in different ways. Where mandatory legislation is applicable, the court will modify the parties' bargain to ensure that the weaker party does not get a rough deal. Where it is not, the bargain of the parties will be respected. The range produced by the available options is staggering: on the one hand, the application of a mandatory, protective framework like employers' liability and on the

111. The background to this piece of legislation may be found in the Joint Report of the Law Commissions, *Third Parties – Rights Against Insurers* (Law Com No 272, 2001; Scot Law Com 184, 2001) available at http://lawcommission.justice.gov.uk/docs/lc272_Third_Parties_Rights_Against_Insurers.pdf (accessed 14 April 2013). A report was produced by the House of Lords Special Public Bills Committee in connection with the adoption of the Bill, available at http://www.publications.parliament.uk/pa/ld200910/ldpublic/third/58/58.pdf (accessed 14 April 2013).

112. On 25 April 2013, there was a written ministerial statement by the Parliamentary Under-Secretary of State for Justice to the effect that the 2010 Act would be amended and would thereafter be brought into force 'as soon as reasonably possible'. The amendments were to include (a) a number of specific insolvency situations and (b) a power for the Secretary of State to add further insolvency situations to the 2010 Act by order should the need arise.

113. 2010 Act, s 9(1)-(5).

114. 2010 Act, s 9(6).

115. 2010 Act, s 9(7), which refers to Marine Insurance Act 1906, s 1.

116. 2010 Act, s 9(7).

other, the application of the permissive, freedom of contract oriented body of rules that is marine insurance law. But legal issues aside, how do we find out who the insurer is? Will insurances be interpreted as encompassing the MLC definition of 'seafarers' or will there be discrepancies? Can we be certain that the jurisdiction and choice of law clauses contained in the insurance will be respected by European courts, who take a protective view of insureds? Can a direct claim by a seafarer against the insurer be pursued in European courts, and if so, what jurisdictions will prove favourable locations to pursue such claims? Will the differences in the approach to third party rights to insurance compensation in various jurisdictions result in development and clarification of the law?

5.78 These are fascinating questions that will receive an answer one way or another in years to come. One thing is certain: the MLC provides the much needed impetus for national legislation that will in turn provide the vehicle for such litigation, and litigation or the threat thereof will bring a crystallisation of seafarers' rights and the opportunity to enforce them, one step at a time.

CHAPTER 6

Seafarer abandonment insurance: a system of financial security for seafarers

DENIS NIFONTOV*
With contributions from Captain Thomas Brown
BSc(Hons) MNI and Nicholas Maddalena BSc(Hons) MBA

INTRODUCTION

6.1 Working on shore, it is all too easy to ignore the problems faced by seafarers. Often isolated on ships in far-flung reaches of the globe, they are at the mercy of shipowners and charterers for their most basic needs. Still today, in the twenty-first century, seafarers find themselves stranded far from home and unable to leave, without money or any financial support, frightened by the rapidly dwindling supplies on their ship.[1] The majority of stakeholders in the shipping industry do their utmost to look after the crews of ships and therefore it is rarely through malice or with intent that every year hundreds of seafarers find themselves abandoned like this.

6.2 Shipping, like any other global industry, is marred by economic realities that can besiege any business. The cyclical nature of economic and industrial growth, the shifts in political powers and unprecedented changes in international trade all do their best to catch businesses off-guard, no matter how successfully or prudently they are run. The resulting effect of these inevitable and, all too often, unexpected financial difficulties experienced by some shipping companies is the ruin and despair of the crews serving on their ships. Such cases are sadly too frequent and historically there have been no protections in place to ensure that the impact on the abandoned seafarer is minimised.

6.3 When a vessel is abandoned, the crew have traditionally had to remain aboard the vessel until its judicial sale in order to recover unpaid wages and costs. If and when the sale occurs, the outstanding sums can be recovered by the crew from the proceeds. Although in theory it can be a real solution, in practice it is fraught with difficulties. The period of waiting for the judicial sale can be a matter of months, sometimes even years. In the meantime, maritime suppliers will break ties with the defaulting owners and stop the supply of food, water and fuel. When the vessel runs out of bunkers, the generators stop producing electricity. This can mean no running

* Denis graduated from the University of Bristol in 2008, having studied for an LLB in Law and German, during which he spent a year in Germany studying at the Faculty of Law of the University of Göttingen. Denis then proceeded to read for an LLM (Maritime Law) at the University of Southampton. Since graduating, Denis has been working in the marine insurance industry in the UK.

1. See Chapter 7 of this work and http://www.ilo.org/dyn/seafarers/seafarersBrowse.list?p_lang=en for ILO's list of abandoned vessels with details regarding the abandonment (accessed 30 June 2013).

water, no light, no air conditioning or heating; conditions which are enough to create a serious risk to the health of those on board. Crews frequently survive these trying times, thanks only to local charities such as the Mission to Seafarers.[2]

6.4 Of course, the human element is the most striking, but we should also consider the other repercussions of this unfortunate ailment suffered by the shipping industry. It is surprising that States have not, until now, legislated for systems to quickly and efficiently repatriate and indemnify the monetary loss of the seafarers who find themselves stranded in their ports. In a world encumbered by a global depression that is also dealing with the realities of international terrorism, the lack of relevant law appears at odds with public policy considerations. As vessels manned by foreign seafarers are trapped within their ports without leave to enter their country, the potential cost to the State in welfare, or worse still, the potential threat to national security, are both high.

6.5 After many years of work amongst a wide ranging number of international bodies, the International Labour Organization (ILO) and the International Maritime Organization (IMO) have delivered the *Maritime Labour Convention 2006 (MLC)*, which goes some way to address these matters. This Chapter explores the problem of abandonment of seafarers and the relatively recent efforts of the international community in tackling the problem. It then continues to explore the provisions within the MLC and how they can be satisfied with the help of insurance.

HISTORICAL PERSPECTIVE

A case study: Adriatic Tankers

6.6 In the mid-1990s, the case of Adriatic Tankers single-handedly highlighted the plight of the abandoned seafarer and the widespread impact of a company collapse; as a result, the Joint IMO/ILO Ad Hoc Expert Working Group on Liability and Compensation Regarding Claims for Death, Personal Injury and Abandonment of Seafarers was set up towards the end of that decade.[3]

6.7 Over a relatively short period of time between the mid-seventies and early nineties, Adriatic Tankers managed to grow from relative obscurity to a formidable force in shipping. At its peak, the company operated over one hundred vessels. The growth of this company was unusual, however. Unlike most other Greek operators, Adriatic did not specialise in bulk carriers and tankers; its fleet consisted largely of chemical carriers. It still maintained a degree of diversity, however, with yachts, tankers and wood chip carriers included in the fleet. The result of this unusual specialisation meant that Adriatic had to break away from Greek shipping tradition and employ non-Greek nationals on board. Adriatic began employing crew from other countries who had experience in working aboard chemical carriers. Due to the nature of their fleet, the vessels, crewed by many different nationalities, were always scattered across the globe.

6.8 Everything was going well; banks around the world were providing an ever increasing amount of finance to fund the continual expansion. Even as the shipping

2. For further information on the work of the Mission to Seafarers, see http://www.missiontoseafarers.org/ (accessed 21 May 2015).
3. See below at para 6.13 for more detail.

market descended into the trough of the cycle, the financiers kept lending. Market commentators have since put this down to misplaced loyalty; the banks expected to be reciprocated in the boom once the cycle had corrected itself. Unchecked lending facilitated rapid growth and created an organization that was ultimately overstretched and unable to cope with its obligations.

6.9 Towards the early to mid-nineties, the house of cards began collapsing. The much awaited recovery of the shipping industry was not forthcoming. The hire rates were insufficient to keep a huge fleet seaworthy and the crew properly cared for. Delays in the payments of wages became more commonplace. As is often the case, not only the seafarers, but also their families suffered great hardships from the lack of allotments. Appeals for help were sent by the seafarers and their families to the International Transport Workers' Federation (ITF). Despite the ITF's assistance, negotiations with the owners to ensure the payment and repatriation of crews were slow. They were further hampered by Adriatic's many broken promises. This meant that crews became growingly more reluctant to carry out the owner's instructions in return for the owner's *promises* to pay. Seafarers found themselves on vessels with little food, water or bunkers, as suppliers were not paid, with no means of getting home and living in despicable conditions.

6.10 After many months of non-payments and many more broken promises, the ships' crews became increasingly desperate. The vessels began falling into disrepair. This in itself led to arrests and concerns were raised by classification societies and Protection and Indemnity (P&I) clubs; neither wanted anything to do with Adriatic Tankers. The ships were delisted from class, their insurance covers were cancelled. The vessels continued to deteriorate with their values falling faster as a result. It was not long before banks and creditors instigated repossessions. The company was highly leveraged with debt; its main assets, the vessels, often represented at sale around 30 per cent of the initial loan amount. The company collapsed.

6.11 Adriatic, at its peak, employed over two thousand seafarers. These were nationals of many different countries around the world. Their ships were often in faraway ports and the crews were left to starve for over two years in some cases. Ship's agents refused to supply ships with fuel, food or water as the owners were not paying. The seafarers survived thanks only to local charities and, in some cases, the diplomatic representatives of the crew's nations.

6.12 Of course, no company sees themselves as the next Adriatic Tankers. In its hay day, however, it would have been hard to imagine that the era of such a shipping behemoth could end so quickly and with such catastrophic consequences.

ILO/IMO EXPERT WORKING GROUP ON SEAFARER ABANDONMENT

6.13 As the shipping industry, and with it seafarers, had gone through a period of severe hardship in the 1990s, the ILO and IMO decided to take action. In April 1998, the 'Joint IMO/ILO Ad Hoc Expert Working Group on Liability and Compensation Regarding Claims for Death, Personal Injury and Abandonment of Seafarers' (Expert Working Group) was set up. This Expert Working Group began discussing how it might be possible, through the operation of appropriate international instruments,

to create an adequate compensation regime to cover seafarers in the event of abandonment.

6.14 The Expert Working Group met nine times between 1999 and 2009. When the ILO began meetings on the MLC, the Expert Working Group continued to work alongside them. After its ninth session, held in March 2009, the Expert Working Group produced a final report, which was passed onto the ILO for consideration when discussing the MLC and its handling of abandonment.

IMO RESOLUTION A.930(22), 2001

6.15 In 2001, following work done by the Expert Working Group, the IMO adopted Resolution A.930(22), entitled 'Guidelines on Provision of Financial Security in Case of Abandonment of Seafarers' (Resolution). The Resolution set out a framework for providing seafarers with basic financial security in the event that shipowners were unable to fulfil their responsibilities.[4]

6.16 The provisions of the Resolution were aimed at handling situations such as those that seafarers aboard the Adriatic Tankers fleet found themselves in. The Resolution required the financial security to cover, *inter alia*, repatriation costs,[5] maintenance from the time of abandonment until repatriation,[6] and, crucially, payment of all outstanding remuneration.[7] The seafarers, with the benefit of such financial security, would have direct access to funds, so the collapse of their employer would not preclude them from relying upon the security to which they were entitled.[8]

6.17 Although the Resolution was intended as an interim measure, it was given some force by Article 94 of the *United Nations Convention on the Law of the Sea (UNCLOS) 1982*. This Article requires Member States to exercise effective jurisdiction over ships flying their flag 'taking into account the applicable international instrument'. This duty, amongst other things, relates to 'manning of ships, labour conditions and the training of crews'.[9] The problem with this arrangement was that the Resolution, not being a convention in its own right, had very limited legal powers. The weak wording of Article 94 also instructs States to merely take into account the international instruments. This was not enough to allow for the enforceability of the Resolution and without this, it has been largely ignored.

6.18 Had this Resolution been in force at the time of Adriatic Tankers' downfall, might the devastation caused to hundreds of seafarers been avoided? The answer is, probably not. The Resolution has now been in existence for over ten years and its effects are imperceptible. The reasons for its inherent failure are twofold. First, its requirements are not mandatory, and secondly, there was no workable solution for the provision of financial security to meet the requirement.

6.19 Although, for the reasons given above, the provisions of the Resolution did not manage to create great change for the issue of abandonment, it is

4. Resolution A.930(22), Article 5.2.
5. Resolution A.930(22), Article 5.1.1.
6. Resolution A.930(22), Article 5.1.2.
7. Resolution A.930(22), Article 5.1.3.
8. Resolution A.930(22), Article 6.2.1.
9. UNCLOS, Article 94(3)(b).

important to remember that it represents the meeting of minds of the international community.

6.20 The Resolution did not set out exactly how States should ensure that shipowners provided the necessary financial security for seafarers, but did suggest some possible methods, including, 'social security schemes, insurance, a national fund, or other forms of financial security'. At the time, however, there was no pragmatic solution. National funds or social security provisions were fraught by obvious political difficulties. States cannot easily offer potentially significant benefits to foreign nationals, employed by foreign organizations that happen to be abandoned in their ports. Furthermore, States feared that imposing stringent requirements unilaterally would put them at an economic disadvantage.

6.21 A few countries, such as Norway[10] and Singapore,[11] nonetheless tried to implement measures to provide some form of State-funded security. The scope of these provisions was limited and undermined by the lack of international legal harmony on the matter; a crucial factor in a global industry such as shipping.

6.22 The only workable solution, it seems, can be in the form of insurance. Accessible by shipowners and ship operators globally, it can offer the security necessary to fulfil obligations towards seafarers, whilst avoiding the drawbacks of being State-funded. Insurance is ideally suited to meet the requirements of a harmonized system of financial security; interested parties can easily recognize and rely upon it.

6.23 In 2005, Seacurus Ltd, a UK-based specialist marine insurance intermediary, developed an insurance solution capable of covering the obligations of shipowners in respect of the Resolution. With this hurdle overcome, the other problem of the Resolution remained: enforceability. Speaking at the sixth session of the Expert Working Group, Seacurus representatives expressed regret that Resolution A.930(22) had largely been ignored by the industry and suggested the following:

> …Seacurus would urge the Committee to recommend to Member States the inclusion of IMO Resolution A.930(22) in a mandatory instrument or convention… in the knowledge that a commercial solution is available.[12]

THE MARITIME LABOUR CONVENTION 2006

6.24 The initial idea behind the drafting of the MLC was to consolidate and update around 70 different conventions relating to labour laws in the maritime sector. The Convention sought to bring the international standards for employment at sea in line

10. The Guarantee Regulations, No 146, entered into force on 18 February 2005. They provided a framework of mandatory guarantees that shipowners wishing to fly the Norwegian flag had to adhere to in order to qualify for registration with the Norwegian International Ship Registry. More information on the Regulations and the scheme can be found at http://www.nis-nor.no/Dokumenter/Guarantee%20 Regulations.aspx (accessed 21 May 2013).

11. Singapore Stranded Seafarers Fund provides contributions in order to ease the hardships of seafarers abandoned on Singaporean-flagged ships. The contributions cover only food, water and supplies on the vessel until repatriation. See http://www.mpa.gov.sg/sites/port_and_shipping/for_seafarers/welfare_schemes .page (accessed 4 June 2013).

12. Sixth session of the Joint IMO/ILO Ad Hoc Expert Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers, 19-21 September 2005, IMO Headquarters, London.

with the developments happening around the world on shore. Seafarer abandonment was, therefore, an issue that could not be overlooked by this legal development.

6.25 The ILO meetings on the MLC avoided discussions on abandonment, leaving this matter to the Expert Working Group. The Expert Working Group by that time had more knowledge and expertise on the subject. At its sixth session, the Expert Working Group began discussing the incorporation of the provisions of Resolution A.930(22) into the MLC. Being an international convention dealing with the rights of seafarers, the MLC was the perfect instrument to empower the planned provisions on financial security for abandoned seafarers. After the ninth session of the Expert Working Group, the issue of abandonment was transferred to the Special Tripartite Committee of the ILO to begin work on the incorporation of the abandonment provisions into the MLC. It is important, therefore, always to bear in mind that the origins of the provisions in the MLC for financial security[13] are rooted in the 2001 IMO Resolution, which was at the heart of the Expert Working Group's discussions.

THE INSURANCE SOLUTION

6.26 Whilst the Expert Working Group and the ILO were discussing a framework for the provision of financial security for seafarers, the industry and its commentators were busy reviewing how it could be implemented in practice. As had been suggested by Resolution A.930(22), the solutions were limited. The most realistic of these is insurance.

6.27 For many years however, shipowners' representatives and the International Group (IG) of P&I Clubs promoted a view that it was impossible to insure the risk of abandonment. On the face of it, P&I Clubs appeared an obvious choice as insurers of abandonment, as they cover shipowners' liabilities to their crew. This, therefore, created great inertia. It was considered futile to create requirements for financial security, when complying with them was impossible or at least impractical.

6.28 The IG Clubs held this position for two main reasons. First, P&I Clubs represent the views of their members, the shipowners and charterers, who might be against the potential cost burden. Secondly, P&I Clubs, despite appearances, are not naturally suited for providing protection against the financial default of their members.

Difficulties for P&I Clubs in providing financial security to cover abandonment

6.29 In order to understand what hurdles P&I Clubs face in trying to provide financial security to cover crew in the case of abandonment, it is necessary to look at what P&I Clubs do and how they operate.

13. The MLC now refers to 'financial security' (MLC, Resolution 2.5(2)) and a 'system of protection' (MLC, Standard A1.4(5)(c)(vi)). Both of these provisions aim to ensure that seafarers are compensated in the event that the shipowner fails to meet his obligations under their contracts of employment, namely when they are abandoned. Despite the difference in how the two are phrased, the purpose of the two provisions ('financial security' and 'system of protection') is largely the same. Any reference, therefore, to 'financial security' in this Chapter includes also the 'system of protection' envisaged in Standard A1.4(5)(c)(vi).

6.30 P&I Clubs provide cover for their members against third party liabilities relating to the use and operation of ships. Having a mutual structure, the Clubs are controlled by members and representatives elected by their members. They are non-profit organizations, allowing for the most cost effective solution to certain insurance coverages.

6.31 The proximate cause of seafarer abandonment is a shipowner's financial hardship or insolvency. When shipowners suffer financial hardship they typically stop paying their 'calls' (P&I premiums), resulting in their insurance and membership of the Club being cancelled.[14] By the time a vessel is abandoned, therefore, the shipowner is often no longer insured by the Club and cannot receive the benefit of the insurance. The Clubs have not made it clear how they plan to overcome this issue. It is, furthermore, very unlikely that other members of the P&I Club would be willing to pay the wages, repatriation and other costs of an ex-member, and perhaps competitor, who has gone bankrupt. It is inconsistent with the principle of a mutual organization for a solvent member to willingly assume the debt of an insolvent ex-member.

6.32 P&I insurance is a third party liability insurance that covers seafarer repatriation in the event of illness or injury or as a consequence of a total loss or major casualty, provided that the shipowner has a legal liability and their premiums have been paid. The Clubs, however, do not cover repatriation liabilities arising out of a breach of a contract of employment and abandonment of seafarers is such a breach. Losses from a breach of contract can be classed as 'credit default'. A P&I Club is not a financial security system and cannot provide cover for its members' failure to meet the costs of contractual commitments as a result of their insolvency or otherwise. This would ordinarily be a barrier to the Clubs covering costs arising from crewmembers' repatriation or payment of wages. Prior to the MLC coming into force in August 2013, there have been numerous press releases[15] from the IG Clubs stating that they have extended their cover to include repatriation in the event of the financial default of the shipowner and a resulting abandonment. It remains to be seen how this will be achieved in practice. IG Clubs have, however, distanced themselves from the payment of outstanding wages to abandoned seafarers.

6.33 On a closer examination, the interrelation between the parties in a situation where abandonment cover is provided by the P&I Clubs suggests a possible conflict of interests. Where the cover is provided on behalf of the shipowner member, the Club cannot be an impartial arbiter of the relationship between crew and employer. If the member is having cash flow problems, but has paid his calls, a Club might be reluctant to act against the owner in defence of the seafarers. This could well serve to delay the point in time when the crew can be repatriated, thereby extending their stay aboard the abandoned vessel against their will. Alternatively, this delay may be so long that the shipowner will become unable to pay its calls and cover will be cancelled. As explained above, this will lead to further difficulties.

14. This was the case, for example, with Adriatic Tankers. They had stopped paying calls to their P&I Clubs and their cover was cancelled.

15. For example, Steamship Mutual's March circular on the MLC, http://www.steamshipmutual.com/Circulars-Bermuda/B.599.pdf (accessed 4 June 2013) and North of England P&I Club's circular on the MLC dated 6 March 2013, http://www.nepia.com/publications/clubcirculars/pandipeople/1340/ (accessed 4 June 2013).

6.34 The IG have overcome the hurdle of the 'pay to be paid' rule. This is a standard Club rule requiring that the member has to discharge their liability to the third party prior to the P&I Club indemnifying them for their claim. The IG Clubs have waived this requirement with respect to some types of crew claims and have indicated that this will also apply to the payment of the heads of claim listed under the MLC. Whether they will further extend this relaxation in the event of a shipowner default remains unclear.

6.35 A final point is that of 'direct action'. Although not in itself a requirement of the MLC, it is questionable what kind of financial security P&I Club cover provides seafarers if they are unable to take any action against the Club. As it is the shipowner and not the crew who are members of the Club and therefore the insureds, it is only they who can act against the P&I Club.[16] In the event of abandonment however, it is very unlikely that a shipowner that has abandoned his ships and crew, will take legal action against the P&I Club for the crew's repatriation.

Pre-requisites for an insurance solution within the MLC framework

6.36 The following section considers the legal and pragmatic considerations that must be borne in mind when devising an appropriate insurance cover, taking into account both the law and the nature of the industry.

Trigger

6.37 A seafarer's abandonment policy must respond to the abandonment of seafarers by the shipowner. The MLC and the 2001 IMO Resolution list requirements and definitions respectively in situations where the shipowner and/or the seafarers' employer have failed to fulfil their contractual obligations.

6.38 In Standard A1.4(5)(c)(vi) of the MLC, the required system of protection responds when there is a 'failure of a recruitment and placement service or the relevant shipowner under the seafarer's employment agreement to meet its obligations to them'. This is a wide definition and adequately covers the situations where the 'monetary loss' as covered by Regulation 1.4 may arise.

6.39 Regulation 2.5 indicates under Guideline B2.5(1)(b)(iii) that, amongst other circumstances, the seafarers' right to repatriation is triggered

> in the event of the shipowner not being able to continue to fulfil their legal or contractual obligations as an employer of the seafarers by reason of insolvency, sale of ship, change of ship's registration or any other similar reason.

6.40 According to the 2001 IMO Resolution these all fit within definitions of abandonment:

> *Abandonment* is characterised by the severance of ties between the shipowner and the seafarer. Abandonment occurs when the shipowner fails to fulfil certain fundamental obligations to the seafarer relating to timely repatriation and payment of outstanding remuneration and to provision of the basic necessities of life, *inter alia*, adequate food,

16. The MLC does not make provision for direct action against insurers. See below and also Hjalmarsson, Chapter 5 of this work.

accommodation and medical care. Abandonment will have occurred when the master of the ship has been left without any financial means in respect of ship operation.[17]

6.41 Therefore, within the MLC and the 2001 IMO Resolution, abandonment is characterised by the shipowner failing to fulfil his legal obligations under the seafarer's contract of employment. It follows that an insurance solution must address abandonment in the same way thereby encompassing a policy trigger that responds in the situations described above and indemnifies a seafarer for monetary loss and the cost of repatriation.

EVIDENCE OF COVER

6.42 As the Convention is policed by a combination of flag and port State control, the shipowner must be able to provide adequate evidence of cover of these obligations. It poses a challenge to ensure compliance: how do you show that the ship's crew have been supplied with cover in accordance with the Convention and that the necessary financial security and system of protection has been provided? The only practicable solution is to provide an insurance certificate to the ship evidencing cover for the whole crew at the relevant time. If the shipowner obtains the relevant insurance *for a specific vessel*, the insureds should therefore be all seafarers legally on board the vessel. In this way, when fulfilling the obligations of flag or port State control, cover for a specific vessel and its crew is sufficient to demonstrate that the vessel is compliant.

COVERED LOSSES

6.43 Under Standard A2.5(1), the MLC makes an explicit requirement that seafarers 'have a right to be repatriated at no cost to themselves' in the case of abandonment. Under Standard A2.5(2), shipowners are required to provide 'financial security'[18] in order to enable a seafarer's repatriation under Standard A2.5(1).[19] Although there are no minimum monetary amounts provided in the MLC for repatriation, the Convention does however provide several costs that must be covered which are related to repatriation in Guideline B2.5.1(3):

(a) *passage to the destination* selected for repatriation in accordance with paragraph 6 of this Guideline;
(b) *accommodation and food* from the moment the seafarers leave the ship until they reach the repatriation destination;
(c) *pay and allowances* from the moment the seafarers leave the ship until they reach the repatriation destination, if provided for by national laws or regulations or collective agreements;

17. Resolution A.930(22), para 2.1.3, also see Chapter 5 of this work.
18. There is no definition of 'financial security', but we can glean some information from Resolution A.930(22) on the matter in para 6.1. Amongst others suggested, is 'insurance'. See also above.
19. If the shipowner fails to comply, the duty falls to the flag State. The flag State will, however, retain the right to recover the costs from the shipowner.

(d) transportation of 30 kg of the seafarers' *personal luggage* to the repatriation destination; and
(e) *medical treatment* when necessary until the seafarers are medically fit to travel to the repatriation destination.[20]

6.44 Apart from subsection (a), which provides for actual payment for repatriation, all other subsections deal with provisions for seafarers between abandonment and until they reach their repatriation destination. These obligations largely mirror the provisions of paragraph 5.1 of Resolution A.930(22):

> 5.1 The financial security system should provide for:
> 1. the *expenses of the repatriation* of the seafarer, which are to be met without costs to the seafarer;
> 2. the *maintenance of the seafarer* from the time of abandonment to the time of arrival at the place of repatriation;
> 3. payment to the seafarer of all *outstanding remuneration* and contractual entitlements; and
> 4. payment to the seafarer of other *expenses incurred during the period of abandonment* arising from the abandonment.[21]

6.45 This mirroring is further evidenced by the definition of 'maintenance' in the Resolution which includes food, accommodation, and medical care.[22]

6.46 The clear omission from the list in Guideline B2.5.1 is the 'payment to the seafarer of all outstanding remuneration and contractual entitlements'. It would be wrong, however, to assume that such requirements do not exist in the Convention. It is the viewpoint of some industry commentators that the MLC obligations with regard to abandonment are limited to the requirements of repatriation in Standard A2.5. It may be so that under a narrow interpretation of the rules this appears to be the case, but the broader picture is somewhat different. To ignore the obligations of all the parties targeted by the Convention provides an incomplete picture and adds to the confusion surrounding the requirements.

6.47 Rightly or wrongly, the intent of the MLC under Standard A1.4 is to place an obligation upon Member governments to regulate the practice of those companies within their territories that supply crew to ships around the world. It is in this Standard that we find an obligation for 'insurance and/or equivalent measure' to protect the seafarer from his or her monetary loss in the event of the shipowner's contractual default:

> (vi) establish a system of protection, by way of insurance or an equivalent appropriate measure, to compensate seafarers for monetary loss that they may incur as a result of the failure of a recruitment and placement service or the relevant shipowner under the seafarers' employment agreement to meet its obligations to them.[23]

6.48 This provision must be read in conjunction with the 2001 IMO Resolution and subsequent rewording presented to the MLC Preparatory Tripartite Committee:

20. Emphasis added.
21. Emphasis added.
22. Resolution A.930(22), para 5.3.
23. MLC, Standard A1.4(5)(c)(vi).

> 10. Assistance provided by the financial security system shall be sufficient to cover the following:
>
> (a) outstanding wages and other entitlements due from the shipowner to the seafarer under their employment agreement, the relevant collective bargaining agreement or the national law of the flag State, limited to four months of any such outstanding wages and four months of any such outstanding entitlements.[24]

6.49 The background and the discussions of the MLC, as well as the provisions of the MLC itself, all indicate a clear intention to include the requirement to cover outstanding wages and contractual entitlements. An MLC-compliant insurance must, therefore, include such provision; this is the only way to ensure the insurance cover delivers compliance with respect to abandonment.

6.50 The requirements of the MLC in Title 4 (Health Protection, Medical Care, Welfare and Social Security Protection) are akin to those currently provided by P&I Clubs. They cover incidents of crew illness and accidents, as well as general care for the crew whilst in employment on board the ship. This, however, does not apply to situations resulting from abandonment and therefore would not be covered by crew abandonment cover.

The burden of providing financial security

6.51 The current[25] version of the MLC places the burden of the requirement to provide financial security primarily on the manning agents. It would, however, be short-sighted for the shipowner to ignore this provision. In any case, it will most likely be shipowners to whom the cost of providing such financial security will be passed by the manning agents.

6.52 There are various considerations which would make it difficult for the manning agents to offer a system of protection that would ensure the financial security of the seafarer. Some of these are discussed here.

6.53 Should manning agents fall short in their obligation, it will most likely be the shipowner who suffers the consequences. Shortcomings in the delivery of financial security are likely to be picked up by port State control. If this leads to the detention of the vessel, the costs to the shipowner will be high. Avoiding detention of vessels can, of course, be achieved by shipowners employing crew only from prudently run manning agents. This in itself presents problems of administration and complexity in choosing manning agents.[26] In the instances where crews are supplied by different agents, the administration is further obfuscated.

6.54 Another problem for manning agents in arranging financial security is the question of unquantifiable potential exposure, which leads to the difficulty of measuring the necessary amount of financial security. This problem will exist whether financial security is in the form of insurance or another equivalent system. Let us suppose

24. Appendix III of the Background Paper for the Preparatory Tripartite MLC, 2006, Committee – Geneva, 20–22 September 2010.

25. The Tripartite Committee will meet again in April 2014; the MLC may be amended following this meeting.

26. The International Shipping Federation's 'Checklist to help Shipowners Ensure MLC Compliance' states in checkbox 10: 'has the manning agent provided evidence of a system of financial protection (such as insurance) to compensate for any failure to meet its obligations to the seafarer?'

the financial security arrangements are made by a manning agent. The manning agent then places a large number of crew onto a fleet of vessels financially interconnected by ownership or onto a cruise ship, employing hundreds of crew. If there is an abandonment of a cruise ship or of many ships within one fleet, then the loss will be so great that the likely limit on a standard insurance policy or a sum of money held in an escrow account, for instance, will be grossly insufficient. When an insurer provides cover for a particular shipowner, on the other hand, he can measure much more accurately the risk and the amount of exposure. The insurer in providing such cover will assess the risk on a case by case basis. He can therefore make the necessary provisions, such as spreading the risk and/or charging a higher premium where the risk is higher or where the exposure greater. Although higher costs might not seem beneficial for the shipowner, it is the only prudent and sustainable solution in the long term for a system of financial security.

6.55 If the MLC is to be interpreted in such a way that only manning agents have the obligation of providing financial security to seafarers, then what of the seafarers that are recruited directly by shipowners or do not go through recruitment and placement services? The Convention cannot possibly intend to offer some seafarers better protection than others. It may be, however, that the Convention intends to encourage seafarers to use crewing agents, rather than going directly to shipowners.[27]

6.56 Finally, commercially powerful manning agents might use their position in the market to avoid dealing with shipowners who complicate matters by not covering the crew for unpaid wages.

6.57 It would, nonetheless, be wrong and against the spirit of the MLC to say that recruitment and placement agents should not try to provide financial security for seafarers. There may be loopholes or gaps in the cover obtained by shipowners or such cover might be inadequate. Individual shipowners may wholly rely on the services of one large and prudently run crewing agent, who might take over the full responsibility of providing the financial security to a shipowner. In this case, some of the problems inherent in manning agents providing the security might be alleviated.

6.58 Whatever a shipowner's arrangements are for the provision of crew, it is paramount that they consider the question of providing financial security for seafarers in depth. Failing to do this could cost the shipowner dearly.

OTHER CONSIDERATIONS

6.59 The intention of an MLC-compliant crew abandonment policy is to care for seafarers that have fallen on hard times as a result of their shipowner's inability to meet their obligations as employers. This brings with it two important requirements: zero deductibles and direct action. The importance of these requirements can be explained as follows.

6.60 A seafarer, who has been stranded on board a vessel for some time, is unlikely to have the money to pay any deductible. Quite apart from this pragmatic difficulty, there would be no good policy considerations behind any deductible being imposed.

27. MLC, Regulation 1.4(1) provides that '[a]ll seafarers shall have access to an efficient, adequate and accountable system for finding employment on board ship without charge to the seafarer.'

Deductibles are used by insurers to give the insured incentive to act prudently, thereby reducing risk and the limit of liability. Neither of these considerations applies in this situation. The seafarer has no control over the likelihood of the vessel being abandoned. If a deductible were to be imposed in order to reduce the underwriters' limit of liability, this would go against the purpose of the Convention. The shipowner must provide a workable and satisfactory system of financial security that facilitates the indemnification of monetary loss as well as the costs of repatriating, at no cost to the seafarer.

6.61 The requirement for direct action is a pragmatic consideration that was also envisaged by Resolution A.930(22). In paragraph 6.2.1 of the Resolution, 'a right of direct access by the seafarer to the financial security system' was a requirement for the financial security system. This is easily achieved by making the seafarers the insureds in the policy. As the insured, a seafarer can ensure the insurer's performance of the insurance contract. There is no mandatory requirement for this in the MLC, but without it, the contract of insurance would be unenforceable.

EXAMPLE INSURANCE SOLUTION: CREWSEACURE

6.62 CrewSEACURE is one such insurance product developed by the market with the aim of providing a solution to the problem of seafarer abandonment.[28] It has been developed alongside the relevant international legislation and complies with such requirements. This is a product aimed at the international shipping market and is available to shipowners globally.[29]

6.63 The cover is provided to a specific vessel covering all persons 'including the Master serving under a Seafarer's employment agreement on board the Ship during the Policy Period'.[30] This allows shipowners to overcome complex arrangements each time there is a change in the crew. It also negates the necessity of checking that the crewing agent(s) has put in place the relevant system of financial security.

6.64 Whilst it is the shipowner who takes out and pays for the policy, it is the seafarers who are the insureds. This confers the benefit of the cover to the seafarers and gives them the right of action against the insurer, should the latter fail in his obligations under the insurance contract. All disputes arising out of or under this policy are subject to the laws of England and Wales and the courts of England and Wales have exclusive jurisdiction.[31] Taking action against the insurer in England or Wales might not always be convenient for every seafarer as they may live or find themselves far from these countries. It does, however, make sense. The insurers behind the CrewSEACURE product have assets in England and for the purposes of enforcement of judgements it is easier to take legal action there. England is also the home of many international organizations that have the seafarers' interests at

28. For further information on the CrewSEACURE product, see http://www.crewseacure.com/ (accessed 5 June 2013).

29. Insurers will require the following information in order to assess the risk and to offer a cover: name and address of the shipowner (as defined by the policy in cl 1.16, see below), the details of the vessel(s) being covered, the numbers of crew per vessel, membership of any shipowner's association, the vessel's arrest history and the shipowner's abandonment history.

30. See cl 1.13 of the CrewSEACURE policy wording (Wording).

31. Shown in the CrewSEACURE Policy Schedule (Schedule).

heart.[32] It is often these organizations, rather than the seafarers themselves, who have the requisite expertise in legal matters and the will to bring legal action on behalf of seafarers.

6.65 The definition of abandonment[33] is entirely consistent with the definition within the MLC and the 2001 IMO Resolution; the policy protects seafarers in situations where their employers breach the obligations under the seafarers' employment contracts. The definition requires the following to be satisfied for an abandonment to occur:

(a) The shipowner fails to fulfil its legal obligations as an employer and leaves the ship without the financial means to continue the ship's operations; and
(b) The seafarer's remuneration is overdue; or
(c) The shipowner fails to provide crew with basic needs such as food, water, accommodation or medical care; or
(d) The shipowner fails to repatriate the seafarers within 30 days (or earlier if their employment contract so provides) from a right to repatriation arising.[34]

6.66 At first glance, requirements (b), (c) and (d) seek to narrow the scope of the policy. This is not so however, they merely help to define a case of abandonment. Not all breaches of a seafarer's contract would lead to abandonment. Those pertaining to wages, provision of basic needs and the right to repatriation in specified circumstances will, subject to requirement (a), signal an abandonment.

6.67 Other definitions in the policy, such as that of a 'Seafarer'[35] or 'Ship',[36] reflect the intention of the MLC. They may differ slightly in their wording so as to fit within the context of an insurance policy but in no case do they seek to limit the scope of the insurance so as to be narrower than that required by the MLC. This ensures that the cover dovetails with the legal framework within which it operates. The 'Shipowner' is given a wide definition: '…owner of the Ship or other organization…, who has assumed the responsibility for the operation of the Ship…'[37] This allows for a wider spectrum of entities to buy cover, who might realistically require it; such as charterers and ship managers and operators.

6.68 Once abandonment has occurred, the losses covered under the policy are wide reaching and include the following:

- Medical expenses incurred from the date of abandonment of the seafarer for up to 90 days after he has been repatriated (cl 2.1);
- Personal accident cover for crew occurring within 30 days of abandonment (cl 2.2);
- Unpaid remuneration for up to six months (cl 2.3);
- Subsistence and repatriation costs, covering adequate food, water, accommodation, medical care and the repatriation itself. The repatriation will be by 'the

32. For example, the International Transport Workers' Federation (ITF) and the Mission to Seafarers are both headquartered in London, England.
33. See cl 1.1 of the Wording.
34. *Ibid.*
35. Cl 1.13 of the Wording.
36. Cl 1.15 of the Wording.
37. Cl 1.16 of the Wording.

most appropriate and expeditious means (normally by air)' and will include 'additional transportation costs of 30kgs of personal effects' (cl 2.4);
- Emergency subsistence and evacuation costs (cl 2.5);
- Claims handling, legal fees and expenses, which are unlimited (cl 2.6).

6.69 The scope of cover satisfies the requirements of the MLC and other international instruments, such as Resolution A.930(22). All claims are handled by Thomas Miller Claims.[38] Claims handlers are available 24 hours a day and 365 days a year. Due to the nature of the shipping industry, the idea of something being 'outside working hours' is unthinkable. The claims handlers are an international organization with a wide-spread network of contacts and representatives. This is absolutely essential if seafarers require urgent help or assistance in a foreign port. As indicated above, the policy covers unlimited claims handling, expenses and legal fees, allowing the claims handlers to do their job without any undue restrictions.

6.70 There are, however, limits under other heads of claims. The aggregate limit, per each case of abandonment, sits at USD 10 million. There are further sub-limits of USD 75,000 per seafarer for unpaid wages and USD 5,000 per seafarer for repatriation and subsistence. Personal accident and medical expenses, of course, have higher sub-limits of USD 500,000 and USD 1 million per seafarer respectively.[39]

6.71 The policy contains various exclusions, which seek to limit the insurer's liability in certain circumstances.[40] The first of these is the 'radioactive contamination, chemical, biological, bio-chemical and electromagnetic weapons exclusion' clause, which is widespread in marine insurance.[41] Clauses 4.1, 4.2 and 4.3 of the Wording exclude liability where it either is, or would reasonably be, covered by other insurances. Clauses 4.1 and 4.3 exclude losses occurring prior to abandonment and those resulting from piracy respectively. The former would include situations where a seafarer tries to claim the costs of medical treatment without, or at least before, an abandonment having occurred. This type of loss should be covered by standard P&I insurance. Losses resulting from piracy are covered by marine kidnap and ransom (K&R) policies. These heads of loss greatly overlap with those in both P&I and K&R insurances; covering them, would lead to double insurance and thus potential disputes. Clause 4.2 is a catch-all provision to avoid any overlap between different policies that might be in place and which might respond to the risk. The policy excludes any liability that might be covered by any other policy. This reaffirms the policy's attempts to avoid unnecessary double insurance.

6.72 Although strictly not an exclusion, a clause in the policy makes the insurance void as against a seafarer who attempts to fraudulently claim under the policy.[42] The effect of this clause is to sever the fraudster from the policy and allow the other insureds (seafarers) the benefit of the protection this insurance offers.

38. See cl 1.2 of the Wording.
39. The aggregate and all the sub-limits are stated in the Schedule.
40. Most of the exclusions are contained in cl 4 of the Wording.
41. Cl 4 of the Wording. This standard clause is used in many marine insurances, e.g., 'Institute radioactive contamination, chemical, biological, bio-chemical and electromagnetic weapons exclusion (CL 370) 10/11/2003'.
42. Cl 3.5 of the Wording.

6.73 A 'Certificate of Seafarer's Abandonment Insurance' is provided to shipowners to be displayed in a prominent place on board the ship. The Certificate shows the relevant contacts and details of cover that will be needed by the seafarers in the case of an abandonment. A Notice of Abandonment can be given to Thomas Miller Claims by either the seafarer himself (as per the details on the Certificate of Insurance), or by an interested third party, such as seafarers' welfare organizations and unions, as well as immigration or port officials.

6.74 The insurance satisfies the obligations of the MLC and other relevant international instruments that set out rules for the provision of financial security to aid seafarers in the case of abandonment. In some respects, the cover goes beyond the strict legal requirements and although these are additional benefits, they are by no means extravagances. They simply provide seafarers with the requisite security in an event of abandonment.

6.75 A big problem, as is frequently the case, is one of cost. Shipowners, particularly in time of trouble, cannot afford to increase the costs of their operations when profit margins are slight as it is. The cost of this product to a shipowner, however, can be as little as 50 cent per seafarer per day.[43] The premium is payable in one instalment at the beginning of an annual period. Although this might be more painful for the paying party, it does mean that, unlike P&I insurance where premiums are paid regularly in instalments, this policy cannot be cancelled for non-payment of premium. This is a crucial safeguard.

6.76 Of course, this product is not for everyone. The risk is priced by reference to the various factors that indicate the healthiness of the shipowner's business. A shipowner that is already in financial difficulties or has a fleet in a deteriorating condition might have to pay more. In some circumstances, where the risk of abandonment is very high, a shipowner might not be able to buy this cover at all. Although this might not seem to be a helpful situation, it will serve as a clear signal to the crew that the risk of being abandoned by their employer is very high. This would then allow the crew to take measures to avoid being stranded.

6.77 The Preamble of the MLC states 'given the global nature of the shipping industry, seafarers need special protection'. CrewSEACURE tries to offer this protection.

A SOLUTION IN LLOYD'S OF LONDON

6.78 Lloyd's of London enjoys a world-wide reputation as a leading insurance market. There is, however, an unusual barrier with respect to the provision of an MLC-compliant insurance product to cover liabilities in the case of abandonment.

6.79 But for a small number of exceptions, in Lloyd's of London, 'no managing agent may enter into a contract of Financial Guarantee insurance… on behalf of a syndicate under its management'.[44] This has been the case in Lloyd's since 1924. It is considered that Financial Guarantee Insurance is riskier than other types of insurance and Lloyd's does not want to expose itself to potential losses which the

43. See http://www.crewseacure.com/ (accessed 5 June 2013).
44. Lloyd's Market Bulletin Y4396 dated 7 May 2010.

market cannot accurately predict. The current guidelines for what is considered to be a Financial Guarantee by Lloyd's are set out in Market Bulletin Y4396.

6.80 Seafarer's abandonment insurance fits squarely within the definition of Financial Guarantee Insurance. It is, therefore, *prima facie*, prohibited by Lloyd's of London. Lloyd's provides two exceptions for allowing Financial Guarantee business to be underwritten. First, it must fall within one of the exceptions listed in the Appendix to Market Bulletin Y4396. Seafarer's abandonment insurance does not fit in any of the categories.[45] The other possibility for writing Financial Guarantee business is if the 'contract has been specifically approved by Underwriting Performance'.

6.81 The delivery of the CrewSEACURE abandonment insurance solution required Seacurus Ltd to seek approval from the Lloyd's Performance Directorate. The approval was obtained. Following the approval of this new product, Lloyd's issued a risk code that will now be associated with this type of cover: 'SA'.[46] The SA risk code is now also exempt from the rules governing Financial Guarantees, but its application is still restricted; 'individual syndicates will need to obtain express approval from Lloyd's Performance Management Directorate (PMD) to write this business'.[47] No such restrictions apply to Companies Market products.

AN INSURANCE SOLUTION: CONCLUSION

6.82 As seen above, CrewSEACURE satisfies the requirements of an MLC-compliant cover. In time, it is likely that other players will enter the market to reflect the growing demand. Insurance is a viable solution to the requirement for a system of protection and financial security detailed within the MLC.

6.83 Not only can insurance provide a workable solution, it is the most suitable solution. Market forces will ensure that insurance remains keenly priced and remains the least costly option. Competition in insurance markets will prevent premiums rising without reason and efficiency gains in management and administration of the financial security are more likely than with monopolistic funds. Market forces should ensure that poor quality shipowners are penalised with higher premiums. This may induce shipowners to strive for higher crewing standards.

6.84 Unlike bank guarantees, and perhaps specialised funds, the insurance industry is ideally suited to deal with claims. Having access to representatives and experts through world-wide networks means that claims by seafarers can be managed quickly and efficiently. It would be wholly unacceptable to delay the repatriation or payment of crewmembers after their often gruelling experiences.

6.85 Insurance is flexible: whilst being properly regulated by established organizations, it can be sufficiently malleable to offer cover to suit a variety of situations that may arise in the market. Covers can easily be amended to suit the needs of

45. As per Appendix 1 of Lloyd's Market Bulletin Y4396, dated 7 May 2010, the exceptions include: Contract Frustration (Risk Code 'CF'), Trade Credit (Risk Code 'TC'), Mortgage Indemnity Insurance (Risk Code 'FM'), Surety Bond Reinsurance (Risk Code 'SB') and Salvage Guarantee Insurance (no Risk Code given).

46. Lloyd's Market Bulletin Y4694, dated 29 April 2013.

47. Lloyd's Market Bulletin Y4694, dated 29 April 2013, para 1.2.

the industry, whilst still complying with the Convention, or to meet the changing requirement of national or international legislation. A public fund might bring with it much bureaucracy that would slow the evolution of the solution.

6.86 There exists a tried and tested system of financial security in the form of insurance. There would be no extra cost, infrastructure or administrative burden on a government in the creation of public funds or other types of security. In the context of the requirements for a system of financial security within the MLC, insurance is fit for purpose

6.87 There will, of course, be other instruments that may be used to satisfy the requirements of the MLC. A shipowner might be able to arrange a bank guarantee or set aside funds in an escrow account. Looking at the advantages of the insurance solution, it becomes clear: although there may not be a perfect solution, it is the least imperfect.

THE FUTURE

6.86 It remains to be seen how the MLC will be implemented in the national law of the various States. The MLC provides minimum requirements; certain States may exceed these minimum requirements and place further obligations on the industry or may, of course, omit some of the requirements either expressly or by clever legal wording. Some States already have legislation in place that would not require amendment when implementing the MLC.[48]

6.89 The MLC itself will also evolve with time.[49] The Convention allows for changes to be made to its provisions[50] and the Code.[51] The Special Tripartite Committee is due to meet in April 2014. Even after half a year of the Convention being in force, there will be many questions and recommendations, which should influence the development of the MLC. The great leap that the Convention has made to the shipping industry and how this industry is regulated is bound to create teething problems. There has already been debate as to the specific requirements of the Convention.[52]

RATIFICATION AND IMPLEMENTATION

6.90 Many States have already ratified the Convention. In May 2013, the percentage of gross tonnage flagged in a signatory State sits at around 69 per cent. Of course, the major crew-supplying countries have been very welcoming of these developments, namely the Philippines and Russia. The ready acceptance of the Convention has

48. The UK Maritime and Coastguard Agency (MCA) suggests that 80 per cent of the provisions of the MLC are already safeguarded by national legislation in England and Wales. See Lavelle, Chapter 10 of this work.

49. MLC, Article XIII(1), 'The Governing Body of the International Labour Office shall keep the working of this Convention under continuous review through a committee established by it with special competence in the area of maritime labour standards.'.

50. MLC, Article XIV.

51. MLC, Article XV.

52. See 'Insurance market clashes on MLC unpaid wages clause', Lloyds List, 22 May 2013, p 2.

also, however, come from ship-owning countries such as Greece and Norway, as well as some of the most prominent commercial flags, including Panama and Liberia. The European Union has also endorsed the Convention and even passed a Council Directive[53] already implementing parts of the MLC. The Directive evidences the Agreement of the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF). There is still some way to go, however.

6.91 The UK is said to be ratifying the Convention towards the end of summer 2013, around the date of the Convention's entry into force. In the meantime, the UK Maritime and Coastguard Agency (MCA) appears to be preparing for its ratification. The MCA has been involved in the discussions surrounding the Convention from the very outset.[54]

6.92 The international community is not holding its breath to see whether the USA ratifies the MLC. Despite the USA's understandable eagerness to participate in the international debate on treaties, they have always been reluctant to ratify any. Due to the requirements of port State control, however, the USA does not want to see its ships prejudiced when trading with Member States by not ratifying the Convention.[55] The US Coast Guard has, therefore, found a way around ratification for the time being. They have introduced a voluntary scheme providing USA shipowners with the opportunity to undergo an inspection and receive a Statement of Voluntary Compliance (SOVC-MLC).[56] The hope is that port State control inspectors will accept this 'certificate' and allow USA vessels to trade freely.

6.93 Another interesting example is that of the Cayman Islands. Being an overseas territory of the UK, the Convention will enter into force by virtue of the UK's ratification and extension to the Cayman Islands. The Cayman Islands do, however, have their own Shipping Registry. The Cayman Islands Shipping Registry has issued Guidance on the MLC's implementation. In its sample Declaration of Maritime Labour Compliance, it shows, *inter alia*, that the following will be required:

> Confirmation that as far as practicable the shipowner has the means to protect seafarers from being stranded in a foreign port together with confirmation that a system of protection is in place by way of insurance or an equivalent measure to compensate seafarers for monetary loss resulting from the failure of either the manning agencies or the shipowner to meet their obligations to the seafarers.[57]

6.94 The Cayman Islands, therefore, place a burden on the shipowner to ensure that a system of protection is in place for the seafarers. This is the position advocated

53. Council Directive 2009/13/EC of 16 February 2009 implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention, 2006, and amending Directive 1999/63/EC [2009] OJ L124/30.

54. See Chapter 10 of this work for a full interview with the UK MCA.

55. This is particularly important due to the principle of no 'more favourable treatment' enshrined in Article V(7) of the MLC. The effect of this provision is that the rules of the MLC will be applied to the same extent to vessels which fly the flags of States that have ratified the Convention as to those that have not.

56. US Government Printing Office, Federal Register/ Vol. 78, No. 28 / Monday, February 11, 2013/ Notices http://www.gpo.gov/fdsys/pkg/FR-2013-02-11/pdf/2013-02956.pdf (accessed 5 June 2013).

57. Section 5 of the Sample Declaration of Maritime Labour Compliance Part II, available from Cayman Island's Shipping Registry website, http://www.cishipping.com/ (accessed 21 May 2015).

by this Chapter as the most practical, but as of yet, not universally acknowledged. It remains to be seen, therefore, what requirements different flag States decide to set.

6.95 Due to the structure of the MLC and the nature of international shipping, it is not going to be necessary for all States to adopt the Convention. Enough States today have implemented the MLC for most shipowners worldwide to be required to comply. It is going to be very difficult for a vessel to trade without calling at the ports of *current* Member States.[58]

6.96 It is hard to second guess how different States will implement the Convention and how they will apply it in practice. All States will, of course, have their national interests at heart. In the instances where these do not fall in line with the intentions and the spirit of the Convention, they will have to be properly balanced.

58. As of 30 June 2013, 39 States, representing approximately 70 per cent of the world tonnage, have ratified the MLC. See further http://www.ilo.org/global/standards/maritime-labour-convention (accessed 30 June 2013).

CHAPTER 7

Seafarers and modern piracy

GRAHAM CALDWELL*

7.1 The term 'Modern Piracy' may be used as synonymous with 'Somali Piracy', despite not all the protagonists being Somali nationals. The business model of pirates operating in the Gulf of Aden and Northern Indian Ocean is substantially different from other areas or pirate hot spots. It is true to say that all involve some degree of detriment to the seafarers working in those areas. However, the escalation in violence, torture and murder of seafarers sailing in the Gulf of Aden transit corridor has attracted a great deal of attention and necessitated international naval intervention. It is perhaps this fact that asks the question, why is piracy not specifically dealt with in the *Maritime Labour Convention 2006 (MLC)*?

7.2 Since the fall of the Somali government in 1991, the problems related to piracy around the Gulf of Aden have steadily grown. The waters surrounding the Gulf of Aden have become a lawless haven for pirates, largely as a result of failed attempts at federalism and ineffectual 'Transitional Governments'. International naval efforts, use of Private Security, Best Management Practices and a proposed court system[1] to detain arrested pirates has done little to break the back of the problem, and ships are still captured and ransomed.[2] A ship and her cargo have a high inherent value but are simply insured assets from the point of view of recovery, whereas the crew cannot so easily be thought of as expendable. In contrast to what has become thought of as 'piracy', it is not the vessel, nor indeed the cargo, that is of greatest value to the pirates. There is great value in both, but Somali pirates have little access to infrastructure that would allow for profit from either. It is in fact the capture of the crew that will ultimately act as the guarantee of ransom payments.

> Many ships and their cargoes have been stolen, but it is increasingly the case that seafarers themselves are the intended prey of pirates. Powerless to protect themselves, the crews are vulnerable, presenting easy pickings. They are held up at gunpoint, mugged, robbed of personal possessions and wages, then tortured, terrorized and held to ransom for enormous sums of money. For the seafarers who fall victim to such cruelty, the results are devastating. For their families, it's terrifying.[3]

* R Graham Caldwell is a PhD candidate at the University of Southampton, currently on sabbatical whilst acting as contract manager for Titan Salvage on the Costa 'Concordia' Wreck Removal Project. Graham's PhD is concerned with the legality of Privately Contracted Armed Security Personnel and UN regulations. Graham was Called to the Bar at Middle Temple in September 2010.

1. R G Caldwell, 'A Court for Somali Pirates: Adequate Deterrent, or Costly Ineffective Mistake?' Paper delivered to Athens Institute of Education and Research (ATINER) Conference July 2012.

2. For further information on counter-piracy measures, see the 'Counter-Piracy Activities Matrix' developed by Oceans Beyond Piracy (OBP) available at http://oceansbeyondpiracy.org/matrix/counter-piracy-activities-dynamic (accessed 14 May 2013). OBP is a project of the One Earth Future Foundation.

3. Note the work of the Mission to Seafarers in relation to piracy at http://www.missiontoseafarers.org/support-us/campaigns-and-appeals/piracy (accessed 14 May 2013).

7.3 With regard to the recovery of captured ships, it is submitted that governments would not be so amicable to the payment of ransoms to pirates were it not for the crew aboard. It is far easier to take a hard line on piracy when there is little chance of loss of innocent life. That being the case, the seafarers held by pirates are central to their success in obtaining ransom.

7.4 Despite the best efforts of the international community and the private sector, the area of pirate operation continues to grow, as does the number of seafarers exposed to piratical capture. At the time of writing, the International Maritime Bureau (IMB),[4] a specialized division of the International Chamber of Commerce (ICC),[5] reports that 5 vessels are detained along with 65 crewmen. This figure is significantly down on the previous year, perhaps as a result of weather, or indeed increased security and vessel tracking. Nonetheless, when considering the negative effects on the lives of those captured the problem is far from insignificant. As the problem has escalated, the international community has engaged in preventative measures with differing levels of success, but has yet to firmly address the effects of capture on ordinary seafarers. Below is a discussion of some of the parts of the MLC that may assist captured seafarers, concentrating on those areas so far unaddressed, namely; repatriation, wages, welfare and compensation.

SEAFARER'S WAGES

7.5 There is no actual declaration of whether wages of captured seafarers is due, which may be seen as somewhat disappointing. Many would agree that it is unthinkable that wages would be withheld after capture or abandonment; nonetheless this is the state of affairs for some seafarers.

> At best, abandoned seafarers are often subject to cruel, inhuman and degrading treatment; and at worst, they may find themselves in life-threatening conditions with no means of sustenance.It should be unacceptable in this modern age that crew members continue to be abandoned in foreign ports without food or water, the financial resources to get home or their earned wages.[6]

7.6 The case of the MV '*Iceberg 1*' is an example of 'abandonment' of a vessel and crew subsequent to capture, which attracted the attentions of state welfare and philanthropic groups. The *Iceberg 1* is a 4,500 DWT[7] roll-on/roll-off cargo ship flying the Panamanian flag and operating for the Azal Shipping Company, situated in Dubai. The ship was captured by pirates whilst navigating 10 nm off the Port of Aden, Yemen, on 29 March 2010. The owners, despite still operating, did not pay ransom citing that they were financially unable to do so. Of the 24 crew aboard, one is alleged to have committed suicide, and the chief engineer is thought to have been killed by the pirates. The owners discontinued the pay of the crew upon capture, although some reports state that they had not been paid for some time before that. After approximately

4. For further information on the work of the IMB, see www.icc-ccs.org.uk/icc/imb (accessed 14 May 2013).
5. See further http://www.iccwbo.org/ (accessed 14 May 2013).
6. Rear Admiral Charles Michel and Lt Amber Ward of the US Coast Guard Office of Maritime & International Law in a joint paper on seafarer abandonment.
7. Deadweight tonnage.

32 months of captivity, troops from the Puntland Maritime Forces, assisted by snipers in a nearby helicopter, shot dead 6 pirates and effected the release of the crew. The crew clearly has a long road to recovery, their troubles compounded by the fact that they have little financial means after such a long period without wages.

> The International Transport Federation which recently opened its office here in Manila, promised to help Gerald with back wages dating back to the time [that he] was hired. Throughout his ordeal, his family never got an allotment. His salary was never given. Gerald's battle continues, but this time on the labour front. The ship owner, an Emirati national named Yasser Ali, and his manning agency led by Ryan Calzada, must ensure that Gerald receives the compensation owed him, and all insurance benefits due him.[8]

7.7 The article, cited above, suggests hope for the recovery of compensation, after the fact, but what good is that to the starving families at home? One need only look so far as the MV '*Danica White*' to see that compensation may not be forthcoming.

> The crew brought a claim against the owner in negligence under Danish law for the psychological trauma. The claim was brought under the Danish Merchant Shipping Act 2004 s151, stating that the negligence of the shipping company had led to the ill effects of the long period of capture. On 6 October 2010 the Danish High Court upheld the decision of the Copenhagen City Court that the owners were not liable.[9]

7.8 It is submitted that ensuring the wages of crew during periods of unlawful detention is essential to the fair treatment of those working in known piracy hot spots. The case of the *Iceberg 1* is not isolated. The '*Golden Wave 305*', a Kenyan-flagged trawler, which had been navigating in Kenyan territorial waters before being boarded and captured was used by pirates for 8 months as a 'mothership' to lure other vessels. The vessel and crew were released on 11 June 2011, when they revealed that their wages had not been paid during their ordeal.[10] The crew of the '*Tai Yuan 227*' fishing vessel, also used by pirates as a mothership, tell a similar story.[11] Can seafarers use the MLC to secure the wages during periods of detention by pirates?

7.9 The wages of seafarers, guaranteed under the MLC, is unsurprisingly related to ordinary duty. Whilst it is inherently good that the wages of crew members are protected in such a manner, it is largely unhelpful when dealing with detention by pirates. The argument could of course be made that, as the lives of the seafarers are used as leverage to ensure ransom payment, and thereby the release of the vessel, they are still acting in service of said vessel; whether, or not, they are still performing any official duty. Regulation 2.2, Standard A2.2(3) gives seafarers the right to assign part, or all, of their wages to their 'families or dependents or legal beneficiaries', which, in the case of detention, would at the very least, assist. However, the wages due are still governed by the individual's contract of employment. That being the case, seafarers captured for long periods may find their contracts expiring during captivity, as was the case with the *Iceberg 1*, leaving them without recourse to the MLC, at least under

8. Susan Ople, '1000 Days in Captivity' *Philippine Daily Inquirer* (Makati City, 27 January 2013).
9. R G Caldwell, 'Piracy and the Zero Incentive Approach' (2012) 12(3) Shipping and Trade Law 2.
10. Andrew Mwangura, 'The Somali Report' 15 February 2011, available at http://www.somaliareport.com/index.php/post/106/Pirated_Golden_Wave_305_Arrives_in_Kenya (accessed 2 June 2013).
11. EU NAVFOR – Somalia, 'FV TAI YUAN 227 Released from Pirate Control' 28 January 2011, available at http://eunavfor.eu/fv-tai-yuan-227-released-from-pirate-control/ (accessed 2 June 2013).

this section. The right to repatriation upon expiry of the contract of employment may assist, and is discussed below.

7.10 There must, of course, be some consideration of the position of the shipowner. The shipowner does not invite or encourage the capture of the vessel, but does, to a far greater extent than the crew, decide the routes taken. It is undoubtedly of great financial strain to smaller companies when their vessels are captured. Nonetheless, the decision to discontinue wages is unsupportable. Flag States should rightly restrict the shipowner's right to terminate employment, or indeed rely upon expiry of employment contracts, when the vessel is unlawfully detained. Whether this will happen is another matter.

REPATRIATION OF SEAFARERS

7.11 Repatriation of seafarers has been problematic at the best of times, with crews still left stranded all over the world to this day. However, the wording of the MLC may be helpful in ensuring that those captured are returned home, and indeed paid until they are. Again, the Convention does not refer directly to piratical capture but it may still be applicable. The Convention provides that 'Seafarers have a right to be repatriated at no cost to themselves in the circumstances and under the conditions specified in the Code'.[12] In regard to the interaction with piracy, the first important section is Standard A2.5(1)(a)-(c), which provides the following:

> '1. Each Member shall ensure that seafarers on ships that fly its flag are entitled to repatriation in the following circumstances:
> (a) if the seafarers' employment agreement expires while they are abroad;
> (b) when the seafarers' employment agreement is terminated:
> (i) by the shipowner; or
> (ii) by the seafarer for justified reasons; and also
> (c) when the seafarers are no longer able to carry out their duties under their employment agreement or cannot be expected to carry them out in the specific circumstances'.

7.12 What is significant initially is the right to repatriation in Standard A2.5(1)(a) that would force the shipowner to repatriate those seafarers that have had a contract of employment that has expired. In the case of the *Iceberg 1*, this would have made abandonment of the crew more difficult, and potentially created an obligation that would have prevented the shipowner from 'walking away', and may, as shown below, have entitled the crew to wages long after capture. As per Standard A2.5(1)(b), there would be no relief for a shipowner who decided to terminate employment after capture, as the right to repatriation would survive the termination.

7.13 However, perhaps most interesting, is Standard A2.5(1)(c), which guarantees repatriation where the seafarer is no longer able to carry out his duties, or cannot be expected to do so 'in the specific circumstances'. The exact circumstances are not specified, which is unsurprising in this type of 'catch all' clause. Nonetheless, it seems very likely that an argument resting upon piratical capture as the 'specific

12. MLC, Regulation 2.5(1).

circumstances' would be successful. After all, no one would reasonably expect the crew to be able to perform their duties under such conditions, and the piratical capture is certainly beyond their control. There is also some assistance for the shipowner from Standard A2.5(4) that protects the shipowner's rights to recover losses under third party contractual agreements. In the case of piracy, this may include Kidnap and Ransom (K&R) insurance instruments. Where the shipowner was properly insured against capture of the vessel, and indeed capture of the crew, he could manage the risk. There is certainly nothing objectionable in expecting shipowners of vessels operating in piracy hot spots to properly protect the crew that is thereby put in harm's way.

7.14 Standard A2.5(5) states that the competent authority shall be able to repatriate seafarers and pass the cost on to the shipowner, in cases where the shipowner has failed to meet their obligations.

> '5. If a shipowner fails to make arrangements for or to meet the cost of repatriation of seafarers who are entitled to be repatriated:
>
> (a) the competent authority of the Member whose flag the ship flies shall arrange for repatriation of the seafarers concerned; if it fails to do so, the State from which the seafarers are to be repatriated or the State of which they are a national may arrange for their repatriation and recover the cost from the Member whose flag the ship flies;
> (b) costs incurred in repatriating seafarers shall be recoverable from the shipowner by the Member whose flag the ship flies;
> (c) the expenses of repatriation shall in no case be a charge upon the seafarers, except as provided for in paragraph 3 of this Standard.'[13]

7.15 There is also an element of 'double protection' allowing the State to which the seafarer is to be repatriated, or indeed the State where he is a national, to act and then pass the expense on to the flag State that has failed to act in the case of a defaulting shipowner. Standard A2.5(3), which is triggered where the seafarer has acted 'in serious default of the seafarer's employment obligations', would seemingly apply only where the person in question was somehow to blame for the capture, or at least complicit in it.

7.16 In regard to entitlement to repatriation, Guideline B2.5.1 states:

> '1. Seafarers should be entitled to repatriation:
> (a) in the case covered by Standard A2.5, paragraph 1(a), upon the expiry of the period of notice given in accordance with the provisions of the seafarers' employment agreement;
> (b) in the cases covered by Standard A2.5, paragraph 1(b) and (c):
> (i) in the event of illness or injury or other medical condition which requires their repatriation when found medically fit to travel;
> (ii) in the event of shipwreck;
> (iii) in the event of the shipowner not being able to continue to fulfil their legal or contractual obligations as an employer of the seafarers by reason of insolvency, sale of ship, change of ship's registration or any other similar reason;

13. MLC, Standard A2.5(5).

(iv) in the event of a ship being bound for a war zone, as defined by national laws or regulations or seafarers' employment agreements, to which the seafarer does not consent to go; and

(v) in the event of termination or interruption of employment in accordance with an industrial award or collective agreement, or termination of employment for any other similar reason.'[14]

7.17 Guideline B2.5.1(1)(b)(iv) is significant as it deals with the seafarers' right to repatriation when the ship is bound for a 'war zone' under the national definitions, or as per the contract of employment. What is perhaps disappointing is that this would not necessarily include the areas of known pirate operation. War zones are most certainly dangerous, and it is right that the seafarer has the option to be repatriated where he decides not to take that risk, whether at the time of notification or, where his contract specifically excludes such destinations. However, piracy is a significant problem in and around the Gulf of Aden, and should rightly attract the same protections. There have been, it should be said, some improvements to the employment of seafarers in this regard. Many labour organizations have demanded, and won, supplemental pay for those working in dangerous areas as well as similar rights of refusal.

> The designation will come into effect on 1st April 2012 in order to allow ship operators to make any necessary preparations. It will afford the same benefits and protections to seafarers in those areas as the High Risk Area in the Gulf of Aden and around Somalia, including: the need for enhanced security measures; advance notice of intent to enter the area; the right to refuse to enter it; and a doubling of the daily basic wage and of death and disability compensation while within the area of risk.[15]

7.18 From the above, it seems as though maritime labour organizations have recognized the need for proper compensation for those working in the high-risk areas, as well as the right to refuse the transit. Sadly, the MLC itself is silent on the matter. Allowing seafarers the right to refuse to transit the piracy risk areas would have the effect of giving them bargaining power to negotiate fair rates of remuneration for taking risk, and freedom to choose to abstain from said risk where they feel that a shipowner has not taken proper steps to protect their safety. Naturally, nothing in the Convention restricts the right to insist upon contractual terms that ensure the same rights.

7.19 The costs of repatriation, to be borne by the shipowner, are significant. Not only are the simple travel costs included, but also 'pay and allowances from the moment the seafarers leave the ship until they reach the repatriation destination, if provided for by national laws or regulations or collective agreements'.[16]

7.20 What is significant here is that, where pirate captors have removed seafarers, they may be guaranteed pay until they are repatriated if Standard A2.5(1)(a)-(c) is engaged, and thereby the right to repatriation, the wages are owing until such time as the seafarer is returned home. Naturally, this is far-reaching, and the shipowner is not responsible for capture to any greater extent than the crew. Nonetheless, shipowners seeking to 'abandon' their crew and vessel, as was the case in the *Iceberg 1*, may

14. MLC, Guideline B2.5.1.

15. International Transport Workers Federation, 'IBF declares piracy high risk area in West African waters' International Bargaining Forum news release, 21 March 2012, available at http://www.seafarersrights.org/tag/seamen/ (accessed 15 May 2013).

16. MLC, Guideline B2.5.1(3)(c).

have a more difficult time in doing so. Guideline B2.5.1(3)(e) also provides that the shipowner shall be liable for medical treatment until such time as the seafarer is fit to travel, which may be helpful in the case of long term captivity, or indeed torture.

7.21 Whether or not the MLC assists seafarers who have had the devastating effects of capture and unlawful detention compounded by cessation of wages remains to be seen. It may be that stretching the Convention to protect seafarers under these circumstances will not work, and it is a shame that the Convention authors did not see fit to include piracy. However, this may be a function of shipowners acting in such an unconscionable manner being rare, if sadly not non-existent.

COMPENSATION OF SEAFARERS FOR LOSS OR FOUNDERING

7.22 Regulation 2.6 states that the shipowner shall be liable to compensate seafarers for loss or foundering of the vessel. In such circumstances, seafarers are entitled to 'adequate compensation in the case of injury, loss or unemployment arising from the ship's loss or foundering'.[17] In addition, each Contracting State is obliged to 'make rules ensuring that, in every case of loss or foundering of any ship, the shipowner shall pay to each seafarer on board an indemnity against unemployment resulting from such loss or foundering'.[18]

7.23 This may, at first, seem to assist in obtaining compensation for seafarers affected by capture. However, unless 'foundering' has occurred, 'loss' of the ship as a result of modern piracy is not cut and dry. For the purposes of insurance, the decision of Rix LJ in *Masefield v Amlin* rejects the notion of actual total loss (ATL)[19] upon piratical capture.[20] On the facts of the case, Rix LJ held that

> It was not an irretrievable deprivation of property. It was a typical 'wait and see' situation. The facts would not even have supported a claim for a [constructive total loss] CTL, for the test of that is no longer uncertainty of recovery, but unlikelihood of recovery … Piratical seizure, in the absence of a policy of ransom, may amount to an ATL, where the pirates escape with their prize for their own use and there is no prospect whatever of finding or recovering vessel or cargo: but where a chance of recapture remains even such a seizure will not give rise to an immediate ATL, and in any event that is very far from this case.[21]

7.24 This would suggest, from the point of view of the Court, that 'loss' is not complete upon capture, at least where a ransom has been demanded. That being the case, it may be that Regulation 2.6 will be unhelpful, at least in the UK,[22] to secure

17. MLC, Regulation 2.6(1).
18. MLC, Standard A2.6(1).
19. The legal concept of ATL is defined in ss 57(1) and 58 of the Marine Insurance Act 1906, which includes the irretrievable deprivation of property.
20. *Masefield AG v Amlin Corporate Member Ltd* [2010] EWHC 280 (Comm).
21. *Ibid.* per Rix LJ, para 56. The legal concept of CTL is defined in s 60 of the Marine Insurance Act 1906.
22. In the UK, payment of ransoms is not illegal or against public policy, which may further explain Rix LJ's decision in *Masefield v Amlin*. See also *Royal Boskalis Westminster NV v Mountain* [1997] EWCA Civ 1140. For other jurisdictions where payment of ransoms is illegal, it may be that the vessel would be deemed lost, as it would be legally impossible to recover the vessel. See further below.

compensation for the injuries, losses and unemployment endured by those captured. The decision itself was not made in the contemplation of seafarer's compensation. Nonetheless, it suggests that arguing this point would be fruitless, unless in fact the shipowner could prove that there was no financial way to pay the ransom. Were that the case, even though the ransom had been demanded, the inability to pay may mean that the ship is lost as the inability would result in 'irretrievable deprivation'.

7.25 There may also be some interaction with international economic sanctions, preventing the payment of ransoms, such as United States (US) Executive Order 13536. Under this order, any payment to a person listed on the Specially Designated Nationals (SDN) list would be unlawful. This is far reaching as, where ransom is demanded in US currency, money centre banks in the US would be prevented from releasing funds which they knew, or should have known, were to be paid to a party named on the SDN list.

> Importantly, the 'prohibitions' referred to in the Executive Order include but are not limited to the making of any contribution or provision of funds, goods or services to or for the benefit of a person whose property is blocked … Thus, a ransom payment to a group of pirates that could benefit an individual or group that is designated would be prohibited. This obviously complicates matters.[23]

7.26 Where it could be shown that such a sanction prohibited the payment of ransom, and thereby the means to recover the vessel and crew, the ship could potentially be successfully argued as lost. Where ransom is in fact illegal, the 'wait and see' situation described by Rix LJ no longer operates. That being the case, recovery is impossible, and the vessel is subject to irretrievable deprivation.[24] Under these circumstances, the protections guaranteed under Regulation 2.6 would be engaged.

7.27 Sadly, seafarers have not always won compensation for the ill effects of capture, despite those effects being well understood. Certainly, those involved in the *Danica White* capture found difficulty in recovery. The *Danica White*, a 73 m 1616 DWT dry cargo ship of Danish registration, was navigating just over 200 nm off the Somali coast when she was attacked and captured by pirates. The ship was transporting pipes and cement from Sharjha, UAE to Mombasa, Kenya when attacked at 10:15 am on 1 June 2007. The investigation of the Danish Maritime Authority[25] was awash with ways in which best practice certainly was not followed, coupled with the reduced speed and low freeboard of the vessel; she must have made a very easy target. It was reported that not one crewmember noticed the pirates until they were aboard. In court, the issue was whether the shipowner was liable as a result of the shortcomings outlined in the report. Unfortunately, for the crew that suffered 85 days captivity, the court ultimately decided that there was no negligence on the part of the shipowner, and therefore no compensation for the crew.

7.28 One question that leaps to mind is why must there be negligence for compensation under these circumstances? Leaving aside the ruling in *Masefield*, this is one

23. US Department of the Treasury, Office of Foreign Assets Control (OFAC) Guidance Notes, available at http://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx (accessed 2 June 2013).

24. R G Caldwell, 'US Executive Order 13536 and the Legality of Ransom Payments' (2011) 11(8) Shipping and Trade Law, 4.

25. An English translation of the investigation is available at http://www.dma.dk/sitecollectiondocuments/publikationer/maritime-accidents/accidents-at-sea-2007.pdf (accessed 15 May 2013).

area where the MLC may assist seafarers, subsequent to piratical capture. Essentially, where capture was successfully argued as a loss, compensation would be guaranteed, at least for the resulting unemployment and repatriation. Sadly, as the Regulation does not refer directly to piracy, it is unlikely that the requisite type of compensation, for post-traumatic stress, for instance, will be covered. It is significant that the Danish Maritime Authority, in the official incident report given to the court, recognized that there might be a need to amend the current law.

MEDICAL CARE ABOARD AND ASHORE (SHIPOWNERS' LIABILITY)

7.29 Regulation 4.1 of the MLC lays out the obligations of the shipowner for medical treatment. Whereas the conditions that must be guaranteed would be impossible in the case of capture, there may be some assistance for those seeking compensation for injury. Under Regulation 4.2, Shipowners' Liability, the Convention states that the purpose of the Regulation is 'to ensure that seafarers are protected from the financial consequences of sickness, injury or death occurring in connection with their employment'. This would seem to fit well with the situation in and around the Gulf of Aden.

7.30 It would seem likely that an argument that the ill effects of capture, whether mental or physical, occur in connection with the employment of seafarers working in or around the Gulf of Aden, would be successful. However, this is because of the wording 'in connection with their employment'. Were it to have been directly connected to their duties, the nexus would not be so close, as piracy, and injury associated therewith, is not part of the ordinary duties. It could be said that it is most certainly connected to the employment of those seafarers deployed in and around piracy hot spots.

7.31 In the case of those detained aboard the *Iceberg 1*, this Regulation would allow the seafarers a far greater protection from the expense arising out of their capture. Those injured would seemingly be able to claim their medical expenses, whether for physical or mental injury, subject to the limitations discussed below. Standard A4.2(1)(a) states that 'shipowners shall be liable to bear the costs for seafarers working on their ships in respect of sickness and injury of the seafarers occurring between the date of commencing duty and the date upon which they are deemed duly repatriated, or arising from their employment between those dates'.[26]

7.32 What is significant is the duration of the obligation. The shipowners' liability, for injury arising out of their employment until repatriation, would in theory cover the period of detention. Whether or not the liability will survive instances where the shipowner is unable to effect repatriation, as a result of detention by pirates, remains to be seen. In addition, Standard A4.2(1)(b) states that 'shipowners shall provide financial security to assure compensation in the event of the death or long-term disability of seafarers due to an occupational injury, illness or hazard, as set out in national law, the seafarers' employment agreement or collective agreement'.[27]

26. MLC, Standard A4.2(1)(a).
27. MLC, Standard A4.2(1)(b).

7.33 The injuries set out in national law are unlikely to include post-traumatic stress, and other mental illness associated with piracy, but the contract of employment may. Where seafarers, and their unions and employment agents, are proactive in securing their rights, they may be able to protect their interests by clearly laying out the types of injuries covered. In the case of death of crewmembers, such as those seen in the *Iceberg 1*, Standard A4.2(1)(d) seemingly ensures financial indemnities for families, including 'the cost of burial expenses in the case of death occurring on board or ashore during the period of engagement'.[28]

7.34 Further to the rights guaranteed above, the shipowner is also liable for the defrayment of medical costs once the crewmember is repatriated.

> [S]hipowners shall be liable to defray the expense of medical care, including medical treatment and the supply of the necessary medicines and therapeutic appliances, and board and lodging away from home until the sick or injured seafarer has recovered, or until the sickness or incapacity has been declared of a permanent character…[29]

7.35 The duration of the liability 'until the sick or injured seafarer has recovered' may, in the case of injury resulting from capture, be substantial.

> The risk of being subjected to violent crimes and mistreatment increases with prolonged periods of captivity, including increased rates of assault and abuse, increased risk of disease and malnutrition, greater likelihood of giving up hope (a hostage committed suicide in 2010 during a prolonged captivity) and being transferred from gang to gang.'[30]

7.36 Cases of seafarers suffering depression long after capture are common. The Seamen's Church Institute produced a report on the mental health of seafarers and found that even those not captured, but working in or around the piracy hot spots, were experiencing greater levels of mental stress.

> Even as the incidence of Somali piracy declines in 2012, the psychological impact on seafarers remains-and is likely to increase-as piracy continues and episodes of captivity become better known among the seafaring community.[31]

7.37 Shipowners are, under the national laws of the flag State, allowed to limit exposure, so long as it is not less than 16 weeks. In the UK, this is less problematic as the National Health Service would provide care. However, some States may not offer the same level of free care. In regard to the payment of wages,

> '3. Where the sickness or injury results in incapacity for work the shipowner shall be liable:
> (a) to pay full wages as long as the sick or injured seafarers remain on board or until the seafarers have been repatriated in accordance with this Convention; and
> (b) to pay wages in whole or in part as prescribed by national laws or regulations or as provided for in collective agreements from the time when

28. MLC, Standard A4.2(1)(d).
29. MLC, Standard A4.2(1)(c).
30. Ship-Technology.com, 'Piracy special report – the human cost of Somali piracy' 28 June 2012, available at http://www.ship-technology.com/features/featurepirate-somalia-facts-figures-piracy (accessed 2 June 2013).
31. Michael Stuart Garfinkle *et al.*, 'The Psycological Impact of Piracy on Seafarers' (2012) Seaman's Church Institute, 12.

> the seafarers are repatriated or landed until their recovery or, if earlier, until they are entitled to cash benefits under the legislation of the Member concerned'.[32]

7.38 This would seem to offer another avenue to claim wages not paid during capture. Where the seafarer has been injured, and repatriation not effected due to capture, wages may still be owing. This is, it is submitted, a tenuous argument. There would undoubtedly be arguments hinging around the shipowner's ability to repatriate. In the case of mental illness, when the impairment began would be difficult to assess. Standard A4.2(3)(b) also suggests the possibility that at least partial wages may be due upon return, until such time as the effected seafarer has recovered. This would, if successfully argued, offer welcome financial protection for the seafarers and their families.

7.39 Under Standard A4.2(5)(a)-(c), the shipowner may be excluded from liability, under national laws, where

> '(a) injury incurred otherwise than in the service of the ship;
> (b) injury or sickness due to the wilful misconduct of the sick, injured or deceased seafarer; and
> (c) sickness or infirmity intentionally concealed when the engagement is entered into'.[33]

7.40 Standard A4.2(5)(a) above may be problematic as it could be argued that the seafarer was not acting in the service of the ship. However, as discussed above, as it is the lives of the crew that will ultimately be used as leverage for the return of the vessel, they could be argued as still serving the vessel even whilst detained. Nonetheless, the cessation of wages of some seafarers during capture suggests that some shipowners may seek to rely upon this. Naturally, Standard A4.2(5)(c) would exclude liability where the seafarer was found to be complicit in the capture. In regard to mental illness, and incapacity caused thereby, seafarers affected by capture whom later return to duty should rightly make the owner aware of any mental illness.

7.41 The MLC itself does not refer directly to mental health, however, it would seem that authorities agree that this forms part of the services covered.

> Neither traditional maritime law or the ILO Maritime Labour Convention 2006 specifically addresses mental health care, but court decisions in the past fifty years make it very clear that a seafarers' right to free medical care includes a right to free mental health care. A greater obstacle to seafarers seeking mental health care is the stigma of receiving the care. Seafarers may fear being labelled as a person with a mental illness and all of its associated stereotypes… Seeking mental care can also have consequences for a seafarers' social acceptance and self-esteem.[34]

7.42 Ultimately, the MLC, whilst not referring directly to piracy, may assist seafarers after release from capture. The effects of piracy upon seafarers, whether they are captured or not, can be extensive. The Convention itself, in guaranteeing rights

32. MLC, Standard A4.2(3)(a)-(b).
33. MLC, Standard A4.2(5)(a)-(c).
34. D B Stevenson, 'Seafarers' rights to mental health care' The Sea, Issue 203, January/February, 6. Published by The Mission to Seafarers 2010 (London).

to care may play a part in reducing the incidence of mental illness. Insofar as wages are concerned, it may be of comfort to know that families will not be prejudiced during difficult times. Implementation will undoubtedly be problematic as piracy is not the intended purpose of this Convention. It is perhaps unsatisfying that piracy is not specifically referred to, when clearly the problems surrounding war zones are. However, nothing in the Convention prevents seafarers working in or around the Gulf of Aden from insisting on these provisions in their contract of employment. Whether or not that will affect their chances of employment may be a concern. Many of the world's seafarers come from developing countries, such as the Philippines and India, and may feel pressure not to 'price themselves out of the market'.

SUMMARY

7.43 Protection of the wages of seafarers who have suffered unlawful detention should rightly be irresistible under the MLC. Whilst the Convention does generally protect seafarers, it is not clear whether it will be helpful in the case of piratical capture. A declaration that wages are due until the vessel and crew is released and/or repatriated, would have been desirable. This would put some pressure on smaller companies operating in the area, but could be offset with insurance instruments. There is, after all, nothing objectionable in owners properly protecting crews in dangerous areas. As for the families of those languishing on captured vessels, the guarantee of wages and the provision that the seafarer can nominate dependents or family members as beneficiaries would surely relieve the hardship.

7.44 The answer to whether wages are due would then be better dealt with in the contract of employment. As stated above, some unions and seafarers organizations have insisted on better levels of remuneration and protection in the piracy hot spot.[35] Unlike the Convention rights, this is dependent upon the bargaining power of the individual group. Nothing in the MLC would restrict the ability to do this, but commercial pressures may still see some seafarers without protection under the Convention, or the leverage to secure it under their contracts.

7.45 A failure to directly address repatriation of captured seafarers is unhelpful. In this regard, those seeking to utilize the MLC subsequent to capture will struggle to fit the mould. Piracy hot spots are not designated war zones and, as such, the protections offered to seafarers entering the latter are not applicable. Accordingly, seafarers will not be guaranteed repatriation for refusal to sail through the Gulf of Aden or surrounding waters. This not only puts financial pressure on the crew, but also limits their bargaining power to secure the rights under their contract of employment. Having said that, some groups have used their collective bargaining power to secure rights, similar to those in the Convention, for seafarers transiting piracy hot spots.

7.46 Similarly, loss of the ship, which would guarantee repatriation and financial support, may not apply to piratical capture. The case of *Masefield v Amlin*, whilst not in contemplation of seafarers' rights, suggests that a claim for wages and compensation

35. See n 15 above.

would be problematic. Where capture, at least when a ransom is demanded and subject to some exceptions, is still a 'wait and see' situation, the legal test for loss under English law is not satisfied. Accordingly, it is likely that the crew would be unable to rely upon the Convention. One further reason for inclusion of piracy directly would be to avoid situations like that in the *Danica White* case, which demonstrated the difficulties faced by seafarers in obtaining compensation for the period of capture. It could be argued that periods of capture are inherently damaging and, as part of the ordinary risks of those working in areas of pirate activity, should be actionable *per se*, as opposed to requiring negligence on the part of the shipowner, who should know full well that crews are put in harm's way as a result of simply working in such areas.

7.47 Medical treatment, and the rights associated therewith, is naturally desirable. However, in addressing the more general needs, without specific reference to capture and mental illness, the Convention has left cracks. It seems likely that an argument, based upon the injuries or illnesses being sustained in service of the vessel, would be difficult to dispute. However, it is also likely that this will have to be tested, as there are some difficulties that are specific to the maritime sector and piracy.

> Equally critical, employers must not view seafarers as 'damaged goods' after a piracy incident. Most seafarers like most people, are resilient and can continue their careers with few or no adverse effects.[36]

7.48 Seafarers may be reluctant to declare previous interactions with pirates, or indeed periods of detention, to avoid complications with Standard A4.2(5)(c); there is still a negative connotation associated with mental illness, which may be difficult to overcome. This may be compounded by seafarers failing to seek proper intervention for post-capture illness to avoid problems with future employers. This, in and of itself, would be good reason to specifically cover piracy in the Convention. That being said, the Convention may be valuable in securing treatment for those in need, and willing to come forward.

7.49 Piracy and capture, whilst uncommon in the grand scheme of things, irreparably damages the lives of a growing number of seafarers. Whilst a great deal of time and money has been spent by the international community on tackling the problem, capture is still a persistent threat for those sailing through the Gulf of Aden and surrounding waters. There is little, if indeed any, official statistics of how the problem is affecting seafarers, which may explain why the Convention is silent on the matter. However, the issues facing seafarers are significant. It is not the case, as discussed above, that instances of non-payment of wages, inadequate compensation and little access to healthcare are unheard of after piratical capture. There will undoubtedly be differences in the way in which companies treat those working for them and the standardization of rights under the Convention is a step forward.

7.50 Furthermore, the MLC, designed to amalgamate rights into one coherent and comprehensive document, can be updated.

> It has been designed for global application, produced in a fashion that actually promotes understanding, and furthermore has been framed so that it can be regularly updated. Thus the MLC will be a 'living' document and we will no longer have people scratching their

36. D B Stephenson, 'Can we Declare Victory and Go Home?' commissioned for Near East and Gulf Military Analysis (INEGMA) Dubai June 2012.

> heads over yellowing, 80-year-old documents, wondering what their authors had really intended.[37]

7.51 This may allow for future clarity in regard to piracy. Given that the failures of shipowners to pay their crews and indeed the findings of seafarers' groups are recent, there is hope for specific inclusion. Guaranteeing wages and compensation is essential to ensuring the future needs of commercial shipping are met, as there are already manning problems in the industry. Providing adequate protection under the Convention is unlikely to cost as much as diverting shipping away from the Gulf of Aden and around the Cape of Good Hope.

37. Michael Grey, 'The Maritime Labour Convention – Shipping's "Fourth Pillar"' available at http://www.seafarersrights.org/seafarers-subjects/maritime-labour-convention-mlc/ (accessed 15 May 2013).

CHAPTER 8

The enforcement procedures of the Maritime Labour Convention 2006

ALEXANDROS X M NTOVAS*

INTRODUCTION

8.1 The *Maritime Labour Convention 2006 (MLC)* is a remarkable international instrument in many respects.[1] First, and foremost, it represents the successful outcome of a wide-ranging process of co-operation among numerous international governmental and non-governmental organizations[2] that contributed in the preparation and development of proposals for the review, improvement and consolidation of all relevant pre-existing International Labour Organization (ILO) maritime instruments.[3] Additionally, it codified and progressively developed a plethora of other international recommendations and general standards, considering the impact of seafarers' living

* BA(Hons), LLB(Hons), LLM(Hons), MA(Hons), PhD(Public International Law), FHEA(London), Advocate(Athens), is a Lecturer at the University of Southampton Law School, where he teaches in the areas of Public International and European Law, with emphasis on dispute settlement and environmental law. He is also a Member of the Institute of Maritime Law where he researches and provides legal consultancy on navigational freedoms and practice as well as on issues regarding public aspects of piracy and other issues of contemporary safety and security of ships.

1. A concise synopsis of the MLC is offered in I Christodoulou-Varotsi and D Pentsov, *Maritime Work Law Fundamentals: Responsible Shipowners, Reliable Seafarers* (Springer 2008). In particular, see 300–325.

2. 2005 Report of the Director-General on developments in the maritime sector; Confrep-ILC94-Maritime-2005-09-0247-1 (International Labour Office 2005), 15–43.

3. These are listed by name in Article X. In accordance with the international law of treaties, the Convention should be considered revising *inter se* previous instruments whereto its ratifying Members are also contracted. In this context, see Articles 30(3) and (4) of the *Vienna Convention on the Law of Treaties 1969* (entered into force on 27 January 1980; 1155UNTS331) with regard to the application of successive treaties relating to the same subject matter. In practice, this means that until the MLC is ratified by all of the States that have ratified the existing maritime labour conventions, it will necessarily have to coexist to varying degrees, depending on their ratification levels, with the obligations under the present international maritime labour conventions; *see*, 2005 Report I(1A) Adoption of an instrument to consolidate maritime labour standards; ConfrepILC94(2006)-(Maritime)-I(1A)-2005-10-0091-1 (International Labour Office 2005), 25–6 ('MLC *Commentary*').

The identification and study of the existing provisions in other international maritime instruments overlapping or conflicting with the proposed provisions of the Convention, along with appropriate recommendations can be found in working paper of Sub-Group of the High-Level Tripartite Working Group on Maritime Labour Standards [STWGMLS/2002/4 (first meeting)] *Duplicative or contradictory text in the existing maritime instruments* (International Labour Office 2002). For specific issues with regard to the tenability of *ipso jure* denunciations and whether the MLC disallows automatically the ratification of the international maritime instruments which it revised, see High-level Tripartite Working Group on Maritime Labour Standards [TWGMLS/2004/3] *Consolidated maritime labour Convention (Preliminary second draft) Effect on Revised Conventions* (International Labour Office 2004).

and working conditions in light of contemporary changes in the structure of the shipping industry and maritime labour.[4]

8.2 In this respect, it is worth noting that the Convention is one of the very few international instruments that was drafted through wide consensus amongst more than 900 delegates representing seafarers, global shipowners and some 100 governments[5]; it was adopted by a vote of 314 in favour, and four abstentions, with no votes being cast against it at the 94th International Labour Conference (Maritime), that was held in Geneva on 7–23 February 2006.[6]

8.3 In terms of substance, the Convention, in response to the joint call of shipowners and seafarers for the adoption of an entire package of ILO maritime labour standards into a single text,[7] provides for the minimum requirements of decent labour, which clearly sets a comprehensive standard for the working and living conditions for the world's over 1.2 million seafarers,[8] thereby inviting worldwide ratification but also encouraging and facilitating States to enact national legislation that takes this standard even higher for the benefit of seafarers.[9] As insightfully noted by the Director of the ILO's Standards Department, Dr Cleopatra Doumbia-Henry, the Convention provides the means for the sustainability of the maritime industry inasmuch as it affords and assures conditions that not only retain workers in the sector, but attract and encourage young ones to take up a career on the seas, which reflects the most vital area of trade.[10] It is evidently attested that around 80 per cent of global trade by volume and over 70 per cent by value is carried by sea.[11]

8.4 On the matter of enforcement, the most significant contribution of the Convention is reflected in the creation of a single coherent instrument which embodies, as far as possible, all up-to-date international standards for maritime labour[12] and provides concrete, clear and effective procedures that ensure their implementation by ratifying States along with the continuous compliance with them through a supervisory mechanism by shipowners and private placement and

4. 2006 Report of the Chairperson of the Governing Body to the 94th (Maritime) Session of the International Labour Conference, International Labour Conference Doc. ILC94-PR1 Provisional Record 1, 94th (Maritime) Session, Geneva 2006, 6–8.

5. ILO, '*ILO Director-General says new maritime Convention on track to make "labour history"*', Press release of 20 February 2006 [ILO/06/06]. On this process see, A Charbonneau and P Chaumette, 'The ILO Maritime Labour Convention 2006: An example of innovative normative consolidation in a globalised sector' (2010) 3 European Labour Law Journal 332–345.

6. Hereinafter referred to as the 'Conference'. For a detailed account see, M L McConnell, D Devlin and C Doumbia-Henry, *The Maritime Labour Convention, 2006 – A Legal Primer to an Emerging International Regime* (Martinus Nijhoff, Brill 2011).

7. The initial concept of consolidating the entire package of ILO maritime labour standards into a single consolidated convention had been a joint initiative; see 2006 *Report of the Committee of the Whole*, International Labour Conference Doc. ILC94-PR7 (Part I) Provisional Record 7, 94th (Maritime) Session, Geneva 2006, 4 *et seq.*, ('2006 *Report of the Committee of the Whole*').

8. ILO, 'The global seafarer: mixed fortunes mirror global trends' 29 January 2006 [WCMS065214].

9. See N Lille 'The ILO Maritime Labour Convention 2006: A new paradigm for global labour rights implementation' in K Papadakis and D Bé, *Cross-Border Social Dialogue and Agreements: an emerging global industrial relations framework?* (International Institute for Labour Studies 2008).

10. C Doumbia-Henry, 'Building the momentum for the ILO's Maritime Labour Convention, 2006' (2009) 2 International Register of Shipping Magazine, 18.

11. United Nations Conference on Trade and Development, *Review of Maritime Transport 2012* (United Nations Publication 2012; E12IID17 UNCTAD/RMT/2012), xiii.

12. MLC, Preamble second recital.

recruitment agencies.[13] Article V of the Convention constitutes 'the legal foundation'[14] wherefrom the compliance and enforcement provisions, which are being elaborated in Title 5, draw their legitimacy and furthermore delineates briefly the general obligations and respective jurisdiction of the Member States.[15] More specifically, all Member States are placed under the firm obligation to implement and enforce through their national legislation the provisions of the Convention with respect to ships and seafarers under their jurisdiction.[16] In this context, the Convention also utters a general obligation that 'all Members shall cooperate with each other for the purpose of ensuring [its] effective implementation and enforcement'.[17] To this end, each Member must prohibit violations of the Convention and should, in accordance with international law, establish sanctions or require the adoption of corrective measures under its laws which are adequate to discourage such violations.[18] In particular, the Convention places its emphasis on the role of flag States by requiring them to effectively exercise their jurisdiction and control over ships that fly their flag by establishing a system for ensuring compliance with the requirements of the Convention,[19] including regular inspections, reporting, monitoring and legal proceedings in their national order,[20] and ensuring that they carry a 'maritime labour certificate' and a 'declaration of maritime labour compliance' (DMLC) as required by the Convention.[21] Port States, in accordance with international law,[22] may inspect ships to which the Convention applies of other Members when these are in one of their ports, in order to determine whether the ship is in compliance with the requirements of the Convention as implemented by the flag State.[23] Port State inspections thus offer the means of enforcing compliance where the shipowner and the flag State have failed in their responsibility to implement or ensure compliance, and contribute in this way to the establishment of a continuous and integrated system that will ensure the full enforcement of the Convention's standards.[24] Additionally, in light of the 'no more favourable treatment' clause,[25] it is expected that port State inspections under

13. For example, before the MLC, these obligations were only implicit in the *Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147)* and the *Labour Inspection (Seafarers) Convention, 1996 (No. 178)*, both of which are consolidated by the MLC. See MLC *Commentary*, 20.

14. MLC *Commentary*, 20.

15. A comprehensive overview of these jurisdictions in reference to the Convention can be found in D Fitzpatrick and M Anderson (eds) *Seafarers' Rights* (OUP 2005), 131–167.

16. Article V(1).

17. Article I(2).

18. Article V(6).

19. International Labour Office, *Guidelines for flag State inspections under the Maritime Labour Convention, 2006* (ILO 2009), v, ('*2009 Guidelines for flag State inspections*').

20. Article V(2). As noted in the Preamble of the Convention, a general obligation also arises for flag States under the *United Nations Law of the Sea Convention (UNCLOS) 1982*, Article 94(3)(b), which stipulates that 'every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, *inter alia*, to: the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments'. UNCLOS was signed in Montego Bay on 10 December 1982 and it entered into force on 16 November 1994 [1833UNTS3].

21. Article V(3).

22. For example, see some of the principles and international rules in relation to the law of the sea that are mentioned in D König, 'The Enforcement of the International Law of the Sea by Coastal and Port States', (2002) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1–15.

23. Article V(4).

24. ILO, '*ILO to adopt 'bills of rights' for seafarers*' Press release of 6 February 2006 [ILO/06/03].

25. Article V(7).

the Convention will contribute to the international efforts deterring substandard shipping[26] by ensuring that ships of non-Member States do not receive more favourable treatment than the ships that fly the flag of any State that has ratified it. However, this opens a question regarding the validity of such authority. It can be maintained that port States may apply certain fundamental elements that are envisaged in the MLC – for instance, Regulation 1.1 regarding minimum age of seafarers – during inspections of ships flying the flag of States that have signed but not ratified the Convention. This may fall under the obligation not to defeat the object and purpose of a treaty prior to its ratification in accordance with VCLT Article 18(a), for those States being bound thereto. However, in the light of the general principle of *pacta tertiis nec nocent nec prosunt* as codified also in VCLT Articles 34–8, the 'no more favourable treatment' clause cannot be expanded to cover ships flying the flag of States that are not bound by MLC, until MLC rules attain at some later point in time the status of customary international law. Finally, States with labour-supplying responsibilities must effectively exercise their jurisdiction and control over seafarer recruitment and placement services, where these are established in their territory.[27]

8.5 Overall, the established enforcement procedures under the Convention amalgamate a number of existing provisions that have been successfully tested in respect of their efficiency in the context of other conventions, such as the *Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147)* and the *Labour Inspection (Seafarers) Convention, 1996 (No. 178)*. The MLC has developed also other new provisions that have been improved and suitably adjusted by the ILO Office, like the information and record maintenance system, as well as other newly devised provisions based on the negotiations during the Conference, such as those in relation to the handling of complaints on board and ashore.[28] The procedural rules and administrative framework of the Convention are designed to encourage compliance by operators and shipowners and strengthen the enforcement of standards at all levels.[29] From the upper level of traditional wide-ranging flag State jurisdiction[30] being supported by inclusive port State control,[31] down to the level of newly introduced responsibilities to be assumed by States supplying labour workforce, and the groundbreaking individual self-enforcement procedures established on board and ashore for seafarers. The above procedures, being consistent with the strong movement towards better integration of work among the organizations of the system,[32] are linked with an international supervisory system, under the aegis of ILO with an

26. As defined in general terms by IMO Resolution A.787(19), amended by Resolution A.882(21), with regard to the procedures for port State control.

27. Article V(5).

28. Tripartite Subgroup of the High-level Tripartite Working Group on Maritime Labour Standards [STWGMLS/2003/1(Annex)] *Preliminary draft for a consolidated maritime labour Convention* (International Labour Office 2003), 13.

29. ILO, '*ILO adopts sweeping new charter for maritime sector: New Convention will guarantee 'quality shipping' worldwide*', Press release of 23 February 2006 [ILO/06/07].

30. J A Witt, *Obligations and Control of Flag States: Developments and Perspectives in International Law and EU Law* (LIT Verlag 2007), *passim*.

31. For various issues in relation to port State control inspections and vessel detention, see W K Talley (ed), *Maritime safety, security and piracy* (Informa 2008).

32. ILO, '*Labour History*: ILO adopts new consolidated maritime Convention' 23 February 2006 [WCMS067248].

important tripartite component, which carries the essential institutional guarantees and necessary authority.[33]

FLAG STATE ENFORCEMENT

8.6 Regulation 5.1 provides for the enforcement responsibilities of a ratifying State with respect to those ships that fly its flag. Flag State Members are placed under the firm obligation to establish an effective system for the inspection and certification of maritime labour conditions, pursuant to the specific conditions laid down, mainly by Regulations 5.1.3 and 5.1.4, to ensure that the working and living conditions for seafarers on ships under their flags meet, and continue to meet while being under their jurisdiction, the standards of the Convention.[34] Broadly speaking, the enforcement responsibilities of a flag State consist of two interrelated aspects of the basic requirement to 'establish a system' and 'require' certain actions.[35] In relation to the first aspect, flag States are required to establish an inspection and certification system which is regulated and co-ordinated by the flag administration, or as being referred to in the provisions of the Convention by the 'competent authority'. The established system subsequently undertakes the required actions, by the Convention, that essentially correspond to carrying out inspections and certifying ships under its flag. This is primarily to be effected through the issuance of the maritime labour certificate, accompanied by the pertinent DMLC, which together should constitute *prima facie* evidence that the ship has been duly inspected by the flag State and that the requirements of the Convention relating to working and living conditions of the seafarers, as implemented by national legislation, have been met to the extent so certified.[36] In response to the above obligation, each flag State must establish clear objectives and standards covering the administration of its inspection and certification systems, as well as adequate overall procedures for assessing the extent to which those objectives and standards are being consequently attained.[37]

THE COMPETENT AUTHORITY

8.7 In order to start addressing their enforcement obligations under the Convention, flag States must duly designate a competent authority, which can be perceived as the principal structural and functional feature in the envisaged national implementation and enforcement system. The competent authority for the purposes of the Convention may correspond to the minister, government department or other authority having power to issue and enforce regulations, orders or other instructions having the

33. ILO, *Background paper for the Preparatory Tripartite MLC 2006, Committee – Geneva, 20-22 September 2010* [PTMLC/2010] (International Labour Office 2010), 3.
34. Regulation 5.1.1(2).
35. ILO, *Guidance on implementing the Maritime Labour Convention, 2006 – Model national provisions* (ILO 2012), 94.
36. Regulation 5.1.1(4).
37. Standard A5.1.1(1).

force of law in respect of the subject matter of the provision concerned.[38] In view of the complex nature of the issues dealt with by the Convention and the practical challenges that may arise out of their implementation, the competent authority can be facilitated in its enforcement duties by a number of other public institutions or private entities, such as classifications societies and other competent private organizations. In general, it can be said that all enforcement actions by the flag administration are to be undertaken mainly by those public institutions or other organizations in its legal order that are appropriately authorized and recognized for this purpose by its competent authority.[39]

8.8 More specifically, the flag State may, if it considers it appropriate for establishing an effective system for the inspection and certification of maritime labour conditions, authorize public institutions or other organizations – including those on behalf of another Member, if the latter agrees – which it recognizes as being competent and independent to carry out the inspections provided for in the relevant provisions of the Convention, or to issue the relevant certificates; or even to do both.[40] The public institutions or such other organizations should have been, however, recognized by the competent authority as meeting the applicable requirements provided in the Code regarding competency and independence.[41] The inspection or certification functions, which the recognized organizations (ROs) may be authorized to carry out, should come within the scope of those activities that are expressly mentioned in the Code as being carried out by the competent authority or ROs.[42] Thus, in cases where inspections are to be undertaken by duly authorized organizations on behalf of the competent authority, the Convention places the flag State under the obligation to establish (a) a system to ensure the adequacy of the work performed by ROs, which includes information on all applicable national laws and regulations and relevant international instruments; and, (b) procedures for communication with, and oversight of, such organizations.[43] In establishing such procedures States should take into account the 1993 Guidelines for the Authorization of Organizations Acting on Behalf of the Administration issued by the International Maritime Organization (IMO).[44] Accordingly, the relevant authorized organization constitutes part of the national system for the inspection and certification of maritime labour conditions.[45] Information about this system, including a current and updated list of any organizations authorized to act on the flag State's behalf, the method used for assessing their effectiveness and the extent of such authorizations given, as well as the arrangements made by the flag State to ensure that the authorized activities are carried out completely and effectively,[46]

38. Article II(1)(a).
39. Regulation 5.1.2, in conjunction with Regulation 5.1.1(3).
40. Regulation 5.1.1(3).
41. This facility mirrors the similar modality that has been employed among other instruments in the *Labour Inspection (Seafarers) Convention, 1996 (No. 178)*.
42. Regulation 5.1.2(1).
43. Standard A5.1.2(3).
44. IMO Resolution A.739; *see*, IMO, *Resolutions and Other Decisions of the 18th session* (IMO 1994; Sales Number I180E), 18–23; see also A.789(19) 'Specifications on the Survey and Certification Functions of Recognized Organizations Acting on Behalf of the Administration'; *see*, IMO, *Resolutions and Other Decisions of the 19th Session*, (IMO 1996; Sales Number I194E), 85–94.
45. Regulation 5.1.1(2).
46. Regulation 5.1.2(2).

should be included in its reports to the International Labour Office,[47] which the latter must make publicly available.[48]

8.9 As a result, the flag State remains fully responsible for the inspection and certification of its ships.[49] It is therefore important to stress in this respect that in all cases where such involvement of other entities takes place, these operate as *quasi* organs of the flag State and the latter remains responsible for the inspection and certification of the working and living conditions of the seafarers concerned.[50] In cases of loss or damage as a result of the wrongful exercise of the inspectors' powers or the unduly delay or detainment of a ship, compensation can be claimed in accordance with national laws and regulations.[51]

8.10 In order to ensure the smooth operation of the inspection and certification system, the flag State through its competent authority should also provide the appropriate arrangements, 'after consultation'[52] with the shipowners' and seafarers' organizations, to promote effective cooperation between any public institutions and ROs which have been made an integral part of that system, or otherwise being involved in the inspection and certification process, or concerned with seafarers' on board working and living conditions.[53]

8.11 The most important task for the competent authority is, however, the appointment of a sufficient number of qualified inspectors.[54] Regardless of whether inspectors are appointed directly by the competent authority or are provided by an authorized organization, the flag State should, through its national legislation, ensure that all inspectors have the appropriate training and competence – and foster this through continuous professional development with appropriate further training during their employment.[55] Inspectors should also be provided with clear terms of reference, powers, status and the requisite independence to enable them to verify and to ensure compliance of ships with the Convention.[56] With regard to the requirement of independency in particular, the flag State must provide, and effectively enforce, adequate rules in order to guarantee that inspectors have the necessary status and

47. *Idem*. According to Article 22 of the ILO's Constitution 'each of the Members agrees to make an annual report to ILO on the measures which it has taken to give effect to the provisions of Conventions to which it is a party. These reports shall be made in such form and shall contain such particulars as the Governing Body may request'.
48. Standard A5.1.2(4).
49. Regulation 5.1.2.
50. Regulation 5.1.1(3). This is a well-established principle in the law of attribution with regard to the conduct of persons, or entities, exercising elements of governmental authority. See for example the codification of this principle in Article 5 of the *2001 Draft Responsibility of States for Internationally Wrongful Acts* by the International Law Commission of the United Nations, where it is provided that 'The conduct of a person or entity which is not an organ of the State under Article 4 but which is empowered by the law of that State to exercise elements of the governmental authority should be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance'. The *Draft Articles* mentioned above have been adopted by the Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report, which also contains commentaries on the Draft Articles, appears in the 2001 *Yearbook of the International Law Commission, Vol. II*.
51. See below at 164, 8.29.
52. See below at 172, n 195.
53. Guideline B5.1.1(1) and (2).
54. Standard A5.1.4(2).
55. Guideline B5.1.4(6).
56. Standard A5.1.4(3).

serve in conditions which render them independent of changes in the government, as well as of improper external influences.[57]

8.12 As mentioned earlier, the competent authority in appointing inspectors should also make sure that these are sufficient in number to secure the efficient discharge of their tasks with due regard to the importance of the duties to be performed, and in particular, by taking into account the number, nature and size of ships subject to inspection in light of the number and complexity of the legal provisions to be enforced and the practical conditions under which inspections must be carried out in order to be effective.[58] In addition to the considerations above, the competent authority and any other public institution or authorized organization wholly or partly concerned with the inspection of seafarers' working and living conditions should have the resources necessary to fulfil their functions. In particular, the flag State must take the necessary measures so that (a) duly qualified technical experts and specialists may be called upon, as needed, to assist in the work of inspectors; and, (b) inspectors should be provided with conveniently situated premises, equipment and means of transport adequate for the efficient performance of their duties.[59] Given that inspectors may be provided either by the competent authority directly, or by authorized private organizations, the Convention requires the flag State to assure the consistency of the inspections by developing a compliance and enforcement policy. Copies of this policy should be provided to all inspectors and relevant law-enforcement officials in advance and also be made available to shipowners and seafarers and to the public.[60]

8.13 Another task to be undertaken by the competent authority is with regard to on board complaint procedures, which must be established to enable the receipt of confidential information concerning possible breaches of the Convention presented by seafarers directly or by their representatives, and to permit inspectors to investigate such matters promptly (see below), including (a) enabling masters, seafarers or their representatives to request an inspection when they consider it necessary; and, (b) supplying technical information and advice to shipowners and seafarers and organizations concerned in respect of the most effective means of complying with the requirements of the Convention, and of bringing about a continual improvement in seafarers' on board conditions.[61]

8.14 Moreover, the competent authority should maintain records of the inspections of conditions for seafarers on ships under its jurisdiction, and based on these records, publish an annual report on inspection activities within a reasonable time, not exceeding six months, after the end of the year.[62] In case of investigation following a major incident, the competent authority must demand that the relevant report be submitted as soon as practicable, but not later than one month after the conclusion

57. Standard A5.1.4(6). Here the insinuation to external influences must be construed as also involving 'commercial pressures'. See the comment made by the Seafarer's Vice-Chairperson during the deliberations of the First Technical Preparatory Committee, in [PTMC/2004/3-1] *Report of Committee 1 Preparatory Technical Maritime Conference* (Geneva, 13-24 September 2004), 24 §180.
58. Guideline B5.1.4(4)(a)-(c).
59. Guideline B5.1.4(1).
60. Guideline B5.1.4(2).
61. Guideline B5.1.4(3).
62. Standard A5.1.4(13).

of the investigation.[63] Such instances may arise in incidents resulting in any serious marine casualty leading to injury or loss of life, for which the competent authority must hold an official inquiry, of which the report should normally be made public.[64] The annual report should normally include (a) a list of laws and regulations in force relevant to seafarers' working and living conditions and any amendments which have come into effect during the year; (b) details of the organization of the system of inspection; (c) statistics of ships or other premises subject to inspection and of ships and other premises actually inspected; (d) statistics on all seafarers subject to its national laws and regulations; (e) statistics and information on violations of legislation, penalties imposed and cases of detention of ships; and (f) statistics on reported occupational injuries and diseases affecting seafarers.[65]

AUTHORIZATION OF RECOGNIZED ORGANIZATIONS

8.15 As mentioned above, the flag State may authorize through its competent authority private organizations which it recognizes to carry out inspections on its behalf. The organization seeking such recognition must demonstrate the technical, administrative and managerial competence, and capacity to ensure the provision of timely service of satisfactory quality.[66] For the purpose of recognition, the competent authority should review most importantly the competency and independence of the organization concerned and determine whether the organization demonstrates this to the extent necessary to carry out such activities.[67]

8.16 The competency and independence of the organization is to be assessed on the basis of a number of criteria which relate generally to considerations over their expertise, efficiency and objectivity. First, the organization must demonstrate that it has the necessary expertise in the relevant aspects of the Convention and an appropriate knowledge of ship operations, including, the minimum requirements for seafarers to work on a ship, conditions of employment, accommodation, recreational facilities, food and catering, accident prevention, health protection, medical care, welfare and social security protection.[68] Secondly, that it has the ability to maintain and update the expertise of its personnel.[69] Thirdly, that it has the necessary knowledge of the requirements of the Convention, as well as of applicable national laws and regulations and relevant international instruments.[70] Finally, that it is of the appropriate size, structure, experience and capability commensurate with the type and degree of authorization.[71] In addition to the above criteria, the competent authority in evaluating the capability of an organization may also determine whether the organization has (a) adequate technical, managerial and support staff; (b) sufficient qualified professional staff to provide the required service, representing an adequate geo-

63. Standard A5.1.4(14).
64. Regulation 5.1.6(1).
65. Guideline B5.1.4(10).
66. Guideline B5.1.2(1).
67. Standard A5.1.2(1).
68. Standard A5.1.2(1)(a).
69. Standard A5.1.2(1)(b).
70. Standard A5.1.2(1)(c).
71. Standard A5.1.2(1)(d).

graphical coverage; and, (c) proven ability to provide a timely service of satisfactory quality.[72] It goes without saying that, in view of the above requirements, organizations seeking to be authorized by the competent authority ought to develop and put in place a corresponding system for qualification of staff employed by them as inspectors to ensure the timely updating of their knowledge and expertise, and to maintain records of the services performed by them such that they are able to demonstrate achievement of the required standards in the items covered by the services.[73]

8.17 The authorization of organizations is concluded by means of a written agreement with the competent authority, which essentially recognizes the delegation of specific powers to such entities by setting out clearly its *modus operandi*. This written agreement will normally provide *inter alia* for (i) the scope of the powers being delegated to the organization; (ii) the purpose and the general conditions for their application; (iii) the legal basis of the functions, and the execution thereof, being authorized; (iv) the reporting requirements of the organization back to the competent authority; and finally, (v) the competent authority's supervision of activities delegated to the recognized organization.[74] Qualified organizations that are granted authorization to undertake inspections on behalf of the competent authority should, as a minimum, be empowered by the latter to require the rectification of identified deficiencies in seafarers' working and living conditions and to carry out inspections in this regard at the request of port States.[75]

THE MARITIME LABOUR CERTIFICATE AND DECLARATION OF MARITIME LABOUR COMPLIANCE

8.18 The Convention requires the flag State to make sure that, at all times, ships under its flag carry on board and maintain (a) a DMLC stating the national requirements implementing the Convention for the working and living conditions for seafarers, which sets out the measures adopted by the shipowner to ensure compliance with the requirements on the ship or ships concerned,[76] and, (b) a valid maritime labour certificate, certifying that the working and living conditions of seafarers on the ship have been inspected and meet the requirements provided for in the national legislation or other measures implementing the applicable of provisions the Convention.[77]

72. Guideline B5.1.2(2).
73. Guideline B5.1.2(4) and (5).
74. Guideline B5.1.2(3)(a)-(h).
75. Standard A5.1.2(2). See below at 167, 8.36.
76. Regulation 5.1.3(4).
77. Regulation 5.1.3(3).

8.19 The ships[78] in need of certification are those of 500 gross tonnage[79] or over, which engage in international voyages. Based on the definition that is provided in the *International Convention for the Safety of Life at Sea (SOLAS) 1974*, this means a voyage from a country to a port outside such a country, or flying the flag of a Member and operating from a port, or between ports, in another country.[80] In relation to the maritime labour certificate, the competent authority of the flag State, or ROs duly authorized for this purpose, must ascertain through inspection that ships under its flag meet or continue to meet the standards of the MLC, and must respectively issue or renew a maritime labour certificate to that effect, which subsequently is maintained on a publicly available record.[81]

8.20 In particular, the working and living conditions of seafarers that must be inspected and approved by the flag State before certifying a ship include (i) minimum age; (ii) medical certification; (iii) qualifications of seafarers; (iii) seafarers' employment agreements; (iv) use of any licensed or certified or regulated private recruitment and placement service; (v) hours of work or rest; (vi) manning levels for the ship; (vii) accommodation; (viii) on board recreational facilities; (ix) food and catering; (x) health and safety and accident prevention; (xi) on board medical care; (xii) on board complaint procedures; and, (xiii) payment of wages.[82]

78. According to Article II(1)(i), 'ship' for the purpose of the Convention means a ship other than one that navigates exclusively in inland waters or waters within, or closely adjacent to, sheltered waters or areas where port regulations apply. Pursuant to Article II(4), the Convention applies to all ships ordinarily engaged in commercial activities, whether publicly or privately owned; except if expressly provided otherwise. The Convention does not apply to warships, or naval auxiliaries, due to enjoying State immunity in accordance with international customary and conventional law. It does not either apply to ships engaged in fishing, or in similar pursuits and ships of traditional build such as dhows and junks. In case of doubt regarding the application of the Convention to a ship or particular category of ships, the question – according to Article II(5) – should be dealt with by the competent authority in each Member after consultation with the shipowners' and seafarers' organizations concerned. Article II(6) further provides that the competent authority should determine the reasonableness or practicality for the application at the present time of certain details of the Code referred to in Article VI(1) to a ship or particular categories of ships flying the flag of the Member, the relevant provisions of the Code will not apply to the extent that the subject matter is dealt with differently by national laws or regulations or collective bargaining agreements or other measures. Such a determination may only be made in consultation with the shipowners' and seafarers' organizations concerned and may only be made with respect to ships of less than 200 gross tonnage not engaged in international voyages. Finally, Article VI(7), requires Members that any such determinations be communicated to the ILO Director-General, who should subsequently notify the Members of the Organization.

79. Pursuant to Article II(1)(c), gross tonnage here is to be calculated in accordance with the tonnage measurement regulations contained in Annex I to the *International Convention on Tonnage Measurement of Ships 1969*; entered into force on 18 July 1982 [1291UNTS3], or any successor Convention; for ships covered by the tonnage measurement interim scheme adopted by the IMO, the gross tonnage is that which is included in the 'Remarks' column of the 'International Tonnage Certificate'.

80. Regulation 5.1.3(1); this however, pursuant to Regulation 5.1.3(2), may also apply, at the request of the shipowner to the Member concerned, to any ship that flies the flag of a Member but is not covered by the scope of Regulation 5.1.3(1).

81. Regulation 5.1.3(6).

82. Standard A5.1.3(1) and Appendix A5-I.

DURATION AND RENEWAL OF THE MARITIME LABOUR CERTIFICATE

8.21 Maritime labour certificates are to be issued for a period which must not exceed five years.[83] Given that this constitutes a relatively long period, the validity of the certificate is made subject to one – or possibly more than one, depending on the circumstances – intermediate inspection to ensure the continuing compliance of the ship with the national requirements implementing the Convention. The number of the required intermediate inspections and the date for which they must be undertaken are not specified by the Convention, but are left to the discretion of the competent authority. That being said, the Code envisages that if only one intermediate inspection is carried out and the period of validity of the certificate is five years, this should take place between the second and third anniversary dates of the certificate. 'Anniversary date' is to be considered the day and month of each year that will correspond to the date of expiry of the maritime labour certificate.[84] In cases where the renewal inspection has been completed *within* three months before the expiry of the existing maritime labour certificate, the new maritime labour certificate will be valid from the date of completion of the renewal inspection for a period not exceeding five years from the date of expiry of the existing certificate[85]; for example where the certificate expires on 1 October 2013, and the renewal inspection is completed on 15 July 2013 (i.e., within three months before the expiry of the existing maritime labour certificate), the new certificate will be valid until 30 September 2018. The formula to calculate the legal validity date accordingly is: 5 years (-1day) plus 3 months. When the renewal inspection is completed *more than* three months before the expiry date of the existing maritime labour certificate, the new maritime labour certificate will be valid for a period not exceeding five years starting from the date of completion of the renewal inspection[86]; for example, where the certificate expires on 1 October 2013 but the renewal inspection is completed on 15 May 2013 (i.e., more than three months before the expiry of the existing maritime labour certificate) the new certificate will be valid until 14 May 2018.

INTERIM CERTIFICATION

8.22 Apart from reasons that relate to the endorsement of the continuous compliance of the ship through the period of five years, a maritime labour certificate may also be issued on an interim basis when there is a change in the details of the ship, such as when a ship changes flag or when a shipowner assumes responsibility for the operation of a new ship.[87] Regardless of the reasons necessitating the issuance of an interim certificate, the scope and depth of the interim inspection should be equal

83. *Idem*.
84. Standard A5.1.3(2).
85. Standard A5.1.3(3).
86. Standard A5.1.3(4).
87. Standard A5.1.3(5)(b) and (c). However, according to Standard A5.1.3(8), a DMLC need not be issued for the period of validity of the interim certificate.

to that under an inspection for renewal of the certificate,[88] but its validity may not exceed a period of more than six months,[89] and no further interim certificate may be issued following the elapse of that period.[90] For that reason, a full inspection which is required pursuant to the Convention must be carried out prior to expiry of the interim certificate in order to enable the competent authority to issue the full-term maritime labour certificate on time.[91] An interim maritime labour certificate may only be issued following verification that the ship has been inspected, 'as far as reasonable and practicable', for all the matters mentioned above, taking into account (a) that the shipowner has demonstrated to the competent authority or RO that the ship has adequate procedures to comply with the Convention[92]; (b) that the master is familiar with the requirements of the Convention and the responsibilities for implementation; and, (c) that the relevant information has been submitted to the competent authority or ROs in order to produce a DMLC.[93]

FORM AND CONTENT

8.23 The maritime labour certificate, the interim maritime labour certificate and the DMLC should be drawn up in a form that corresponds to the international model that is provided in the Code.[94] Notwithstanding that the Code details the various requirements to be included in the certificate and the declaration, and moreover compiles in a list all the matters that must be inspected and approved,[95] it goes further to describe in great detail the appropriate standards of the instruments for the sake of international administrative uniformity, especially with regard to the DMLC, which should be drafted in clear terms designed to help all persons concerned, such as flag State inspectors, authorized officers in port States (PSCOs) and seafarers, to check that the requirements are being properly implemented.[96] More specifically, it provides that the DMLC must be attached to the maritime labour certificate and consist of two parts. The first part, which is drawn up by the competent authority, should:[97]

(i) provide a list containing all the matters to be inspected in accordance with the Convention, as presented above;
(ii) identify the national requirements embodying the relevant provisions of the Convention by providing a reference to the relevant national legal provisions as well as, to the extent necessary, concise information on the main content of the national requirements. The statement of national requirements here

88. Standard A5.1.3(2).
89. Standard A5.1.3(6).
90. Standard A5.1.3(8).
91. *Idem*.
92. See MLC *Commentary*, 50.
93. Standard A5.1.3(7).
94. Regulation 5.1.3(5), as specified in Standard A5.1.3(9); this form can been found in Appendix A5-II of the Code.
95. Regulation 5.1.3(7).
96. Guideline B5.1.3(4); an example of the kind of information that may be contained in the DMLC is given in Appendix B5-I.
97. Standard A5.1.3(10)(a).

should include, or be accompanied by, references to the legislative provisions relating to seafarers' working and living conditions in each of these matters. However, where national legislation precisely follows the requirements stated in the Convention, a reference may be all that is necessary[98];

(iii) refer to ship-type specific requirements under national legislation;

(iv) record any substantially equivalent provisions adopted pursuant to Article VI(3); in this case, such provision shall be identified and a concise explanation be provided[99];

(v) clearly indicate any exemption granted by the competent authority as provided in Title 3.

8.24 The second part, which is drawn up by the shipowner, should identify the measures adopted to ensure on-going compliance with the national requirements between inspections and the measures proposed to ensure that there is continuous improvement.[100] In particular, it should indicate the occasions on which on-going compliance with particular national requirements will be verified, the persons responsible for verification, the records to be taken, as well as the procedures to be followed where non-compliance is noted.[101] In addition, it should include general international requirements for the shipowner and master to keep themselves informed of the latest advances in technology and scientific findings concerning workplace design, taking into account the inherent dangers of seafarers' work, and to inform the seafarers' representatives accordingly, thereby guaranteeing a better level of protection of the seafarers' working and living conditions on board.[102] Accordingly, this part may take a number of forms, as it could make reference to other more comprehensive documentation covering policies and procedures relating to other aspects of the maritime sector, for example, documents required by the International Management Code for the Safe Operation of Ships and for Pollution Prevention (ISM Code), 1993, as amended, or the information required by Regulation 5, Chapter XI-1 of SOLAS, relating to the ship's Continuous Synopsis Record.[103]

8.25 Valid originals of the maritime labour certificate and DMLC must always be accompanied by an English-language translation where these are not in English, and these documents must be carried on board, with a copy thereof being posted in a conspicuous place on the ship which is accessible to all seafarers. A copy of each must also be made available, upon request, to seafarers, flag State inspectors, PSCOs, and shipowners' and seafarers' representatives.[104] It must be noted that the requirement for an English-language translation does not apply in cases where a ship is not engaged in an international voyage, as defined above.[105]

98. Guideline B5.1.3(1).
99. *Idem*.
100. Standard A5.1.3(10)(b).
101. Guideline B5.1.3(2).
102. Guideline B5.1.3(3).
103. Guideline B5.1.3(2).
104. Standard A5.1.3(12).
105. Standard A5.1.3(13). See above at 8.19.

CEASE AND WITHDRAWAL OF CERTIFICATES

8.26 Given that a certificate is issued for a period that cannot exceed five years, it follows that certificates immediately cease to be valid after the expiration of the prescribed period. Such instances may arise where the relevant inspections for a certificate's renewal have not been completed within the said period, or a certificate has not been endorsed during that period by means of an intermediate inspection as provided for in the Convention. Apart from the above reasons relating to the temporal validity of the certificate, a certificate may also be rendered *de facto* invalid when the shipowner ceases to assume the responsibility for the operation of the ship; when substantial changes have been made to the structure or equipment that are covered in Title 3 of the Convention; or, upon the change of her flag.[106] However, in the latter case, and where both States concerned have ratified the Convention, the Member whose flag the ship was formerly entitled to fly should, as soon as possible, transmit to the competent authority of the other Member copies of the maritime labour certificate and the DMLC carried by the ship before the change of flag and, if applicable, copies of the relevant inspection reports if the competent authority so requests within three months after the change of flag has taken place.[107] In such cases, a new certificate must only be issued when the competent authority or RO is fully satisfied that the ship is in compliance with the applicable requirements.[108] A maritime labour certificate that has not expired should be withdrawn by the competent authority or RO if there is 'evidence' that the ship concerned does not comply with the requirements of the Convention and any required corrective action has not been taken.[109] Nevertheless, when considering whether a maritime labour certificate should be withdrawn, the competent authority or RO should take into account the seriousness or the frequency of the deficiencies.[110]

INSPECTIONS

8.27 The enforcement of the Convention's provisions by the flag State is to be assured mainly through the establishment of an effective and coordinated system, as described above, which will be in a position to undertake regular inspections, provide efficient and detailed monitoring functions, and give effect to other control measures that may be required by the competent authority, in order to verify that its ships comply with the requirements of the Convention as implemented in the national laws and regulations.[111] More specifically, each Member needs to develop and maintain

106. Standard A5.1.3(14).
107. Guideline B5.1.3(6).
108. Standard A5.1.3(15).
109. Standard A5.1.3(16); the explicit reference to the existence of, what can be safely inferred in the light of the provisions rationale to constitute 'sufficient evidence' is very important, as noted by the delegation of South Africa, as the withdrawal of a maritime labour certificate will be extremely costly for a detained vessel, and it was inserted in the wording of the final text of the Convention with a view to avoiding a vessel being unduly detained on the basis of a malicious complaint; MLC *Commentary*, 52.
110. Standard A5.1.3(17).
111. Regulation 5.1.4(1).

a system of regular, i.e., at intervals not exceeding in any case a three year period,[112] inspections of the conditions for seafarers on ships that fly its flag. These should verify that the measures relating to working and living conditions as set out in the DMLC, where applicable, are being followed, and that the requirements of the Convention are met.[113]

8.28 Apart from the regular inspections above, the flag State must also take the necessary steps to investigate any complaints – which it considers to not be manifestly unfounded – or evidence received in relation to ships under its flag that do not conform to the requirements of the Convention or where there are serious deficiencies in the implementation of the measures set out in the DMLC.[114] Such complaints may be received from port State Members,[115] or through the employment of on board[116] and onshore complaint procedures,[117] or possibly by labour-supplying State Members.[118] When acting on such complaints and evidence, the flag State must ensure that action is taken to remedy any deficiencies found.[119]

8.29 In either case, when an inspection is conducted or when corrective measures are taken, all reasonable efforts should be made to avoid a ship being unreasonably detained or delayed.[120] Where it is established, any loss or damage suffered as a result of the wrongful exercise of the inspectors' powers must be compensated in accordance with national laws and regulations.[121] Here, the burden of proof is on the complainant. Equally, adequate penalties and other corrective measures for breaches of the requirements of the Convention and for obstructing inspectors in the performance of their duties should be provided for and effectively enforced.[122]

8.30 Inspections are undertaken by persons who are appointed by the competent authority, and who are fully trained to secure the efficient discharge of their duties.[123] Inspectors are issued with clear guidelines regarding the tasks to be performed and they need to be provided with proper credentials under the national law which set out the actions that are being empowered to undertake.[124] However, where the competent authority has authorized ROs for that role, the flag State should equally require their personnel carrying out the inspection to be equally qualified to undertake these responsibilities and must provide them with the necessary legal authority to perform their duties.[125] The Convention does not list the qualifications of inspectors, apart from a broad reference that such persons should have adequate training in order to perform their duties under the Convention, because these are subject to the conditions for recruitment of the public service which may be prescribed only by

112. Regulation 5.1.4(4).
113. Standard A5.1.4(1).
114. Standard A5.1.4(5).
115. See below at 169, 8.40.
116. See below at 171.
117. See below at 173.
118. See below at 174.
119. Standard A5.1.4(5).
120. Standard A5.1.4(15).
121. Standard A5.1.4(16).
122. Standard A5.1.4(17).
123. Standard A5.1.4(2), in conjunction with Guideline B5.1.4(4).
124. Regulation 5.1.4(7); and Guideline B5.1.4(8) *chapeau*.
125. Standard A5.1.4(2).

national laws and regulations.[126] However, in its guidelines, the Convention provides that, where possible, inspectors should have a maritime education or experience as a seafarer, and adequate knowledge of seafarers' working and living conditions and of the English language.[127]

8.31 The main role of inspectors is to carry out any examination, test or inquiry which they may consider necessary in order to satisfy themselves that the standards are being strictly observed[128] on board ships flying the Member's flag.[129] Where inspectors are unable to find any national provisions or other measures that cover the Convention's requirements, they must request clarification from the flag State's competent authority.[130] During the course of inspections, inspectors must have a clear understanding of the circumstances in which it should be carried out, and particularly to be cognizant of its scope in the various circumstances referred to, and of the general method for its conduct.[131] Therefore, inspectors should not be entrusted with duties which might, because of their number or nature, interfere with effective inspection or prejudice in any way their authority or impartiality in their relations with shipowners, seafarers or other interested parties.[132] In relation to the latter stipulation particularly, the Convention states that inspectors should be prohibited from having any direct or indirect interest in any operation which they are called upon to inspect[133]; and they must not reveal, even after leaving their service, any commercial secrets or confidential working processes or information of a personal nature, which may come to their knowledge in the course of their duties.[134]

8.32 The specific powers of inspectors are to be provided in their credentials and according to the Convention's *de minimis* enumeration. These should include (a) to board ships freely and without previous notice; however, when commencing the ship inspection, inspectors should provide notification of their presence to the master or person in charge and, where appropriate, to the seafarers or their representatives[135]; (b) to question the master, seafarer or any other person, including the shipowner or the shipowner's representative, on any matter concerning the application of the requirements under laws and regulations, in the presence of any witness that the person may have requested; (c) to require the production of any books, log-books, registers, certificates or other documents or information directly related to matters subject to inspection, in order to verify compliance with the national laws and regulations implementing the Convention; (d) to enforce the posting of notices required under the national laws and regulations implementing the Convention; (e) to take or remove, for the purpose of analysis, samples of products, cargo, drinking water, provisions, materials and substances used or handled; however, when such a sample (of which the quantity should be properly recorded by the inspector) is being taken

126. Guideline B5.1.4(5).
127. *Idem*.
128. Regulation 5.1.4(7)(b).
129. Regulation 5.1.4(7)(a).
130. *2009 Guidelines for flag State inspections*, 36.
131. Guideline B5.1.4(7).
132. Regulation 5.1.4(11).
133. Regulation 5.1.4(11)(a).
134. Regulation 5.1.4(11)(b).
135. Guideline B5.1.4(8)(a).

or removed, the shipowner or the shipowner's representative, and, where appropriate, a seafarer, should be notified or should be present at the time that this is taken or removed[136]; (f) following an inspection, to bring immediately to the attention of the shipowner, the operator of the ship or the master, deficiencies which may affect the health and safety of those on board ship; (g) to alert the competent authority and, if applicable, the RO to any deficiency or abuse not specifically covered by existing laws or regulations and submit proposals to them for the improvement of the laws or regulations; and, (h) to notify the competent authority of any occupational injuries or diseases affecting seafarers in such cases and in such manner as may be prescribed by laws and regulations.

8.33 On the occasion that any deficiency is found, the inspector is empowered to require its rectification and, where there are grounds to believe that the occurrence of one or more deficiencies either constitute a 'serious breach'[137] of the requirements of the Convention or represent a significant danger to seafarers' safety, health or security, to prohibit, after having exercised 'professional judgment',[138] a ship from leaving port until necessary actions are taken.[139] However, where an inspection is undertaken by an authorized organization, '[i]t is important to be remembered that the flag State remains fully responsible for the inspection and certification of working and living conditions of seafarers on ships that fly its flag'.[140] However, any action of detention is made subject to any right of appeal to a judicial or administrative authority.[141] Nevertheless, inspectors retain discretion to give advice instead of instituting or recommending proceedings when there is no clear breach of the requirements of the Convention that endangers the safety, health or security of the seafarers concerned and where there is no prior history of similar breaches.[142] Where inspectors receive any grievance or complaint alleging a danger or deficiency in relation to seafarers' working and living conditions or a violation of laws and regulations, they must treat its source as confidential and give no intimation to the shipowner, the shipowner's representative or the operator of the ship that an inspection was made as a consequence thereof.[143] The findings of the inspections are then submitted in a report to the competent authority.

8.34 A copy of the report in English, or in the working language of the ship, should be furnished to the master of the ship and another copy be posted on the ship's notice board. Relevant to the above considerations over the form and content of the certificate and declaration is the standard manner in which inspections are to be documented. In particular, the results of all subsequent inspections or other verifications carried out with respect to the ship concerned. For reasons relating also to the efficient monitoring of the Convention's enforcement, a record of such results along with documentation of any significant deficiencies found, together with accurate dates and the remedial actions taken must be maintained on board. This record,

136. Guideline B5.1.4(9).
137. Regarding the concept and determination of serious breaches of the Convention see below at 170, n 173.
138. *2009 Guidelines for flag State inspections,* 73, 76.
139. Regulation 5.1.4(7)(c).
140. *2009 Guidelines for flag State inspections,* 73.
141. Regulation 5.1.4(8).
142. Regulation 5.1.4(9).
143. Regulation 5.1.4(10).

accompanied by an English-language translation where it is not in English and the ship engages in international voyages, should in accordance with the applicable national legislation be inscribed upon, or appended to, the DMLC or made available in some other way to seafarers, flag State inspectors, PSCOs, and shipowners' and seafarers' representatives.[144]

PORT STATE ENFORCEMENT

8.35 The second aspect in the enforcement of the Convention is reflected in the port State responsibilities under Regulation 5.2 which 'enables' Members to implement its responsibilities regarding international cooperation in the implementation and enforcement of the maritime labour standards, including seafarers' rights, on foreign ships. Port State inspections are to be undertaken not only pursuant to the relevant mandatory provisions of the Code, as discussed below, but they must also conform to general international law and other applicable international arrangements governing port State control inspections in the Member State.[145] The language employed by the Convention does not compel Members to undertake continuous or otherwise regular or systematic port inspections. It must be seen as providing the opportunity to port States with the necessary national inspection capacity and monitoring system to supplement flag States' inspections. This will ensure that the working and living conditions for seafarers on ships entering their port meet the requirements of the Convention,[146] and also to protect, to the extent discussed earlier, shipowners that conform to its standards against unfair competition from substandard ships.[147] Overall, although the general obligation is mandatory, it has been recognized that the decision when and how to cooperate with other Members is best left to the discretion of each State.[148]

8.36 On the basis of the Convention, inspections may be carried out by the port State authority either on its own initiative,[149] or upon receipt of a complaint.[150] Nevertheless, as elsewhere has been rightly noted, port State enforcement constitutes 'a key part of the international regulatory system for ensuring on-going compliance by ships while they are on international voyages and is an important example of international cooperation'.[151] In the same spirit and to this end, the Convention requires States to develop, through their respective competent authority, and have in place a policy to enable PSCOs to conduct port inspections if necessary, for example where the conditions on board are clearly hazardous to the safety, health or security of seafarers, to ensure consistency and to guide otherwise related enforcement activities

144. Regulation 5.1.4(12), as further specified in Standard A5.1.3(11).
145. Article V(4), in conjunction with Regulation 5.2.1(3).
146. Regulation 5.2.1(4). See MLC *Commentary*, 54, where is stated that 'it is not obligatory for a Member to inspect the ships of another State when they are in its ports (port state control)'.
147. ILO, '*ILO to consider new guidelines on ship inspection under 2006 Maritime Labour Convention*' Press release of 15 September 2008 [ILO/08/037].
148. MLC *Commentary*, 14.
149. International Labour Office, *Guidelines for port State control officers carrying out inspections under the Maritime Labour Convention, 2006* (ILO 2009), 22, ('*2009 Guidelines for port State control officers*').
150. Regulation 5.2.2.
151. *Guidance on implementing the Maritime Labour Convention, 2006 – Model national provisions,* 122.

with regard to the implementation of its provisions.[152] Information about such a system, including the method used for assessing its effectiveness, should be included in the Member's reports pursuant to Article 22 of the Constitution,[153] and copies of the applicable inspection policy be made available to the public, shipowners and seafarers.[154]

8.37 The Convention provides that every foreign ship calling, in the normal course of its business or for operational reasons, in the port of a Member 'may be' the subject of inspection by PSCOs[155] for the purpose of reviewing and determining compliance with its provisions relating to the working and living conditions of seafarers on the ship.[156] However, port inspections have a narrow scope in being limited to a review of the 'validity and completeness' of the maritime labour certificate and the DMLC,[157] as port States will accept them as constituting '*prima facie*' evidence of the ship's compliance with the requirements of the Convention.[158] This is with the exception only of the explicit circumstances as specified in the Code and discussed shortly below.[159] Nonetheless, an inspection must be confined in verifying that the mandatory relevant requirements set out in the Articles and Regulations of the Convention, and in Part A only of the Code, are being complied with. This limitation reflects the anticipation that it is not the function of PSCOs to enforce any national requirements that go beyond the requirements set out in the Convention.[160]

8.38 As mentioned above, the port State authority may, or must, in the circumstances referred to above, carry out more detailed inspections to ascertain the working and living conditions on board the ship, on one of the four following grounds. First, where its PSCOs find that the required documents are not produced or maintained, or are 'falsely maintained',[161] or that the documents produced do not contain the information required by the Convention or are otherwise invalid.[162] Secondly, where there are 'reasonable grounds' to believe that the ship has changed flag for the purpose of avoiding compliance with the Convention.[163] Thirdly, if there

152. Guideline B5.2.1(1).
153. Regulation 5.2.1(5). See above.
154. Guideline B5.2.1(1).
155. Given that the nomenclature of such officers differs considerably among the various national orders, and in some cases the person carrying out a port State inspection under the Convention may not necessarily be the same person as that currently carrying out inspections under other existing international or regional port State control arrangements, the term here is employed to mean those persons who are authorized, by the competent authority in the port State, to carry out these inspections and they must show the necessary official identification to ships' masters and to seafarers; see *2009 Guidelines for port State control officers*, 15.
156. Regulation 5.2.1(1).
157. *2009 Guidelines for port State control officers,* 26–29.
158. Regulation 5.2.1(2). The legal term of *prima facie* should be construed in the context of the Convention and for the purpose of inspection as 'evidence which is sufficient to establish a fact in the absence of any evidence to the contrary, but is not conclusive'; *see*, MLC *Commentary*, 54.
159. Regulation 5.2.1(2).
160. Regulation 5.2.1(3). See *2009 Guidelines for port State control officers,* 39 §88.
161. Such inference may *inter alia* be based on results obtained through initial investigation if they seriously contradict the information provided in the ship's documentation, and therefore may constitute evidence that warrant a more detailed inspection; see *2009 Guidelines for port State control officers*, 35.
162. Standard A5.2.1(1)(a).
163. Standard A5.2.1(1)(c). This particular aspect in the language of the Convention's text attracted the apposite remarks of the Russian Federation which viewed '[t]hat the various references to 'grounds', 'clear grounds' and 'reasonable grounds' had to be brought into line'; see 2006 *Report of the Committee of the Whole*, 98 §842.

are 'clear grounds' for believing that the working and living conditions on the ship do not conform to the requirements of the Convention; in other words 'where a ship is evidently substandard'.[164] Such grounds may be revealed either from the ship's documentation, or from other elements which may be noted in several other contexts, including during the preparations for inspections, the general impressions or even through visual observations.[165]

8.39 In such circumstances, the port State must undertake a detailed inspection where the working and living conditions believed or alleged to be defective could constitute a clear hazard to the safety, health or security of seafarers or where the PSCO has grounds to believe that any deficiencies constitute a serious breach of the requirements of the Convention.[166] If a more detailed inspection is conducted due to one or more of the grounds above, this should in principle cover the matters listed in Appendix A5-III.[167] Finally, a more detailed inspection may also be carried out when there is a complaint alleging that specific working and living conditions on the ship do not conform to the requirements of the Convention.[168]

8.40 Subsequently, where a detailed inspection verifies that the working and living conditions on the ship are not in conformity with the requirements of the Convention, PSCOs must immediately bring the deficiencies to the attention of the master of the ship with required deadlines for their rectification.[169] Additionally, PSCOs may notify a representative of the flag State, or provide the competent authorities of the next port of call with the relevant information.[170] Furthermore, the port State carrying out the inspection should have the right to transmit a copy of the PSCO's report, which must be accompanied by any reply received from the competent authorities of the flag State within the prescribed deadline, to the ILO Director-General with a view to such action as may be considered appropriate and expedient, in order to ensure that a record is kept of such information and that it is brought to the attention of parties which might be interested in availing themselves of relevant recourse procedures.[171] In the event that such deficiencies are either considered by PSCOs to be significant or if they relate to a complaint, the officer must bring the deficiencies also to the attention of the appropriate seafarers' and shipowners' organizations in the port of the Member State in which the inspection is carried out.[172]

The employment of the term 'reasonable grounds', in contradistinction to the use of 'clear grounds' for believing that the working and living conditions on the ship do not conform to the requirements of the Convention (see below), suggests that a wider margin of appreciation is left to the authorized officer to inspect a ship where it is believed that the purpose of such a change of flag was to avoid compliance. See also the suggestive comments that are with regard to such differential language provided in the *2009 Guidelines for port State control officers*, 32.

164. *2009 Guidelines for port State control officers*, 35 §87. Such grounds may be apparent to the authorized officer from the documentation produced or from his or her professional observations when boarding the ship, or they may be brought to light when the inspector is considering a complaint; *see*, MLC *Commentary*, 55.

165. *2009 Guidelines for port State control officers*, 29–31.

166. Standard A5.2.1(1)(b).

167. Standard A5.2.1(2). See above at 159, 8.20.

168. Standard A5.2.1(1)(d).

169. Standard A5.2.1(4).

170. Standard A5.2.1(4)(a) and (b).

171. Standard A5.2.1(5).

172. Standard A5.2.1(4).

8.41 It must be noted, however, that where an inspection reveals a non-conformity exceeding what can ordinarily be perceived as being a mere deficiency, i.e., where either the conditions on board are clearly hazardous to the safety or health or security of seafarers, or the non-conformity constitutes a serious, or repeated, breach of the requirements of the Convention,[173] PSCOs in exercising 'professional judgement'[174] should take steps to ensure that the ship does not proceed to sea until any non-conformities have been rectified, or until the officer has accepted a plan of action for their rectification which will be implemented in an expeditious manner.[175] If the ship is prevented from sailing, PSCOs must immediately notify the flag State accordingly and invite a representative of that State to be present; if possible, requesting the flag State to reply within a prescribed deadline.[176]

8.42 Likewise, the shipowners' and seafarers' organizations in the port State in which the inspection was carried out, may be also informed. To avoid unnecessary or unreasonable interferences with the navigation and commercial activity of ships, the Convention requires Member States to make all possible efforts in order to avoid unduly delaying or detaining a ship,[177] and to ensure that their PSCOs are given guidance on the kinds of circumstances justifying such drastic action.[178] To this end, Member States should co-operate with each other to the maximum extent possible with a view to adopting internationally agreed guidelines on inspection policies, and especially those relating to the circumstances warranting the detention of a ship.[179] For that reason, if a ship is found to be unduly detained or delayed, compensation must be paid for any loss or damage suffered, with the burden of proof in each case being on the complainant.[180]

SELF-ENFORCEMENT PROCEDURES

8.43 In parallel with the established flag State and port State procedures which are focused mainly on 'government based inspection(s)',[181] the Convention introduces a novel set of on board and onshore procedures which are based on the concept of a continuity of 'compliance awareness', thereby giving seafarers a rather important

173. On this particular aspect, it must be noted that the Convention draws the attention of port States when developing a policy relating to the circumstances warranting a detention of a ship, to construe the seriousness of a non-conformity in relation to the nature of the deficiency, rather than the repetition of one or more defects, or several instances of defects, which do not constitute at the time of inspection a serious breach. Such a margin of appreciation nevertheless is not to be employed in cases of a violation of fundamental rights and principles or seafarers' employment and social rights under Articles III and IV. This is clearly illustrated in the examples employed by the Convention which views, for instance, that the employment of a person who is under the minimum age of 16 should be considered as a serious breach even if there is only one such person on board, but contradistinctively several instances of defects relating to accommodation or food and catering, which do not threaten safety or health, might be needed before they should be considered as constituting a serious breach; *see*, Guideline B5.2.1(2) and *2009 Guidelines for port State control officers*, 67–70 §§98–100. For a comprehensive list detailing the factors that could lead to the detention of a ship on grounds of serious breach with the Convention see the [PTMC 2005/6] *Seafarers' Group Paper on Title 5 of CMLC*, 10–11.

174. *2009 Guidelines for port State control officers*, 65 §91.

175. Standard A5.2.1(6).

176. Standard A5.2.1(6).

177. Standard A5.2.1(8).

178. Standard A5.2.1(7); for instance, of the kind indicated in Part B of the Code.

179. Guideline B5.2.1(3).

180. Standard A5.2.1(8).

181. *Guidance on implementing the Maritime Labour Convention, 2006 – Model national provisions,* 116.

role in its enforcement.[182] These innovative procedures, of which unsurprisingly the basic underlying concept was the subject of some preliminary controversy,[183] allow for the 'direct identification' of existing deficiencies on board[184] to enable their timely rectification, and constitute 'an important source of information'[185] for the on-going compliance of ships with the provisions of the Convention.

On board complaint procedures

8.44 Along with the regular inspections to be undertaken at the intervals discussed above, seafarers can also have recourse to on board procedures. The Convention requires each Member State to establish these kind of procedures in its national legislation with regard to ships flying its flag,[186] in order to handle in a fair, effective and expeditious manner, complaints lodged by seafarers or their representative,[187] regarding any matter that is alleged to constitute a breach of the Convention, including seafarers' rights and the requirements of their implementation.[188] The scope of these procedures, therefore, is quite broad inasmuch as it does not cover 'simple grievances' or complaints that are limited to the seafarer's employment agreement, but also relates to concerns over which the ship has no control.[189]

8.45 The purpose of these procedures is to resolve complaints at the lowest level possible, and 'to exhaust such on board remedies',[190] given that, in all cases, seafarers have a right to complain directly to the master before they consider it necessary to pursue a complaint with appropriate external authorities.[191] In any case, recourse to such procedures is without prejudice to a seafarer's right to seek redress through whatever legal means the seafarer considers appropriate.[192]

182. ILO, *Background paper for the Preparatory Tripartite MLC 2006, Committee – Geneva, 20-22 September 2010* [PTMLC/2010] (International Labour Office 2010), 3.

183. [PTMC/2005/1] *Tripartite Intersessional Meeting on the Follow-up of the Preparatory Technical Maritime Conference - Unresolved issues for the draft consolidated maritime labour Convention 2006* (ILO 2005), 22. See however the preliminary discussions framing the 'Joint submission by the Shipowners' and Seafarers' groups concerning provisional grievance procedures', in Tripartite Subgroup of the High-level Tripartite Working Group on Maritime Labour Standards [STWGMLS/2003/8] *Final Report of the Geneva Meeting, 3–7 February 2003* (ILO 2003), 23–25.

184. *Guidance on implementing the Maritime Labour Convention, 2006 – Model national provisions*, 116.

185. *Ibid*, 126.

186. Standard A5.1.5(2).

187. Regulation 5.1.5(1); in accordance with Standard A5.1.5(3), 'the on board complaint procedures shall include the right of the seafarer to be accompanied or represented during the complaints procedure…'

188. Standard A5.1.5(1).

189. [PTMC 2005/6] Annex 1, *Seafarers' Group Paper on Title 5 of CMLC,* 14.

190. For the principle that local remedies should first be exhausted, in this context, see the comment in [PTMC/2005/1] *Tripartite Intersessional Meeting on the Follow-up of the Preparatory Technical Maritime Conference - Unresolved issues for the draft consolidated maritime labour Convention 2006* (ILO 2005), 30.

191. Standard A5.1.5(2).

192. Regulation 5.1.5(3). The rationale underlying this provision as explained by the Workers Vice-Chairperson related 'to the right of seafarers to exercise their rights before the law and to take their complaints ashore, for example to a port state control officer, since some ships never returned to their home port', see 2006 *Report of the Committee of the Whole*, 97 §904. This particular question was proved the 'most sensitive part of the Convention' considering the balanced compromise that had been reached between the groups of workers and employers over the rest of the provisions in Title 5; see 88 §836. It is interesting to note that the Government group had requested that the Tripartite Drafting Group produce a new draft which should on purpose remain silent on, and not explicitly or implicitly refer to, the legal right of the seafarer to pursue a complaint in a court of law. See [PTMC/2005/23] *Tripartite Intersessional Meeting on the Follow-up to the Preparatory Technical Maritime Conference* (Geneva, 21-27 April 2005), 17 §111.

8.46 To this end, the competent authority of the flag State should enter into close consultation with shipowners' and seafarers' organizations to develop a model for fair, expeditious and well-documented on board complaint-handling procedures.[193] Subject to any relevant provisions in the applicable seafarer's collective agreements, these procedures envisage the following steps.[194] Any complaint is to be addressed to the head of the department of the seafarer or to the seafarer's superior officer who will then attempt to resolve the matter within prescribed time limits appropriate to the seriousness of the issues involved. If the head of department or the superior officer, respectively, cannot resolve the complaint to the satisfaction of the seafarer, this should be referred to the master. At all times, seafarers retain their right to be accompanied and to be represented by another seafarer of their choice on board the ship concerned. All complaints, together with any subsequent decisions, must be recorded and a copy be given to the seafarer concerned. However, where a complaint cannot be resolved on board, the matter must be referred ashore to the shipowner, who should be given appropriate time for resolving the matter; and where appropriate, 'in consultation' with the seafarer concerned, or any person that may be appointed as representative.[195] The above procedure is without prejudice to the right of seafarers to file complaints directly with the master, shipowner and competent authorities.

8.47 The availability of these procedures should be communicated to seafarers, and to this end they have to receive a copy of the on board complaint procedures applicable on the ship with their employment agreement.[196] The former document will include the contact information for the competent authority in the flag State and, where different, in the seafarers' country of residence, and the name of a person or persons on board the ship who can, on a confidential basis, provide seafarers with impartial advice on their complaint and otherwise assist them in following the complaint procedures available to them on board the ship.[197] This is an important feature in the meaningful employment of such procedures taking into account that many complaints may relate specifically to those individuals to whom the complaint is to be made or even to the master of the ship.[198] Given the sensitivity of the process, the Convention calls on States to make provision for adequate safeguards in order to prohibit and penalize any kind of 'victimization' of a seafarer for filing a complaint.[199] Victimization, in this context, covers any adverse action taken by any person with respect to a seafarer for lodging a complaint, which is not manifestly vexatious or

193. Guideline B5.1.5(1).
194. Guideline B5.1.5(2).
195. The legal phrase 'in consultation' in this context – being distinguishable from the term 'after consultation' – should be construed as 'the continuous process of consultation with the shipowners' and seafarers' organizations', but as this undertaking does not represent negotiations, it is not necessary to have an agreement with the social partners as long as discussions have been held in good faith and with good will. The term 'in consultation', therefore, does not envisage a final agreement to be reached, but rather implies that the consultation process may continue depending on the circumstances; see High-level Tripartite Working Group on Maritime Labour Standards [TWGMLS/2003/10] *Final Report of the Geneva Meeting, 30 June–4 July 2003* (International Labour Office 2003), 44–45 §§311–315.
196. Standard A5.1.5(4); in accordance with Article II(1)(g), the seafarers' employment agreement includes 'both a contract of employment and articles of agreement'. In addition, Standard A5.1.1(2), obliges each flag State to require all their ships to have a copy of the Convention available on board.
197. Standard A5.1.5(4).
198. Guideline B5.1.5(1)(a).
199. Regulation 5.1.5(2).

maliciously made.[200] In view of avoiding such incidents, the Convention encourages the nomination of a person on board who can advise seafarers on the procedures available to them and, if requested by the complainant seafarer, also attend any meetings or hearings into the subject matter of the complaint.[201]

Onshore complaint procedures

8.48 Port States are similarly required to establish appropriate complaint-handling procedures in order to facilitate a prompt and practical means of redress for seafarers on ships calling at their ports who allege a breach of the requirements of the Convention.[202] In this particular context, a complaint should be construed as any 'information submitted by a seafarer, a professional body, an association, a trade union or, generally, any person with an interest in the safety of the ship, including an interest in safety or health hazards to seafarers on board'.[203] In case of a complaint of this kind, the inspection should generally be limited to matters within the scope of the complaint; unless a complaint, or its investigation, reveals a serious breach of the Convention or a clear hazard to the safety, health or security of seafarers, where its finding necessitates a subsequent detailed inspection.[204] Having received a complaint, and in taking appropriate steps to safeguard confidentiality where that is needed,[205] PSCOs in the port must undertake an initial investigation,[206] and where appropriate, seek to promote a resolution of the complaint at the ship-board level.[207] In this context, PSCOs, taking into account the nature of the complaint, should consider whether the on board complaint procedures provided under the Convention have been explored, before making a decision to carry out a more detailed inspection as described above.[208]

8.49 More specifically, PSCOs should first check whether the complaint is of a general nature that concerns all seafarers on the ship, or a category of them, or whether it relates only to the individual case of the seafarer concerned.[209] With regard to complaints of general nature, a more detailed inspection should be undertaken.[210] If the complaint relates to an individual case, however, an examination of the results of any on board complaint procedures for the resolution of the complaint concerned should be undertaken first. If those procedures have not yet been explored, PSCOs should suggest to the complainant that they exhaust any available procedures. Nonetheless, they must make an informed decision to determine whether there are good reasons for considering a complaint before any on board complaint procedures have been explored. These reasons will include the inadequacy of, or undue delay in, the internal procedures or the complainant's fear of reprisal for lodging a complaint.[211] In any

200. Standard A5.1.5(3).
201. Guideline B5.1.5(1)(b).
202. Regulation 5.2.2(1).
203. Standard A5.2.1(3).
204. *Idem.*
205. Standard A5.2.2(7).
206. Standard A5.2.2(1).
207. Standard A5.2.2(3).
208. Standard A5.2.2(2).
209. Guideline B5.2.2(1).
210. Guideline B5.2.2(2).
211. Guideline B5.2.2(3).

investigation of a complaint, PSCOs should give the master, the shipowner and any other person involved in the complaint a proper opportunity to communicate their views.[212]

8.50 In the event that the investigation or the inspection reveals a non-conformity that constitutes a clear hazard to the safety, health or security of seafarers, or a serious or repeated breach of the requirements of the Convention, PSCOs must proceed in the same manner as discussed above to ensure that the ship will not proceed to sea until any such non-conformities have been rectified, or until a plan of action for their expeditious rectification has been agreed. Similarly, if the ship is prevented from sailing on these grounds, PSCOs must immediately notify the flag State accordingly and invite a representative of that State to be present; if possible, requesting the flag State to reply within a prescribed deadline.[213]

8.51 Contrariwise, for any other confirmed complaints which remain unresolved at the ship-board level, PSCOs should notify immediately the flag State, seeking, within a prescribed deadline, advice and a corrective plan of action.[214] Where a flag State demonstrates, in response to a notification by the port State, that it will handle the matter, and that it has effective procedures in place for this purpose and has submitted an acceptable plan of action, PSCOs may refrain from any further involvement with the complaint.[215] Nonetheless, where a complaint has not been resolved, despite the advice and the corrective action plan received by the competent authority of the flag State, the port State should transmit a copy of the PSCO's report to the ILO Director-General, which must be accompanied by any reply received within the prescribed deadline from the flag State.[216] The appropriate shipowners' and seafarers' organizations in the port State should similarly be informed.[217] After this step, no further action on the complaint should be taken in the port State.[218] In addition, statistics and information regarding complaints that have been resolved should regularly be submitted by the port State to the Director-General. Both submissions are provided so that, on the basis of such action as may be considered appropriate and expedient, a record is kept of such information and is brought to the attention of parties, including shipowners' and seafarers' organizations, which might be interested in availing themselves of relevant recourse procedures.[219]

LABOUR-SUPPLYING RESPONSIBILITIES

8.52 The other novel aspect in the enforcement procedures of the Convention is mirrored in Regulation 5.3 setting out the labour-supplying responsibilities for ratifying States. Its pronounced purpose lies in ensuring that each Member implements its responsibilities under the Convention pertaining to the social protection of its seafarers and the seafarer recruitment and placement service. The term 'seafarer

212. Guideline B5.2.2(4).
213. Standard A5.2.2(4).
214. Standard A5.2.2(5).
215. Guideline B5.2.2(5).
216. Standard A5.2.2(6).
217. *Idem*.
218. *2009 Guidelines for port State control officers*, 77 §117.
219. Standard A5.2.2(6).

recruitment and placement' is defined as any person, company, institution, agency or other organization, in the public or the private sector, which is engaged in recruiting seafarers on behalf of shipowners or placing seafarers with shipowners.[220]

8.53 The enforcement jurisdiction of labour-supplying States is without prejudice to the jurisdiction of flag States regarding their responsibilities to ensure the working and living conditions of seafarers on board,[221] but runs in parallel to ensure the implementation of the requirements of the Convention in relation to recruitment and placement of seafarers as well as the social security protection of seafarers that are its nationals or are resident or are otherwise domiciled in its territory.[222] Certain flag States at the Conference were ready to accept the much more specific commitment 'to verify that only seafarers who enjoyed social security coverage worked on ships flying their flag and to this end not to authorize the recruitment and employment on board their ships of seafarers from countries which failed to provide for the minimum three branches of social security protection', which had been proposed in an amendment by the Workers' group,[223] but ultimately this provision failed to be adopted when it was put to a vote.[224]

8.54 Consequently, the main responsibility of the flag State in this context, and without prejudice to those that are inherent in its general obligations under

220. Article II(1)(h).

221. See below at n 224, in relation to UNCLOS, Article 94(3)(b).

222. Regulation 5.3(1). *Nb.*, the deliberations in the *International Labour Conference* favoured the employment of the term 'labour supplying responsibilities' against that of 'labour-supplying' State (this had been employed in the initial first drafts, see Sub-Group of the High-Level Tripartite Working Group on Maritime Labour Standards [TWGMLS/2002/1(first meeting) *Considerations for provisions on inspection and control in a consolidated maritime labour Convention (Draft I); Simplified amendment procedure for the proposed new maritime labour Convention (Draft II)* (International Labour Office 2002), 5 *et seq.*], in view of the fact that although it was easy to identify the major countries that supply seafarers, the majority of both flag and port States (if they are not landlocked), act also as suppliers of seafarers, albeit on a small scale, in the sense that their citizens may serve on ships registered outside their territory. The employment of the latter term could have a blurring effect on the respective responsibilities intended to be allocated clearly to a State that act in more than one capacity (i.e., flag State, port State, labour-supplying State). To avoid the misconception of a limited category of 'labour-supplying States', the Convention simply refers to 'labour supplying responsibilities' in order to stress their possible concurrence with other responsibilities; see MLC *Commentary*, 60.

223. See, the deliberations over amendment D.26, in 2006 *Report of the Committee of the Whole*, Geneva 2006, 90–91 §850–851. As noted by the Spanish delegation, the legal nature of the flag State's responsibility in that case '[w]ould not constitute a direct responsibility to provide social security protection but a responsibility to verify compliance, which was substantially different'; *see*, 93 §873.

224. 2006 *Report of the Committee of the Whole*, 97 §§899–900. For the text of the proposed amendments see [PTMC/2005/2] *Tripartite Intersessional Meeting on the Follow-up of the Preparatory Technical Maritime Conference - Compendium of proposed amendments to the draft consolidated maritime labour Convention 2006* (International Labour Office 2005).

A plausible argument was advanced by the Seafarers' group during the tripartite deliberations in associating the reference in UNCLOS Article 94 to 'social matters', for which flag States must effectively exercise its jurisdiction and control over their ships, with the provision under the Convention regarding 'social security'. That was also maintained in the light of Article 2(b) of Convention No. 147, which already required flag States to have legal provisions concerning social security, but nevertheless it has been unsatisfactorily ratified. Eventually such argument was not accepted by the flag States; at least not beyond the limited enforcement responsibility that will be mentioned shortly below. On these deliberations, see Tripartite Subgroup of the High-level Tripartite Working Group on Maritime Labour Standards [STWGMLS/2002/12] *Final Report of the Geneva Meeting, 24–8 June 2002 (*International Labour Office 2002), 5 §26. See also *High-level Tripartite Working Group on Maritime Labour Standards (Second meeting) [ILO uncoded document] ITF submission to the High-level Tripartite Working Group on Maritime Labour Standards* (International Labour Office 2002), 2 §7.

international law,[225] is the explicit responsibility found in Title 4 of the Convention to ensure that the shipowners' social security protection obligations are respected for seafarers on their ships,[226] and to this end, to inspect the seafarers' employment agreements where complementary social security protection is provided by shipowners.[227] Another obligation, although broadly stated, is that of cooperation with labour-supplying States to ensure the maintenance of their social security rights acquired during employment or in course of acquisition, through bilateral or multilateral agreements.[228] Additionally, a flag State is responsible for verifying, where contributions are required by another country under its national social security system for seafarers, that these contributions are made by the seafarers working on board the ships that fly its flag.[229]

8.55 Consequently, the crucial enforcement function in this area is accorded to the labour-supplying State, which is placed under the firm obligation to exercise effectively its jurisdiction and control over seafarer recruitment and placement services, if these are established in its territory.[230] This obligation has been taken from the *Recruitment and Placement of Seafarers Convention, 1996 (No. 179),* and reflects the complementary responsibilities of all Members from which the world's seafaring workforce is recruited, to ensure that private sector services must be licensed, or certified, or otherwise regulated.[231] In response to this responsibility, each Member must establish an effective inspection, monitoring and legal proceedings system for enforcing the labour-supplying requirements of the Convention applicable to the operation and practice of seafarer recruitment and placement services established in its territory,[232] as well as to address breaches of licensing and other operational requirements provided for in Standard A1.4.[233] During the initial consultations, it had been proposed that private seafarer recruitment and placement service agencies should be made jointly and severally liable with shipowners, regardless of their domicile, for breach of the contract of employment and/or articles of agreement.[234] Nonetheless, the above principle was relegated to a non-mandatory guideline,[235] lest it prove a possible obstacle to the ratification of the Convention, and has been replaced now with the much more indeterminate responsibility for private agencies which secure the services of a seafarer for a shipowner, wherever the latter is located, to ensure the proper fulfilment by shipowners of the terms of their employment agreements concluded

225. Standard A4.5(5).
226. Guideline B4.5(7).
227. Standard A2.1(4)(h).
228. Standard A4.5(8).
229. ILO, *Guidance on implementing the Maritime Labour Convention, 2006 and Social Security for Seafarers* (International Labour Office 2012), 13–14.
230. Article V(5).
231. MLC *Commentary*, 20.
232. Regulation 5.3(2) and (3).
233. Standard A5.3(1).
234. High-level Tripartite Working Group on Maritime Labour Standards [TWGMLS/2002/1] *Considerations for provisions on inspection and control in a consolidated maritime labour Convention; Appendix I 'Consensual Statement of the Meeting of Experts on Working and Living Conditions of Seafarers on board Ships in International Registers, Geneva, 6-8 May 2002'* (International Labour Office 2002).
235. Guideline B5.3(1).

with seafarers.[236] Information on the overall system in place, including the method used for assessing its effectiveness, should be included in the Member's reports pursuant to Article 22 of the ILO Constitution.[237]

CONCLUSIONS

8.56 As the Convention just entered into force, the efficacy of all the above promising enforcement procedures remains to be tested when these will be put into practice. Challenges relating to the inspection capacity of flag States, as well as to the degree of implementation of the Convention by Member States have been already identified and insightfully discussed elsewhere.[238] Yet, some caution may also be warranted at this early stage in relation to two other matters. A first concern relates to the entire lack of provision regarding the settlement of disputes between Member States. While the question of whether a ratifying State has properly implemented its obligations, including those with regard to enforcement, is a matter that may be dealt with by the international supervisory system being established under the ILO Constitution.[239] However, possible disputes that may arise over the unlawful detention of ships and their crews are left without any procedures similar to those provided in Article 292 of UNCLOS, which addresses *inter alia* detentions following enforcement by port States.[240] It should be noted, nonetheless, that a reference to the above Article had been made during the Conference.[241]

8.57 The second concern relates to the elusive provisions regarding the determination of the forum that can be seized with regard to unresolved complaints by seafarers, particularly on occasions where recourse to on board and onshore procedures have been made. It has already been observed in this respect that although seafarers and shipowners are equal before the law and are accordingly entitled to equal protection without any discrimination as regards their access to courts, tribunals or other dispute resolution mechanisms, the enforcement provisions of the Convention do not determine either the legal jurisdiction or a legal venue for these.[242] Even though the wording of the relevant provisions in the Convention remain ambiguous on this matter, they seem to favour the principle of 'party autonomy', despite arguments

236. Tripartite Subgroup of the High-level Tripartite Working Group on Maritime Labour Standards [STWGMLS/2003/1(Annex)] *Preliminary draft for a consolidated maritime labour Convention* (International Labour Office 2003), 18.

237. Regulation 5.3(4).

238. See M L McConnell, 'The Maritime Labour Convention, 2006 – reflections on challenges for flag State implementation' (2011) 10(1) World Maritime University Journal of Maritime Affairs 127–141.

239. *2009 Guidelines for flag State inspections*, 16.

240. UNCLOS, Article 292 provides for the prompt release of vessels and their crews where the authorities of a Party have detained a vessel flying the flag of another Party and it is alleged that the detaining State has not complied with the relevant provisions of the Convention. In particular, the Convention creates a general obligation upon a detaining Party to release promptly a vessel and its crew upon the posting of a reasonable bond or other financial security as these may be determined by its complement authorities. See further T Treves, 'The Proceedings Concerning Prompt Release of Vessels and Crews before the International Tribunal for the Law of the Sea' (1996) 11(2) The International Journal of Marine and Coastal Law 179–200.

241. See MLC *Commentary*, 58.

242. Title 5, introductory paragraph 4.

advanced in the proposals to the Committee of the Whole by some States during the Conference[243] that specific '[l]egal venue(s) had to be predetermined in order to prevent a person from seeking redress in any court of their choosing'.[244] Hopefully, such omission will not considerably affect the efficient use of these truly novel enforcement procedures. This issue is further discussed in Chapters 5 and 9 of this book.

243. 2006 *Report of the Committee of the Whole*, 100 §931.

244. Among others, see the submissions by the Norwegian delegation that can be found in the 2006 *Report of the Committee of the Whole*, 99 §923.

CHAPTER 9

How to determine jurisdiction and governing law in disputes arising out of a seafarer's employment agreement

JENNIFER LAVELLE*

INTRODUCTION

9.1 While the *Maritime Labour Convention 2006 (MLC)* is a comprehensive document,[1] it does not include any rules on jurisdiction or governing law in the event of a legal dispute that arises out of its substantive provisions. Rather, the Convention expressly states that the provisions of Title 5 on compliance and enforcement do not determine legal jurisdiction or a legal venue.[2]

9.2 Accordingly, should the Convention's enforcement procedures[3] prove to be ineffective with court proceedings subsequently threatened or commenced, rules of private international law will be called upon to determine which court has jurisdiction to hear the dispute and which substantive law should govern it. Such rules are usually found in the national legislation of each State. For Member States[4] of the European Union (EU)[5] however, a harmonized conflict of laws system for 'civil and commercial matters' has been established at the European level. It is this system of laws that will act as the protagonist of this chapter.

* LLB (Hons)(Soton) 2008, LLM (Hons)(Soton) 2010. PhD Candidate and Tutor in Law, Law School, University of Southampton. Member of the Insurance Law Research Group, University of Southampton, and Gray's Inn, London. General Editor and co-founder of www.aviationlaw.eu. The author wishes to thank Barry Ross, Crossland Solicitors Ltd, for his invaluable input, and Professor Yvonne Baatz and Johanna Hjalmarsson, Law School, University of Southampton, for their insightful comments. Any remaining errors are attributable to the author.

1. For an overview, see J Lavelle, 'Maritime Labour Convention to enter into force' (2012) 12(8) STL 1-4.
2. MLC, Title 5, introductory paragraph 4. This paragraph was a new addition proposed and adopted after significant debate by the 94th (Maritime) Session of the International Labour Conference (ILC), Geneva, 7-23 February 2006. See the *Report of the Committee of the Whole*, paras 903-934. The introductory paragraphs may be considered as 'over-arching *chapeau* directed to questions of interpretation'; Moira McConnell, Dominick Devlin, and Cleopatra Doumbia-Henry, *The Maritime Labour Convention, 2006: A Legal Primer to an Emerging International Regime* (Martinus Nijhoff 2011) ('MLC Annotation'), 500.
3. For a detailed examination of the MLC's enforcement procedures, see Ntovas, Chapter 8 of this work.
4. Unless provided otherwise, references to 'Member States' within this chapter are references to EU Member States and not to the Contracting Parties of the MLC or Members of the International Labour Organization (ILO).
5. Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and United Kingdom (UK).

9.3 By way of overview, there are three main European Regulations. The first, the Jurisdiction Regulation,[6] sets out the relevant rules to be used in order to determine whether a court of an EU Member State[7] has jurisdiction to hear a dispute.[8] It should be noted at the outset that the Jurisdiction Regulation will be replaced by a recast version[9] in all Member States except Denmark[10] from 10 January 2015.[11] Reference to any relevant amendments will be made during the chapter. Then, the Rome I Regulation,[12] which deals with contractual obligations, and the Rome II Regulation,[13] which deals with non-contractual obligations, provide the framework for establishing governing law. Rome I and Rome II apply in all EU Member States,[14] except Denmark.[15]

9.4 This chapter will examine how the European Regulations determine the relevant jurisdiction and governing law in a dispute arising out of a seafarer's employment agreement (SEA). It goes without saying that actions relating to an employment contract will be discussed, including liability in respect of pre-contractual dealings.

6. Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1 ('Jurisdiction Regulation' or 'JR'). The Jurisdiction Regulation supersedes the *Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters* [1972] OJ L299/32 ('Jurisdiction Convention'), as amended, with regard to the territories of the Member States covered by the *Treaty on the Functioning of the European Union (TFEU)* (consolidated version) [2010] OJ C83/47, as between the Member States except Denmark; see n 7 below. The UK and Ireland both decided to adopt and apply the Jurisdiction Regulation; JR, Recital (20). However, the Jurisdiction Convention continues to apply with respect to those territories of EU countries that fall within its territorial scope and that are excluded from the Jurisdiction Regulation pursuant to TFEU, Article 355.

7. By way of Council Decision 2006/325/EC of 27 April 2006 concerning the conclusion of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2006] OJ L120/22, the application of the Jurisdiction Regulation was extended to Denmark.

8. A parallel system of jurisdictional rules is also in place for certain Members of the European Free Trade Association (EFTA), namely, Iceland, Norway and Switzerland, by virtue of the *Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* [2009] OJ L147/5 (revised Lugano Convention). Liechtenstein has not ratified the revised Lugano Convention. This Convention revises the *Lugano Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters* [1988] OJ L 319/9 (Lugano Convention). Discussion of these rules is outside the scope of this chapter. See generally, Lord Collins (Gen Ed), *Dicey, Morris & Collins on the Conflict of Laws* (15th edn, Sweet & Maxwell 2012) ('DMC').

9. Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1 ('Recast Regulation').

10. The UK and Ireland will adopt and apply the Recast Regulation; Recast Regulation, Recital (40). Denmark is not taking part in the adoption of the Recast Regulation, although this is without prejudice to the possibility for Denmark of applying the amendments; Recast Regulation, Recital (41).

11. Recast Regulation, Article 81.

12. Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6. For the Member States concerned, Rome I replaces the *Rome Convention of 19 June 1980 on the law applicable to contractual obligations (consolidated version)* [2005] OJ C334/1 ('Rome Convention').

13. Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40.

14. Following Commission Decision 2009/26/EC of 22 December 2008 on the request from the United Kingdom to accept Regulation (EC) No 593/2008 of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) [2009] OJ L10/22, the application of Rome I was extended to the UK. Ireland also decided to apply and adopt Rome I; Rome I, Recital (44). The UK and Ireland both decided to apply and adopt Rome II; Rome II, Recital (39).

15. Denmark is not taking part in the adoption of Rome I; Rome I, Recital (46), or Rome II; Rome II, Article 1(4) and Recital (40). Accordingly, for contractual obligations, the Rome Convention will remain in force in Denmark.

Given the tripartite nature of the MLC, in particular, the involvement of shipowners' and seafarers' unions, it is also pertinent to consider the relevant rules that apply to liability arising out of industrial action.[16]

TERMS OF ART

9.5 As a specialist convention, the MLC makes reference to 'seafarers' and 'shipowners', rather than 'employees' and 'employers', while the relevant provisions of the European Regulations prefer the latter terms. This is unsurprising on both counts. Given that the European Regulations aim to harmonize the conflict of laws rules across Member States, the terms used therein should be understood as broad concepts. This part of the chapter will compare the terms in the MLC[17] with those in the European Regulations.

9.6 As an aside, it is worth noting the stark contrast between the MLC and the European Regulations as regards the way in which each instrument is to be implemented and interpreted.[18] The MLC requires implementation by way of national legislation,[19] and it also allows flexibility with respect to implementation of certain sections of Part A of the Code through measures which are 'substantially equivalent' to those provisions of Part A.[20] Accordingly, the rights within the Convention are likely to be reflected in varying degrees in the national laws of Contracting States. Regarding interpretation, the courts will be required to construe the national law provisions that implement the Convention, rather than the Convention itself, and this may give rise to ambiguities and inconsistent application where provisions have been rephrased or amended. Conversely, the European Regulations are binding in their entirety and directly applicable,[21] so that national legislation is not required to bring the Regulations into effect.[22] Also, the Regulations must be interpreted autonomously

16. Moreover, following the Court of Justice of the European Communities' (commonly referred to as the 'ECJ') judgments in Case C-438/05 *International Transport Workers' Federation v Viking Line* ABP [2007] ECR I-10779 and Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767, it would seem that claims by employers, including shipowners, against trade unions in respect of industrial/collective actions are likely to increase. See further, Andrew Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations* (OUP 2008), as amended by the 2010 Updating Supplement ('Dickinson'), paras 9.12-9.16.

17. For a substantive review of the MLC definitions in relation to English law, see Bek, Chapter 4 of this work.

18. It should be noted that steps have already been taken to transpose the provisions of the MLC, including its definitions, into EU law, and it may follow that the Court of Justice of the European Union ('CJEU'), as renamed following the entry into force on 1 December 2009 of the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* [2007] OJ C306/1, would look to the definitions included in the relevant European instrument, rather than those found in the MLC (where different). For a detailed discussion of the status of the MLC in the EU legal order, see Abel, Chapter 1 of this work.

19. MLC, Article V.

20. MLC, Articles VI(3) and (4). Nonetheless, Contracting Parties are required to give 'complete effect' to the provisions of the Convention; MLC, Article I(1).

21. See generally TFEU, Article 288. Also, JR, Final clause and Recital (6); Rome I, Final clause; Rome II, Final clause.

22. European Communities Act 1972, c 68, s 2(1). Even so, the UK usually adopts legislation to clarify the relationship between European instruments and existing national laws. Regarding jurisdiction, see the Civil Jurisdiction and Judgments Act 1982, c 27; the Civil Jurisdiction and Judgments Act 1982 (Amendment) Order 2000, SI 2000/1824; and, the Civil Jurisdiction and Judgments Order 2001,

unless provided otherwise, and the substantive scope and provisions of the three Regulations should be interpreted consistently with each other.[23]

Seafarers as employees

9.7 The broad definition of 'seafarer' in the MLC has already raised many concerns.[24] Article II(1)(f) defines a seafarer as 'any person who is employed or engaged or works in any capacity on board a ship to which this Convention applies'. Furthermore, the Convention applies to all seafarers.[25] Even so, to determine which seafarers are protected by the Convention, reference must also be made to the definition and scope of application of the term 'ship',[26] in order to confirm that the MLC applies to the ship on which the seafarer is engaged. The all-encompassing definition of seafarer in the MLC thus includes the master of the ship[27] and it also reflects the wide array of working arrangements that fall within the scope of the Convention, including, for example, a seafarer who is self-employed.

9.8 If a person falls within the MLC definition of seafarer as reflected in national law,[28] that person should satisfy the concept of an 'employee' under the European Regulations.[29] Nonetheless, a person who *does not* fall within the MLC definition of seafarer as reflected in national law, may still be considered as an employee for the purposes of determining jurisdiction and governing law. Accordingly, where concerns have been raised as to whether particular categories of persons who may perform work on board a ship should be regarded as seafarers, such as the occupational groups dealt with in Resolution VII,[30] these persons may still be regarded as employees as far

SI 2001/3929. Regarding applicable law, see the Contracts (Applicable Law) Act 1990, c 36; the Law Applicable to Contractual Obligations (England and Wales and Northern Ireland) Regulations 2009, SI 2009/3064; and, the Law Applicable to Non-Contractual Obligations (England and Wales and Northern Ireland) Regulations 2008, SI 2008/2986.

23. Rome I, Recital (7); Rome II, Recital (7).

24. See MLC Annotation, 180-182 and the references cited therein.

25. See MLC, Article II(2) and Article II(3). Note that the term 'seafarer' in English is gender neutral.

26. See MLC, Article II(1)(i), Article II(4) and Article II(5). See also MLC Annotation, 183-188. For a discussion of when the MLC applies to yachts and superyachts, see Bek, Chapter 4 of this work.

27. See further Cartner, Chapter 3 of this work.

28. For instance, in the UK, the MLC definition of seafarer will be used with the following proviso, 'whose normal place of work is on board the ship'; interview with the UK Maritime and Coastguard Agency (MCA), Chapter 10 of this work. As regards the MLC definitions and Maltese law, see Attard & Gonzi, Chapter 2 of this work. See also MLC Annotation, 108-181 n 42.

29. Such a sweeping statement cannot be made in respect of national law definitions of 'employees' however, especially as regards English law. In the UK, the definition of 'employee' is of critical importance, as a significant number of rights in the Employment Rights Act (ERA) 1996, c 18, refer only to the rights of an employee, as opposed to a 'contractor' or a 'worker'. These include, *inter alia*, the right not to be unfairly dismissed (ERA, s 94), the right to claim a redundancy payment (ERA, s 135), and the right to a minimum period of notice (ERA, s 86). Accordingly, a seafarer will only be able to bring an action in respect of such rights if they fall within the national definition of an 'employee'. Even though the term is defined in various statutory provisions, including, ERA, s 230(1); the Transfer of Undertakings (Protection of Employment) Regulations 2006, SI 2006/246, Regulation 2(1); the Trade Union and Labour Relations (Consolidation) Act 1992, c 52, s 295; and, the Social Security Contributions and Benefits Act 1992, c 4, s 171(1), none of the definitions are decisive and the courts have been required to develop legal tests to establish the status of an individual. Unfortunately, there is no single list of factors that determines whether a person is an employee, worker or otherwise.

30. Resolution VII concerning information on occupational groups, adopted by the International Labour Conference, 94th (Maritime) Session, 22 February 2006. Examples include scientists, divers, harbour pilots, ship inspectors, superintendents, portworkers, guest entertainers, surveyors and repair technicians.

as the European Regulations are concerned; it will mainly depend on whether the relevant contract between the parties is considered to be an employment contract.

9.9 The pertinent difference between the two situations described above is the *type* of employment claim that can be brought before a court or tribunal.[31] Any person with a contract of employment will be able to bring an action against their employer where one or more of the terms of the contract have been breached. In addition to contractual rights, an employee will also be able to bring a claim for breach of any statutory rights that are applicable to them. Under a State's national laws, there are likely to be an assortment of employment law rights that are protected by statute, in addition to any rights in applicable European legislation. These statutory rights will only be added to following the implementation of the MLC in a State's legal system. For those persons who are deemed to be seafarers, they will be protected by certain statutory rights that a non-seafarer would not, such as the rights in respect of crew accommodation in Regulation 3.1, as reflected in national law. That being said, there are certain provisions of the MLC that may be equally applicable to seafarers and non-seafarers under national law, such as those relating to minimum working age[32] and maximum working hours.[33] As a result, for legal systems like the UK where approximately 80 per cent of the minimum standards provided by the MLC were already covered by national law,[34] the definition of a seafarer in the MLC is perhaps less important than the scope of application of pre-existing statutory rights where those rights are the same as, or similar to, the minimum standards of the MLC.

9.10 In sum, the question of whether an *employee is a seafarer* is one of substance that will be determined with the merits of the case. For this chapter, the more apposite question of whether a *seafarer is an employee* will, more often than not, be answered in the affirmative, and seafarers will therefore be able to avail themselves of the protective rules of the European Regulations. Accordingly, the terms 'seafarer' and 'employee' will be used interchangeably in this chapter.

Shipowners as employers

9.11 A 'shipowner', the obvious employer, could be a number of persons or a company. The term is defined under the Convention as 'the owner of the ship or another organization or person, such as the manager, agent or bareboat charterer, 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

31. Discussion of when a seafarer can bring a claim before a UK employment tribunal is outside the scope of this chapter. Suffice it to say that seafarers have typically been excluded from bringing claims before an employment tribunal, as no jurisdiction existed where the employee ordinarily worked outside Great Britain (ERA, s 196). However, this exclusion has been repealed by the Employment Relations Act 1999, c 26, 32(3). Prior to the repeal, relevant factors included whether the employee was required to work wholly outside of the UK and where the employee was ordinarily resident when not working. No statutory provision has replaced the former exclusion, so the question of jurisdiction has continued to be developed by the courts and employment tribunals. In respect of jurisdiction for unfair dismissal claims, see *Serco Ltd v Lawson* [2006] UKHL 3 and *Diggins v Condor Marine Crewing Services Ltd* [2009] EWCA Civ 1133. See further, Lorenzon and Coles, *The Law of Yachts and Yachting* (Informa 2012), paras 6-009-6-014, and Liz Williams, 'Employment of seafarers' (2009) 9(3) STL 5-6.

32. MLC, Regulation 1.1.

33. MLC, Regulation 2.3.

34. See Chapter 10 of this work.

on shipowners in accordance with this Convention, regardless of whether any other organization or persons fulfil certain of the duties or responsibi[l]ities on behalf of the shipowner'.[35]

9.12 This definition aligns the MLC with conventions adopted under the auspices of the International Maritime Organization (IMO)[36] and it has been designed 'to capture all known variations on corporate organizational, management, and operational practices in the sector'.[37] Importantly, shipowners, as defined in the MLC, are the responsible employers under the Convention with respect to all seafarers employed on board their ship(s).[38] This is without prejudice to the right of the shipowner to recover the costs involved from others who may also have responsibility for the employment of a particular seafarer.[39] Practical issues are likely to arise however, where a seafarer is employed by someone other than the shipowner, or has more than one employer.[40]

9.13 As far as the European Regulations are concerned, where a shipowner has employed the employee directly (seafarer or otherwise), it is quite clear that the shipowner is the 'employer'. That being said, it is questionable whether an action brought against a shipowner where the seafarer has a contract of employment with a different employer should fall within the special rules for employment claims, in spite of the wide definition of 'shipowner' in the MLC.[41] This is discussed further below. Again, the contract between the employee and shipowner, if there is one, will be determinative, along with the nature of the claim. Nevertheless, it is assumed that, in the majority of cases, the 'shipowner' will be the 'employer' and therefore these terms are used interchangeably in this chapter.

Recruitment services as employers

9.14 Recruitment services are discussed as it is not unheard of for seafarers to be 'employed by' or 'engaged by' such services even though their duties are to be performed on board a ship. In the first scenario, the seafarer's contract of employment is likely to be with the recruitment service rather than the shipowner, whereas in the latter scenario, the seafarer's contract may take many forms; for example, the seafarer may have a contract *for* services rather than a contract *of* service, and be considered self-employed.[42] Given the definition of seafarer in the MLC, it is clear that the Convention envisages such scenarios, although the shipowner's obligations vis-à-vis the seafarers on board his ship are not restricted to those seafarers that are directly

35. MLC, Article II(1)(j).

36. It is almost identical to the definition of 'company' found in the *International Management Code for the Safe Operation of Ships and for Pollution Prevention (ISM Code), 1993*, to the *International Convention for the Safety of Life at Sea (SOLAS), 1974*, and the *International Convention on Standards of Training, Certification and Watchkeeping (STCW), 1978*.

37. MLC Annotation, 189.

38. During the negotiations for the MLC, despite some debate over wording, there was 'clear tripartite consensus' on the idea that shipowners should be the central point for responsibility, irrespective of individual contractual agreements; MLC Annotation, 190.

39. MLC Annotation, 189 n 62.

40. For example, workers on board cruise ships and passenger ships who do not fall within the traditional definition of seafarer (or crew) are generally employed by persons other than the shipowner.

41. Cf *Samengo-Turner v Marsh & McLennan (Services) Ltd* [2007] EWCA Civ 723. Discussed further below.

42. See *WPP Holdings Italy Srl v Benatti* [2006] EWHC 1641 (Comm), reversed in part by the Court of Appeal [2007] EWCA Civ 263.

employed by him; the shipowner is the 'locus or focal point for regulatory activity and responsibility for all workers/seafarers on its ships, irrespective of other contractual and management arrangements between the seafarer and her or his employer'.[43]

9.15 The inclusion of seafarer recruitment and placement services in the MLC, however, is more relevant to the obligation on Contracting States with labour-supplying responsibilities to regulate recruitment services that operate in its territory[44]; the Convention does not address direct recruitment by such services. Specifically, the MLC defines a 'seafarer[45] recruitment and placement service' as 'any person, company, institution, agency or other organization, in the public or the private sector, which is engaged in recruiting seafarers on behalf of shipowners or placing seafarers with shipowners'.[46] It should also be noted that a recruitment service may be completely independent from the shipowner, or an agent or subsidiary corporation of the shipowner.

9.16 For the purposes of the European Regulations, the court seised will need to establish the actual employment situation as compared to the situation expressed by the contract, in order to determine whether the seafarer is employed by a recruitment service or a shipowner.[47] If it considers that the recruitment service is the relevant employer, then the protective rules of the European Regulations will also be applied to disputes arising out of the employment contract between the seafarer and the recruitment service. While the author acknowledges the reality of such situations, this chapter will be expressed in terms of the shipowner being the relevant employer and employment by a recruitment service will not be discussed further. Nonetheless, readers may assume that the rules applicable to shipowners domiciled in Member States would be equally applicable to recruitment services domiciled in Member States if it is established that the service is the relevant employer.

9.17 Where a seafarer enters into an individual contract of employment with an employer who is not domiciled in a Member State, but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of that branch, agency or establishment, be deemed to be domiciled in that Member State.[48] This jurisdictional rule does not cast light on the issues described above. Rather, where seafarers are employed by a company (shipowner or recruitment service) that is not domiciled in a Member State, e.g., Australia, but that company has a branch or agency in one of the EU Member States, e.g., France, and the dispute in question arises out of the operation of that branch or agency, then, under the Jurisdiction Regulation, the Australian employer will be deemed to be domiciled in France. This rule may be particularly important for seafarers who are engaged at a port in one of the Member States, even if the relevant employer has its statutory seat or central administration in a non-Member State.

43. MLC Annotation, 175.
44. See MLC, Article V(5), Regulation 1.4 and Regulation 5.3.
45. It is unclear how the use of the word 'seafarer' before 'recruitment and placement service' will affect the application of the Convention to services that do not recruit seafarers on a regular basis. See further, MLC Annotation, 183 n 48 and Chapter 7 thereof.
46. MLC, Article II(1)(h).
47. Case C-384/10 *Voogsgeerd v Navimer* [2011] (unreported), 15 December 2011.
48. JR, Article 18(2). See *New Hampshire Insurance Co v Strabag Bau AG* [1990] 2 Lloyd's Rep 61, aff'd on other grounds [1992] 1 Lloyd's Rep 361, and n 67 below.

Seafarers' employment agreements as individual contracts of employment

9.18 The MLC provides a very wide definition of a SEA, stating that it 'includes both a contract of employment and articles of agreement'.[49] This is to allow for a range of contractual situations and terminology in different legal systems.[50] The term is further explained in Regulation 2.1 of the MLC. It is therefore necessary to determine whether the definition of a SEA is wider than the autonomous term 'individual contract of employment' that is used in the European Regulations.

9.19 First, the term 'individual contract of employment' does not include collective agreements between employers and workers' representatives.[51] Also, it appears that a contract for work on a self-employed basis, such as an independent consultancy contract, should *not* be considered as an individual contract of employment.[52]

9.20 While the CJEU has not yet pronounced on the relevant objective factors to determine whether a contract is one of employment, employment contracts have been described as differing from other contracts 'by virtue of certain peculiarities: they create a lasting bond which brings the worker to some extent within the organizational framework of the business of the undertaking or employer, and they are linked to the place where the activities are pursued, which determines the application of mandatory rules and collective agreements'.[53] Also, it has been held that the 'essential feature' of an employment relationship is that 'for a certain period of time a person performs service for and under the direction of another person in return for which he receives remuneration'.[54] Accordingly, the relevant court should consider whether any of these elements are present when examining the employment relationship.

9.21 Moreover, the contract need not be in one document or made at one time. An agreement varying or adding to the terms of an earlier contract of employment will obviously become part of the contract even if on its own it does not contain all the terms one would expect to find in such a contract.[55] It is also worth noting that the mandatory exclusive use of an official language of a Member State in a cross-border employment contract is precluded by Article 45 TFEU.[56]

9.22 From the above, it seems that there will be situations where a SEA would not be an individual contract of employment. Furthermore, under Standard A2.1(1)(a) of the MLC, where a seafarer is *not* an employee, the Convention requires that they

49. MLC, Article II(1)(g). The MCA has prepared a model format for seafarer employment agreements, available at http://www.dft.gov.uk/mca/mcga07-home/workingatsea/mcga-healthandsafety/maritime_labour_convention_2006/mcga-ds-ssh-mlc-sea.htm (accessed 20 August 2013).

50. MLC Annotation, 182. Under English law, a number of decisions have introduced and developed the concept of an 'irreducible minimum' for a contract of employment, which requires three elements, namely, control, mutuality of obligation and personal performance. See *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, which was subsequently endorsed by Lord Hoffman in *Carmichael v National Power Plc* [1999] 1 WLR 2042.

51. *Samengo-Turner v Marsh & McLennan (Services) Ltd* [2007] EWCA Civ 723, [29].

52. *WPP Holdings Italy Srl v Benatti* [2006] EWHC 1641 (Comm), [63]-[101].

53. Case 266/85 *Shenavai v Kreischer* [1987] ECR 239, [16].

54. Case 66/85 *Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 2121, [17]. See also Case 197/86 *Brown v The Secretary of State for Scotland* [1988] ECR 3205 and Case C-3/90 *Bernini v Minister van Onderwijs en Wetenschappen* [1992] ECR I-1071.

55. *Samengo-Turner v Marsh & McLennan (Services) Ltd* [2007] EWCA Civ 723, [29].

56. Case C-202/11 *Las v PSA Antwerp* [2013] (unreported), 16 April 2013, where the CJEU held that legislation requiring the exclusive use of an official language constituted a restriction on the freedom of movement for workers.

have 'evidence of contractual or similar arrangements' providing them with decent working and living conditions on board the ship. It remains to be seen whether such evidence will satisfy the concept of 'individual contract of employment', although it seems unlikely.

JURISDICTION

9.23 The question of which court has jurisdiction to hear a dispute is not one that should be taken lightly. While the ultimate success of a party may depend on the law applicable to the dispute, especially in respect of any defences that may be raised, the forum seised is of equal importance. Indeed, there are many incentives for a party to prefer a court in one State over another. These include, *inter alia*, procedural advantages, such as specialised employment tribunals, disclosure and confidentiality, legal costs, the efficiency, or even the inefficiency,[57] of a court, any interest payable, remedies prescribed by the court and the availability of legal aid.[58]

9.24 It should also be remembered that while many refer to the Regulation as the 'Jurisdiction Regulation', including the author, it is in fact a 'Judgments Regulation'. By harmonising the rules governing jurisdiction and the recognition and enforcement of judgments, the Regulation was designed to attain the objective of free movement of judgments in civil and commercial matters within the Community, which is in turn necessary for the sound operation of the internal market.[59]

Jurisdiction Regulation

9.25 The Jurisdiction Regulation sets forth a system of rules that a court or tribunal of an EU Member State must apply in civil and commercial matters that fall within the scope of the Regulation.[60] For all Member States, except Denmark, the Jurisdiction Regulation entered into force on 1 March 2002.[61] The general rule of the Regulation is that a person domiciled[62] in a Member State must be sued in the courts of that State.[63] That being said, in relation to insurance, consumer and employment

57. European and domestic case law are replete with examples of parties using 'wrecking tactics' by purposely seising courts in jurisdictions that are known to be slow. In Case C-159/97 *Transporti Castelletti v Trumpy* [1999] ECR I-1597, for example, the first instance judgment was handed down in December 1989 but litigation continued to the ECJ, where a preliminary ruling was issued in March 1999, some ten years later, and even then, the case had to return to the national court. The length of these proceedings resulted in the endearing term, the 'Italian torpedo' for such tactics.

58. Cf the matters governed by the applicable law, Rome I, Article 12; Rome II, Article 15.

59. JR, Recitals (1)-(6).

60. JR, Article 1 and Recital (7). Where the dispute does not fall within the scope of the JR, the court seised will need to assess its jurisdiction in accordance with its national law rules (unless jurisdiction is regulated by another EU Regulation). In the UK, a court seised will turn to the Civil Procedure Rules, in particular Part 6 and Practice Direction 6B where service out of the jurisdiction is required, along with any other relevant common law rules. See also *Spiliada Maritime Corp v Cansulex Ltd* [1986] UKHL 10.

61. JR, Article 76. For Denmark, following Council Decision 2006/325/EC, the Agreement of 19 October 2005 between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2005] OJ L299/62, entered into force on 1 July 2007.

62. 'Domicile' is defined in JR, Articles 59 and 60.

63. JR, Article 2 and Recital (11).

contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for.[64] Accordingly, the special rules of jurisdiction that govern matters relating to individual contracts of employment, and thereby SEAs, are discussed here.[65]

Matters relating to individual contracts of employment

9.26 In 'matters relating to individual contracts of employment', jurisdiction is exclusively determined by Articles 18-21 (Section 5) of the Jurisdiction Regulation, without prejudice to Article 4[66] or Article 5(5)[67] of the Regulation.[68]

9.27 While this rule of application may seem straight-forward, it is worth noting that discussions have arisen in English case law in respect of *when* to apply the rules in Section 5. In *Swithenbank Foods v Bowers*,[69] it was held by McGonigal HHJ that the jurisdictional advantages under Section 5 should be confined to cases where a person's status as an employee is 'legally relevant'. On that basis, the Judge considered that 'the contract of employment is relevant, and there is a matter relating to an individual contract of employment, *only* if the employer is seeking to rely on that contract of employment in order to bring his claim against the employee'.[70] The Judge could see no justification of policy for conspirators, or any tortfeasors, who are employees being given jurisdictional advantages not enjoyed by conspirators or other tortfeasors who are not employees.[71] As a result, the Judge held that the provisions of Section 5 did not apply to the conspiracy claims before him, even though eight of the nine defendants had been former employees of the claimant.

9.28 Further, in *Alfa Laval Tumba AB v Separator Spares International Ltd*,[72] questions of application arose following the alleged misuse of confidential information by an employee even though there was no specific claim based upon a breach of his contract of employment.[73] Briggs J agreed with the decision of McGonigal

64. JR, Recital (13). There is no requirement to prove that a party is actually 'weaker' from a socio-economic perspective; the protective rules will apply regardless. For examples relating to insurance contracts, see *New Hampshire Insurance Co v Strabag Bau AG* [1992] 1 Lloyd's Rep 361.

65. For a detailed assessment of the jurisdictional rules in emploment matters, see U Grusic, 'Jurisdiction in emploment matters under Brussels I: a reassessment' (2012) ICLQ 91-126.

66. JR, Article 4 deals with disputes where the defendant is not domiciled in a Member State. In such circumstances, the jurisdiction of the court is determined by national law, unless the court has exclusive jurisdiction regardless of domicile in accordance with Articles 22 or 23 of the Regulation.

67. JR, Article 5(5) provides for special jurisdiction in relation to a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated. See *New Hampshire Insurance Co v Strabag Bau AG* [1990] 2 Lloyd's Rep 61, aff'd on other grounds [1992] 1 Lloyd's Rep 361; Case 14/76 *De Bloos SPRL v Société en commandite par actions Bouyer* [1976] ECR 1497; Case 33/78 *Somafer SA v Saar-Ferngas AG* [1978] ECR 2183; Case 139/80 *Blanckaert & Willems PVBA v Trost* [1981] ECR 819; Case 218/86 *SAR Schotte GmbH v Parfums Rothschild SARL* [1987] ECR 4905; Case C-439/93 *Lloyd's Register of Shipping v Société Campenon Bernard* [1995] ECR I-961.

68. JR, Article 18(1).

69. [2002] 2 All ER (Comm) 974. This judgment has been overruled in part by *Alfa Laval Tumba AB v Separator Spares International Ltd* [2012] EWCA Civ 1569. See further below.

70. *Ibid.*, [24] (emphasis added).

71. *Ibid.*, [25].

72. [2012] EWHC 1155 (Ch).

73. An earlier version of the Particulars of Claim did include a claim for breach of the contract of employment but this was abandoned upon the 'sensible recognition' that the English court would decline jurisdiction in relation to them under the JR, *ibid.*, [15].

HHJ to confine Section 5 to cases where the contract of employment was legally relevant to the claim. Accordingly, Briggs J held that Section 5 was inapplicable to the claims against the employee, stating that 'Mr Jasokowski's status as an employee of WSK during part of the material period, while undoubtedly part of the factual matrix, is legally irrelevant to the claim against him as party to a common design to misuse the claimant's intellectual property for the purposes of facilitating unlawful competition against them'.[74] As the protective provisions did not apply, joinder of the Polish-domiciled defendant to the English proceedings under Article 6(1) was allowed.

9.29 Conversely, when *Alfa Laval* was before the Court of Appeal,[75] Lord Justice Longmore, with whom the other judges agreed, rejected McGonigal HHJ's 'legal relevance' test, preferring to ask the broad question, 'Do the claims made against an employee *relate to* the individual's contract of employment?'[76] The Court of Appeal held that the alleged misuse of confidential information by an employee clearly amounted to a breach of the contract of employment, as the misuse of such was dealt with in the 'Employees Handbook', which formed part of the contract. Even though claims for misuse of information and breach of copyright could be framed in a claim for tort or delict, the Court of Appeal held that to do so would emasculate Article 20(1).[77]

9.30 The jurisdictional rules of Section 5 should therefore have broad application, but the sky should not be the limit. Questionable application of the rules of Section 5 can be seen in *Samengo-Turner v Marsh & McLennan (Services) Ltd*, where the Court of Appeal applied Section 5 to a claim by an associated company of the defendant's employer under incentive arrangements which formed part of his employment package, but *not* part of his contract of employment.[78]

9.31 Where the court determines that Section 5 does apply, unless provided otherwise, no recourse may be made to other provisions of the Regulation, including Article 5(3), which deals with matters relating to tort, or Article 6(1), which allows a defendant to be joined to proceedings in another Member State. As a result, in a highly criticised decision, the ECJ has held that an employee was unable to join an employer established in one Member State to proceedings against another employer established in another Member State, even though he considered them to have been joint employers. This conclusion was based on the opinion that the provisions of Section 5 were not only specific but exhaustive, and therefore Article 6(1) could not be applied.[79]

74. [2012] EWHC 1155 (Ch), [31].
75. [2012] EWCA Civ 1569.
76. *Ibid.*, [24] (emphasis added).
77. *Ibid.*, [26]-[28]. See, to this effect, Briggs and Rees, *Civil Jurisdiction and Judgments* (5th edn, Informa 2009), para 2.103. To the extent that subsequent decisions at first instance have followed the decision of Briggs J in *Alfa Laval*, they should no longer be considered authoritative; see *CEF v Mundey* [2012] EWHC 1524 (QB), where Silber J rejected the approach taken in *Swithenbank* ([165]-[167]) but still applied the test of 'legal relevance', and *Sibir Energy Ltd v Tchigirinski* [2012] EWHC 1844, on Article 6(1) of the revised Lugano Convention.
78. Criticised by Briggs, 'Who is bound by the Brussels Regulation?' (2007) LMCLQ 433-438 and Dickinson, 'Resurgence of the anti-suit injunction: the Brussels I Regulation as a source of civil obligations?' (2008) ICLQ 465-473. See also *Duarte v The Black and Decker Corp* [2007] EWHC 2720 (QB), where it was held that a cash-based incentive scheme agreement that was entered into separately from the employment contract was 'nonetheless a contract of employment' for the purposes of Article 6 of the Rome Convention.
79. Case C-462/06 *Glaxosmithkline v Rouard* [2008] ICR 1375. Criticised by Harris, 'The Brussels I Regulation, the ECJ and the rulebook' (2008) LQR 523-529; and Briggs and Rees (2009), para 2.105. This decision will effectively be reversed by the entry into force of the Recast Regulation, which, in the case

Seafarer v shipowner

9.32 A shipowner, who is domiciled, or deemed to be domiciled, in an EU Member State may be sued in a number of jurisdictions at the choice of the claimant seafarer.[80] This is because the seafarer is deemed to be a weaker party than the shipowner and should therefore be accorded more choice in order to secure an advantageous forum.[81] First, a shipowner may be sued in the courts of the Member State where he, the employer, is domiciled.[82] This poses no great threat to such companies, as they should be aware of the laws and practices of that State; although shipowners should take note if they are domiciled in a State that differs from the flag State of its vessel(s). A shipowner may also be sued in the courts of the Member State where the seafarer habitually carries out his work[83]; this place must be determined autonomously. However, if the employee habitually carries out their work in a non-Member State, this rule should not apply[84]; reference should instead be made to Article 19(1), with proceedings commenced in the Member State where the shipowner is domiciled, or possibly Article 19(2)(b), which refers to the place where the business which engaged the employee/seafarer is or was situated. On this latter rule, see further below. If the seafarer no longer works for the shipowner, the shipowner may be sued in the courts of the Member State where the seafarer previously (habitually) carried out his work.[85]

9.33 Generally speaking, one would think that the State in which a seafarer 'habitually carries out his work' is the flag State of the vessel but this is not a settled matter. It is curious to note that in the recent case of *Voogsgeerd*, regarding choice of law, neither the CJEU nor the Advocate General made any reference to the flag of the vessel that Mr Voogsgeerd worked upon. It noted instead that if the place from which an employee carries out his tasks and also receives the instructions concerning his tasks is always the same, that place must be considered as the place where he 'habitually carries out his work'. The CJEU clearly focused on the fact that Mr Voogsgeerd's permanent base was in Belgium and that a significant connection existed between the work carried out and that base. It has since been asserted that determination of the law applicable to a seafarer's contract of employment has been resolved,[86] and presumably, the question of

of proceedings brought against an employer, allows an employer domiciled in a Member State to be joined to proceedings before the courts of another Member State where he is one of a number of defendants, provided that the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments; Recast Regulation, Articles 20(1) and 8(1).

80. Alternatively, there may be situations where the seafarer has no choice but to sue the shipowner's insurer, for example, where the shipowner is insolvent. Such direct actions, where permitted, would not be subject to the rules on jurisdiction and governing law examined in this chapter, but to those discussed by Hjalmarsson in Chapter 5 of this work.

81. JR, Recital (13).

82. JR, Article 19(1). This rule reflects the general rule in JR, Article 2.

83. JR, Article 19(2)(a).

84. Case 32/88 *Six Constructions Ltd v Humbert* [1989] ECR 341. In relation to Article 5(1) of the Jurisdiction Convention, the ECJ held that 'where, in the case of a contract of employment, the obligation of the employee to carry out the agreed work was performed and has to be performed outside the territory of the Contracting States, Article 5(1) of the Convention is not applicable and that in such a case jurisdiction is determined on the basis of the place of the defendant's domicile in accordance with Article 2 of the Convention', [22]. The case concerned an employment contract between an employee residing in France and a company having its registered office in Belgium, although all of the work was performed in African and Arab countries.

85. JR, Article 19(2)(a).

86. See U Grusic, 'Should the connecting factor of the "engaging place of business" be abolished in European private international law?' (2013) ICLQ 173-192, at 181. See also Grusic (2012), 114 et ff.

jurisdiction also given the similar tests used. It is, however, respectfully submitted that this assertion is incorrect given that many seafarers do not set up a permanent base, but fly all over the world to various ports when seeking out employment hopping from one ship to the next; that seafarers may work on vessels that have various ports of call rather than a consistent route between two destinations; and, that a temporary base ashore for the sole reason of receiving instructions before disembarking should not satisfy the requisite 'significant connection'. Further, many seafarers spend comparatively little time in the territory of a State as compared to the time spent on the High Seas, where they are subject to the exclusive jurisdiction of the flag State, and a seafarer's permanent base will likely be the country of his domicile, often a developing country, to which the majority of his wages will be sent even though the seafarer in fact spends very little time there. Nonetheless, this chapter does not intend to restate the arguments for and against the application of the law of the flag or the consideration that the seafarer works within the territory of the flag but continues on the assumption that the law is not settled either way. As an aside, if the debate concerning the relevance of the flag has indeed been settled, perhaps it should be reopened given the MLC's new role in regulating the working conditions of seafarers where a shipowner's obligations under the Convention are dictated exclusively by the national law of the flag State.

9.34 It is possible to establish the place where the seafarer 'habitually carries out his work' even if the seafarer carries out his activities in more than one State. With respect to Article 5(1) of the Jurisdiction Convention,[87] the ECJ has made reference to the place where, or from which, the employee principally discharged his obligations towards his employer[88]; to the place in which the employee had established the effective centre of his working activities[89]; and, in the absence of an office, to the place in which the employee carried out the majority of his work.[90] In the latter case, the Court preferred a temporal assessment of the employee's duties, surmising that, in the absence of other criteria, the place where the employee habitually carried out his duties was the place where he had worked the longest.[91] Given the importance of avoiding any multiplication of courts having jurisdiction, in order to preclude the risk of irreconcilable decisions and to facilitate the recognition and enforcement

87. Under Article 5(1) of the Jurisdiction Convention, as amended by the 1989 Accession Convention, in matters relating to individual contracts of employment, a person domiciled in a Contracting State could be sued in the place where the employee habitually carried out his work, or, if the employee did not habitually carry out his work in any one country, the employer could also be sued in the courts for the place where the business which engaged the employee was or is now situated. Prior to the amendment, the ECJ in Case 133/81 *Ivenel v Schwab* [1982] ECR 1891, had determined that the obligation arising out of a contract of employment, was that which characterised the *contract*, namely, the obligation to carry out the agreed work, [15]. This judgment departed from the language of Article 5(1) and the preceding case law, thereby highlighting the unsuitability of Article 5(1) in employment disputes. Prior even to that case (and the relevant amendment to the Jurisdiction Convention), the ECJ confirmed that issues relating to employment contracts fell within the Jurisdiction Convention; Case 25/79 *Sanicentral GmbH v Collin* [1979] ECR 3423.

88. Case C-125/92 *Mulox IBC Ltd v Hendrick Geels* [1993] ECR I-4075, [24]. In this case, the ECJ highlighted the fact that the work was carried out from an office in a Contracting State, where the employee had established his residence, from which he performed his work and to which he returned after each business trip, [25].

89. Case C-383/95 *Rutten v Cross Medical Ltd* [1997] ECR I-57, [23], [26]. In *Rutten*, the employee carried out almost two-thirds of his work in one Contracting State and the remainder in several other States.

90. Case C-37-00 *Weber v Universal Ogden Services Ltd* [2002] ECR I-2013, [50]-[58].

91. *Ibid.*, [58]. A temporal assessment must not, however, be made in isolation and all the circumstances of the case must be considered to avoid the determination of a jurisdiction that does not have a close connection with the dispute. If it appears that another Member State has a stronger connection to the dispute, that State should have jurisdiction instead.

of judgments, the Jurisdiction Regulation should not be interpreted as conferring concurrent jurisdiction on the courts of each Member State in whose territory the employee performs part of his work.[92]

9.35 The jurisdictional rule founded on the place where the employee habitually carries out his work has been justified on the basis that it affords the weaker party, the employee, proper protection. The ECJ has held that protection of an employee is 'best assured' if disputes relating to a contract of employment fall within the jurisdiction of the courts of the place where the employee discharges his obligations towards his employer, as this is the place where it is least expensive for the employee to commence, or defend himself against, court proceedings.[93] It is submitted, however, that this justification holds little weight as far as seafarers are concerned.

9.36 The ECJ has also held that work carried out by an employee on fixed or floating installations positioned on or above the part of the continental shelf adjacent to a Member State is to be regarded as work carried out in that State.[94] The Court held that in the absence of any provision in the Jurisdiction Convention in respect of its territorial scope, reference must be made to the principles of public international law relating to the legal regime applicable to the continental shelf and, in particular, the *Geneva Convention on the Continental Shelf, 1958*.[95] Given the Court's judgment in *Weber*, it is unclear why the same rationale as regards the territorial scope of the Jurisdiction Regulation and rules of public international law in respect of the primacy of flag State jurisdiction has not been followed in later cases.[96]

9.37 Furthermore, it has already been mentioned that a seafarer may have more than one employer. Accordingly, in a dispute between a seafarer and his *first* employer, in respect of which his obligations are suspended, the place where the seafarer performs his obligations to the *second* employer may be regarded as the place where he habitually carries out his work under his employment contract with the *first* employer. Put differently, where certain conditions are satisfied, the first employer may be sued in the Member State where the employee habitually discharges his obligations vis-à-vis the second employer. This may arise when, at the time of the conclusion of the second contract, the first employer has an interest in the performance of the service by the employee towards the second employer, in a place to be decided on by the latter. Such an interest does not have to be strictly verified according to formal and exclusive criteria, but determined in an overall manner taking into consideration all the facts of the case.[97] Factors may include the fact that the conclusion of the second contract was envisaged when the first was being concluded; that the first contract was amended on account of the conclusion of the second contract; that there is an organizational or economic link between the two employers; that there is an agreement between the two employers providing a framework for the coexistence of the two contracts; that the first employer retains management powers in respect of the employee;

92. *Mulox IBC*, [23]; Rutten, [18]; Weber, [42]. Cf C-204/08 *Rehder v Air Baltic Corp* [2009] ECR I-6073. See also para 9.38 below.
93. *Mulox IBC*, [18]-[19].
94. *Weber*, [36].
95. (499 UNTS 311); *Weber*, [31]. The *United Nations Convention on the Law of the Sea (UNCLOS), 1982* (1833 UNTS 3) had not been ratified by the Netherlands at the material time.
96. See UNCLOS, Articles 91-94.
97. Case C-43/00 *Pugliese v Finmeccanica SpA* [2003] ECR I-3573.

and, that the first employer is able to decide the duration of the employee's work for the second employer.[98]

9.38 Where the seafarer does not or did not habitually carry out his work in any one country, the shipowner may be sued 'in the courts for the place where the business which engaged the employee is or was situated'.[99] The relevant 'place of business' may refer to the domicile of the shipowner or to a branch, agency or other establishment of a shipowner in accordance with Article 18(2). In light of the MLC, this rule may even be interpreted to extend to independent recruitment and placement services, although such an interpretation may raise considerable difficulties for a shipowner.[100] According to Briggs and Rees (2009), however, this rule will rarely arise for consideration given that judicial authorities, such as *Mulox IBC*, *Rutten* and *Weber*, sought to 'concentrate and ascribe a single location to an employee's work which crossed Contracting State borders' under the first sub-rule of Article 5(1) of the Jurisdiction Convention, which is now reflected in Article 19(2)(a) of the Jurisdiction Regulation.[101] That being said, if the entry into force of the MLC does give rise to a multitude of litigation perhaps the usefulness of this rule should be re-evaluated. For example, if it is considered that a seafarer does not habitually carry out his work in any State, then recourse to the engaging place of business seems to offer a reasonable solution in spite of the difficulties in interpretation that have arisen in respect of choice of law, which are discussed below. The unfortunate result of adopting this rule for seafarers, and international transport workers, is that it could be abused by employers thereby going against the Regulation's objective of protecting employees.

9.39 As mentioned above, in relation to a dispute arising out of the operations of the employer's branch, agency or other establishment, a seafarer may also sue the shipowner in the courts of the Member State of that establishment.[102] This rule is particularly important if the shipowner is not domiciled in a Member State. Finally, it goes without saying that a seafarer may issue a counter-claim in the courts where an original claim against him/her is pending.[103]

Shipowner v seafarer

9.40 In contrast to the position of a seafarer, a shipowner may only bring proceedings against a seafarer in the courts of the Member State in which the seafarer is domiciled.[104] This holds true even if the seafarer's employment has ceased before proceedings have begun. In such cases, this rule reflects the general rule in Article 2 of the Jurisdiction Regulation that a person domiciled in a Member State must be sued in the courts of that State. As can be seen from the cases of *Swithenbank* and *Alfa Laval* mentioned above, characterisation of the claim as a matter relating to an individual contract of employment is of the utmost importance for a seafarer, as otherwise,

98. Ibid., [24].
99. JR, Article 19(2)(b).
100. Cf Grusic (2012), 187-188.
101. See para 3.10.
102. JR, Article 18(2). See para 9.17 above.
103. JR, Article 20(2).
104. JR, Article 20(1). See *Samengo-Turner v Marsh & McLennan (Services) Ltd*. In contrast to the pre-Jurisdiction Regulation position, a shipowner cannot commence proceedings against the seafarer in the Member State in which the seafarer habitually carries out his work.

the claim would not need to be brought in the courts of the seafarer's domicile and he may be sued in a number of jurisdictions.

9.41 That being said, a shipowner is not precluded from bringing a counter-claim in the court in which the original claim is pending if it is not also a court of the Member State in which the seafarer is domiciled.[105]

Jurisdiction agreements (Article 21)

9.42 Under Section 5 of the Jurisdiction Regulation only limited autonomy to nominate the courts having jurisdiction is allowed.[106] Accordingly, jurisdiction agreements will be upheld in only two circumstances - provided that the formal requirements of Article 23 are satisfied. These requirements are discussed briefly below.

9.43 First, the rules provided above may be departed from by an agreement on jurisdiction which is entered into after the dispute has arisen.[107] This will be a simple question of fact for the court seised to assess.

9.44 Alternatively, a jurisdiction agreement may be upheld where it allows the seafarer to bring proceedings in courts other than those provided for in Section 5 of the Regulation.[108] Importantly, the jurisdiction agreement must not reduce the number of forums available to the seafarer or provide further options to the shipowner. The difference between exclusive and non-exclusive jurisdiction agreements should be considered in light of this rule, as an exclusive jurisdiction agreement is likely to 'knock-out' one of the options under the Jurisdiction Regulation. For example, an exclusive jurisdiction agreement for the courts of a State which is neither the place where the seafarer habitually carries out his work nor the place where the shipowner is domiciled, would seem to give the seafarer an option in addition to the places of jurisdiction listed in the Jurisdiction Regulation, but it has been held that such an agreement in fact excludes those options and must therefore be struck out.[109] Accordingly, a jurisdiction agreement in a SEA would need to be non-exclusive so that the seafarer has the option of selecting the courts of the State nominated in the agreement *in addition to* any of the places prescribed by the Jurisdiction Regulation.

Jurisdiction under Articles 22 and 23

9.45 As discussed above, the provisions of Section 5 only apply where the defendant shipowner or defendant seafarer are domiciled in a Member State. It has also been noted that Section 5 is without prejudice to Article 4, which applies in situations where the defendant is *not* domiciled in a Member State. So, where the defendant is domiciled in a non-Member State, the jurisdiction of the courts of each Member

105. JR, Article 20(2).

106. JR, Recital (14). Cf the original position under the Jurisdiction Convention where jurisdiction agreements in employment contracts were given full effect as long as they satisfied the formal requirements required by the Convention; Case 25/79 *Sanicentral GmbH v Collin* [1979] ECR 3423.

107. JR, Article 21(1).

108. JR, Article 21(2). Note however that a jurisdiction agreement cannot be invoked where a shipowner has commenced proceedings against a seafarer in the seafarer's domicile; Grusic (2012), 100 n 50.

109. *Sherdley v Nordea Life and Pension SA* [2012] EWCA Civ 88 in respect of an exclusive jurisdiction agreement in an insurance contract.

State is to be determined by the national law of that State. This provision, however, is in turn subject to Articles 22 and 23 of the Jurisdiction Regulation.

9.46 Article 22 provides exclusive jurisdiction, regardless of domicile, for five types of proceedings, none of which are relevant for the present discussion,[110] and Article 23 provides general rules in respect of jurisdiction agreements. Given the broad application of Article 21, however, it is presumed that the provisions of Article 23 would only apply where Section 5 is not triggered[111]; i.e., where both parties are domiciled in a non-Member State (Article 23(3)), or where only the *claimant* is domiciled in a Member State (Article 23(1)).[112]

9.47 In the first example, where there is an exclusive jurisdiction agreement for the courts of a Member State but *neither* party are domiciled in a Member State, then, Article 23(3) provides that the courts of other Member States will not have jurisdiction unless the court nominated in the agreement has declined jurisdiction. In this situation, the nominated court will apply national law rules to determine whether or not it has jurisdiction, and in doing so, the validity of the jurisdiction agreement.[113] So, in a dispute between a Filipino seafarer and a Singaporean shipowner, for example, if the SEA had an English jurisdiction clause, an English court may be seised. The English court will then assess whether or not it has jurisdiction to hear the dispute by applying its common law rules. It is only where the English court declines jurisdiction, that the courts of other Member States will be able to examine their own jurisdiction over the dispute.

9.48 In the second scenario, where the defendant is *not* domiciled in a Member State but the claimant is so domiciled, and there is an exclusive jurisdiction agreement for the courts of a Member State, then the rules in Article 23(1) should be applied. Article 23(1) provides specific rules for assessing the validity of such agreements, including that an agreement be (a) in writing or evidenced in writing; (b) in a form which accords with practices which the parties have established between themselves; or (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware. If one of these conditions is satisfied, then the agreement should be considered as valid and the court nominated in the agreement must assume jurisdiction over the dispute.

9.49 In the alternative, where the *defendant* is domiciled in a Member State and there is an exclusive jurisdiction agreement for the courts of a Member State (Article 23(1)), then Article 21 should prevail over Article 23 given the objective of Section 5 in protecting the interests of the employee.

110. These include proceedings which have as their object rights in rem in immovable property; the validity of the constitution, the nullity or the dissolution of companies; the validity of entries in public registers; the registration or validity of patents, trademarks or designs; or, the enforcement of judgments.

111. Under the Recast Regulation, the jurisdiction of the courts of each Member State where the defendant is *not domiciled* in a Member State will be determined by Article 6(1), which is subject to Articles 21(2) and 25.

112. The provisions of Section 5 focus on the domicile of the defendant employer (Article 19) or defendant employee (Article 20); the domicile of the claimant is not mentioned. It is only in exceptional cases where an express provision of the Regulation provides that the application of the rule of jurisdiction which it sets out is dependent on the plaintiff's domicile being in a Member State; *Group Josi Reinsurance Company SA v Universal General Insurance Company*.

113. Even though JR, Article 23(3) deals with the jurisdiction of Member State courts that are not nominated by the jurisdiction agreement, the provision does not provide any rules to determine the validity of the agreement, so this falls to national law.

9.50 Finally, where the SEA contains a jurisdiction agreement in favour of the courts of a non-Member State, the court seised should determine its jurisdiction according to its national law rules.[114]

Industrial action

9.51 Even though Section 5 will apply to the majority of disputes between a seafarer and a shipowner, there are still certain circumstances in which other rules of the Jurisdiction Regulation will be relevant. It has already been mentioned that Section 5 does not apply to collective bargaining agreements, and it follows that jurisdiction in respect of liability for damage arising out of industrial or collective action will need to be determined by the general rules of the Regulation.

9.52 Liability arising out of industrial action is likely to be dealt with by Article 5(3) of the Jurisdiction Regulation, which broadly encompasses 'matters relating to tort, delict or quasi-delict'. In such matters, a defendant domiciled in a Member State may be sued in the courts for the place where the harmful event occurred or may occur. The ECJ has confirmed that the expression 'place where the harmful event occurred' in Article 5(3) must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it, so that the defendant may be sued, at the option of the plaintiff, in the courts for either of those places, if they are different.[115]

9.53 In the *DFDS Torline* case,[116] the legality of a notice of industrial action given by a trade union, SEKO, against a shipowner, DFDS was in question. The notice was served with the objective of securing a collective agreement for the Polish crew of the cargo ship *Tor Caledonia* owned by DFDS, which served the route between Göteborg, Sweden and Harwich, UK. The ship was registered in Denmark and subject to Danish law, and the Polish crew were employed on the basis of individual contracts that were governed by Danish law. SEKO served the notice in March 2001, which instructed its Swedish members not to accept employment on the *Tor Caledonia* and called for sympathy action. In April 2001, the Swedish Transport Workers Union (STAF) gave notice of sympathy action refusing to engage in any work whatsoever relating to the *Tor Caledonia*, which would prevent the ship from being loaded or unloaded in Swedish ports (blacking the ship). DFDS brought an action against SEKO and STAF alleging that both actions were unlawful. The implementation of the notified industrial action by SEKO was suspended pending the outcome of the Danish labour court's ruling. DFDS also decided to withdraw the *Tor Caledonia* from the Göteborg-Harwich route, which was subsequently served by another vessel. In addition, DFDS brought an action for damages against SEKO before another Danish court, claiming that SEKO was liable in tort for giving notice of unlawful industrial action and inciting another Swedish union to give notice of unlawful sympathy action. The damages sought were

114. See Case C-387/98 *Coreck Maritime GmbH v Handelsveem BV* [2000] ECR I-9337, [19], and *Konkola Copper Mines Plc v Coromin Ltd* [2006] EWCA Civ 5. Cf *Samengo-Turner v Marsh & McLennan (Services) Ltd*.

115. Case 21/76 *Bier BV v Mines de potasse d'Alsace SA* [1976] ECR 1735, [24]-[25]. See also Case C-68/93 *Fiona Shevill & Ors v Presse Alliance SA* [1995] ECR I-415.

116. Case C-18/02 *DFDS Torline* [2004] ECR I-1417.

for the loss allegedly suffered by DFDS as a result of immobilising the *Tor Caledonia* and leasing a replacement ship.

9.54 As regards jurisdiction, under Danish law, the labour court had jurisdiction to determine the lawfulness of industrial action, while other courts had jurisdiction to adjudicate claims for consequential damage. As a consequence, SEKO argued that the dispute before the labour court did not fall within Article 5(3) of the Jurisdiction Convention, as that court was not hearing a claim for damages. The ECJ held that a case concerning the legality of industrial action fell within the definition of tort, delict or quasi-delict under Article 5(3) and it was sufficient that the industrial action by SEKO was a necessary precondition to the sympathy action by STAF which may result in harm (SEKO's industrial action in itself could not have caused harm to DFDS).[117] The ECJ also decided that the application of Article 5(3) was not affected by the fact that the implementation of the threatened industrial action was suspended pending a ruling on its legality.[118]

9.55 Most importantly, for the purposes of this chapter, the ECJ also held that Article 5(3) must be interpreted as meaning that the damage resulting from industrial action taken by a trade union in a Contracting State, in that case, Sweden, to which a ship registered in another Contracting State sails, namely Denmark, *can* be regarded as having occurred in the flag State, with the result that the shipowner can bring an action for damages against the trade union in the flag State.[119] It is for the national court to inquire whether consequential loss may be regarded as having arisen at a place other than where the industrial action (harmful event) originated; in the *DFDS Torline*, it was held that the damage arose from the withdrawal and replacement of the *Tor Caledonia*. Even so, the flag State of a ship must be regarded as only one factor, among others, assisting in the identification of the place where the harmful event took place, and the nationality of a ship can play a decisive role only if the national court reaches the conclusion that the damage arose on the ship. In such circumstances, the flag State must necessarily be regarded as the place where the harmful event caused damage.[120]

Prorogation of jurisdiction

9.56 In spite of all of the above, where a defendant seafarer (or shipowner) enters an appearance before a court of a Member State which would not otherwise have jurisdiction under the Regulation, he is taken to have submitted to the jurisdiction of that court, as his appearance amounts to a tacit prorogation of jurisdiction. It is only where appearance was entered to contest the jurisdiction of the court that this rule does not apply.[121]

9.57 This is so, even if a defendant is deemed to be a weaker party and thereby able to avail himself of the protective provisions of Sections 3, 4 or 5. Such a situation arose in *Vienna Insurance Group v Bilas*,[122] where the defendant policyholder challenged

117. *DFDS Torline*, [28], [34].
118. *DFDS Torline*, [38].
119. *DFDS Torline*, [45] (emphasis added).
120. *DFDS Torline*, [44].
121. JR, Article 24 (or where another court has exclusive jurisdiction by virtue of Article 22).
122. Case C-111/09, [2010] ECR I-4545.

his insurer's claim without contesting the jurisdiction of the court seised. The insurance company had seised a court in the Czech Republic in breach of Article 12(1) of the Jurisdiction Regulation, which provided that the defendant policyholder could be sued only in the courts of his domicile, Slovakia. The CJEU held that, although the aim of the provisions in Sections 3 to 5 is to offer the weaker party stronger protection, the jurisdiction determined by those Sections cannot be imposed on that party. As such, if the defendant deliberately decides to enter an appearance, the Regulation leaves him the option to defend himself as to substance elsewhere.[123] The Court further held that there was no obligation on a court seised to ascertain, in the interest of protecting the weaker party, whether that party's manifestation of intention was in fact deliberate and designed to give that court jurisdiction. Nonetheless, it was always 'open' to the court seised to ensure that the defendant being sued before it in those circumstances was fully aware of the consequences of his agreement to enter an appearance.[124] There is no reason to suppose that the protective provisions of Section 5 are any stronger than those in Section 3 (insurance), as they are all intended to protect a party who is deemed to be weaker by the Regulation. Accordingly, all seafarers should be made fully aware of the difference between *contesting the jurisdiction of a court*, as compared to *contesting the merits of a claim*; the latter resulting in tacit prorogation of jurisdiction.

9.58 Fortunately, once the Recast Regulation enters into force, in the matters referred to in Sections 3, 4 and 5, where the weaker party is the defendant, the court must, before assuming jurisdiction, ensure that the defendant is informed of his right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance.[125] This should prevent seafarers unknowingly submitting to the jurisdiction of a court that would not otherwise be able to hear the dispute.

CHOICE OF LAW

9.59 Once the relevant jurisdiction has been ascertained, it is necessary to determine the law that governs the dispute.[126] While there are many benefits in a court applying its national legislation to the merits of a case, there may be cases that require the application of a foreign law. This will not necessarily result in a court declining jurisdiction over the case, especially where jurisdiction is mandatory under the Jurisdiction Regulation. The rules provided in Rome I and Rome II guide the courts as to the applicable law over contractual and non-contractual obligations respectively.[127]

123. *Ibid.*, [30]. See also Case 150/80 *Elefanten Schuh GmbH v Jacqmain* [1981] ECR 1671, where appearance before a court other than that named in a jurisdiction agreement was taken to be tacit amendment of the agreement.

124. *Ibid.*, [32].

125. Recast Regulation, Article 26(2).

126. Then again, there is no reason why a court could not determine the governing law of a dispute before addressing the question of jurisdiction.

127. As mentioned above, the rules for determining the governing law in respect of matters relating to insurance, including direct actions against the shipowner's insurer, are discussed in Chapter 5 of this work.

Contractual obligations under Rome I

9.60 Rome I applies, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters, subject to a number of exclusions.[128] Specifically, Rome I applies, in all Member States except Denmark, to contracts concluded as from 17 December 2009.[129] It has universal application so that any law specified by its rules must be applied even if it is the law of a non-Member State.[130] In principle, the rules require the same national law to be established irrespective of the Member State in which an action is brought.[131] So, if, through the application of the rules in Rome I, it is determined that Indian law applies to a dispute over which a Member State court has jurisdiction, that court is required to apply Indian law.

9.61 The parties' freedom to choose the law applicable to their contractual obligations is one of the cornerstones of Rome I.[132] Even so, for contracts concluded with parties regarded as being weaker from a socio-economic point of view, such as consumer, insurance and 'individual employment contracts',[133] those parties should be protected by rules that are more favourable to their interests.[134] For that reason, the conflict of law rules applicable to individual employment contracts, or SEAs, are discussed in this section.

Individual employment contracts

9.62 Article 8 of Rome I provides special rules for individual employment contracts,[135] which derogate from the choice of law rules in Articles 3 and 4. As a general rule, a SEA will be governed by the law chosen by the parties.[136] A choice of law must be made expressly (in writing) or 'clearly demonstrated'[137] by the terms of the

128. Rome I, Article 1, although the term 'contractual obligation' is not defined in the Regulation. Note the exclusion of obligations arising out of dealings prior to the conclusion of a contract in Rome I, Article 1(2)(i) and Recital (10). Such obligations are dealt with in Rome II. See below. The capacity of a person to enter into an employment contract is also excluded; Rome I, Article 1(2)(a), without prejudice to Article 13.

129. Rome I, Article 28, as amended by the Corrigendum to Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2009] OJ L309/87. For the UK, see Commission Decision 2009/26/EC, Article 2.

130. Rome I, Article 2.

131. Rome I, Recital (6).

132. Rome I, Recital (11). It should also be noted that Rome I does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention; Rome I, Recital (13).

133. As the JR and Rome I have to be interpreted consistently with each other, it seems safe to assume that there is no difference between the concepts of an employment contract under each Regulation.

134. Rome I, Recital (23).

135. It is unclear which law should be applied to determine the initial question of whether the contract is an individual employment contract for the purposes of Rome I, although there are arguments in favour of applying the law that would govern the contract if it was held to be so. This approach has the added advantage of avoiding a situation where the court applies the employment law of a particular country to a contract which is not a contract of employment according to that law; C Morse, 'Consumer contracts, employment contracts and the Rome Convention' (1992) 41 ICLQ 1.

136. Rome I, Article 8(1).

137. Under the equivalent provision in the Rome Convention, the relevant test was 'demonstrated with reasonable certainty', although the change of language was not intended to involve a change of meaning but to align the English, German and French texts. The party asserting that there has been a choice of law has the burden of establishing it. For an example of where a choice had not been established with reasonable certainty in an employment/agency context, see *Lawlor v Sandvik Mining & Construction Mobile Crushers and Screens Ltd* [2013] EWCA Civ 365.

employment contract or the circumstances of the case.[138] A choice of law may not, however, have the result of depriving the seafarer of the protection afforded to him by provisions that cannot be derogated from by agreement, or which can only be derogated from to his benefit, under the law that would apply to the contract in absence of such an agreement.[139] Where the parties have not chosen the law applicable to the employment contract, or where the choice is held to be invalid, the relevant law may be determined according to the following rules.

9.63 Typically, a SEA is to be governed by the law of the country *in which* or, failing that, *from which*, the seafarer 'habitually carries out his work' in performance of the contract[140]; a similar test to that provided in Article 19(2)(a) of the Jurisdiction Regulation. It is first necessary to examine whether a seafarer principally carries out his work within one single country. If so, it is the law of that country which will govern the SEA.

9.64 Difficulties may arise, however, where the seafarer 'habitually carries out his work' in more than one country, although it may still be possible for a court to determine the State with which the work has a 'significant connection'. This criterion should be interpreted broadly and understood as referring to the place in which or from which the seafarer actually carries out his working activities and, in the absence of a centre of activities, to the place where he carries out the majority of his activities.[141]

9.65 In such circumstances, the CJEU has held that the country in which the employee 'habitually carries out his work' in performance of his contract is that in which or from which, in the light of all factors which characterise his activity, the employee performs the greater part of his obligations towards his employer.[142] Factors may include the place from which the employee carries out his transport tasks, the place where the employee receives instructions concerning his tasks and organises his work, the place where his work tools are situated, the places where the transport is principally carried out, the places where goods are unloaded and the place to which the employee returns after completion of his tasks, along with the place of actual employment and the place where the employee must report before discharging his tasks.[143] In *Voogsgeerd*, the Court held that if the place from which the employee carries out his tasks and also receives the instructions concerning his tasks is always the same, that place *must* be considered as the place where he habitually carries out his work.[144] As a result of the judgment, it has been argued that the Court has laid down a general rule for international transport cases, noting that a seaman's employment contract is, in principle, governed by the law of the country of the seaman's

138. See Rome I, Article 3(1). Also, the parties may select the law applicable to the whole or to part only of the contract. This is known as dépeçage.

139. Rome I, Article 8(1) and Recital (35). See *Duarte v The Black and Decker Corp* [2007] EWHC 2720 (QB), where it was held that the English law of restrictive covenants in employment contracts does not consist of mandatory rules affording protection to employees within Article 6(1) of the Rome Convention, but is part of the general law of contract.

140. Rome I, Article 8(2).

141. Regarding Article 6(2) of the Rome Convention, see Case C-29/10 *Koelzsch v Luxembourg* [2011] ECR I-1595, [45], and *Voogsgeerd v Navimer*. See also J Lavelle, 'Employment contracts in the international transport and maritime sectors' (2012) 12(4) STL 1-3. Reference should also be made to the jurisprudence of the CJEU in respect of similar rules in the Jurisdiction Regulation and Jurisdiction Convention.

142. *Koelzsch*, [50].

143. *Koelzsch*, [48]-[49]; *Voogsgeerd*, [40].

144. *Voogsgeerd*, [39].

permanent base, provided that there is a significant connection between the work and that base. Otherwise, the applicable law is that of the engaging place of buiness.[145] As expressed above in relation to jurisdiction, it is the author's opinion that the judgement in *Voogsgeerd* does not signal the end of the matter as far as seafarers are concerned, even though Mr Voogsgeerd was a seafarer. Rather, it is submitted that the facts in *Voogsgeerd* may easily be distinguished in so far as the majority of the seafaring workforce are concerned.

9.66 The country where the work is habitually carried out does not change where the seafarer is *temporarily* employed in another country.[146] Work carried out in another country should be regarded as temporary if the seafarer is expected to resume working in the country of origin after carrying out his tasks abroad. Also, the conclusion of a new SEA with the original shipowner, or an employer belonging to the same group of companies as the original shipowner, should not preclude the seafarer from being regarded as carrying out his work in another country temporarily.[147]

9.67 If the applicable law cannot be determined as above, the SEA will be governed by the law of the country where 'the place of business' through which the seafarer was 'engaged' is situated[148]; again a similar test to that found in Article 19(2)(b) of the Jurisdiction Regulation. The CJEU has confirmed that this criterion should *only* be applied in cases where the court is not in a position to determine the country in which (or from which) the work is habitually carried out,[149] and that it should be interpreted strictly to guarantee the complete foreseeability of the law applicable to the contract of employment.[150] The term 'engaged' refers only to the conclusion of the SEA or, in the case of a *de facto* employment relationship, to the creation of the employment relationship, and not to the way in which the seafarer's actual employment is carried out.[151] Factors that characterise a seafarer's actual employment, which are relevant to Article 6(2)(a), cannot also be relevant to Article 6(2)(b). Instead, the court should consider factors relating to the procedure for concluding the contract such as the place of business which published the recruitment notice and carried out the recruitment interview, and the real location of that business.[152] If, however, it is clear that the undertaking which concluded the SEA acted in the name of and on behalf of another undertaking, then the law of the country in which the latter undertaking is situated is more likely to apply to the SEA.[153]

145. Grusic (2013), 178, 180-182 and the sources cited therein.
146. Rome I, Article 8(2).
147. Rome I, Recital (36).
148. Rome I, Article 8(3). For the purpose of this rule, there is no requirement for the place of business to have legal personality, although the relevant unit of an undertaking should have a degree of permanence in a State to connect the SEA to that State; *Voogsgeerd*, [54]-[58].
149. *Koelzsch*, [43]. Where the country in which the employee habitually carries out his work can be determined, there is no scope for applying the law of a different country by virtue of the fact that the other country is the country in which the relevant place of business is situated. The intention of the legislator was to establish a hierarchy between Article 6(2)(a) and Article 6(2)(b), with the former applying in priority; *Voogsgeered*, [34].
150. *Voogsgeerd*, [47]. It has been argued by Grusic that the ECJ has deprived this connecting factor of almost any effect and it should consequently be abolished. See Grusic, 'Should the connecting factor of the "engaging place of business" be abolished in European private international law?' (2013) ICLQ 173-192.
151. *Voogsgeerd*, [46].
152. *Voogsgeerd*, [50].
153. *Voogsgeerd*, [49].

9.68 There may be circumstances where an undertaking other than that which is expressed as the employer in the employment agreement, can be regarded as acting in the capacity of the employer, even though such authority has not been transferred to that undertaking. In such circumstances, the court must assess what is the real relationship between the two companies in order to establish whether one is the employer of personnel engaged by the other. The court must consider all relevant objective factors in order to establish the actual employment situation as compared to the situation expressed by the contract. The absence of a transfer of authority is a relevant factor, although it is not, in itself, decisive.[154]

9.69 In spite of the above rules, where it appears from the circumstances as a whole that the SEA is 'more closely connected' with a country other than the country indicated in the above rules, the law of that other country will apply to the agreement.[155] According to Dicey, Morris & Collins, the effect of the employment contract provisions in the Jurisdiction Regulation is that, in many cases, the State which has jurisdiction will also be the State whose law governs.[156] That being said, the test of 'more closely connected' in Rome I does not appear in the Jurisdiction Regulation.

9.70 Finally, the above rules on individual employment contracts are without prejudice to the application of overriding mandatory provisions of the country to which a worker is posted in accordance with Directive 96/71/EC; a discussion of the Directive is outside the scope of this chapter.[157]

Non-contractual obligations under Rome II

9.71 Rome II applies, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters, subject to a number of exclusions.[158] For all Member States except Denmark, Rome II applies to events giving rise to damage occurring after 11 January 2009.[159] As the concept of a 'non-contractual obligation' varies from one Member State to another, for the purposes of the Regulation, it is to be understood as an autonomous concept.[160] In particular, the Regulation deals with damage arising out of tort/delict, unjust enrichment, acts performed without due authority (*negotiorum gestio*) and pre-contractual dealings (*culpa in contrahendo*),[161] as

154. *Voogsgeerd*, [59]-[65].
155. Rome I, Article 8(4). The burden of proving that a SEA is more closely connected with another country is lower than other displacement provisions in Rome I, given the omission of the term 'manifestly'.
156. DMC, para 11-373.
157. Rome I, Recital (34); Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L18/1.
158. Rome II, Article 1.
159. Rome II, Articles 31 and 32; Case C-412/10 *Homawoo v GMF Assurances SA* [2012] IL Pr 2. In the UK, prior to the entry into force of Rome II, the law applicable to events constituting tort or delict was determined pursuant to Part III of the Private International Law (Miscellaneous Provisions) Act 1995, c 42. The 1995 Act remains relevant for matters falling outside the scope of Rome II that are not dealt with by other European instruments and for events giving rise to damage that occurred before 11 January 2009 where such claims are not time-barred.
160. Rome II, Recital (11).
161. Rome II, Article 2(1).

well as non-contractual obligations arising out of strict liability[162] and non-contractual obligations that are likely to arise.[163]

9.72 In the same manner as that under Rome I, any law specified by Rome II must be applied irrespective of whether it is the law of a Member State[164] and irrespective of the Member State in which the action is brought.[165] The general rule of Rome II is that the law applicable to a non-contractual obligation should be the law of the country in which the damage occurs.[166] This rule, however, is subject to many exceptions and the Regulation also contains specific rules for special torts/delicts, where the general rule would not allow a reasonable balance to be struck between the interests at stake.[167]

9.73 In this section, non-contractual obligations arising out of tort, industrial action and pre-contractual dealings are discussed, along with the limited situations in which parties may choose the law applicable to their non-contractual obligations.

Tort

9.74 There are numerous situations in which an action in tort may arise in a maritime situation. Examples include the liability of the shipowner for personal injuries sustained by a seafarer[168] or the liability of the seafarer for damage caused to the vessel; both of which may be pursued under the tort of negligence. In certain circumstances, the parties may be able to choose the law applicable to a non-contractual obligation arising out of a tort.[169] If the circumstances do not allow, or if the parties cannot agree upon a choice of law, the applicable law will be determined in accordance with Article 4 of Rome II.

9.75 Accordingly, unless Rome II otherwise provides, the law applicable to a dispute arising out of a tort will be the law of the county in which the damage occurs.[170] This rule applies irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.[171] For personal injury, the country in which the damage occurs should be the country where the injury was sustained,[172] and for property damage, the country where the damage occurs should be the country where the property was damaged.

162. Rome II, Recital (11).
163. Rome II, Article 2(2).
164. Rome II, Article 3. The rationale behind this rule of universal application is to avert the risk of distortions of competition between Community litigants; Recital (13).
165. Rome II, Recital (6). The Regulation also applies irrespective of the nature of the court or tribunal seised; Recital (8).
166. See Rome II, Article 4(1) and Recitals (14)-(18).
167. See Rome II, Articles 5-12 and Recitals (19) and (29).
168. For examples of such claims, see *Collins v Secretary of State for Business Innovation and Skills* [2013] EWHC 1117 (QB), where it was alleged that the injured party contracted cancer following his exposure to asbestos on ships that he unloaded, and *Braganza v BP Shipping Ltd* [2013] EWC Civ 230, where a negligence claim for damages was brought in tort by the widow of a chief engineer who disappeared while on board the vessel he worked upon.
169. Discussed below.
170. Rome II, Article 4(1) and Recital (18).
171. *Ibid.*
172. Rome II, Recital (17). See also *Jacobs v Motor Insurers Bureau* [2010] EWHC 231 (reversed by the Court of Appeal [2010] EWCA Civ 1208 without addressing the determination of where the injury occurred).

9.76 An exception to this general rule exists where the person claimed to be liable and the person sustaining damage[173] both have their habitual residence[174] in the same country at the time when the damage occurs. Where this special connection exists, the law of that country will apply instead of the law of the country in which the damage occurs.[175] Where a shipowner based in England operates its ship from the port of another country, say Italy, it may be argued that the shipowner's habitual residence should be Italy if it has an establishment there that deals with the day-to-day operations of the ship.[176]

9.77 The above two rules may be displaced, however, where it is clear from all of the circumstances of the case that the tort is 'manifestly more closely connected' with another country. If so, the law of that other country will apply to the dispute.[177] It is important to note that a manifestly closer connection with another country may be based, in particular, on a pre-existing relationship between the parties, such as a contract, if it is closely connected to the tort in question.[178] Consequently, a SEA may satisfy the requirement of a manifestly closer connection so that the law applicable to the employment agreement would also apply to the action in tort.

9.78 To illustrate, a Filipino seafarer may be injured while working aboard a Panamanian-flagged vessel. Initially, the law applicable to the dispute would be Panamanian law, as the law of the country in which the damage occurs. If the shipowner's place of central administration (habitual residence) is the Philippines, however, then the exception in Article 4(2) is triggered and the applicable law would be Filipino law. If the shipowner is resident elsewhere, the exception does not apply. Yet, in either scenario, the court seised may determine that the tort is manifestly more closely connected with England, as the SEA is subject to English law and jurisdiction. Ultimately then, English law will be applied to the dispute.

Industrial action

9.79 Unlike the Jurisdiction Regulation, Rome II includes a special rule applicable to industrial action, which is found in Article 9.[179] This rule only applies to non-contractual obligations, and does not apply, for example, to the enforcement of a contract between a seafarer and a shipowner, or between a trade union and its members.[180]

9.80 As the concept of industrial action varies between Member States, the Regulation assumes, as a general principle, 'that the law of the country where the industrial action was taken should apply, with the aim of protecting the rights and obligations

173. It is the residence of the injured party that is paramount, not the residence of the person claiming damage on their behalf. For example, where the injury results in death, it is the deceased's country of habitual residence at the time the fatal injury occurred that should be considered.

174. 'Habitual residence' is defined in Rome II, Article 23. Cf the definition of 'domicile' that is used in the Jurisdiction Regulation; JR, Articles 59 and 60.

175. Rome II, Article 4(2).

176. Dickinson, para 9.32 and n 54. See also, para 3.58.

177. Rome II, Article 4(3). See *Hillside (New Media) Ltd v Baasland* [2010] EWHC 3336 (Comm).

178. *Ibid.*

179. The addition of this special rule resulted from an initiative of the Swedish Government, with the support of the European Parliament. See Dickinson, Chapter 9.

180. The law applicable to contractual obligations should instead be determined in accordance with Rome I; Dickinson, para 9.17.

of workers and employers'.[181] Accordingly, it is unlikely that the concept of industrial action should be given an autonomous meaning, as is usually required, but understood in accordance with the law of the country in which the relevant action is to be, or has been, taken, as the 'application of any law other than the law identified by Article 9 to determine the breadth of the concept would reduce the parties' ability to predict the law applicable to claims arising out of acts that might be argued to constitute industrial action'.[182] Specifically, Article 9 provides:

> Without prejudice to Article 4(2), the law applicable to a non-contractual obligation in respect of the liability of a person in the capacity of a worker or an employer or the organizations representing their professional interests for damages caused by an industrial action, pending[183] or carried out, shall be *the law of the country in which the action is to be, or has been, taken*.[184]

9.81 Put simply, this rule applies to industrial action taken, or threatened to be taken, by a seafarer, or a shipowner, or a representative union of either of the two. Examples of such actions can range from a trade union serving a notice of industrial action to strikes, lock-outs, boycotts or the blacking of a ship. In the latter scenario, the country of industrial action will be the place where port workers refuse to cooperate in the loading or unloading of a ship.

9.82 The application of this rule may surprise shipowners, as the legality of any industrial action taken against them would be subject to the national laws of countries in which the industrial action is taken, rather than the laws of the vessel's flag, even if the shipowner is in full conformity with the relevant legislation of the flag State. It is only where industrial action is taken by a ship's crew while she is on the high seas that the law of the flag State is likely to apply.[185] In addition, where a vessel habitually serves a route between two countries and industrial action is threatened in both, the national law of each country will apply to the action threatened therein. Further complications arise if the action threatened is lawful under the law of one country but not the other.

9.83 On further examination of Article 9, liability 'in the capacity of a worker' should also extend to former employees/seafarers and to those employed by others who participate in a secondary action, such as 'sympathy actions', but not to third parties, such as the relatives or friends of workers who may become involved.[186] In addition, liability 'in the capacity of an employer' should extend to those representing the employer/shipowner in a trade dispute, including senior management, and, as to trade unions, liability should extend to officials representing those organizations.[187] What remains unclear is whether the rule in Article 9 should apply to determine the law applicable to a dispute brought by a third party who has suffered loss as result

181. Rome II, Recital (27).
182. Dickinson, para 9.19. For an overview of the relevant definitions under English law, see paras 9.21-9.23. See also DMC, para 35-086 where it is stated that '"Industrial action" is one term in the Regulation which should not be given an autonomous interpretation, bearing in mind the sensitivity of labour relations in many countries and the different rules which may prevail in different countries as to what is permissible or impermissible industrial action'.
183. Rome II, Article 9 also deals with industrial action that is threatened to be taken.
184. Emphasis added.
185. See Dickinson, para 9.31 and n 51, and paras 4.55-4.57.
186. Dickinson, para 9.24.
187. *Ibid.*

of the industrial action, such as cargo owners or passengers following the blockade of a port, where that party does not fall within one of the three categories of persons mentioned in Article 9.

9.84 The situations to which this special rule must be applied should be limited to those concerned with protecting the rights and obligations of seafarers and shipowners. The law applicable to 'peripheral situations', such as violence committed during a strike or attacks on property, even though related to the industrial action, should be determined by other relevant rules in Rome II.[188] The term 'damages' in Article 9 is also understood to include actions for monetary and non-monetary remedies, including claims for injunctive or declaratory relief.[189]

9.85 Furthermore, as the rule in Article 9 is without prejudice to 'the conditions relating to the exercise of such action in accordance with national law' and 'the legal status of trade unions or of the representative organizations of workers as provided for in the laws of Member States',[190] it is concerned only with questions of civil liability. That being said, the applicable law under Article 9 will determine 'the legal and factual criteria that a trade union or other representative body must meet in order to be exempted from non-contractual liability for industrial action'.[191]

9.86 In spite of the above, Article 9 is without prejudice to Article 4(2),[192] which provides a strict exception to the rule where both parties are habitually resident in the same country at the time when the damage occurs. In such circumstances, the law of that country shall apply. So, where damage is caused by industrial action taken in France, but, at the time the damage occurs, both parties are habitually resident in Germany, then, German law will apply to the dispute rather than French law. This exception is mandatory and Article 9 does not include a displacement provision based on a manifestly closer connection such as that found in Article 4(3). The appropriateness of this exception has been questioned given the sensitivity of the context in which Article 9 operates, and it has been noted that the lack of escape clause is liable to produce unsatisfactory results, particularly where industrial action is organised on an international basis, as is common in the maritime sector.[193]

Pre-contractual dealings (*culpa in contrahendo*)

9.87 The law applicable to a non-contractual obligation[194] arising out of pre-contractual dealings during the negotiation of a SEA will also be determined by Rome II, under

188. See Dickinson, para 9.28.

189. See Dickinson, para 9.27, and DMC, para 35-087. See, for example, *White Sea & Onega Shipping Co Ltd v International Transport Workers' Federation (The Amur-2528 and Pyalma)* [2001] 1 Lloyd's Rep 421 where injunctive relief was sought to prevent an allegedly unlawful boycott action in Denmark.

190. Rome II, Recital (28). The law applicable to these matters should be determined in accordance with other rules of private international law.

191. Dickinson, para 9.30.

192. See above.

193. DMC, para 35-089.

194. While it is clear that Rome II applies only to non-contractual obligations, there is significant judicial and academic debate in respect of the characterisation of the various obligations that arise during pre-contractual dealings, and the consequences of their breach; the relationship between Rome I and Rome II in this regard is somewhat unclear. Prior to the adoption of Rome II, the question of whether pre-contractual liability should be considered as contractual within JR, Article 5(1) or as a matter relating to tort, delict or quasi-delict under JR, Article 5(3) caused much confusion. A full discussion of this issue is outside the scope of this chapter. See Dickinson, paras 12.09-12.12 and DMC, paras 35-094, and the

Article 12.[195] The concept of '*culpa in contrahendo*' must be interpreted autonomously and not necessarily in line with the meaning attributed to it under national law.[196] The Regulation expressly specifies that it should include the violation of the duty of disclosure and the breakdown of contractual negotiations,[197] although it is likely that claims for fraudulent or negligent misrepresentation or misstatement would also be included.[198] Relevant examples include the misrepresentation or non-disclosure of the seafarer's age, particularly where he is younger than the minimum age specified in the MLC (16 years)[199]; the seafarer's medical certification, especially where that seafarer is not medically fit to perform his duties[200]; and, the seafarer's training and qualifications, in particular where such qualifications have been falsified.[201]

9.88 In addition, the rule provided in Article 12 refers only to non-contractual obligations presenting a direct link with the dealings prior to the conclusion of a contract.[202] It is questionable whether the application of Article 12 is limited to disputes between the parties to the SEA, or the prospective SEA, i.e., between the shipowner and seafarer, or whether claims involving third parties, such as an agent, are also included.[203]

9.89 The applicable law in such disputes will be the law that applies to the SEA or the law that would have applied to the SEA if it had been entered into.[204] This rule applies regardless of whether a SEA was actually concluded or not. As a consequence, it is necessary to determine the law applicable to the SEA, or the law that would have been applicable,[205] to satisfy this provision. In order to do so, the rules of Rome I must be applied, depending on the type of contract. As the relevant contract here is the SEA, the applicable law will be determined by the rules provided in Article 8 of Rome I, and any limitations on a choice of law provided there should apply equally to pre-contractual obligations.[206]

9.90 Given that a seafarer-shipowner relationship will, more often than not, be based on a SEA, it should be straightforward enough to determine the applicable law of that agreement, irrespective of whether the parties had chosen the applicable law or not.

sources cited therein. Even so, the fact that Rome II, Article 12(1) applies the law applicable, or the law that would have been applicable, to the contract to non-contractual obligations arising out of pre-contractual dealings reduces the significance of much of the debate.

195. Note the exclusion of such matters in Rome I, Article 1(2)(i) and Recital (10).

196. Rome II, Recital (30). While many would agree that Rome II, Article 12 covers 'pre-contractual liability', the legal systems of EU Member States may differ as to the conceptual basis on which such liability may be based, see DMC, para 35-092 and n 433.

197. Rome II, Recital (30).

198. See, for example, *Morgan Stanley & Co International Plc v Chine Haisheng Juice Holdings Co Ltd* [2009] EWHC 2409 (Comm) and *Morin v Bonhams & Brooks Ltd* [2003] EWCA Civ 1802. For examples of claims that are likely to fall outside the scope of Rome II, Article 12, see DMC, para 35-093. Also, it is unclear whether Rome II, Article 12 extends to liability for innocent misrepresentation, although in situations that involve strict liability (see Recital 11), this seems plausible; Dickinson, para 12.04.

199. See MLC, Regulation 1.1.

200. See MLC, Regulation 1.2.

201. See MLC, Regulation 1.3.

202. Rome II, Recital (30). Other types of damage, such as personal injury suffered while a SEA is being negotiated, should be governed by other relevant provisions of the Regulation. See further, Dickinson, para 12.06.

203. See Dickinson, paras 12.07-12.08.

204. Rome II, Article 12(1).

205. Where a SEA has not been entered into, it may be extremely difficult to determine the law applicable to it. See DMC, para 35-095.

206. DMC, para 35-095. See above.

As expressed by Lord Diplock, 'contracts are incapable of existing in a legal vacuum. They are mere pieces of paper devoid of all legal effect unless they were made by reference to some system of private law which defines the obligations assumed by the parties to the contract by their use of particular forms of words and prescribes the remedies enforceable in a Court of justice for failure to perform any of those obligations'.[207] As every SEA must have an applicable law, there should be no need to consider the rules provided in Article 12(2) of Rome II. It is only where the parties have agreed to apply the law of a different country to their respective non-contractual obligations that the law of the SEA will be displaced.[208]

9.91 Even where a SEA is not ultimately concluded, the negotiations should have reached a stage which still allows the applicable law of the prospective agreement to be established. Once determined, that law will also govern questions of pre-contractual liability. That being said, where a SEA is not concluded, in certain circumstances it may be impossible to determine the applicable law with regard to the rules provided in Article 8 of Rome I. For example, the country in which or from which the seafarer would have habitually carried out their work may not have been decided before negotiations broke down. Consequently, it is only where the applicable law 'cannot be determined' under Article 12(1) that recourse to Article 12(2) is necessary.

9.92 The rules in Article 12(2) are almost identical to the general rules of Article 4 of Rome II. Accordingly, where the law applicable to the (prospective) SEA cannot be determined, the law of the country in which the damage occurs will govern any pre-contractual liability.[209] This rule applies irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occurred.[210] An exception to this rule exists where the parties have their habitual residence[211] in the same country at the time when the event giving rise to the damage occurs, and the law of that country will apply instead.[212] However, if it is clear from all the circumstances of the case that the non-contractual obligation arising out of dealings prior to the conclusion of a SEA is 'manifestly more closely connected' with another country, the law of that country will apply.[213]

207. *Amin Rasheed Shipping Corp v Kuwait Insurance Co (The Al Wahab)* [1984] AC 50, 65.
208. See Rome II, Article 14; discussed below.
209. Rome II, Article 12(2)(a).
210. *Ibid.*
211. 'Habitual residence' is defined in Rome II, Article 23. Cf the definition of 'domicile' that is used in the Jurisdiction Regulation; JR, Articles 59 and 60.
212. Rome II, Article 12(2)(b). This rule, unlike that in Article 4(2) refers to the 'parties', rather than 'the person claimed to be liable and the person sustaining damage', and the temporal element refers to the 'time when the *event giving rise* to the damage occurs', instead of the 'time when the damage occurs' (emphasis added). It has been submitted that the reference to the 'parties' should be taken as a reference to the parties to the contemplated contract and not the parties to the proceedings; Dickinson, para 12.22.
213. Rome II, Article 12(2)(c). There is nothing to suggest that this displacement provision cannot be used to move away from the country of the parties' habitual residence and back to the country where the damage occurs.

Freedom of choice

9.93 Party autonomy is also respected as regards non-contractual obligations, although in limited circumstances.[214] The parties may select the law[215] applicable to non-contractual obligations (a) by an agreement entered into *after* the event giving rise to the damage occurred; or, (b) by an agreement freely negotiated *before* the event giving rise to damage where all the parties are pursuing a commercial activity.[216] The choice must be express (in writing) or demonstrated with reasonable certainty[217] by the circumstances of the case, and it must not prejudice the rights of third parties.[218] Taking the personal injury scenario discussed above, instead of applying the law that would be determined by Article 4 of the Regulation, the parties may simply choose the applicable law after the event. It goes without saying that parties should select the applicable law that would best protect their interests.

9.94 The court should not, however, infer a choice of law that the parties might have made where the parties had no clear intention of making that choice.[219] For example, if the parties also have a contractual relationship and they have selected the law applicable to their respective contractual obligations, the court should not infer that the parties' choice should also govern any non-contractual obligations between them, unless it was the parties' intention that their choice should do so.[220]

9.95 Parties are allowed to choose the law applicable to a non-contractual obligation, as this respects the principle of party autonomy but also enhances legal certainty. When establishing the existence of an agreement,[221] the court must respect the intentions of the parties, although protection should be given to weaker parties by imposing certain conditions on the choice.[222] It is unlikely that an agreement negotiated before the event in question would be upheld in a dispute between a seafarer and a shipowner given the seafarer's deemed status as a weaker party that needs to be protected. That being said, the court may instead provide protection to the seafarer by imposing certain conditions.

214. Rome II, Article 14. Also, note the exclusion of party autonomy in Rome II, Article 6(4) and Article 8(3).

215. It is unclear whether dépeçage is permitted under Rome II, i.e., whether parties can select different laws to apply to different issues arising out of a non-contractual obligation. The parties may, however, choose to apply different laws to different non-contractual obligations. See Dickinson, para 13.20.

216. The term 'commercial activity' is not defined in Rome II. It may include any activity with a commercial or professional purpose; Dickinson, para 13.37; DMC, para 34-045 n 283.

217. The test of 'demonstrated with reasonable certainty' is the same as that found in Rome Convention, Article 3(1). The test in Rome I, Article 3(1) is slightly amended, however, providing that the choice must be 'clearly demonstrated' although there is no material difference between these tests.

218. See Rome II, Article 14(1) and Recital (31).

219. See *Lawlor v Sandvik Mining & Construction Mobile Crushers and Screens Ltd* [2013] EWCA Civ 365.

220. Parties should carefully select the wording used in their choice of law agreement. For example, the use of 'any claim arising under or in connection with this contract' may be construed to extend the choice of law to non-contractual obligations arising out of their contractual relationship. See further, Dickinson, paras 13.21-13.26, and Briggs, *Agreements on Jurisdiction and Choice of Law* (OUP 2008). Note however that the distinction between disputes 'arising under' and disputes 'arising out of' has become impermissible following *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40.

221. It is unclear which system of law should be applied to determine the existence and validity of the agreement and/or the intentions of the parties. While it is unlikely to be the law of the forum, it may be (i) the law nominated in the agreement; (ii) the law applicable to the agreement that is determined in accordance with Rome I (or the Rome Convention); or, (iii) that an autonomous interpretation of the concept of 'agreement' in Rome II, Article 14 be given. For further discussion, see Dickinson, paras 13.11-13.19.

222. Rome II, Recital (31).

9.96 The term 'parties' should be understood as referring to the 'parties to the agreement as to the law applicable', rather than the 'parties to the proceedings'.[223] This is explained as follows: 'if one or more parties to an agreement is not pursuing a commercial activity in entering the agreement, the effectiveness of that agreement may depend on the identity of the persons joined as parties to subsequent proceedings concerning non-contractual obligations arising out of that agreement'.[224] Where a party in subsequent proceedings was not a party to the original agreement, the court will need to determine whether the relevant party has succeeded to the rights and obligations of an original party to the choice of law agreement with respect to the non-contractual obligation.[225]

9.97 Moreover, there are two situations where a choice of law will not avoid certain legal provisions that cannot be derogated from by agreement.[226] First, where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in a country other than the country whose law has been chosen by the parties,[227] and secondly, where all the elements relevant to the situation at the time when the event giving rise to damage occurs are located in one or more of the EU Member States, and the parties have chosen the law of a non-Member State.[228] Such 'elements' are likely to include the habitual residence of the parties as well as the country in which the event giving rise to damage occurred, whereas the parties' choice of law and the country where the damage occurred should not be considered.[229]

CONCLUSION

9.98 It is hopefully clear from the above that questions of jurisdiction and choice of law cannot be answered simply by reference to provisions in the SEA or to the State with which the ship is flagged. Parties to a SEA, or any type of employment contract for that matter, should carefully consider including provisions on jurisdiction and governing law in the contract. Shipowners and employers should, however, take note of the above discussions to ensure that such provisions will not be struck out by a court. While there is much to be criticised in respect of the European Regulations, their rules are strict and parties should be able to determine with certainty where their dispute will be heard and the law that will govern it.

9.99 Some may question why the MLC does not contain its own system of rules for establishing jurisdiction and governing law, especially if they are of the opinion that the European Regulations are 'ill-suited for maritime claims'.[230] Quite simply,

223. Rushworth and Scott, 'Rome II: Choice of law for non-contractual obligations' (2008) LMCLQ 274, 293 n 36.
224. Dickinson, para 13.09.
225. Dickinson, para 13.10 with reference to *Coreck Maritime*, [22]-[26].
226. Cf Rome II, Article 16, which deals with 'overriding mandatory provisions' that apply irrespective of the law applicable to a non-contractual obligation.
227. Rome II, Article 14(2). See also Rome I, Article 3(3) and Recital (15).
228. Rome II, Article 14(3). See also Rome I, Article 3(4).
229. See further, Dickinson, paras 13.28-13.33; DMC, paras 34-047-34-048.
230. See V Ulfbeck, *'Direct Actions Against the Insurer in a Maritime Setting: the European Perspective'* (2011) LMCLQ 293-306.

the EU Member States would not have been able to adopt the MLC had it included such rules.

9.100 If one is optimistic, the discussions in this chapter may be considered premature. Given that the MLC was adopted by a vote of 314 in favour, with no votes being cast against it, there is no reason why Contracting States should not implement and enforce the Convention as agreed. Also, with the involvement of shipowners' representatives throughout the process of adoption, shipowners, too, should uphold their end of the bargain. Moreover, should a State or a shipowner fall foul of their obligations under the Convention, there are various enforcement procedures under the MLC that should enable such discrepancies to be rectified and deter any further lapses. Accordingly, dispute resolution before the courts should be the 'worst case scenario', and it is hoped that the advent of the MLC does not give rise to a proliferation of unnecessary legal actions taken by seafarers against their employers. That being said, at the very least, the MLC provides seafarers with a compendium that outlines their rights and entitlements while working on board a ship, of which unscrupulous shipowners should be mindful.

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CHAPTER 10

Implementation of the Maritime Labour Convention 2006

MARITIME & COASTGUARD AGENCY

INTRODUCTION TO THE MARITIME AND COASTGUARD AGENCY

The Maritime and Coastguard Agency (MCA)[1] was established on 1 April 1998 and is an executive agency of the Department for Transport (DfT).[2] The MCA provides a 24 hour maritime search and rescue service; enforces ship safety, prevention of pollution and seafarer health, safety and welfare standards by survey and inspection; processes the registration and certification of ships and seafarers; and manages pollution prevention and response.

The MCA is committed to maritime safety through both prevention and response activities. All of their work contributes to their vision of being the world's best maritime safety organization, dedicated to safer lives, safer ships and cleaner seas. That clear vision is underpinned by their shared values of safety, professionalism, trust and respect.

The MCA is the lead government organization for implementation of the *Maritime Labour Convention 2006 (MLC)* in the United Kingdom (UK), although some parts of the MLC fall under the policy responsibility of other government departments – for example, social security in Regulation 4.5 is the responsibility of the Department for Work and Pensions.[3] The MCA will also enforce the MLC on UK ships and on non-UK ships in UK ports once the UK has ratified the Convention.[4]

Julie Carlton[5] and Neil Atkinson[6] of the MCA kindly agreed to be interviewed in respect of the work undertaken by the MCA in implementing and enforcing the Convention. The below transcript provides a detailed report of the interview.[7]

1. See further http://www.dft.gov.uk/mca/ (accessed 13 May 2013).
2. For further information on the work of the DfT, see https://www.gov.uk/government/organisations/department-for-transport (accessed 13 May 2013).
3. See further http://www.dwp.gov.uk/ (accessed 13 May 2013).
4. For legal reasons, the Secretary of State is the so-called 'competent authority' under the Convention, although questions of implementation and enforcement will mainly fall to the MCA.
5. Julie Carlton (Seafarer Safety and Health Manager in MCA) is responsible for implementing the MLC in UK legislation.
6. Neil Atkinson (Audit Operations Lead) is responsible for putting in place arrangements for the practical implementation of the MCA (e.g. training of surveyors and arranging MLC inspections).
7. Any statements reproduced in this chapter reflect the views of the interviewees as of 2 May 2013 and are subject to change.

INTERVIEW

10.1 *What involvement did the MCA have in the negotiations that led to the adoption of the Convention?*

Neil: The MCA was involved right from the beginning. The idea for the Convention was mooted in 2001 and from day one, the UK government, including the MCA, together with representatives from the UK Chamber of Shipping[8] (shipowners' association) and Nautilus International[9] (seafarers' union), was in attendance at the International Labour Organization (ILO). As such, a tripartite delegation took part in the negotiations until the Convention was ultimately adopted in 2006. The way the ILO works is through plenary sessions and a number of working groups. The UK Government delegation took an active part in the working groups. For example, the UK Government was actively involved in the drafting group. This is mainly because one of the official languages is English and it is preferable that native English speakers are involved in drafting. In my opinion, the drafting group is one of the most challenging groups to be on.

Julie: In addition, one of our colleagues chaired one of the working groups on crew accommodation. As the working groups were split up into topics, there were quite a lot of people involved.

Neil: Since the adoption, the MCA has been continually involved with the ILO. For example, we have had an active input in producing the booklet, *Guidelines for flag State Inspections under the Maritime Labour Convention, 2006.*[10] The MCA led the informal working group that produced the Guidelines, which consisted of some ten delegations. In particular, the MCA provided the technical expertise for the back-to-back expert meetings for both the adoption of the *Guidelines for flag State Inspections* and the *Guidelines for port State control officers carrying out inspections under the Maritime Labour Convention, 2006.*[11] We have also provided considerable input into the ILO's 'Train-the-Trainer' course, which is currently run in Turin. Input was provided in both the development and the delivery of the course. In particular, a number of MCA representatives, including surveyors, nautical surveyors and engineers, have given talks on flag State implementation. We have sent three people, who are responsible for the implementation side of things, to attend the Turin course. Two of those people have returned to provide further training on behalf of the ILO. In addition, we have attended what the ILO calls 'missions'. One of the missions was in Barbados, where we gave presentations on implementation of the Convention. As you can see, our work has continued beyond the adoption of the Convention.

10.2 *The UK has not yet ratified the Convention although there does seem to be preparations leading in that direction. Does it intend to do so? What considerations led to this decision?*

8. For further information, see http://www.ukchamberofshipping.com/ (accessed 13 May 2013).
9. For further information, see https://www.nautilusint.org/ (accessed 13 May 2013).
10. The *Guidelines for flag State inspections* are available to download in English, Spanish and French from http://www.ilo.org/global/standards/maritime-labour-convention/WCMS_101788/lang—en/index.htm (accessed 2 May 2013).
11. The *Guidelines for port State control officers* are available to download in English, Spanish and French from http://www.ilo.org/global/standards/maritime-labour-convention/WCMS_101787/lang—en/index.htm (accessed 2 May 2013).

Julie: Yes, the UK is intending to ratify. The Shipping Minister in Parliament answered questions in February 2013 where this was made clear. It is believed that our shipping industry would suffer if we did not ratify the Convention. Accordingly, we intend to ratify in order to support our shipping industry and to prevent the industry being disadvantaged internationally.

10.3 *Do you believe that the MLC provides States with any advantages or benefits?*

Neil: Ratification of the Convention makes a State more attractive to shipowners. It is a selling point for the flag, which attracts responsible shipowners.

Julie: Also, ratification provides a common understanding of what the standards are from an enforcement point of view. Even though there may be variations around the edges, the Convention reflects global minimum standards, which everyone should be working towards.

10.4 *Which of the now-consolidated ILO conventions had the UK ratified before the MLC was adopted?*

Julie: The UK has ratified the following conventions:

- *Minimum Age (Sea) Convention, 1920 (No. 7)*
- *Unemployment Indemnity (Shipwreck) Convention, 1920 (No. 8)*
- *Medical Examination of Young Persons (Sea) Convention, 1921 (No. 16)*
- *Seamen's Articles of Agreement Convention, 1926 (No. 22)*
- *Repatriation of Seamen Convention, 1926 (No. 23)*
- *Officers' Competency Certificates Convention, 1936 (No. 53)* *
- *Shipowners' Liability (Sick and Injured Seamen) Convention, 1936 (No. 55)* *
- *Sickness Insurance (Sea) Convention, 1936 (No. 56)*
- *Minimum Age (Sea) Convention (Revised), 1936 (No. 58)* *
- *Food and Catering (Ships' Crews) Convention, 1946 (No. 68)*
- *Certification of Ships' Cooks Convention, 1946 (No. 69)*
- *Medical Examination (Seafarers) Convention, 1946 (No. 73)* *
- *Certification of Able Seamen Convention, 1946 (No. 74)*
- *Accommodation of Crews Convention (Revised), 1949 (No. 92)*
- *Accommodation of Crews (Supplementary Provisions) Convention, 1970 (No. 133)*
- *Prevention of Accidents (Seafarers) Convention, 1970 (No. 134)*
- *Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147)*
- *Protocol of 1996 to the Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147)*
- *Labour Inspection (Seafarers) Convention, 1996 (No. 178)*
- *Seafarers' Hours of Work and the Manning of Ships Convention, 1996 (No. 180).*

Julie: Where they have relevant legislation in place, the UK has also extended ratification to the Red Ensign Group (REG) administrations.[12]

* *The standards in these conventions had been adopted by means of ratification of Convention No. 147.*

12. The REG, in addition to the United Kingdom, consists of the shipping registers of each of the following: Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Guernsey, St Helena, Isle of Man, Jersey, Montserrat and the Turks and Caicos Islands. Further information on each of the registers can be found on the REG website: www.redensigngroup.org (accessed 13 May 2013).

10.5 *Are any of the minimum standards set out in the MLC already safeguarded by national law?*

Julie: It is estimated that 80 per cent of the minimum standards set out in the Convention are already protected by national law.

Neil: The UK has ratified the *Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147)*, which sets out various minimum standards. Also, for a number of years, we have had an effective inspection regime in place for living and working conditions under the *Labour Inspection (Seafarers) Convention, 1996 (No. 178)*. Keeping in mind that the MLC is a consolidation and update of previous conventions, many of the standards set out in the MLC are already included in English law.

10.6 *How will seafarers be informed of their rights under the Convention?*

Julie: For every piece of new or amending legislation – effectively for each Title of the Convention – a Marine Guidance Note (MGN) or a Merchant Shipping Notice (MSN), depending on whether it contains mandatory information or not, will be issued. These documents will set out the relevant provisions of national law.

10.7 *How will this information be distributed?*

Julie: Much of this information is already available on our website in provisional form, and companies and individuals can subscribe to receive marine notices free of charge. Under Standard A1.4 of the Convention, we are required to publish information that will inform seafarers of the disadvantages of working on ships flagged with countries which have not ratified the MLC, so one of the marine notices will set out a list of the standards that seafarers can expect on UK-flagged ships. Marine notices are available under free subscription to anybody who wishes to subscribe to them. A link is sent via email that will redirect to the full marine notice, which is published on our website. In addition, there are certain commercial companies who replicate our notices and provide seafarers with a full statutory instrument and marine notices service for every nation State.

10.8 *With the majority of seafarers coming from developing countries, as compared to developed countries, they may not have online access, so how will they be able to obtain the relevant information?*

Neil: Every British ship has to carry a full set of marine notices on board the ship. The notices may be available in hard copy or in DVD form, but they are available to everyone on board.

10.9 *It has been said that the MLC is simply an update and consolidation of existing instruments, if that is the case, why did we need this new Convention?*

Neil: For a number of reasons. First, a lot of the conventions were out-dated; for example, the *Placing of Seamen Convention, 1920 (No. 9)*, which was adopted a year after the inception of the ILO. There was also a very low ratification rate of ILO conventions, especially when compared to the ratification level of the conventions adopted under the auspices of the International Maritime Organization (IMO).[13] The ILO was seen as the 'second cousin' of the IMO. Hopefully, the ratification level of the MLC will rise to the same level as the key IMO conventions, which is why the MLC has been referred to as the 'fourth pillar of the international regulatory regime for quality shipping'. Whilst seafarers' rights were protected under

13. Further information on IMO conventions, including ratification levels, can be found on the IMO's website at http://www.imo.org/About/Conventions/Pages/Home.aspx (accessed 13 May 2013).

the previous conventions, there wasn't an effective enforcement element. The MLC requires seafarers' rights to be protected under national laws, thereby enforcing the obligations within the Convention.

10.10 *Would you say that the main driving factors for the Convention was the updating process and that consolidation also aids enforcement, as there is only one instrument to enforce?*

Neil: Yes. Also, there was no requirement for certification under the previous conventions. Under the MLC, Title 5 requires an effective inspection and certification regime – namely, a statutory certificate – which gives the MCA enforcement powers.

10.11 *So the inspection and certification regime that is familiar to the IMO conventions has been adopted as a way to enforce labour standards? Do you think that this was the best way to bring the MLC into line with the IMO conventions?*

Neil: I think so, yes. If you look at the MLC, you will see certain parallels with the *International Management Code for the Safe Operation of Ships and for Pollution Prevention (ISM Code)*,[14] in particular, the certification regime. It is not a new regime; it has been tried and tested. There is also quite a lot of overlap between the provisions of the MLC and the ISM Code. The existing IMO systems have been adapted and adopted for the MLC.

Julie: Another improvement for seafarers is that there is now one person who is ultimately responsible for upholding their rights under the Convention, specifically, the shipowner. From an enforcement point of view, this makes things a lot easier but it is also a much more transparent system, as far as seafarers are concerned.

10.12 *The MLC has been hailed as many things, 'a seafarer's bill of rights' and 'the fourth pillar of the international regulatory regime for quality shipping', for example. Do you think that these are accurate descriptions?*

Neil: Yes, but I think that the Convention is not just a seafarer's bill of rights; it also creates a level playing field for shipowners.

10.13 *In your opinion then, do shipowners benefit from the MLC?*

Julie: The Convention provides a minimum global standard for seafarer living and working conditions, and effective enforcement by both flag and port States. So shipowners who provide decent living and working conditions for seafarers will no longer be at a competitive disadvantage to unscrupulous shipowners who try to cut corners, or whose flag States do not regulate living and working conditions for seafarers.

Neil: Yes. And when a ship changes flag it would be a lot easier if there is a level playing field when moving your ship from flag A to flag B. As such, I do think that the two descriptions (above) are correct but that the Convention also creates a level playing field for shipowners.

10.14 *Do you think that the MLC has filled any existing gaps or resolved any prior problems in maritime labour law, either on a domestic or an international level?*

Neil: Yes, referring back to Julie's point about the shipowner, the shipowner is now visible to everyone, regardless of whether that is flag State, port State, seafarer,

14. Further information on the ISM Code and the Guidelines on Implementation of the ISM Code 2010 can be found on the IMO website at http://www.imo.org/ourwork/humanelement/safetymanagement/pages/ismcode.aspx (accessed 13 May 2013). Instructions to surveyors have been produced by the MCA for the guidance of surveyors auditing the safety management systems of ships. These instructions are available at http://www.dft.gov.uk/mca/mcga-guidance-regulation/mcga-dqs-ss_guidance_to_surveyors/dqs-instuctions-ism.htm (accessed 13 May 2013).

captain, chief engineer, cook or whoever, and they are all aware of who exactly is responsible for working and living conditions. Even though that is quite a simplistic statement, and, in reality, things are not as straightforward, there is increased transparency.

Julie: Prior to the Convention, certain standard legal protection only applied to workers ashore. While some employment matters were covered under UK shipping law, it is unlikely that they would have been covered in every States' domestic legislation. That being said, there are some matters that were not dealt with under UK law either, such as the requirement for financial security for shipowner's liability for compensation for personal injury and death that occurs on board the ship, so there are a few areas where the Convention could be said to have plugged gaps.

Neil: I also think that wages is another area that can be mentioned, as our current legislation is extremely out of date. The MLC has made the law applicable to wages and seafarers' employment agreements a lot more comprehensive and up to date.

10.15 *As the MLC has to be implemented and enforced on a national level, it could be said that it is open to interpretation. As such would you say that the Convention raises more questions than it answers?*

Neil: I wouldn't say that the Convention has raised more questions as such, although it has raised more challenges. For example, the definition of a seafarer is a particularly challenging area. You must not forget that the MLC is all encompassing in terms of application. It is probably easiest for container ships to conform to the Convention, as it has fewer crew members on board in comparison to passenger ships like cruise ships, which have a number of concessionaires and guest entertainers on board. Then you have mobile offshore drilling units to consider, which have a core crew as well as specialist contractors like divers, rig specialists, remotely operated vehicle (ROV) drivers and so on. It is debatable whether these persons are seafarers or not. Accordingly, one of the questions to be answered is 'who exactly is a seafarer?' It is quite easy to say that anyone who works on board a ship is a seafarer but, in reality, it is not as simple as that.

10.16 *With that view in mind, and given that we are dealing with an international convention, should such definitions be interpreted autonomously? Or is this not possible when the Convention has to be implemented by way of national legislation?*

Julie: It has taken a lot of discussion but we are actually adding a few words into the definition of seafarer, specifically, ' … whose normal place of work is on board the ship.' For example, a guest entertainer who is on board for a short period would not be considered to be a seafarer whilst a dancer who is on board for the duration of a cruise and whose normal place of work is on the ship would be considered to be a seafarer. The concept of who is a seafarer is already dealt with in Resolution VII of the Maritime Labour Conference,[15] concerning information on occupational groups. We have used that Resolution to inform our legal definition and have inserted additional words to try and make the definition clearer in UK law.

15. The Resolutions adopted by the International Labour Conference at its 94th (Maritime) Session are available at http://www.ilo.org/global/standards/maritime-labour-convention/WCMS_088130/lang—en/index.htm (accessed 13 May 2013).

As Neil has said, there are so many provisions within the MLC that rely on national legislation, and all of our guidance will refer to national legislation rather than the Convention.

Neil: In several places, the wording of the MLC is very vague, which leaves each provision open to differing interpretations by differing flag States depending on the point of view taken. Whilst the Convention is trying to achieve a level playing field, there will be slight differences in interpretation.

10.17 *Ultimately then, whether or not a person is to be classed as a seafarer would be a question of fact? Is the length of time spent on board the determinative factor?*

Julie: It's not so much the length of time, it's whether the ship is their normal place of work.

Neil: The problem is if we put a time limit on the employment contract, then, if a person does not spend the set amount of time on a ship, they wouldn't be classed as a seafarer. That would provide a loophole for an unscrupulous owner who may make sure that their people spend less than the specified time on the ship, in order to circumvent the provisions of the Convention. As Julie says, if your normal place of work is on a ship, then you are a seafarer. The view that can be taken is that the flag State can say that everyone is a seafarer unless someone convinces us otherwise. The onus is on the shipowner to convince us why certain categories of people would not fall within the definition of seafarer.

10.18 *Could it be said that there is a presumption that a person is a seafarer, although this presumption can be rebutted? In terms of a legal test?*

Julie: I'm not sure, it sounds right.

10.19 *With certain categories of people, such as guest entertainers, it may be easier to understand that they are not seafarers, but what about pilots?*

Julie: Pilots are not seafarers as they are employed in the port, even though they spend time on the ship. That is a longstanding interpretation, which has been used in the UK for working time and other matters.

Neil: Resolution VII uses pilots, superintendents and surveyors as examples of people who aren't seafarers, although these persons are not specifically excluded from the definition. The other very easy way of determining whether someone is a seafarer is whether their position is on the muster list. Guest entertainers, for example, will not have a muster station, whereas the dancers and other entertainers will have a muster station, so it is quite easy to determine.

10.20 *It seems that the question of whether a person is a seafarer, although difficult from a legal point of view, is something that can be determined in fact quite easily?*

Neil: Yes. The definition of seafarer in the Convention is the over-arching definition. It is then down to the flag State to determine who a seafarer is and to implement that, and it is the other factors that have been mentioned which can be used to decide who is and who isn't a seafarer.

10.21 *Do you think that the Convention was necessitated by any trends in the industry or any changes in the maritime sector? Or was it simply a case that the laws needed to be updated?*

Neil: It is worth bearing in mind that the idea behind the Convention originated from shipowners, partly because they wanted to eradicate sub-standard shipping. I wouldn't say that sub-standard shipping had worsened over the years, as the advent

of port State control has had a positive impact upon such shipping. But, if you run a ship below standard, you can undercut good operators and gain a commercial advantage. The International Shipping Federation (ISF),[16] for example, were keen to keep the standard fairly level, and the way to do that is to eradicate sub-standard shipping. Also, the maritime workforce is now global. You can have UK ships now without any UK crew members, whereas, when I went to sea in 1974, all British ships had all British crew. The workforce has expanded and you may have Indonesians and Filipinos working on British ships. This may have been a factor that led to the adoption of the MLC.

10.22 *Do you consider the Convention to be a living instrument? I have already heard mention of amendments to the Convention?*

Julie: I think that it is too early to say. There are some amendments on the cards but how quickly they will happen is to be tested. For example, there is a 'fast-track procedure' for amendment and we shall have to wait and see how effective it is.

Neil: I think that over the next few years, the MLC will be a living instrument. If you look at the *International Convention for the Safety of Life at Sea (SOLAS) 1974*, there are constantly amendments and updates; it is evolving due to different ship types and technology. As regards the MLC, in the light of experience, I think that the Convention will be changed.

Julie: There are certainly areas at the moment that we will be asking to be looked at, because they are unclear etc. In particular, the system of protection for recruitment and placement services in Regulation 1.4. It is very difficult to understand what the provision is getting at really. We have spent a lot of time trying to resolve that.

10.23 *How have you tried to resolve the issue? Have you been in contact with the ILO? Are there circumstances where the industry stakeholders are looking to you for the same answers?*

Julie: We have approached the ILO informally and we have also been in discussion with industry stakeholders including shipowners and seafarer unions, recruitment and placement services, and the insurance industry just to get a broad view of what the provision means and what in practice is achievable, which is not necessarily the same thing. On these questions we work together with the industry stakeholders, as we have different expertise.

10.24 *Do you think that ratification of the MLC is likely to change the legal status quo? There does seem to be a lot of hype about the Convention.*

Neil: In many areas of the industry, the Convention is new and different, and people are wary of change. It may not change the status quo as such; in many respects, the legal obligations of various parties are already in place in the UK. What the Convention has done, however, has heightened the awareness of those obligations. That being said, if you are working on board a ship flagged with a State that had not ratified any of the previous conventions but has now ratified the MLC, then the inception of the MLC will change the status quo and it will improve it.

10.25 *Even though the UK has not yet ratified the MLC, it seems that the process of implementation has already started. How will the Convention be enacted in national law?*

16. For further information on the work of the ISF, see http://www.ics-shipping.org/ (accessed 13 May 2013).

Julie: We have conducted an analysis of pre-existing legislation and we are effectively filling in gaps in order to bring national law fully into line with the Convention. This process was undertaken by the government; by us and the lawyers that support the MCA.

10.26 *Presumably this process was chosen because so many of the minimum standards were already protected under national law and there was no need to start all over again?*

Julie: There are several reasons why this process was chosen but that is probably the simplest way to explain the decision.

10.27 *Does national law require any higher standards than those provided in the MLC?*

Julie: I wouldn't say that there are many higher standards, although national law does provide more detail in some areas, and this is partly because there is also European legislation in place. Quite a good example of the additional detail provided are the requirements relating to medical stores. The MLC requires that you have medical stores and that the stores are to be determined by the area of operation of the ship. Under European law, Council Directive 92/29/EEC[17] specifies for a particular area of operation the specific treatments that must be carried. This may be seen as a higher standard or simply further prescription. If the European standard is higher than the international standard, the UK will comply with the European standard.

Neil: Another point to mention is, under the ILO constitution, the presumption is that if existing national laws provide higher standards than those found in the MLC, those standards should not be reduced so that they are in line with the Convention; we would not use a new convention to lower our labour standards. If there are any standards that are currently higher under national law, they will generally remain so.

10.28 *How would you describe the approach taken by the UK to establish an effective system of implementation and enforcement so far?*

Neil: We have what can be described as a two-pronged attack. The first part is developing the legislation and the second part is implementing that legislation. These two strands have been running parallel, in consultation with our tripartite working group, which was set up in 2007. The working group includes representatives not only from us, but from the DfT, the UK Chamber of Shipping, Nautilus International, the National Union of Rail, Maritime and Transport Workers (RMT)[18] and the REG, amongst others. The working group has overseen the development of both strands.

10.29 *Is the legislative process finished?*

Julie: We still have two sets of legislation to consult on but only as regards minor changes, so in terms of legislation, we are well-advanced. UK Government policy is not to bring international legislation into force earlier than required, so the MLC regulations will not come into force before 20 August 2013.

10.30 *Do you consider implementation of the MLC to be an on-going task or is there an end in sight?*

Neil: We have already started a system of voluntary inspections because we do not want to disadvantage UK shipowners whose ships may be stopped by port State

17. Council Directive 92/29/EEC of 31 March 1992 on the minimum safety and health requirements for improved medical treatment on board vessels [1992] OJ L113/19.

18. See further http://www.rmt.org.uk/ (accessed 13 May 2013).

control officers in other countries that have already ratified the MLC; it would be detrimental if UK ships did not have a certificate by the time the Convention enters into force. This also helps to manage our workload efficiently.

Julie: It's an on-going exercise because once all the legislation is in place we still need to implement the MLC standards in practice. The MCA will need to issue the initial certificates and then carry out intermediate inspections, and renewals etc.

Neil: When the ISM Code entered into force, there was a big panic within the industry that it was going to cause mayhem, yet now, some ten years later, the inspection and certification requirements under the ISM Code are 'just another survey'. I think that the same will happen with the MLC. Over a period of time, things will settle down and people will become familiar with the new requirements, and it will also be regarded as 'just another survey'. We are trying to avoid a bottleneck as much as possible, which is another reason why we put the voluntary inspection scheme in place. In addition, we only have a certain number of people who can carry out the inspections.

10.31 *Have you come across any difficulties or challenges so far? If so, were they unexpected?*

Julie: The mainstream issues are relatively straight-forward, but difficulties do come up around the edges in parts of the industry with less direct involvement with the MCA. Problems arise in sectors that have a unique set up, such as the offshore oil and gas sector where there are structures which may or may not be classed as ships for the purposes of the Convention and so on.

Neil: By way of example, we had quite a significant challenge with the large yacht sector, in particular, superyachts (24 metres and above in length) and crew accommodation. To begin with, they had not realized that the MLC applied to them. Subsequently, discussions were commenced with the interested parties of the yacht sector, who were particularly concerned about how they could comply with the minimum standards for sleeping rooms (in particular the floor area) under the crew accommodation standard in the Convention. Yachts are relatively small ships but they have a large number of crew members in comparison to the number of 'guests' on board. It took us in the region of 18 months to sort this issue out by way of a 'substantial equivalence'. One of the ways that we achieved this was by using the flexibilities within the Convention. In particular, if you look at Regulation 3.1 on the size of the sleeping rooms, it states that the minimum size of a sleeping room should be 4.5 m^2 for one seafarer.[19] This minimum size can be relaxed, however, for ships that are less than 3,000 gross tonnes in order to provide single cabins, and all of the yachts concerned were less than 3,000 gross tonnes. The fact that we could reduce the size for a single cabin was the key to solving the problem in hand. With a bit of ingenuity from one of the yacht designers, it was demonstrated that on a 200 ton yacht, five single crew cabins could be provided with a reduction of just 300 millimetres in the length of two of the guest cabins. So the size of the guest cabins was reduced by approximately one foot in order to accommodate the Convention requirements.

10.32 *So the adaptation of superyachts was not as difficult as initially perceived?*

Julie: It certainly took some work, but a solution was possible. The solution resulted from a lot of effort from the various organizations involved and it has now been accepted.

19. See specifically MLC, Standard A3.1(9).

10.33 *What about the costs of adaptation?*

Julie: Representatives of the yacht building industry have said that the costs involved are relatively small. Obviously, if you are trying to adapt an existing design there will be certain costs involved but if you were starting from scratch then the costs of building to the new standard rather than the current standard will be negligible.

10.34 *How then would you summarise the affect that the MLC has had on the yachting industry in terms of shipbuilding? Has the Convention required substantial changes?*

Neil: I think that there has been a substantial change; there has been a cultural change in the way that the industry approaches crew accommodation. Traditionally, the owner would have the final say on the design aspects of the yacht, which would tend be in his favour, and the crew accommodation would not necessarily meet the minimum standards that are called for in the MLC. In terms of costs, however, they have not substantially increased.

10.35 *Was this example one of the unexpected difficulties that you have faced?*

Julie: Not really. If you look at the standards in the MLC, it is obvious that issues will arise in respect of smaller ships.

Neil: One of the difficulties that was unexpected was quite a simple issue. In SOLAS there is an exemption for 'a one-off voyage' but no such exemption is permitted within the MLC, and you cannot have substantial equivalence in respect of Title 5. There are certain ships that work between the islands off the coast of Scotland. These ships do not necessarily fall within the definition of 'ship' in Article II(1)(i) of the MLC, as they navigate exclusively in waters that are 'closely adjacent to' areas where port regulations apply. However, once a year, some of these ships travel to Denmark where they are dry-docked, and thereby undertake 'an international voyage'. These ships are over 500 gross tonnes, as they are passenger ships that weigh a couple of thousand tonnes. As such, they would need to comply with the certification obligations in the MLC, although they do not have to comply with the Title 5 requirements for their normal operations. For the voyage to Denmark, we could issue an interim certificate for these ships but the Convention states that we are only able to issue one interim certificate to any ship. Alternatively, we could issue a full-term certificate but if you have a ship that is excluded from the definition of 'ship' in Article II(1)(i), then the shipowner is unlikely to be willing to pay for a full certificate. The key to resolving this issue was again the flexibilities within the Convention. Specifically, Article II(4) of the MLC refers to ships that are 'ordinarily engaged in commercial activities'. This definition was discussed at length with the members of the Paris Memorandum of Understanding on Port State Control (MoU).[20] If the ship goes to dry-dock and she doesn't carry any passengers or cargo then she is not undertaking a commercial voyage, as the ship is not making any money. The ship is going to dry-dock in ballast and return in ballast, and her ordinary commercial activities are undertaken within the exempted area, so the obligations under Title 5 of the Convention are not applicable to the voyage to Denmark. An agreement has been reached with the Paris MoU Members and they are content for such voyages to be undertaken, and the ship will not be detained for not having a certificate. This is an example of an unexpected challenge,

20. For further information on the Paris MoU, see http://www.parismou.org/ (accessed 13 May 2013).

even if the outcome was relatively simple. Nevertheless, it does show the flexibilities within the MLC. The more you read the Convention, the more these flexibilities become apparent.

10.36 *In terms of resources, has anything in particular been used during the implementation process?*

Neil: The sets of Guidelines for flag State inspections and for port State control officers form the basis of our instructions to surveyors, especially Chapter 3 of each, which goes through the various Regulations and explains what to look for, where to get the relevant information and what possible deficiencies there may be. We have also made use of ILO's Train-the-Trainer course in Turin, and our own surveyor training course is derived from the Turin course. The presentations have been adapted to take into account the position in the UK. This information has been used by MCA surveyors and also by surveyors from the REG, as well as shipowners.

10.37 *So paper resources and training courses, anything else?*

Neil: One of the most useful resources we've had is the networking between individuals from various countries that have been attending ILO functions. These people reflect a range of stakeholders including flag State inspectors, surveyors from 'recognized organizations' (ROs), inspectors from the International Transport Workers' Federation (ITF),[21] shipowner representatives and the ILO themselves. We can always seek advice from the ILO.

10.38 *Would you say that information-sharing has fundamentally helped implementation? Should it be encouraged?*

Neil: Yes, because you will find that everyone has the same problems to encounter. For example, if you are struggling with the definition of a ship or a seafarer, it may be that someone else has already resolved the issue.

10.39 *Are there any online databases or forums where this information can be shared?*

Neil: On the ILO website, there is a compilation of 'Frequently Asked Questions',[22] which has been put together by the ILO and is a useful resource, although it does not cover technical questions. There is also the Paris MoU forum, where a task-force was set up to produce guidelines for port State control inspections. The UK was one of the Members of the task-force. Information is available from all of the States involved, including how they are dealing with any problems. Even though they are acting in their capacity as a port State, the Members also have flag State responsibilities.

10.40 *So, even though you may have been at a formal event, information has mainly been informally exchanged?*

Julie: Yes, I think so.

Neil: Yes, I agree.

10.41 *Do you think that other resources should have been made available? Was there anything that you particularly needed that was not available?*

21. For further information on the ITF, see http://www.itfglobal.org/seafarers/maritime-round-table.cfm (accessed 13 May 2013).

22. The '*Maritime Labour Convention, 2006*. Frequently Asked Questions (FAQ) - Online revised Edition, 2012' are available to download in English and Spanish from http://www.ilo.org/global/standards/maritime-labour-convention/WCMS_177371/lang--en/index.htm (accessed 13 May 2013).

Julie: I don't think so. The only thing that comes to mind is the records of negotiations, which we have referred to from time to time to understand the intention behind a particular provision. Quite understandably, they are not indexed so searching through them for discussion on a particular point takes an awfully long time. They were therefore less useful than we initially thought they might be. This may also be because I was not involved in the negotiations; people who were there may have remembered which meeting record to consult to look for certain information.

10.42 *Did you come across any specific gaps in the resources that are available?*

Neil: I don't think so, no. I think that it is a learning process for everyone.

10.43 *In terms of information available, would you say that there is enough information or that there should be more?*

Julie: There is a lot of information available actually.

Neil: I don't think that we have reached the stage where you can't see the wood for the trees. If you are familiar with the authoritative documents, I would say that the information contained therein is sufficient. There is, of course, plenty that can be read in news articles, magazines and papers, and on LinkedIn, which does not necessarily follow the authoritative line on matters.

10.44 *As regards the obligations under the MLC, have you come across any overlap with obligations under other conventions?*

Neil: Yes. There is about 25 per cent overlap between the requirements under the MLC and the ISM Code. In particular, with respect to Title 1, the medical certificate requirements[23] and the training and qualification requirements.[24] In Title 2, the hours of work and hours of rest requirements[25] and the manning levels requirements[26] are also dealt with in the ISM Code. A comparison between the MLC 2006 and the ISM Code is provided below.

Table 10.1 Comparison between the MLC 2006 and the ISM Code

This table illustrates where the requirements of the MLC 2006 are the same as that of the ISM Code, where they do not correspond and where they are approximately the same. In the last category the MLC requirements appear to be in excess of those required by the ISM Code.
Requirements under the MLC that are the same as those under the ISM Code • 1.2 – Medical certification • 1.3 – Training and qualifications • 2.3 – Hours of work and hours of rest • 2.7 – Manning levels • 4.1 – Medical care on board ship and ashore
Requirements under the MLC topics that are not covered by the ISM Code • 1.4 – Recruitment and placement • 2.1 – Seafarers' employment agreements • 2.2 – Wages • 2.4 – Entitlement to leave • 2.5 – Repatriation • 2.6 – Seafarer compensation for the ship's loss or foundering

(*Continued*)

23. See MLC, Regulation 1.2 and ISM Code, Requirement 6.2.
24. See MLC, Regulation 1.3 and ISM Code, Requirement 6.
25. See MLC, Regulation 2.3 and ISM Code, Requirement 6.
26. See MLC, Regulation 2.7 and ISM Code, Requirement 6.2.

Table 10.1 Comparison between the MLC 2006 and the ISM Code (Continued)

• 2.8 – Career and skill development and opportunities for seafarers' employment • 3.1 – Crew accommodation • 4.2 – Shipowners' liability • 4.4 – Access to shore-based welfare facilities • 4.5 – Social security • 5.1.5 – On-board complaints procedures
Requirements under the MLC topics that are approximately the same as those required by the ISM Code • 1.1 – Minimum age This could come to light whilst inspecting medical certificates • 3.2 – Food and catering The requirement for food to be free of charge and to be varied is not covered under the ISM Code • 4.3 – Health and safety protection and accident prevention The requirement for an on board programme for occupational safety and health for seafarers is not included
An ISM audit cannot be substituted for a MLC inspection because all the topics are not covered by the ISM Code. This could only be achieved if a general inspection of the ship was carried out at the same time with the general inspection concentrating on the MLC topics that are not covered by the ISM Code. Any deficiencies raised during the general inspection would be against the MLC and not the ISM Code. The resulting Safety Management Certificate could not be taken as evidence that the ship complies with the MLC. However, due to the amount of overlap it is understandable why some administrations are considering conducting the two in parallel.

Source: Neil Atkinson, MCA, 12 September 2008

Julie: Some of those requirements are also covered under the *International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW Convention) 1978*, as amended.

10.45 *Presumably none of these requirements conflict?*

Neil: No, it is mainly duplication.

Julie: There is a subtle difference between the STCW Convention hours of work requirements and the MLC hours of work requirements, but there is not a conflict. Because the MLC is a tripartite agreement, it includes a provision for exceptions to the hours of work and hours of rest requirements on the basis of a social partners' agreement that has been authorized by the competent authority. The STCW Convention also allows authorized exceptions. It does not require agreement on exceptions between social partners, but it sets certain limits on the kind of exception that can be authorized. As a result, Contracting States to both Conventions are required to comply with both sets of criteria. As the UK intends to ratify both Conventions, we have to require both a social partners' agreement on a proposed exception, and ensure that it remains within the STCW Convention limits.

10.46 *In your opinion, can both Conventions be read together?*

Julie: Yes.

Neil: Yes.

10.47 *Has it not been helpful that a lot of the MLC obligations are already provided for?*

Neil: Yes, it reduces the workload. It is also helpful when we are looking at duration of inspections.

10.48 *Has implementation of the MLC been costly for the State?*

Julie: Yes, it has taken resources and time, but we have implemented the Convention within existing resources. It is part of the government's role in meeting our international obligations.

Neil: We haven't increased our resources. It is an intrinsic part of the work that the MCA carries out as regards seafarer health and safety. It has been implemented as part of the government's commitment to ensuring a well looked after workforce; it just so happens that this part of the workforce involves the maritime sector.

10.49 *As permitted by Article II(6) of the MLC, has the UK decided to exempt ships of less than 200 gross tonnes that are not engaged in international voyages from certain requirements within the Convention?*

Julie: Those ships are not exempt from the requirements of the Convention; the MLC permits the competent authority to apply the Convention in a different way from that set out in the MLC Code (Part A and B). A lot of the UK's existing legislation already applies to those ships anyway. We have a regime for them and we will continue with that regime, which has been modified to ensure that it complies fully with the MLC.

10.50 *As permitted by Article VI(3)-(4) of the MLC, will the UK be implementing any parts of the Convention through provisions in its national law that are considered to be 'substantially equivalent' to the mandatory provisions of the Code?*

Julie: In our legislation, we are implementing the MLC as it stands. In certain areas, like superyacht accommodation, we are using a substantial equivalent to tackle a specific problem in a specific sector. We are not, however, implementing entire Regulations by way of substantially equivalent legislation. It is only where the provisions of the Convention are not appropriate for a particular sector that we will use a substantial equivalence.

10.51 *How many ships are currently registered with the UK flag? How many of those ships are affected by the MLC inspection and certification regime?*

Julie: According to the Impact Assessment (IA) published with the draft Merchant Shipping (Maritime Labour Convention)(Survey and Certification) Regulations in March 2013,[27] the total number of ships on the UK ship register (UKSR) affected by the MLC inspection regime was estimated to be 1,018. Out of these, 720 ships were expected to require survey and certification. A breakdown of the vessel types of 500 gross tonnes and over that operate on international voyages on the UKSR at December 2012 is provided in Table 10.2 below.

10.52 *How many ships have you inspected so far? Do you believe that all of the relevant ships will be inspected and certified by the time the MLC enters into force?*

Neil: We have inspected approximately 105 ships so far, and these have all been voluntary inspections. Our plan is to prioritise and to focus on those ships that are 500 gross tonnes and over that undertake international voyages. These include tankers, container ships and liner vessels, and so on. They are the ships that we are inspecting first. There are other ships, such as oil rig supply ships and North Sea supply vessels, which depart from Aberdeen, sail to the middle of the North

27. For further information on the Merchant Shipping (Maritime Labour Convention) (Survey & Certification including seafarer complaints) Regulations Consultation, including the IA (11/02/13), see http://www.dft.gov.uk/mca/mcga07-home/shipsandcargoes/consultations/mcga-currentconsultations/mcga-ds-ssh-consultation-mlc/merchant_shipping_maritime_labour_convention_survey_and_certification.htm (accessed 13 May 2013).

Table 10.2 Further details on UK registered ships of 500GT and over that operate on international voyages

Vessel Types	Number of Ships on UKSR at December 2012
Cruise ships	4
Other passenger ships	3
Large yachts	9
Bulk carriers	31
Cargo vessels	673
Total	720

Source: Merchant Shipping (Maritime Labour Convention) (Survey & Certification including seafarer complaints) Regulations Consultation: Impact Assessment, 11 February 2013

Sea and then return. These ships do not undertake an international voyage, as the voyage starts and finishes in the UK, so these ships are a lower priority. If, however, a shipowner decides to send one of these ships on an international voyage, we would carry out an inspection. Secondly, as and when a safety audit is required and a ship needs a new Safety Management Certificate, we will also carry out MLC inspections as a matter of course if the shipowner is willing. The third level of priority involves Small Commercial Vessels (under 24 metres and carrying no more than 12 passengers) operating under the MCA Codes of Practice.[28] We are not actively inspecting these ships at the moment. By the time the MLC enters into force in August 2013, every ship that is 500 gross tonnes or over that undertakes international voyages will have a certificate of some form. The certificate may be an interim certificate or a full certificate. Subsequently, when the Convention enters into force for the UK, in summer 2014, all ships will have been inspected and certificated, although we are not considering ships less than 500 gross tonnes right now.

10.53 *Are inspections being carried out by the competent authority or a recognized organization, or both? Why was this process chosen?*

Neil: It is our intention that the inspections will be carried out by MCA surveyors, so the competent authority. In the near future, we will use ROs on a case-by-case basis, for example, when a ship 'flags-in' to issue an interim certificate but ostensibly, the inspections will be carried out by MCA surveyors. We already have an established process of undertaking inspections under the *Labour Inspection (Seafarers) Convention, 1996 (No. 178)* on the same occasion as we do the Safety Management Certificate for the ISM Code, and the two sit together quite nicely. We wanted to carry on with this process as it is logistically efficient. As regards the overlap between the MLC and the ISM Code, we do not want to send a surveyor all the way to Singapore to conduct a safety audit and then, a week later, have to send another surveyor to Hong Kong to perform a MLC inspection, which would look at 25 per cent of the issues covered the week before. To do so would not make sense and unnecessary costs would be involved. In addition, by undertaking these inspections together, it means that we are looking at the entire ship. By undertaking the MLC inspection at the same time as the safety audit, we look at the safety management

28. Information on the MCA Codes of Practice is available from http://www.dft.gov.uk/mca/mcga07-home/shipsandcargoes/mcga-shiptype/mcga-pleasurecraftandsmallships/mcga-dqs-cvs-newsletter.htm (accessed 13 May 2013).

system on board and how the ship is operated; we undertake a general inspection of the ship so we look at some of the hardware; we conduct a fire and boat drill, which assesses the competence of the crew to deal with an emergency; and, we look at living and working conditions. If you compare that with what happens during the inspection for a safety equipment certificate, where we go on board and just look at life-saving appliances and fire-fighting equipment, essentially a hardware inspection, you could have the best ship in the world in that regard but if it is not properly operated and the crew are demotivated, the ship may become a hazard. Vice versa, you could have a ship which is very old and requires a lot of money to keep it running, but if that ship is run by a very good company and the systems in place are very good, then that ship would not be considered as a hazard. Accordingly, it is more beneficial for us to look at the whole ship.

10.54 *Do you send your surveyors to meet the ship wherever she is docked at a mutually convenient time?*

Neil: Yes.

10.55 *When you use a RO, what criteria will you use to determine that they are competent and independent?*

Neil: We recognize seven classification societies, namely, American Bureau of Shipping,[29] Bureau Veritas,[30] Det Norske Veritas,[31] Germanischer Lloyd,[32] Lloyd's Register,[33] Nippon Kaiji Kyokai[34] and RINA,[35] and these are the ROs that we will be using. We already have an established process for appointing surveyors. When these surveyors undertake work on our behalf, they are actually a MCA surveyor for the duration of that work and they are given an official appointment; they are named to undertake a certain task between specific dates. We also have a system of supervision where we audit these classification societies to ensure that they are doing their job correctly.

10.56 *Where ROs are used, do you think that a risk of 'certification shopping' exists? For example, will these organizations be selected on the basis that they might be more likely to issue a certificate?*

Neil: Not so much in respect of ROs, as they will only work according to the instructions and requirements of the flag State. Different prices are offered by the classification societies and there is a degree of bargaining as regards prices.

Julie: With the controls that are in place to effectively supervise ROs, such certification shopping should not be possible.

10.57 *Can you provide some examples of the length of time it takes to inspect a particular vessel and the costs of that inspection?*

Julie: There are three categories for flag State inspection: an 'initial MLC inspection', an 'intermediate MLC inspection' or an 'interim MLC inspection'. The UK will need to conduct an initial MLC inspection and, where compliant, issue a Maritime Labour Certificate to all existing UK registered ships of 500 gross tonnes and over that operate

29. See further http://www.eagle.org/ (accessed 13 May 2013).
30. See further http://www.bureauveritas.co.uk/ (accessed 13 May 2013).
31. See further http://www.dnv.co.uk/ (accessed 13 May 2013).
32. See further http://www.gl-group.com/en/ (accessed 13 May 2013).
33. See further http://www.lr.org/ (accessed 13 May 2013).
34. See further http://www.classnk.or.jp/ (accessed 13 May 2013).
35. See further http://www.rina.org/ (accessed 13 May 2013).

internationally. The inspection and the issue of a Maritime Labour Certificate will need to be repeated every five years. All ships will also need to undergo an intermediate MLC inspection between two and three years after the date of the full inspection in each five year period, in order to ensure continuing compliance with MLC standards. Given the overlap between the MLC and ISM Code requirements, the cost of an initial MLC inspection will depend on whether it is conducted simultaneously with an ISM survey. In addition, ships may be located anywhere in the world when their inspection becomes due, and the shipowner will be liable to cover the associated travel and subsistence costs.[36]

When a ship flags-in, a general inspection of the ship, including an interim MLC inspection, will be conducted and it is assumed that the length of time required for an interim inspection will vary on whether or not the ship transfers from a MLC-ratifying flag State. An interim MLC inspection will result in a six-month Interim Maritime Labour Certificate. Interim certificates are issued as it is not expected that a full initial inspection will be possible when a ship first flags-in. Where a ship transfers from another flag, the shipowner will not have been able to prepare Part 2 of the Declaration of Maritime Labour Compliance (DMLC), to demonstrate compliance with the relevant national legislation of the new flag. Conversely, for new builds, there would be no records to show that the systems put in place to ensure continuing compliance with the MLC requirements are operational and effective. Surveyor travel costs will also need to be paid by the shipowner. Subsequently, ships will also undergo an initial MLC inspection leading to a five year Maritime Labour Certificate, which will then be renewed with on-going MLC inspections as part of the five year inspection cycle.[37]

The fees for an initial MLC inspection will depend on the type and size of the ship to be surveyed, along with the number of seafarers on board and whether they are all employed under similar employment agreements. The MCA has made working assumptions regarding the length of time and the resultant costs per ship, which are based on trial surveys carried out by the MCA at the current MCA survey rate of £94 per hour, presented in Table 10.3. For MLC surveys that are conducted

Table 10.3 Central assumptions for 'Initial MLC Inspections' not conducted simultaneously with ISM surveys

Vessel Type	Initial MLC Inspection	
	Hours	Cost Per Vessel (at £94 per hour)
Cruise ships	20	£1,880
Other passenger ships	12	£1,128
Large yachts	8	£752
Bulk carriers	10	£940
Cargo vessels	8	£752

Source: Merchant Shipping (Maritime Labour Convention) (Survey & Certification including seafarer complaints) Regulations Consultation: Impact Assessment, 11 February 2013

36. See further Merchant Shipping *(Maritime Labour Convention)* (Survey & Certification including seafarer complaints) Regulations Consultation: Impact Assessment, 11 February 2013, 10-11.
37. *Ibid.*

simultaneously with ISM surveys, the MCA's working assumptions are 70 per cent of the amounts presented.[38]

Completion of a Maritime Labour Certificate also involves (1) producing a DMLC Part 1, which is a declaration by the flag State of the MLC regulations applying to the ship; and, (2) checking the shipowner's DMLC Part 2, which is a declaration of the procedures in place to ensure continuing compliance with those regulations, before confirmation by the MCA. The cost of approving a certificate is estimated at £282 per certificate (3 hours), and the cost of issuing a Maritime Labour Certificate is estimated at £94 per certificate (1 hour); a total cost of £376 per ship.[39]

It is estimated that an intermediate MLC inspection would take approximately half the time of an initial MLC inspection, as it would involve checking against a known benchmark. Accordingly, the average cost per vessel is estimated at 50 per cent of the amount presented in Table 10.3.[40]

The cost of issuing an Interim Maritime Labour Certificate would depend on whether the vessel is transferring from another flag or is a new build. For transfers, an Interim Certificate is estimated to cost £188 (2 hours), to ascertain broad compliance with the MLC and to initiate procedures leading to full MLC certification regardless of vessel category. For new builds, plan approval for MLC requirements is assumed to add a further 2 hours to the interim MLC inspection; the cost per ship is therefore assumed to be £376. It is assumed that ships transferring from non-MLC ratifying countries will also require four-hour long inspections, in order to ensure that the shipowners can comply with the standards of the MLC, where there is no history of previous compliance.[41]

Table 10.4 Central assumptions for Interim MLC Inspections

Vessel Category	Interim MLC Inspections	
	Hours	**Cost Per Vessel (at £94 per hour)**
New-builds	4	£376
Transfers from MLC ratifying countries	2	£188
Transfers from no-MLC ratifying countries	4	£376

Source: Merchant Shipping (Maritime Labour Convention) (Survey & Certification including seafarer complaints) Regulations Consultation: Impact Assessment, 11 February 2013

10.58 *Do you think that there is a risk of fraudulent certificates being issued?*

Neil: This will certainly not arise in respect of MCA-issued certificates, as we have safeguards in place to prevent this happening. If, during the course of a port State control inspection, we came across a certificate that we considered to be fraudulent,

38. See further Merchant Shipping *(Maritime Labour Convention)* (Survey & Certification including seafarer complaints) Regulations Consultation: Impact Assessment, 11 February 2013, 14-15.
39. *Ibid.*
40. *Ibid.*
41. See further Merchant Shipping *(Maritime Labour Convention)* (Survey & Certification including seafarer complaints) Regulations Consultation: Impact Assessment, 11 February 2013, 15-16.

we would contact the relevant flag State to have the certificate verified. There is always a possibility of fraudulent certificates but I do not think that the possibility is any greater or any lesser with the advent of the MLC.

10.59 *Has a public record of all maritime labour certificates that have been issued been made available? Such as an online database, as this would help safeguard against fraudulent certificates.*

There are public databases such as Thetis[42] and ITF Seafarer,[43] where you can find certain information. There is also the Paris MoU website, which provides a record of ship inspections and once the MLC is in force, MLC inspections and certificates should be included.[44] I do not foresee the ILO creating a database, however.

10.60 *How many intermediate inspections within a five-year period will a ship be subject to?*

Neil: A ship will be subject to one intermediate inspection, as required by the MLC.

10.61 *Do you envisage any problems with the system of inspection and certification outlined in the Convention?*

Neil: I don't think so; it is the same system that is used under other conventions. From the inspections that we have carried out, we have not come across any problems with the actual system. The only 'problem' that does arise is the time restraints that we are under now that we are doing three inspections, and the additional resources that are needed to do so.

10.62 *Do you consider that the system of inspection and certification will ultimately be nothing more than a paper trail?*

Neil: No. When we started doing the voluntary inspections, certain problems were highlighted. For example, given the intensity of port calls for container ships at certain destinations, crew members were unable to adhere to the hours of rest under the MLC. This issue was addressed by having additional resources, namely, an extra third mate, available during such periods. While this problem should have also arisen in respect of the provisions in the *Labour Inspection (Seafarers) Convention, 1996 (No. 178)*, you must not forget that certificates are now required under the MLC, and if such issues are not being addressed, we will not issue a certificate. At other destinations, the length of time that it takes to bunker a ship, which could take up to 20 hours, has caused difficulties. Under normal circumstances, the chief engineer is in charge of bunkering, which would require them to be up for a considerable period of time. This again breaches the hours of rest requirements in the MLC, so companies are making additional resources available. In light of these experiences, we are already seeing the Convention having an effect on the maritime industry.

10.63 *How will effective enforcement of the MLC be achieved?*

Neil: I think enforcement requires a two-pronged approach. First, there needs to be an effective flag State that is willing to enforce the Convention and to take the appropriate action when discrepancies are highlighted, such as withdrawing

42. See https://portal.emsa.europa.eu/web/thetis/ (accessed 13 May 2013).
43. ITF Seafarers' 'Look Up a Ship' tool is available at http://www.itfseafarers.org/look_up_ship2.cfm (accessed 13 May 2013).
44. The Paris MoU inspection database can be searched at http://www.parismou.org/Inspection_efforts/Inspections/Inspection_database_search/ (accessed 13 May 2013).

certificates or undertaking additional inspections. The second area is port State control. An effective port State control system is required for the Convention to be implemented and enforced. It shouldn't be forgotten that the port State inspection is not a survey, it is simply a snapshot. Both of these methods of enforcement are needed.

Julie: Also, the new complaints procedure to some extent because that picks up any issues between inspections.

Neil: Again, this relies on dynamic flag and port States.

10.64 *What about flag States that are less pro-active? Could the MLC still be enforced through port State control?*

Neil: Yes. For the flags that rely heavily on delegation of survey on ROs the MLC has been a bit of a wake-up call, as the one thing that you cannot delegate under the MLC to a RO is the complaints procedure. Any complaints must be dealt with by the flag State. It is unlikely that the Convention could be enforced through Port State control alone.

10.65 *Do you think that the MLC will have a real impact, if it has not already done so?*

Julie: I think that it has raised awareness of a lot of issues among shipowners but also among seafarers. I do think that seafarers have quite high expectations of the Convention, and therefore, if they do not get the improvements that they are expecting, there will be a lot of complaints. It could act as a catalyst.

Neil: I think that the Convention has already had a real impact on the shipping industry. The global maritime industry is spending a lot of time and money putting systems in place in order to comply with the Convention.

10.66 *Do you think that there have been any innovations in the enforcement mechanisms provided by the Convention? The inspection and certification regime is not new, nor is the system of port State control.*

Neil: I think that the on-shore complaints procedures could be mentioned, although they are already provided for by the *Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147)*. The fact that a seafarer can complain not only to the flag State but also to the port State is an innovation in itself, especially as both States have to respond to them.

10.67 *What about the 'no more favourable treatment principle'?*

Neil: This principle is already established in port State control. It is a useful tool, as the port State control officers will treat a ship from a non-ratifying State in exactly the same way as a ship from a ratifying State, and they expect the same standards.

10.68 *You have mentioned the requisite two-pronged approach by flag and port States, but what about the obligations that are placed on labour-supplying States, even though their obligations are fewer?*

Neil: I think that they have a reasonably large part to play in all of this, but in relation to how seafarers are engaged and how they obtain their employment. The MLC does not allow black-listing or paying for jobs, even though we know that this happens in certain parts of the world. I do not think that, as a surveyor undertaking an inspection on board a ship, I will be able affect whether black-listing or paying for jobs continues in the labour-supplying State. It is down to the labour-supplying States to eradicate this behaviour.

10.69 *Will you be issuing any guidance for shipping companies and shipowners who are now faced with obligations under the MLC?*

Julie: We have already issued some guidance that is available on the dedicated MLC pages of our website.[45] The guidance goes through each Title of the Convention. It is provisional guidance, based primarily on existing rules, at the moment, but we will update it as the new legislation is finalised.

Neil: We have also provided four two-day seminars for shipowners from different sectors, including the yachting industry. More recently, we are having regular one-to-one meetings with shipowners to guide them through the process of implementation and to solve any problems that they may have.

10.70 *Are your online resources available to anyone? What about your courses? Are they only available to shipowners that have registered their vessels with the UK?*

Julie: The online resources are available to anyone.

Neil: The courses are currently only available to shipowners of UK-flagged ships.

10.71 *What implications, if any, do you think the Convention will have on the ship-building industry?*

Neil: There are certainly implications regarding crew accommodation, as the size and the amount of the accommodation has to be increased. Quite often, ships are built on production lines with a standard design. Now, ship builders will have to amend that standard design to take account of the increased crew accommodation requirements, and the whole process may need to overhauled, as ships tend to be built in blocks. The MLC is likely to lead to substantial changes within the shipbuilding industry.

10.72 *Have you encountered any conflicts between labour obligations under European law and labour obligations provided by international conventions, in particular, those in the MLC?*

Julie: In 2007, the EU issued Council Decision 2007/431/EC that authorized Member States to ratify the MLC.[46] This had to be done because the Convention deals with an area of exclusive competence (co-operation on social security), and so, the Member States needed authorization to ratify. Then, Council Directive 2009/13/EC[47] was adopted, which puts into EU law the European social partners' agreement on the MLC. That agreement largely reiterates the parts of the MLC within EU competence, and areas that were within the social partners' remit. So, for example, they didn't include the recruitment and placement provisions because the European social partners, the shipowners and seafarers unions, do not represent recruitment and placement services. Even though parts of the Convention are missing, there is no conflict.

10.73 *Is the UK considered to be a labour-supplying State?*

Julie: Yes. The DfT publishes statistics on the number of UK seafarers, which is currently around 25,000 seafarers.

45. See http://www.dft.gov.uk/mca/mcga07-home/workingatsea/mcga-healthandsafety/maritime_labour_convention_2006.htm (accessed 13 May 2013).

46. Council Decision 2007/431/EC of 7 June 2007 authorizing Member States to ratify, in the interests of the European Community, the *Maritime Labour Convention, 2006,* of the International Labour Organization [2007] OJ L161/63.

47. Council Directive 2009/13/EC of 16 February 2009 implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention, 2006, and amending Directive 1999/63/EC [2009] OJ L124/30.

10.74 *How will the UK's obligations as regards its national seafarers be implemented and enforced?*

The MCA is not responsible for the regulation of recruitment and placement services; this is dealt with by the Department for Business, Innovation and Skills.[48] They are responsible for legislating, implementing, enforcing and monitoring. We have liaised with this Department and UK legislation will be updated in order to fully comply with the MLC. The changes needed are relatively minor.

10.75 *Do you think that the Convention places enough of a burden on labour-supplying States to protect their nationals?*

Neil: I think so, yes. It will be interesting to see what happens.

Julie: I think it is interesting, as not every country that has a labour-supply has its own fleet, and, in order to ratify the MLC, each State must implement the whole Convention. I can see why that may be difficult for some countries because they may not have the kind of shipping industry to make it worthwhile to put the whole Convention into their legislation. That being said, we do have landlocked States – who would not have any port State responsibilities – that have ratified, such as Switzerland.

Neil: I think that there is scope to argue that the labour-supplying side of things should be dealt with in a separate convention to allow landlocked States to ratify, but that would then defeat the object of having all of the minimum standards in one document. Also, there is nothing to prevent States adopting the standards in the Convention without actually ratifying.

48. See further https://www.gov.uk/government/organisations/department-for-business-innovation-skills (accessed 13 May 2013).

Table 10.5 Detailed Comparison between the MLC 2006 and the ISM Code

MLC Reg	MLC Requirement	ISM Section	ISM Requirement	Evidence	
				MLC	ISM
1.1 – Minimum age	No person below the minimum age (16) shall be employed or engaged to work on a ship.	6 – Resources and Personnel	6.2 -The Company should ensure that each ship is manned with qualified, certified and medically fit seafarers in accordance with national and international requirements.	Inspection of crew list or other documents to confirm the seafarers' ages. Check work schedules and accident reports regarding the work undertaken by young persons.	Inspection of seafarers' medical certificates could possibly highlight any under age seafarers.
1.2 – Medical certificate	Seafarers shall not work on a ship unless they are certified as medically fit to perform their duties.	6 – Resources and Personnel	6.2 – The Company should ensure that each ship is manned with qualified, certified and medically fit seafarers in accordance with national and international requirements.	Inspection of seafarers medical certificates.	Inspection of seafarers medical certificates.
1.3 – Training and qualifications	1. Seafarers shall not work on a ship unless they are trained or certified as competent or otherwise qualified to perform their duties. 2. Seafarers shall not be permitted to work on a ship unless they have successfully completed training for personal safety on board ship. 3. Training and certification with IMO requirements shall be considered to meet the requirements of 1 and 2.	6 – Resources and Personnel	6.2 – The Company should ensure that each ship is manned with qualified, certified and medically fit seafarers in accordance with national and international requirements. 6.3 – The Company should establish procedures to ensure that new personnel and personnel transferred to new assignments related to safety and protection of the environment are given proper familiarization with their duties.	Inspection of seafarers certificates of competency, safety training courses and familiarization records.	Inspection of seafarers certificates of competency, safety training courses and familiarization records.

MLC Reg	MLC Requirement	ISM Section	ISM Requirement	Evidence	
				MLC	ISM
1.4 – Recruitment and placement	1. All seafarers shall have access to an efficient, adequate and accountable system for finding employment on board ship without charge to the seafarer. 2. Seafarer recruitment and placement services operating in a Member's territory shall conform to the standards set out in the Code. 3. Each Member shall require, in respect of the seafarers who work on ships that fly its flag, that shipowners who use seafarer recruitment and placement services that are based in countries or territories in which the MLC does not apply, ensure that those services conform to the requirements set out in the Code.	Not covered by the ISM Code.		Check documentation or other information to allow the inspector to ascertain if seafarers were, recruited directly by the shipowner, recruited through a public service or through a service that is not based in a MLC2006 country.	
2.1 – Seafarers' employment agreements (SEAs)	1. The terms and conditions for employment of a seafarer shall be set out or referred to in a clear written legally enforceable agreement and shall be consistent with the standards set out in the Code. 2. SEAs shall be agreed to by the seafarer under conditions which ensure that the seafarer has an opportunity to review and seek advice on the terms and conditions in the agreement and freely accepts them before signing. 3. To the extent compatible with the Member's national law and practice, SEAs shall be understood to incorporate any applicable CBA.	Not covered by the ISM Code.		Check the SEAs and any applicable CBAs. Check for seafarers record of employment and that they do not contain statements regarding their quality of work.	

(*Continued*)

Table 10.5 Detailed Comparison between the MLC 2006 and the ISM Code (Continued)

MLC Reg	MLC Requirement	ISM Section	ISM Requirement	Evidence	
				MLC	ISM
2.2 - Wages	1. All seafarers shall be paid for their work regularly and in full in accordance with their employment agreements.	Not covered by the ISM Code.		Check the SEA and other documentation (payroll records). Check relevant documents showing service charges and exchange rates applied to any allotments. Check for confirmation of payment of wages and that where applicable wages are consistent with national wages for seafarers.	
2.3 – Hours of work and hours of rest	1. Each member shall ensure that the hours of work or the hours of rest for seafarers are regulated. 2. Each member shall establish maximum hours of work or minimum hours of rest over given periods that are consistent with the provisions in the Code.	1.4 - Functional arrangements for a safety management system	1.4.2 – Every company should develop, implement and maintain a Safety Management System which includes instructions and procedures to ensure safe operation of ships and protection of the environment in compliance with relevant international and flag State legislation.	Check for table of working arrangements and hours of work/rest records and compare same with for example log book entries, SEAs etc.	Inspect hours of work/rest records and compare same with, for example, log book entries etc.
2.4 – Entitlement to leave	1. Each member shall require that seafarers employed on ships that fly its flag are given paid annual leave under appropriate conditions, in accordance with provisions of the Code. 2. Seafarers shall be granted shore leave to benefit their health and well being and with the operational requirements of their positions.	Not covered by the ISM Code.		Check SEAs, CBAs and wages records.	

MLC Reg	MLC Requirement	ISM Section	ISM Requirement	Evidence	
				MLC	ISM
2.5 – Repatriation	1. Seafarers have a right to be repatriated at no cost to themselves in the circumstances and under the conditions specified in the Code. 2. Each member shall require ships that fly its flag to provide financial security to ensure that seafarers are duly repatriated in accordance with the Code.	Not covered by the ISM Code.		Check SEAs, CBAs and other documents.	
2.6 – Seafarer compensation for the ship's loss or foundering	1. Seafarers are entitled to adequate compensation in the case of injury, loss or unemployment arising from the ship's loss or foundering.	Not covered by the ISM Code.			
2.7 – Manning levels	1. Each member shall require that all ships that fly its flag have a sufficient number of seafarers employed on board to ensure that ships are operated safely, efficiently and with due regard to security under all conditions, taking in to account concerns about seafarer fatigue and the particular nature and conditions of the voyage.	1.2 – Objectives. 6 – Resources and personnel	1.2.3.1 – The SMS should ensure compliance with mandatory rules and regulations. 6.2 – The Company should ensure that each ship is manned with qualified, certificated and medically fit seafarers in accordance with national and international requirements.	Check the Safe Manning Document or equivalent and any other relevant documentation.	Inspect the Safe Manning Document.
2.8 – Career and skill development and opportunities for seafarer employment	1. Each member shall have national policies to promote employment in the maritime sector and to encourage career and skill development and greater employment opportunities for seafarers domiciled in its territory.	Not covered by the ISM Code.			
3.1 – Accommodation and recreational facilities	1. Each Member shall ensure that ships that fly its flag provide and maintain decent accommodations and recreational facilities for seafarers working and living on board, or both, consistent with promoting seafarers' health and well being.	Not covered by the ISM Code.		Inspect the crew accommodation areas for compliance. Inspect records confirming that regular inspections are being carried out.	

(*Continued*)

Table 10.5 Detailed Comparison between the MLC 2006 and the ISM Code (Continued)

MLC Reg	MLC Requirement	ISM Section	ISM Requirement	Evidence	
				MLC	ISM
3.2 –Food and catering	1. Each member shall ensure that ships that fly its flag carry on board and serve food and drinking water of appropriate quality, nutritional value and quantity that adequately covers the requirements of the ship and takes into account the differing cultural and religious backgrounds. 2. Seafarers on board a ship shall be provided with food free of charge during the period of engagement. 3. Seafarers employed as ship's cooks with responsibility for food preparation must be trained and qualified for their position on board ship.	6 – Resources and personnel 7 – Development of Plans for Shipboard Operations	1.2.2 – Safety management objectives of the Company should, *inter alia*: 1. provide for safe practices in ship; operation and safe working environment 2. establish safeguards against all identified risks; and 3. continuously improve safety management skills of personnel ashore and on board ships, including preparing for emergencies related both to safety and environmental protection. 1.2.3 – The safety management system should ensure: 1. compliance with mandatory rules and regulations; and 2. that applicable codes, guidelines and standards recommended by the Organisation, Administrations, Classification Societies and maritime industry organisations are taken in to account. 6.2 – The Company should ensure that each ship is manned with qualified, certificated and medically fit seafarers in accordance with national and international requirements (eg ship's cooks certificates). The Company should establish procedures for the preparation of plans and instructions, including checklists as appropriate, for key shipboard operations concerning the safety of the ship and the prevention of pollution. The various tasks involved should be defined and assigned to qualified personnel. The Company should identify the key shipboard operations and ensure that procedures and instructions, including those for general shipboard operations are laid down for carrying out these operations.	Check documents to confirm that the ship's cook is certificated and that the catering staff has been trained. Check on board records to confirm that inspections are being carried out as required. Check that the food and drinking water is of suitable quality and quantity and that there is a variation in the food being provided. Check that charges for food are not being made.	Check documents to confirm that the ship's cook is certificated and that the catering staff have been trained. Inspect the galley and food handling areas to ensure that the laid down procedures are being adhered to.

MLC Reg	MLC Requirement	ISM Section	ISM Requirement	Evidence	
				MLC	ISM
4.1 – Medical care on board ship and ashore	1. Each Member shall ensure that all seafarers on ships that fly its flag are covered by adequate measures for the protection of their health and that they have access to prompt and adequate medical care whilst working on board. 2. The protection and care under para 1 of this Regulation shall, in principle be provided free of charge. 3. Each member shall ensure that seafarers on board ships in its territory who are in need of immediate medical care are given access to the Member's facilities on shore. 3. The requirements for on board health protection and medical care set out in the Code include standards for measures aimed at providing seafarers with health protection and medical care as comparable as possible to that which is generally available to workers ashore.	6 – Resources and personnel 7 – Development of Plans for Shipboard Operations	6.2 – The Company should ensure that each ship is manned with qualified, certificated and medically fit seafarers in accordance with national and international requirements (eg the Doctor's qualification and training records of those responsible for medical care). The Company should establish procedures for the preparation of plans and instructions, including checklists as appropriate, for key shipboard operations concerning the safety of the ship and the prevention of pollution. The various tasks involved should be defined and assigned to qualified personnel. The Company should identify the key shipboard operations and ensure that procedures and instructions, including those for general shipboard operations are laid down for carrying out these operations.	Check SEAs and other relevant documents for compliance. Inspect the hospital for compliance and check the SMD or crew list for confirmation that a doctor is/is not required to be carried. Check the Doctor's certificate and the training records of those responsible for medical care.	Inspect the Doctor's qualification together with the training records of those responsible for medical care on board ship. Inspect the hospital and check that the laid down procedures are being adhered to including the handling of drugs and medical waste.
4.2 – Shipowners liability	1. Each member shall ensure that measures in accordance with the Code, are in place on ships that fly its flag to provide seafarers employed on ships with a right to material assistance and support from the shipowner with respect to the financial consequences of sickness, injury or death occurring while they are serving under a seafarer's employment agreement or arising from their employment under such agreement. 2. This Regulation does not affect any other legal remedies that a seafarer may seek.	Not covered by the ISM Code.		Check SEAs, CBAs and other relevant documents for compliance together with ensuring that on board procedures are being adhered to.	

(*Continued*)

Table 10.5 Detailed Comparison between the MLC 2006 and the ISM Code (Continued)

MLC Reg	MLC Requirement	ISM Section	ISM Requirement	Evidence	
				MLC	ISM
4.3 - Health and safety protection and accident prevention	1. Each Member shall ensure that seafarers on ships that fly its flag are provided with occupational health protection and live, work and train on board ship in a safe hygienic environment. 2. Each Member shall develop and promulgate national guidelines for the management of occupational safety and health on board ships that fly its flag, after consultation with representative shipowners' and seafarers' organisations and taking in to account applicable codes, guidelines and standards recommended by international organisations, national administrations and maritime industry organisations. 3. Each Member shall adopt laws and regulations and other measures addressing the matters specified in the Code, taking in to account relevant international instruments, and set standards for occupational safety and health protection and accident prevention on ships that fly its flag.	1.2 - Objectives	1.2.2 – Safety management objectives of the Company should, *inter alia*: 1. provide for safe practices in ship operation and a safe working environment; 2. establish safeguards against all identified risks; and 3. continuously improve safety management skills of personnel ashore and on board ships, including preparing for emergencies related both to safety and environmental protection. 1.2.3 – The safety management system should ensure: 1. compliance with mandatory rules and regulations; and 2. that applicable codes, guidelines and standards recommended by the Organisation, Administrations, Classification Societies and maritime industry organisations are taken in to account.	Check relevant documents such as accident reports for the management of occupational safety and health (OSH) on the ship together with checking that a safety committee is in operation (if required) and check the on board programme for OSH is compliant and available to all seafarers. Inspect the ship to ensure that OSH procedures are being adhered to and that hazards and the risk of accidents is reduced to a minimum.	Inspection of risk assessments, accident reports and circulars. Inspection of the ship to ensure that hazards and risks are reduced to a minimum.
4.4 – Access to shore based welfare facilities	1. Each Member shall ensure that shore-based welfare facilities, where they exist, are easily accessible. The Member shall also promote the development of welfare facilities, such as those listed in the Code, in designated ports to provide seafarers on ships that are in its ports with access to adequate welfare facilities and services. 2. The responsibilities of each member with respect to shore based facilities such as welfare, cultural, recreational and information facilities and services, are set out in the Code.	Not covered by the ISM Code.			

MLC Reg	MLC Requirement	ISM Section	ISM Requirement	Evidence	
				MLC	ISM
4.5 – Social security	1. Each Member shall ensure that all seafarers and, to the extent provided for in its national law, their dependents have access to social security protection in accordance with the Code without prejudice however to any more favourable conditions referred to in para 9 of article 19 of the Constitution. 2. Each member undertakes steps, according to its national circumstances, individually and through international cooperation, to achieve progressively comprehensive social security provision for seafarers. 3. Each member shall ensure that seafarers who are subject to its social security legislation, and, to the extent provided for in its national law, their dependents, are entitled to benefit from social security protection no less favourable than that enjoyed by shoreworkers.	Not covered by the ISM Code.		Check for evidence that seafarers are covered by the national social security system and that appropriate contributions are being made. Check the SEA to confirm protection is provided by the shipowner.	
5.1.5 – On board complaint procedures	1. Each Member shall require that ships that fly its flag have on board procedures for the fair, effective and expeditious handling of seafarer complaints alleging breaches of the requirements of this Convention (including seafarers' rights) 2. Each member shall prohibit and penalise any kind of victimisation of a seafarer for filing a complaint. 3. The provisions in this Regulation and related sections of the Code are without prejudice to a seafarer's right to seek redress through whatever legal means the seafarer considers appropriate.	Not covered by the ISM Code.		Check the on board complaint procedure for compliance and that seafarers have been provided with a copy.	

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APPENDIX

INTERNATIONAL LABOUR CONFERENCE

MARITIME LABOUR CONVENTION, 2006

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INTERNATIONAL LABOUR CONFERENCE

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MARITIME LABOUR CONVENTION, 2006

PREAMBLE

The General Conference of the International Labour Organization,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Ninety-fourth Session on 7 February 2006, and

Desiring to create a single, coherent instrument embodying as far as possible all up-to-date standards of existing international maritime labour Conventions and Recommendations, as well as the fundamental principles to be found in other international labour Conventions, in particular:

– the Forced Labour Convention, 1930 (No. 29);
– the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87);
– the Right to Organise and Collective Bargaining Convention, 1949 (No. 98);
– the Equal Remuneration Convention, 1951 (No. 100);
– the Abolition of Forced Labour Convention, 1957 (No. 105);
– the Discrimination (Employment and Occupation) Convention, 1958 (No. 111);
– the Minimum Age Convention, 1973 (No. 138);
– the Worst Forms of Child Labour Convention, 1999 (No. 182); and

Mindful of the core mandate of the Organization, which is to promote decent conditions of work, and

Recalling the ILO Declaration on Fundamental Principles and Rights at Work, 1998, and

Mindful also that seafarers are covered by the provisions of other ILO instruments and have other rights which are established as fundamental rights and freedoms applicable to all persons, and

Considering that, given the global nature of the shipping industry, seafarers need special protection, and

Mindful also of the international standards on ship safety, human security and quality ship management in the International Convention for the Safety of Life at Sea, 1974, as amended, the Convention on the International Regulations for Preventing Collisions at Sea, 1972, as amended, and the seafarer training and competency requirements in the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended, and

Recalling that the United Nations Convention on the Law of the Sea, 1982, sets out a general legal framework within which all activities in the oceans and seas must be carried out and is of strategic importance as the basis for national, regional and global action and cooperation in the marine sector, and that its integrity needs to be maintained, and

Recalling that Article 94 of the United Nations Convention on the Law of the Sea, 1982, establishes the duties and obligations of a flag State with regard to, inter alia, labour conditions, crewing and social matters on ships that fly its flag, and

Recalling paragraph 8 of Article 19 of the Constitution of the International Labour Organisation which provides that in no case shall the adoption of any Convention or Recommendation by the Conference or the ratification of any Convention by any Member be deemed to affect any law, award, custom or agreement which ensures more favourable conditions to the workers concerned than those provided for in the Convention or Recommendation, and

Determined that this new instrument should be designed to secure the widest possible acceptability among governments, shipowners and seafarers committed to the principles of decent work, that it should be readily updateable and that it should lend itself to effective implementation and enforcement, and

Having decided upon the adoption of certain proposals for the realization of such an instrument, which is the only item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention;

adopts this twenty-third day of February of the year two thousand and six the following Convention, which may be cited as the Maritime Labour Convention, 2006.

GENERAL OBLIGATIONS

Article I

1. Each Member which ratifies this Convention undertakes to give complete effect to its provisions in the manner set out in Article VI in order to secure the right of all seafarers to decent employment.

2. Members shall cooperate with each other for the purpose of ensuring the effective implementation and enforcement of this Convention.

DEFINITIONS AND SCOPE OF APPLICATION

Article II

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

(a) *competent authority* means the minister, government department or other authority having power to issue and enforce regulations, orders or other instructions having the force of law in respect of the subject matter of the provision concerned;

(b) *declaration of maritime labour compliance* means the declaration referred to in Regulation 5.1.3;

(c) *gross tonnage* means the gross tonnage calculated in accordance with the tonnage measurement regulations contained in Annex I to the International Convention on Tonnage Measurement of Ships, 1969, or any successor Convention; for ships covered by the tonnage measurement interim scheme adopted by the International Maritime Organization, the gross tonnage is that which is included in the REMARKS column of the International Tonnage Certificate (1969);

(d) *maritime labour certificate* means the certificate referred to in Regulation 5.1.3;

(e) *requirements of this Convention* refers to the requirements in these Articles and in the Regulations and Part A of the Code of this Convention;

(f) *seafarer* means any person who is employed or engaged or works in any capacity on board a ship to which this Convention applies;

(g) *seafarers' employment agreement* includes both a contract of employment and articles of agreement;

(h) *seafarer recruitment and placement service* means any person, company, institution, agency or other organization, in the public or the private sector, which is engaged in recruiting seafarers on behalf of shipowners or placing seafarers with shipowners;

(i) *ship* means a ship other than one which navigates exclusively in inland waters or waters within, or closely adjacent to, sheltered waters or areas where port regu- lations apply;

(j) *shipowner* means the owner of the ship or another organization or person, such as the manager, agent or bareboat charterer, 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 ship- owners in accordance with this Convention, regardless of whether any other or- ganization or persons fulfil certain of the duties or responsibiities on behalf of the shipowner.

2. Except as expressly provided otherwise, this Convention applies to all seafarers.

3. In the event of doubt as to whether any categories of persons are to be regarded as seafarers for the purpose of this Convention, the question shall be determined by the competent authority in each Member after consultation with the shipowners' and seafarers' organizations concerned with this question.

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

5. In the event of doubt as to whether this Convention applies to a ship or particular category of ships, the question shall be determined by the competent authority in each Member after consultation with the shipowners' and seafarers' organizations concerned.

6. Where the competent authority determines that it would not be reasonable or practicable at the present time to apply certain details of the Code referred to in Article VI, paragraph 1, to a ship or particular categories of ships flying the flag of the Member, the relevant provisions of the Code shall not apply to the extent that the subject matter is dealt with differently by national laws or regulations or collective

bargaining agreements or other measures. Such a determination may only be made in consultation with the shipowners' and seafarers' organizations concerned and may only be made with respect to ships of less than 200 gross tonnage not engaged in international voyages.

7. Any determinations made by a Member under paragraph 3 or 5 or 6 of this Article shall be communicated to the Director-General of the International Labour Office, who shall notify the Members of the Organization.

8. Unless expressly provided otherwise, a reference to this Convention constitutes at the same time a reference to the Regulations and the Code.

FUNDAMENTAL RIGHTS AND PRINCIPLES

Article III

Each Member shall satisfy itself that the provisions of its law and regulations respect, in the context of this Convention, the fundamental rights to:

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

SEAFARERS' EMPLOYMENT AND SOCIAL RIGHTS

Article IV

1. Every seafarer has the right to a safe and secure workplace that complies with safety standards.

2. Every seafarer has a right to fair terms of employment.

3. Every seafarer has a right to decent working and living conditions on board ship.

4. Every seafarer has a right to health protection, medical care, welfare measures and other forms of social protection.

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

IMPLEMENTATION AND ENFORCEMENT RESPONSIBILITIES

Article V

1. Each Member shall implement and enforce laws or regulations or other measures that it has adopted to fulfil its commitments under this Convention with respect to ships and seafarers under its jurisdiction.

2. Each Member shall effectively exercise its jurisdiction and control over ships that fly its flag by establishing a system for ensuring compliance with the requirements of this Convention, including regular inspections, reporting, monitoring and legal proceedings under the applicable laws.

3. Each Member shall ensure that ships that fly its flag carry a maritime labour certificate and a declaration of maritime labour compliance as required by this Convention.

4. A ship to which this Convention applies may, in accordance with international law, be inspected by a Member other than the flag State, when the ship is in one of its ports, to determine whether the ship is in compliance with the requirements of this Convention.

5. Each Member shall effectively exercise its jurisdiction and control over seafarer recruitment and placement services, if these are established in its territory.

6. Each Member shall prohibit violations of the requirements of this Convention and shall, in accordance with international law, establish sanctions or require the adoption of corrective measures under its laws which are adequate to discourage such violations.

7. Each Member shall implement its responsibilities under this Convention in such a way as to ensure that the ships that fly the flag of any State that has not ratified this Convention do not receive more favourable treatment than the ships that fly the flag of any State that has ratified it.

REGULATIONS AND PARTS A AND B OF THE CODE

Article VI

1. The Regulations and the provisions of Part A of the Code are mandatory. The provisions of Part B of the Code are not mandatory.

2. Each Member undertakes to respect the rights and principles set out in the Regulations and to implement each Regulation in the manner set out in the corresponding provisions of Part A of the Code. In addition, the Member shall give due consideration to implementing its responsibilities in the manner provided for in Part B of the Code.

3. A Member which is not in a position to implement the rights and principles in the manner set out in Part A of the Code may, unless expressly provided otherwise in this Convention, implement Part A through provisions in its laws and regulations or other measures which are substantially equivalent to the provisions of Part A.

4. For the sole purpose of paragraph 3 of this Article, any law, regulation, collective agreement or other implementing measure shall be considered to be substantially equivalent, in the context of this Convention, if the Member satisfies itself that:

(a) it is conducive to the full achievement of the general object and purpose of the provision or provisions of Part A of the Code concerned; and

(b) it gives effect to the provision or provisions of Part A of the Code concerned.

CONSULTATION WITH SHIPOWNERS' AND SEAFARERS' ORGANIZATIONS

Article VII

Any derogation, exemption or other flexible application of this Convention for which the Convention requires consultation with shipowners' and seafarers' organizations may, in cases where representative organizations of shipowners or of seafarers do not exist within a Member, only be decided by that Member through consultation with the Committee referred to in Article XIII.

ENTRY INTO FORCE

Article VIII

1. The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

2. This Convention shall be binding only upon those Members of the International Labour Organization whose ratifications have been registered by the Director-General.

3. This Convention shall come into force 12 months after the date on which there have been registered ratifications by at least 30 Members with a total share in the world gross tonnage of ships of 33 per cent.

4. Thereafter, this Convention shall come into force for any Member 12 months after the date on which its ratification has been registered.

DENUNCIATION

Article IX

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.

2. Each Member which does not, within the year following the expiration of the period of ten years mentioned in paragraph 1 of this Article, exercise the right of denunciation provided for in this Article, shall be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each new period of ten years under the terms provided for in this Article.

EFFECT OF ENTRY INTO FORCE

Article X

This Convention revises the following Conventions:

Minimum Age (Sea) Convention, 1920 (No. 7)

Unemployment Indemnity (Shipwreck) Convention, 1920 (No. 8)

Placing of Seamen Convention, 1920 (No. 9)
Medical Examination of Young Persons (Sea) Convention, 1921 (No. 16)
Seamen's Articles of Agreement Convention, 1926 (No. 22)
Repatriation of Seamen Convention, 1926 (No. 23)
Officers' Competency Certificates Convention, 1936 (No. 53)
Holidays with Pay (Sea) Convention, 1936 (No. 54)
Shipowners' Liability (Sick and Injured Seamen) Convention, 1936 (No. 55)
Sickness Insurance (Sea) Convention, 1936 (No. 56)
Hours of Work and Manning (Sea) Convention, 1936 (No. 57)
Minimum Age (Sea) Convention (Revised), 1936 (No. 58)
Food and Catering (Ships' Crews) Convention, 1946 (No. 68)
Certification of Ships' Cooks Convention, 1946 (No. 69)
Social Security (Seafarers) Convention, 1946 (No. 70)
Paid Vacations (Seafarers) Convention, 1946 (No. 72)
Medical Examination (Seafarers) Convention, 1946 (No. 73)
Certification of Able Seamen Convention, 1946 (No. 74)
Accommodation of Crews Convention, 1946 (No. 75)
Wages, Hours of Work and Manning (Sea) Convention, 1946 (No. 76)
Paid Vacations (Seafarers) Convention (Revised), 1949 (No. 91)
Accommodation of Crews Convention (Revised), 1949 (No. 92)
Wages, Hours of Work and Manning (Sea) Convention (Revised), 1949 (No. 93)
Wages, Hours of Work and Manning (Sea) Convention (Revised), 1958 (No. 109)
Accommodation of Crews (Supplementary Provisions) Convention, 1970 (No. 133)
Prevention of Accidents (Seafarers) Convention, 1970 (No. 134)
Continuity of Employment (Seafarers) Convention, 1976 (No. 145)
Seafarers' Annual Leave with Pay Convention, 1976 (No. 146)
Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147)
Protocol of 1996 to the Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147)
Seafarers' Welfare Convention, 1987 (No. 163)
Health Protection and Medical Care (Seafarers) Convention, 1987 (No. 164)
Social Security (Seafarers) Convention (Revised), 1987 (No. 165)
Repatriation of Seafarers Convention (Revised), 1987 (No. 166)
Labour Inspection (Seafarers) Convention, 1996 (No. 178)
Recruitment and Placement of Seafarers Convention, 1996 (No. 179)
Seafarers' Hours of Work and the Manning of Ships Convention, 1996 (No. 180).

Depositary functions

Article XI

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organization of the registration of all ratifications, acceptances and denunciations under this Convention.

2. When the conditions provided for in paragraph 3 of Article VIII have been fulfilled, the Director-General shall draw the attention of the Members of the Organization to the date upon which the Convention will come into force.

Article XII

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications, acceptances and denunciations registered under this Convention.

Special Tripartite Committee

Article XIII

1. The Governing Body of the International Labour Office shall keep the working of this Convention under continuous review through a committee established by it with special competence in the area of maritime labour standards.

2. For matters dealt with in accordance with this Convention, the Committee shall consist of two representatives nominated by the Government of each Member which has ratified this Convention, and the representatives of Shipowners and Seafarers appointed by the Governing Body after consultation with the Joint Maritime Commission.

3. The Government representatives of Members which have not yet ratified this Convention may participate in the Committee but shall have no right to vote on any matter dealt with in accordance with this Convention. The Governing Body may invite other organizations or entities to be represented on the Committee by observers.

4. The votes of each Shipowner and Seafarer representative in the Committee shall be weighted so as to ensure that the Shipowners' group and the Seafarers' group each have half the voting power of the total number of governments which are represented at the meeting concerned and entitled to vote.

Amendment of this Convention

Article XIV

1. Amendments to any of the provisions of this Convention may be adopted by the General Conference of the International Labour Organization in the framework of Article 19 of the Constitution of the International Labour Organisation and the rules and procedures of the Organization for the adoption of Conventions. Amendments to the Code may also be adopted following the procedures in Article XV.

2. In the case of Members whose ratifications of this Convention were registered before the adoption of the amendment, the text of the amendment shall be communicated to them for ratification.

3. In the case of other Members of the Organization, the text of the Convention as amended shall be communicated to them for ratification in accordance with Article 19 of the Constitution.

4. An amendment shall be deemed to have been accepted on the date when there have been registered ratifications, of the amendment or of the Convention as amended, as the case may be, by at least 30 Members with a total share in the world gross tonnage of ships of at least 33 per cent.

5. An amendment adopted in the framework of Article 19 of the Constitution shall be binding only upon those Members of the Organization whose ratifications have been registered by the Director-General of the International Labour Office.

6. For any Member referred to in paragraph 2 of this Article, an amendment shall come into force 12 months after the date of acceptance referred to in paragraph 4 of this Article or 12 months after the date on which its ratification of the amendment has been registered, whichever date is later.

7. Subject to paragraph 9 of this Article, for Members referred to in paragraph 3 of this Article, the Convention as amended shall come into force 12 months after the date of acceptance referred to in paragraph 4 of this Article or 12 months after the date on which their ratifications of the Convention have been registered, whichever date is later.

8. For those Members whose ratification of this Convention was registered before the adoption of an amendment but which have not ratified the amendment, this Convention shall remain in force without the amendment concerned.

9. Any Member whose ratification of this Convention is registered after the adoption of the amendment but before the date referred to in paragraph 4 of this Article may, in a declaration accompanying the instrument of ratification, specify that its ratification relates to the Convention without the amendment concerned. In the case of a ratification with such a declaration, the Convention shall come into force for the Member concerned 12 months after the date on which the ratification was registered. Where an instrument of ratification is not accompanied by such a declaration, or where the ratification is registered on or after the date referred to in paragraph 4, the Convention shall come into force for the Member concerned 12 months after the date on which the ratification was registered and, upon its entry into force in accordance with paragraph 7 of this Article, the amendment shall be binding on the Member concerned unless the amendment provides otherwise.

Amendments to the Code

Article XV

1. The Code may be amended either by the procedure set out in Article XIV or, unless expressly provided otherwise, in accordance with the procedure set out in the present Article.

2. An amendment to the Code may be proposed to the Director-General of the International Labour Office by the government of any Member of the Organization or by the group of Shipowner representatives or the group of Seafarer representatives who have been appointed to the Committee referred to in Article XIII. An amendment proposed by a government must have been proposed by, or be supported by, at least five governments of Members that have ratified the Convention or by the group of Shipowner or Seafarer representatives referred to in this paragraph.

3. Having verified that the proposal for amendment meets the requirements of paragraph 2 of this Article, the Director-General shall promptly communicate the proposal, accompanied by any comments or suggestions deemed appropriate, to all Members of the Organization, with an invitation to them to transmit their observations or suggestions concerning the proposal within a period of six months or such other period (which shall not be less than three months nor more than nine months) prescribed by the Governing Body.

4. At the end of the period referred to in paragraph 3 of this Article, the proposal, accompanied by a summary of any observations or suggestions made under that paragraph, shall be transmitted to the Committee for consideration at a meeting. An amendment shall be considered adopted by the Committee if:

(a) at least half the governments of Members that have ratified this Convention are represented in the meeting at which the proposal is considered; and

(b) a majority of at least two-thirds of the Committee members vote in favour of the amendment; and

(c) this majority comprises the votes in favour of at least half the government voting power, half the Shipowner voting power and half the Seafarer voting power of the Committee members registered at the meeting when the proposal is put to the vote.

5. Amendments adopted in accordance with paragraph 4 of this Article shall be submitted to the next session of the Conference for approval. Such approval shall require a majority of two-thirds of the votes cast by the delegates present. If such majority is not obtained, the proposed amendment shall be referred back to the Committee for reconsideration should the Committee so wish.

6. Amendments approved by the Conference shall be notified by the Director-General to each of the Members whose ratifications of this Convention were registered before the date of such approval by the Conference. These Members are referred to below as 'the ratifying Members'. The notification shall contain a reference to the present Article and shall prescribe the period for the communication of any formal disagreement. This period shall be two years from the date of the notification unless, at the time of approval, the Conference has set a different period, which shall be a period of at least one year. A copy of the notification shall be communicated to the other Members of the Organization for their information.

7. An amendment approved by the Conference shall be deemed to have been accepted unless, by the end of the prescribed period, formal expressions of disagreement have been received by the Director-General from more than 40 per cent of the Members which have ratified the Convention and which represent not less than 40 per cent of the gross tonnage of the ships of the Members which have ratified the Convention.

8. An amendment deemed to have been accepted shall come into force six months after the end of the prescribed period for all the ratifying Members except those

which had formally expressed their disagreement in accordance with paragraph 7 of this Article and have not withdrawn such disagreement in accordance with paragraph 11. However:

(a) before the end of the prescribed period, any ratifying Member may give notice to the Director-General that it shall be bound by the amendment only after a subsequent express notification of its acceptance; and

(b) before the date of entry into force of the amendment, any ratifying Member may give notice to the Director-General that it will not give effect to that amendment for a specified period.

9. An amendment which is the subject of a notice referred to in paragraph 8(a) of this Article shall enter into force for the Member giving such notice six months after the Member has notified the Director-General of its acceptance of the amendment or on the date on which the amendment first comes into force, whichever date is later.

10. The period referred to in paragraph 8(b) of this Article shall not go beyond one year from the date of entry into force of the amendment or beyond any longer period determined by the Conference at the time of approval of the amendment.

11. A Member that has formally expressed disagreement with an amendment may withdraw its disagreement at any time. If notice of such withdrawal is received by the Director-General after the amendment has entered into force, the amendment shall enter into force for the Member six months after the date on which the notice was registered.

12. After entry into force of an amendment, the Convention may only be ratified in its amended form.

13. To the extent that a maritime labour certificate relates to matters covered by an amendment to the Convention which has entered into force:

(a) a Member that has accepted that amendment shall not be obliged to extend the benefit of the Convention in respect of the maritime labour certificates issued to ships flying the flag of another Member which:

  (i) pursuant to paragraph 7 of this Article, has formally expressed disagreement to the amendment and has not withdrawn such disagreement; or

  (ii) pursuant to paragraph 8(a) of this Article, has given notice that its acceptance is subject to its subsequent express notification and has not accepted the amendment; and

(b) a Member that has accepted the amendment shall extend the benefit of the Convention in respect of the maritime labour certificates issued to ships flying the flag of another Member that has given notice, pursuant to paragraph 8(b) of this Article, that it will not give effect to that amendment for the period specified in accordance with paragraph 10 of this Article.

AUTHORITATIVE LANGUAGES

Article XVI

The English and French versions of the text of this Convention are equally authoritative.

Explanatory note to the Regulations and Code of the Maritime Labour Convention

1. This explanatory note, which does not form part of the Maritime Labour Convention, is intended as a general guide to the Convention.

2. The Convention comprises three different but related parts: the Articles, the Regulations and the Code.

3. The Articles and Regulations set out the core rights and principles and the basic obligations of Members ratifying the Convention. The Articles and Regulations can only be changed by the Conference in the framework of Article 19 of the Constitution of the International Labour Organisation (see Article XIV of the Convention).

4. The Code contains the details for the implementation of the Regulations. It comprises Part A (mandatory Standards) and Part B (non-mandatory Guidelines). The Code can be amended through the simplified procedure set out in Article XV of the Convention. Since the Code relates to detailed implementation, amendments to it must remain within the general scope of the Articles and Regulations.

5. The Regulations and the Code are organized into general areas under five Titles:

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

Title 2: Conditions of employment

Title 3: Accommodation, recreational facilities, food and catering

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

Title 5: Compliance and enforcement

6. Each Title contains groups of provisions relating to a particular right or principle (or enforcement measure in Title 5), with connected numbering. The first group in Title 1, for example, consists of Regulation 1.1, Standard A1.1 and Guideline B1.1, relating to minimum age.

7. The Convention has three underlying purposes:

(a) to lay down, in its Articles and Regulations, a firm set of rights and principles;

(b) to allow, through the Code, a considerable degree of flexibility in the way Members implement those rights and principles; and

(c) to ensure, through Title 5, that the rights and principles are properly complied with and enforced.

8. There are two main areas for flexibility in implementation: one is the possibility for a Member, where necessary (see Article VI, paragraph 3), to give effect to the detailed requirements of Part A of the Code through substantial equivalence (as defined in Article VI, paragraph 4).

9. The second area of flexibility in implementation is provided by formulating the mandatory requirements of many provisions in Part A in a more general way, thus leaving a wider scope for discretion as to the precise action to be provided for at the national level. In such cases, guidance on implementation is given in the non-mandatory Part B of the Code. In this way, Members which have ratified this Convention can ascertain the kind of action that might be expected of them under the corresponding general obligation in Part A, as well as action that would not necessarily be required. For example, Standard A4.1 requires all ships to provide prompt access to the necessary medicines for medical care on board ship (paragraph 1(b)) and to 'carry a medicine chest' (paragraph 4(a)). The fulfilment in good faith of this latter obligation clearly means something more than simply having a medicine chest on board each ship. A more precise indication of what is involved is provided in the corresponding Guideline B4.1.1 (paragraph 4) so as to ensure that the contents of the chest are properly stored, used and maintained.

10. Members which have ratified this Convention are not bound by the guidance concerned and, as indicated in the provisions in Title 5 on port State control, inspections would deal only with the relevant requirements of this Convention (Articles, Regulations and the Standards in Part A). However, Members are required under paragraph 2 of Article VI to give due consideration to implementing their responsibilities under Part A of the Code in the manner provided for in Part B. If, having duly considered the relevant Guidelines, a Member decides to provide for different arrangements which ensure the proper storage, use and maintenance of the contents of the medicine chest, to take the example given above, as required by the Standard in Part A, then that is acceptable. On the other hand, by following the guidance provided in Part B, the Member concerned, as well as the ILO bodies responsible for reviewing implementation of international labour Conventions, can be sure without further consideration that the arrangements the Member has provided for are adequate to implement the responsibilities under Part A to which the Guideline relates.

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APPENDIX

THE REGULATIONS AND THE CODE

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TITLE 1. MINIMUM REQUIREMENTS FOR SEAFARERS TO WORK ON A SHIP

Regulation 1.1 – Minimum age

Purpose: To ensure that no under-age persons work on a ship

1. No person below the minimum age shall be employed or engaged or work on a ship.

2. The minimum age at the time of the initial entry into force of this Convention is 16 years.

3. A higher minimum age shall be required in the circumstances set out in the Code.

Standard A1.1 – Minimum age

1. The employment, engagement or work on board a ship of any person under the age of 16 shall be prohibited.

2. Night work of seafarers under the age of 18 shall be prohibited. For the purposes of this Standard, 'night' shall be defined in accordance with national law and practice. It shall cover a period of at least nine hours starting no later than midnight and ending no earlier than 5 a.m.

3. An exception to strict compliance with the night work restriction may be made by the competent authority when:

(a) the effective training of the seafarers concerned, in accordance with established programmes and schedules, would be impaired; or

(b) the specific nature of the duty or a recognized training programme requires that the seafarers covered by the exception perform duties at night and the authority determines, after consultation with the shipowners' and seafarers' organizations concerned, that the work will not be detrimental to their health or well-being.

4. The employment, engagement or work of seafarers under the age of 18 shall be prohibited where the work is likely to jeopardize their health or safety. The types of such work shall be determined by national laws or regulations or by the competent authority, after consultation with the shipowners' and seafarers' organizations concerned, in accordance with relevant international standards.

Guideline B1.1 – Minimum age

1. When regulating working and living conditions, Members should give special attention to the needs of young persons under the age of 18.

Regulation 1.2 – Medical certificate

Purpose: To ensure that all seafarers are medically fit to perform their duties at sea

1. Seafarers shall not work on a ship unless they are certified as medically fit to perform their duties.

2. Exceptions can only be permitted as prescribed in the Code.

Standard A1.2 – Medical certificate

1. The competent authority shall require that, prior to beginning work on a ship, seafarers hold a valid medical certificate attesting that they are medically fit to perform the duties they are to carry out at sea.

2. In order to ensure that medical certificates genuinely reflect seafarers' state of health, in light of the duties they are to perform, the competent authority shall, after consultation with the shipowners' and seafarers' organizations concerned, and giving due consideration to applicable international guidelines referred to in Part B of this Code, prescribe the nature of the medical examination and certificate.

3. This Standard is without prejudice to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended ('STCW'). A medical certificate issued in accordance with the requirements of STCW shall be accepted by the competent authority, for the purpose of Regulation 1.2. A medical certificate meeting the substance of those requirements, in the case of seafarers not covered by STCW, shall similarly be accepted.

4. The medical certificate shall be issued by a duly qualified medical practitioner or, in the case of a certificate solely concerning eyesight, by a person recognized by the competent authority as qualified to issue such a certificate. Practitioners must enjoy full professional independence in exercising their medical judgement in undertaking medical examination procedures.

5. Seafarers that have been refused a certificate or have had a limitation imposed on their ability to work, in particular with respect to time, field of work or trading area, shall be given the opportunity to have a further examination by another independent medical practitioner or by an independent medical referee.

6. Each medical certificate shall state in particular that:

(a) the hearing and sight of the seafarer concerned, and the colour vision in the case of a seafarer to be employed in capacities where fitness for the work to be performed is liable to be affected by defective colour vision, are all satisfactory; and

(b) the seafarer concerned is not suffering from any medical condition likely to be aggravated by service at sea or to render the seafarer unfit for such service or to endanger the health of other persons on board.

7. Unless a shorter period is required by reason of the specific duties to be performed by the seafarer concerned or is required under STCW:

(a) a medical certificate shall be valid for a maximum period of two years unless the seafarer is under the age of 18, in which case the maximum period of validity shall be one year;

(b) a certification of colour vision shall be valid for a maximum period of six years.

8. In urgent cases the competent authority may permit a seafarer to work without a valid medical certificate until the next port of call where the seafarer can obtain a medical certificate from a qualified medical practitioner, provided that:

(a) the period of such permission does not exceed three months; and

(b) the seafarer concerned is in possession of an expired medical certificate of recent date.

9. If the period of validity of a certificate expires in the course of a voyage, the certificate shall continue in force until the next port of call where the seafarer can obtain a medical certificate from a qualified medical practitioner, provided that the period shall not exceed three months.

10. The medical certificates for seafers working on ships ordinarily engaged on international voyages must as a minimum be provided in English.

Guideline B1.2 – Medical certificate

Guideline B1.2.1 – International guidelines

1. The competent authority, medical practitioners, examiners, shipowners, seafarers' representatives and all other persons concerned with the conduct of medical fitness examinations of seafarer candidates and serving seafarers should follow the ILO/WHO *Guidelines for Conducting Pre-sea and Periodic Medical Fitness Examinations for Seafarers*, including any subsequent versions, and any other applicable international guidelines published by the International Labour Organization, the International Maritime Organization or the World Health Organization.

Regulation 1.3 – Training and qualifications

Purpose: To ensure that seafarers are trained or qualified to carry out their duties on board ship

1. Seafarers shall not work on a ship unless they are trained or certified as competent or otherwise qualified to perform their duties.

2. Seafarers shall not be permitted to work on a ship unless they have successfully completed training for personal safety on board ship.

3. Training and certification in accordance with the mandatory instruments adopted by the International Maritime Organization shall be considered as meeting the requirements of paragraphs 1 and 2 of this Regulation.

4. Any Member which, at the time of its ratification of this Convention, was bound by the Certification of Able Seamen Convention, 1946 (No. 74), shall continue to carry out the obligations under that Convention unless and until mandatory provisions covering its subject matter have been adopted by the International Maritime Organization and entered into force, or until five years have elapsed since the entry into force of this Convention in accordance with paragraph 3 of Article VIII, whichever date is earlier.

Regulation 1.4 – Recruitment and placement

Purpose: To ensure that seafarers have access to an efficient and well-regulated seafarer recruitment and placement system

1. All seafarers shall have access to an efficient, adequate and accountable system for finding employment on board ship without charge to the seafarer.

2. Seafarer recruitment and placement services operating in a Member's territory shall conform to the standards set out in the Code.

3. Each Member shall require, in respect of seafarers who work on ships that fly its flag, that shipowners who use seafarer recruitment and placement services that are based in countries or territories in which this Convention does not apply, ensure that those services conform to the requirements set out in the Code.

Standard A1.4 – Recruitment and placement

1. Each Member that operates a public seafarer recruitment and placement service shall ensure that the service is operated in an orderly manner that protects and promotes seafarers' employment rights as provided in this Convention.

2. Where a Member has private seafarer recruitment and placement services operating in its territory whose primary purpose is the recruitment and placement of seafarers or which recruit and place a significant number of seafarers, they shall be operated only in conformity with a standardized system of licensing or certification or other form of regulation. This system shall be established, modified or changed only after consultation with the shipowners' and seafarers' organizations concerned. In the event of doubt as to whether this Convention applies to a private recruitment and placement service, the question shall be determined by the competent authority in each Member after consultation with the shipowners' and seafarers' organizations concerned. Undue proliferation of private seafarer recruitment and placement services shall not be encouraged.

3. The provisions of paragraph 2 of this Standard shall also apply – to the extent that they are determined by the competent authority, in consultation with the shipowners' and seafarers' organizations concerned, to be appropriate – in the context of recruitment and placement services operated by a seafarers' organization in the territory of the Member for the supply of seafarers who are nationals of that Member to ships which fly its flag. The services covered by this paragraph are those fulfilling the following conditions:

(a) the recruitment and placement service is operated pursuant to a collective bargaining agreement between that organization and a shipowner;

(b) both the seafarers' organization and the shipowner are based in the territory of the Member;

(c) The Member has national laws or regulations or a procedure to authorize or register the collective bargaining agreement permitting the operation of the recruitment and placement service; and

(d) the recruitment and placement service is operated in an orderly manner and measures are in place to protect and promote seafarers' employment rights comparable to those provided in paragraph 5 of this Standard.

4. Nothing in this Standard or Regulation 1.4 shall be deemed to:

(a) prevent a Member from maintaining a free public seafarer recruitment and placement service for seafarers in the framework of a policy to meet the needs of seafarers and shipowners, whether the service forms part of or is coordinated with a public employment service for all workers and employers; or

(b) impose on a Member the obligation to establish a system for the operation of private seafarer recruitment or placement services in its territory.

5. A Member adopting a system referred to in paragraph 2 of this Standard shall, in its laws and regulations or other measures, at a minimum:

(a) prohibit seafarer recruitment and placement services from using means, mechanisms or lists intended to prevent or deter seafarers from gaining employment for which they are qualified;

(b) require that no fees or other charges for seafarer recruitment or placement or for providing employment to seafarers are borne directly or indirectly, in whole or in part, by the seafarer, other than the cost of the seafarer obtaining a national statutory medical certificate, the national seafarer's book and a passport or other similar personal travel documents, not including, however, the cost of visas, which shall be borne by the shipowner; and

(c) ensure that seafarer recruitment and placement services operating in its territory:

  (i) maintain an up-to-date register of all seafarers recruited or placed through them, to be available for inspection by the competent authority;

  (ii) make sure that seafarers are informed of their rights and duties under their employment agreements prior to or in the process of engagement and that proper arrangements are made for seafarers to examine their employment agreements before and after they are signed and for them to receive a copy of the agreements;

  (iii) verify that seafarers recruited or placed by them are qualified and hold the documents necessary for the job concerned, and that the seafarers' employment agreements are in accordance with applicable laws and regulations and any collective bargaining agreement that forms part of the employment agreement;

  (iv) make sure, as far as practicable, that the shipowner has the means to protect seafarers from being stranded in a foreign port;

  (v) examine and respond to any complaint concerning their activities and advise the competent authority of any unresolved complaint;

  (vi) establish a system of protection, by way of insurance or an equivalent appropriate measure, to compensate seafarers for monetary loss that they may incur as a result of the failure of a recruitment and placement service or the relevant shipowner under the seafarers' employment agreement to meet its obligations to them.

6. The competent authority shall closely supervise and control all seafarer recruitment and placement services operating in the territory of the Member concerned. Any licences or certificates or similar authorizations for the operation of private services in the territory are granted or renewed only after verification that the seafarer recruitment and placement service concerned meets the requirements of national laws and regulations.

7. The competent authority shall ensure that adequate machinery and procedures exist for the investigation, if necessary, of complaints concerning the activities of

seafarer recruitment and placement services, involving, as appropriate, representatives of shipowners and seafarers.

8. Each Member which has ratified this Convention shall, in so far as practicable, advise its nationals on the possible problems of signing on a ship that flies the flag of a State which has not ratified the Convention, until it is satisfied that standards equivalent to those fixed by this Convention are being applied. Measures taken to this effect by the Member that has ratified this Convention shall not be in contradiction with the principle of free movement of workers stipulated by the treaties to which the two States concerned may be parties.

9. Each Member which has ratified this Convention shall require that shipowners of ships that fly its flag, who use seafarer recruitment and placement services based in countries or territories in which this Convention does not apply, ensure, as far as practicable, that those services meet the requirements of this Standard.

10. Nothing in this Standard shall be understood as diminishing the obligations and responsibilities of shipowners or of a Member with respect to ships that fly its flag.

Guideline B1.4 – Recruitment and placement

Guideline B1.4.1 – Organizational and operational guidelines

1. When fulfilling its obligations under Standard A1.4, paragraph 1, the competent authority should consider:

(a) taking the necessary measures to promote effective cooperation among seafarer recruitment and placement services, whether public or private;

(b) the needs of the maritime industry at both the national and international levels, when developing training programmes for seafarers that form the part of the ship's crew that is responsible for the ship's safe navigation and pollution prevention operations, with the participation of shipowners, seafarers and the relevant training institutions;

(c) making suitable arrangements for the cooperation of representative shipowners' and seafarers' organizations in the organization and operation of the public seafarer recruitment and placement services, where they exist;

(d) determining, with due regard to the right to privacy and the need to protect confidentiality, the conditions under which seafarers' personal data may be processed by seafarer recruitment and placement services, including the collection, storage, combination and communication of such data to third parties;

(e) maintaining an arrangement for the collection and analysis of all relevant information on the maritime labour market, including the current and prospective supply of seafarers that work as crew classified by age, sex, rank and qualifications, and the industry's requirements, the collection of data on age or sex being admissible only for statistical purposes or if used in the framework of a programme to prevent discrimination based on age or sex;

(f) ensuring that the staff responsible for the supervision of public and private seafarer recruitment and placement services for ship's crew with responsibility for the ship's safe navigation and pollution prevention operations have had adequate training, including approved sea-service experience, and have relevant knowledge of the maritime industry, including the relevant maritime international instruments on training, certification and labour standards;

(g) prescribing operational standards and adopting codes of conduct and ethical practices for seafarer recruitment and placement services; and

(h) exercising supervision of the licensing or certification system on the basis of a system of quality standards.

2. In establishing the system referred to in Standard A1.4, paragraph 2, each Member should consider requiring seafarer recruitment and placement services, established in its territory, to develop and maintain verifiable operational practices. These operational practices for private seafarer recruitment and placement services and, to the extent that they are applicable, for public seafarer recruitment and placement services should address the following matters:

(a) medical examinations, seafarers' identity documents and such other items as may be required for the seafarer to gain employment;

(b) maintaining, with due regard to the right to privacy and the need to protect confidentiality, full and complete records of the seafarers covered by their recruitment and placement system, which should include but not be limited to:

  (i) the seafarers' qualifications;

  (ii) record of employment;

  (iii) personal data relevant to employment; and

  (iv) medical data relevant to employment;

(c) maintaining up-to-date lists of the ships for which the seafarer recruitment and placement services provide seafarers and ensuring that there is a means by which the services can be contacted in an emergency at all hours;

(d) procedures to ensure that seafarers are not subject to exploitation by the seafarer recruitment and placement services or their personnel with regard to the offer of engagement on particular ships or by particular companies;

(e) procedures to prevent the opportunities for exploitation of seafarers arising from the issue of joining advances or any other financial transaction between the shipowner and the seafarers which are handled by the seafarer recruitment and placement services;

(f) clearly publicizing costs, if any, which the seafarer will be expected to bear in the recruitment process;

(g) ensuring that seafarers are advised of any particular conditions applicable to the job for which they are to be engaged and of the particular shipowner's policies relating to their employment;

(h) procedures which are in accordance with the principles of natural justice for dealing with cases of incompetence or indiscipline consistent with national laws and practice and, where applicable, with collective agreements;

(i) procedures to ensure, as far as practicable, that all mandatory certificates and documents submitted for employment are up to date and have not been fraudulently obtained and that employment references are verified;

(j) procedures to ensure that requests for information or advice by families of seafarers while the seafarers are at sea are dealt with promptly and sympathetically and at no cost; and

(k) verifying that labour conditions on ships where seafarers are placed are in conformity with applicable collective bargaining agreements concluded between a shipowner and a representative seafarers' organization and, as a matter of policy,

supplying seafarers only to shipowners that offer terms and conditions of employment to seafarers which comply with applicable laws or regulations or collective agreements.

3. Consideration should be given to encouraging international cooperation between Members and relevant organizations, such as:

(a) the systematic exchange of information on the maritime industry and labour market on a bilateral, regional and multilateral basis;

(b) the exchange of information on maritime labour legislation;

(c) the harmonization of policies, working methods and legislation governing recruitment and placement of seafarers;

(d) the improvement of procedures and conditions for the international recruitment and placement of seafarers; and

(e) workforce planning, taking account of the supply of and demand for seafarers and the requirements of the maritime industry.

TITLE 2. CONDITIONS OF EMPLOYMENT

Regulation 2.1 – Seafarers' employment agreements

Purpose: To ensure that seafarers have a fair employment agreement

1. The terms and conditions for employment of a seafarer shall be set out or referred to in a clear written legally enforceable agreement and shall be consistent with the standards set out in the Code.

2. Seafarers' employment agreements shall be agreed to by the seafarer under conditions which ensure that the seafarer has an opportunity to review and seek advice on the terms and conditions in the agreement and freely accepts them before signing.

3. To the extent compatible with the Member's national law and practice, seafarers' employment agreements shall be understood to incorporate any applicable collective bargaining agreements.

Standard A2.1 – Seafarers' employment agreements

1. Each Member shall adopt laws or regulations requiring that ships that fly its flag comply with the following requirements:

(a) seafarers working on ships that fly its flag shall have a seafarers' employment agreement signed by both the seafarer and the shipowner or a representative of the shipowner (or, where they are not employees, evidence of contractual or similar arrangements) providing them with decent working and living conditions on board the ship as required by this Convention;

(b) seafarers signing a seafarers' employment agreement shall be given an opportunity to examine and seek advice on the agreement before signing, as well as such other facilities as are necessary to ensure that they have freely entered into an agreement with a sufficient understanding of their rights and responsibilities;

(c) the shipowner and seafarer concerned shall each have a signed original of the seafarers' employment agreement;

(d) measures shall be taken to ensure that clear information as to the conditions of their employment can be easily obtained on board by seafarers, including the ship's master, and that such information, including a copy of the seafarers' employment agreement, is also accessible for review by officers of a competent authority, including those in ports to be visited; and

(e) seafarers shall be given a document containing a record of their employment on board the ship.

2. Where a collective bargaining agreement forms all or part of a seafarers' employment agreement, a copy of that agreement shall be available on board. Where the language of the seafarers' employment agreement and any applicable collective bargaining agreement is not in English, the following shall also be available in English (except for ships engaged only in domestic voyages):

(a) a copy of a standard form of the agreement; and
(b) the portions of the collective bargaining agreement that are subject to a port State inspection under Regulation 5.2.

3. The document referred to in paragraph 1(e) of this Standard shall not contain any statement as to the quality of the seafarers' work or as to their wages. The form of the document, the particulars to be recorded and the manner in which such particulars are to be entered, shall be determined by national law.

4. Each Member shall adopt laws and regulations specifying the matters that are to be included in all seafarers' employment agreements governed by its national law. Seafarers' employment agreements shall in all cases contain the following particulars:
(a) the seafarer's full name, date of birth or age, and birthplace;
(b) the shipowner's name and address;
(c) the place where and date when the seafarers' employment agreement is entered into;
(d) the capacity in which the seafarer is to be employed;
(e) the amount of the seafarer's wages or, where applicable, the formula used for calculating them;
(f) the amount of paid annual leave or, where applicable, the formula used for calculating it;
(g) the termination of the agreement and the conditions thereof, including:
    (i) if the agreement has been made for an indefinite period, the conditions entitling either party to terminate it, as well as the required notice period, which shall not be less for the shipowner than for the seafarer;
    (ii) if the agreement has been made for a definite period, the date fixed for its expiry; and
    (iii) if the agreement has been made for a voyage, the port of destination and the time which has to expire after arrival before the seafarer should be discharged;
(h) the health and social security protection benefits to be provided to the seafarer by the shipowner;
(i) the seafarer's entitlement to repatriation;
(j) reference to the collective bargaining agreement, if applicable; and
(k) any other particulars which national law may require.

5. Each Member shall adopt laws or regulations establishing minimum notice periods to be given by the seafarers and shipowners for the early termination of a seafarers' employment agreement. The duration of these minimum periods shall be determined after consultation with the shipowners' and seafarers' organizations concerned, but shall not be shorter than seven days.

6. A notice period shorter than the minimum may be given in circumstances which are recognized under national law or regulations or applicable collective bargaining agreements as justifying termination of the employment agreement at shorter notice or without notice. In determining those circumstances, each Member shall ensure that the need of the seafarer to terminate, without penalty, the employment agreement on shorter notice or without notice for compassionate or other urgent reasons is taken into account.

Guideline B2.1 – Seafarers' employment agreements

Guideline B2.1.1 – Record of employment

1. In determining the particulars to be recorded in the record of employment referred to in Standard A2.1, paragraph 1(e), each Member should ensure that this document contains sufficient information, with a translation in English, to facilitate the acquisition of further work or to satisfy the sea-service requirements for upgrading or promotion. A seafarers' discharge book may satisfy the requirements of paragraph 1(e) of that Standard.

Regulation 2.2 – Wages

Purpose: To ensure that seafarers are paid for their services

1. All seafarers shall be paid for their work regularly and in full in accordance with their employment agreements.

Standard A2.2 – Wages

1. Each Member shall require that payments due to seafarers working on ships that fly its flag are made at no greater than monthly intervals and in accordance with any applicable collective agreement.

2. Seafarers shall be given a monthly account of the payments due and the amounts paid, including wages, additional payments and the rate of exchange used where payment has been made in a currency or at a rate different from the one agreed to.

3. Each Member shall require that shipowners take measures, such as those set out in paragraph 4 of this Standard, to provide seafarers with a means to transmit all or part of their earnings to their families or dependants or legal beneficiaries.

4. Measures to ensure that seafarers are able to transmit their earnings to their families include:

(a) a system for enabling seafarers, at the time of their entering employment or during it, to allot, if they so desire, a proportion of their wages for remittance at regular intervals to their families by bank transfers or similar means; and

(b) a requirement that allotments should be remitted in due time and directly to the person or persons nominated by the seafarers.

5. Any charge for the service under paragraphs 3 and 4 of this Standard shall be reasonable in amount, and the rate of currency exchange, unless otherwise provided, shall, in accordance with national laws or regulations, be at the prevailing market rate or the official published rate and not unfavourable to the seafarer.

6. Each Member that adopts national laws or regulations governing seafarers' wages shall give due consideration to the guidance provided in Part B of the Code.

Guideline B2.2 – Wages

Guideline B2.2.1 – Specific definitions

1. For the purpose of this Guideline, the term:

(a) *able seafarer* means any seafarer who is deemed competent to perform any duty which may be required of a rating serving in the deck department, other than the duties of a supervisory or specialist rating, or who is defined as such by national laws, regulations or practice, or by collective agreement;

(b) *basic pay or wages* means the pay, however composed, for normal hours of work; it does not include payments for overtime worked, bonuses, allowances, paid leave or any other additional remuneration;

(c) *consolidated wage* means a wage or salary which includes the basic pay and other pay-related benefits; a consolidated wage may include compensation for all overtime hours which are worked and all other pay-related benefits, or it may include only certain benefits in a partial consolidation;

(d) *hours of work* means time during which seafarers are required to do work on account of the ship;

(e) *overtime* means time worked in excess of the normal hours of work.

Guideline B2.2.2 – Calculation and payment

1. For seafarers whose remuneration includes separate compensation for overtime worked:

(a) for the purpose of calculating wages, the normal hours of work at sea and in port should not exceed eight hours per day;

(b) for the purpose of calculating overtime, the number of normal hours per week covered by the basic pay or wages should be prescribed by national laws or regulations, if not determined by collective agreements, but should not exceed 48 hours per week; collective agreements may provide for a different but not less favourable treatment;

(c) the rate or rates of compensation for overtime, which should be not less than one and one-quarter times the basic pay or wages per hour, should be prescribed by national laws or regulations or by collective agreements, if applicable; and

(d) records of all overtime worked should be maintained by the master, or a person assigned by the master, and endorsed by the seafarer at no greater than monthly intervals.

2. For seafarers whose wages are fully or partially consolidated:

(a) the seafarers' employment agreement should specify clearly, where appropriate, the number of hours of work expected of the seafarer in return for this remuneration, and any additional allowances which might be due in addition to the consolidated wage, and in which circumstances;

(b) where hourly overtime is payable for hours worked in excess of those covered by the consolidated wage, the hourly rate should be not less than one and one-quarter times the basic rate corresponding to the normal hours of work as defined in paragraph 1 of this Guideline; the same principle should be applied to the overtime hours included in the consolidated wage;

(c) remuneration for that portion of the fully or partially consolidated wage representing the normal hours of work as defined in paragraph 1(a) of this Guideline should be no less than the applicable minimum wage; and

(d) for seafarers whose wages are partially consolidated, records of all overtime worked should be maintained and endorsed as provided for in paragraph 1(d) of this Guideline.

3. National laws or regulations or collective agreements may provide for compensation for overtime or for work performed on the weekly day of rest and on public holidays by at least equivalent time off duty and off the ship or additional leave in lieu of remuneration or any other compensation so provided.

4. National laws and regulations adopted after consulting the representative shipowners' and seafarers' organizations or, as appropriate, collective agreements should take into account the following principles:

(a) equal remuneration for work of equal value should apply to all seafarers employed on the same ship without discrimination based upon race, colour, sex, religion, political opinion, national extraction or social origin;

(b) the seafarers' employment agreement specifying the applicable wages or wage rates should be carried on board the ship; information on the amount of wages or wage rates should be made available to each seafarer, either by providing at least one signed copy of the relevant information to the seafarer in a language which the seafarer understands, or by posting a copy of the agreement in a place accessible to seafarers or by some other appropriate means;

(c) wages should be paid in legal tender; where appropriate, they may be paid by bank transfer, bank cheque, postal cheque or money order;

(d) on termination of engagement all remuneration due should be paid without undue delay;

(e) adequate penalties or other appropriate remedies should be imposed by the competent authority where shipowners unduly delay, or fail to make, payment of all remuneration due;

(f) wages should be paid directly to seafarers' designated bank accounts unless they request otherwise in writing;

(g) subject to subparagraph (h) of this paragraph, the shipowner should impose no limit on seafarers' freedom to dispose of their remuneration;

(h) deduction from remuneration should be permitted only if:

  (i) there is an express provision in national laws or regulations or in an applicable collective agreement and the seafarer has been informed, in the manner deemed most appropriate by the competent authority, of the conditions for such deductions; and

  (ii) the deductions do not in total exceed the limit that may have been established by national laws or regulations or collective agreements or court decisions for making such deductions;

(i) no deductions should be made from a seafarer's remuneration in respect of obtaining or retaining employment;

(j) monetary fines against seafarers other than those authorized by national laws or regulations, collective agreements or other measures should be prohibited;

(k) the competent authority should have the power to inspect stores and services provided on board ship to ensure that fair and reasonable prices are applied for the benefit of the seafarers concerned; and

(l) to the extent that seafarers' claims for wages and other sums due in respect of their employment are not secured in accordance with the provisions of the International Convention on Maritime Liens and Mortgages, 1993, such claims should be protected in accordance with the Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173).

5. Each Member should, after consulting with representative shipowners' and seafarers' organizations, have procedures to investigate complaints relating to any matter contained in this Guideline.

Guideline B2.2.3 – Minimum wages

1. Without prejudice to the principle of free collective bargaining, each Member should, after consulting representative shipowners' and seafarers' organizations, establish procedures for determining minimum wages for seafarers. Representative shipowners' and seafarers' organizations should participate in the operation of such procedures.

2. When establishing such procedures and in fixing minimum wages, due regard should be given to international labour standards concerning minimum wage fixing, as well as the following principles:

(a) the level of minimum wages should take into account the nature of maritime employment, crewing levels of ships, and seafarers' normal hours of work; and

(b) the level of minimum wages should be adjusted to take into account changes in the cost of living and in the needs of seafarers.

3. The competent authority should ensure:

(a) by means of a system of supervision and sanctions, that wages are paid at not less than the rate or rates fixed; and

(b) that any seafarers who have been paid at a rate lower than the minimum wage are enabled to recover, by an inexpensive and expeditious judicial or other procedure, the amount by which they have been underpaid.

Guideline B2.2.4 – Minimum monthly basic pay or wage figure for able seafarers

1. The basic pay or wages for a calendar month of service for an able seafarer should be no less than the amount periodically set by the Joint Maritime Commission or another body authorized by the Governing Body of the International Labour Office. Upon a decision of the Governing Body, the Director-General shall notify any revised amount to the Members of the Organization.

2. Nothing in this Guideline should be deemed to prejudice arrangements agreed between shipowners or their organizations and seafarers' organizations with regard to the regulation of standard minimum terms and conditions of employment, provided such terms and conditions are recognized by the competent authority.

Regulation 2.3 – Hours of work and hours of rest

Purpose: To ensure that seafarers have regulated hours of work or hours of rest

1. Each Member shall ensure that the hours of work or hours of rest for seafarers are regulated.

2. Each Member shall establish maximum hours of work or minimum hours of rest over given periods that are consistent with the provisions in the Code.

Standard A2.3 – Hours of work and hours of rest

1. For the purpose of this Standard, the term:

(a) *hours of work* means time during which seafarers are required to do work on account of the ship;

(b) *hours of rest* means time outside hours of work; this term does not include short breaks.

2. Each Member shall within the limits set out in paragraphs 5 to 8 of this Standard fix either a maximum number of hours of work which shall not be exceeded in a given period of time, or a minimum number of hours of rest which shall be provided in a given period of time.

3. Each Member acknowledges that the normal working hours' standard for seafarers, like that for other workers, shall be based on an eight-hour day with one day of rest per week and rest on public holidays. However, this shall not prevent the Member from having procedures to authorize or register a collective agreement which determines seafarers' normal working hours on a basis no less favourable than this standard.

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

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

(a) maximum hours of work shall not exceed:

(i) 14 hours in any 24-hour period; and

(ii) 72 hours in any seven-day period;

or

(b) minimum hours of rest shall not be less than:

(i) ten hours in any 24-hour period; and

(ii) 77 hours in any seven-day period.

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

7. Musters, fire-fighting and lifeboat drills, and drills prescribed by national laws and regulations and by international instruments, shall be conducted in a manner that minimizes the disturbance of rest periods and does not induce fatigue.

8. When a seafarer is on call, such as when a machinery space is unattended, the seafarer shall have an adequate compensatory rest period if the normal period of rest is disturbed by call-outs to work.

9. If no collective agreement or arbitration award exists or if the competent authority determines that the provisions in the agreement or award in respect of paragraph 7 or 8 of this Standard are inadequate, the competent authority shall determine such provisions to ensure the seafarers concerned have sufficient rest.

10. Each Member shall require the posting, in an easily accessible place, of a table with the shipboard working arrangements, which shall contain for every position at least:

(a) the schedule of service at sea and service in port; and

(b) the maximum hours of work or the minimum hours of rest required by national laws or regulations or applicable collective agreements.

11. The table referred to in paragraph 10 of this Standard shall be established in a standardized format in the working language or languages of the ship and in English.

12. Each Member shall require that records of seafarers' daily hours of work or of their daily hours of rest be maintained to allow monitoring of compliance with paragraphs 5 to 11 inclusive of this Standard. The records shall be in a standardized format established by the competent authority taking into account any available guidelines of the International Labour Organization or shall be in any standard format prepared by the Organization. They shall be in the languages required by paragraph 11 of this Standard. The seafarers shall receive a copy of the records pertaining to them which shall be endorsed by the master, or a person authorized by the master, and by the seafarers.

13. Nothing in paragraphs 5 and 6 of this Standard shall prevent a Member from having national laws or regulations or a procedure for the competent authority to authorize or register collective agreements permitting exceptions to the limits set out. Such exceptions shall, as far as possible, follow the provisions of this Standard but may take account of more frequent or longer leave periods or the granting of compensatory leave for watchkeeping seafarers or seafarers working on board ships on short voyages.

14. Nothing in this Standard shall be deemed to impair the right of the master of a ship to require a seafarer to perform any hours of work necessary for the immediate safety of the ship, persons on board or cargo, or for the purpose of giving assistance to other ships or persons in distress at sea. Accordingly, the master may suspend the schedule of hours of work or hours of rest and require a seafarer to perform any hours of work necessary until the normal situation has been restored. As soon as practicable after the normal situation has been restored, the master shall ensure that any seafarers who have performed work in a scheduled rest period are provided with an adequate period of rest.

Guideline B2.3 – Hours of work and hours of rest

Guideline B2.3.1 – Young seafarers

1. At sea and in port the following provisions should apply to all young seafarers under the age of 18:

(a) working hours should not exceed eight hours per day and 40 hours per week and overtime should be worked only where unavoidable for safety reasons;

(b) sufficient time should be allowed for all meals, and a break of at least one hour for the main meal of the day should be assured; and

(c) a 15-minute rest period as soon as possible following each two hours of continuous work should be allowed.

2. Exceptionally, the provisions of paragraph 1 of this Guideline need not be applied if:

(a) they are impracticable for young seafarers in the deck, engine room and catering departments assigned to watchkeeping duties or working on a rostered shift-work system; or

(b) the effective training of young seafarers in accordance with established programmes and schedules would be impaired.

3. Such exceptional situations should be recorded, with reasons, and signed by the master.

4. Paragraph 1 of this Guideline does not exempt young seafarers from the general obligation on all seafarers to work during any emergency as provided for in Standard A2.3, paragraph 14.

Regulation 2.4 – Entitlement to leave

Purpose: To ensure that seafarers have adequate leave

1. Each Member shall require that seafarers employed on ships that fly its flag are given paid annual leave under appropriate conditions, in accordance with the provisions in the Code.

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

Standard A2.4 – Entitlement to leave

1. Each Member shall adopt laws and regulations determining the minimum standards for annual leave for seafarers serving on ships that fly its flag, taking proper account of the special needs of seafarers with respect to such leave.

2. Subject to any collective agreement or laws or regulations providing for an appropriate method of calculation that takes account of the special needs of seafarers in this respect, the annual leave with pay entitlement shall be calculated on the basis of a minimum of 2.5 calendar days per month of employment. The manner in which the length of service is calculated shall be determined by the competent authority or through the appropriate machinery in each country. Justified absences from work shall not be considered as annual leave.

3. Any agreement to forgo the minimum annual leave with pay prescribed in this Standard, except in cases provided for by the competent authority, shall be prohibited.

Guideline B2.4 – Entitlement to leave

Guideline B2.4.1 – Calculation of entitlement

1. Under conditions as determined by the competent authority or through the appropriate machinery in each country, service off-articles should be counted as part of the period of service.

2. Under conditions as determined by the competent authority or in an applicable collective agreement, absence from work to attend an approved maritime vocational training course or for such reasons as illness or injury or for maternity should be counted as part of the period of service.

3. The level of pay during annual leave should be at the seafarer's normal level of remuneration provided for by national laws or regulations or in the applicable seafarers' employment agreement. For seafarers employed for periods shorter than one year or in the event of termination of the employment relationship, entitlement to leave should be calculated on a pro-rata basis.

4. The following should not be counted as part of annual leave with pay:

(a) public and customary holidays recognized as such in the flag State, whether or not they fall during the annual leave with pay;
(b) periods of incapacity for work resulting from illness or injury or from maternity, under conditions as determined by the competent authority or through the appropriate machinery in each country;
(c) temporary shore leave granted to a seafarer while under an employment agreement; and
(d) compensatory leave of any kind, under conditions as determined by the competent authority or through the appropriate machinery in each country.

Guideline B2.4.2 – Taking of annual leave

1. The time at which annual leave is to be taken should, unless it is fixed by regulation, collective agreement, arbitration award or other means consistent with national practice, be determined by the shipowner after consultation and, as far as possible, in agreement with the seafarers concerned or their representatives.

2. Seafarers should in principle have the right to take annual leave in the place with which they have a substantial connection, which would normally be the same as the place to which they are entitled to be repatriated. Seafarers should not be required without their consent to take annual leave due to them in another place except under the provisions of a seafarers' employment agreement or of national laws or regulations.

3. If seafarers are required to take their annual leave from a place other than that permitted by paragraph 2 of this Guideline, they should be entitled to free transportation to the place where they were engaged or recruited, whichever is nearer their home; subsistence and other costs directly involved should be for the account of the shipowner; the travel time involved should not be deducted from the annual leave with pay due to the seafarer.

4. A seafarer taking annual leave should be recalled only in cases of extreme emergency and with the seafarer's consent.

Guideline B2.4.3 – Division and accumulation

1. The division of the annual leave with pay into parts, or the accumulation of such annual leave due in respect of one year together with a subsequent period of leave, may be authorized by the competent authority or through the appropriate machinery in each country.

2. Subject to paragraph 1 of this Guideline and unless otherwise provided in an agreement applicable to the shipowner and the seafarer concerned, the annual leave with pay recommended in this Guideline should consist of an uninterrupted period.

Guideline B2.4.4 – Young seafarers

1. Special measures should be considered with respect to young seafarers under the age of 18 who have served six months or any other shorter period of time under a collective agreement or seafarers' employment agreement without leave on a foreign-going ship which has not returned to their country of residence in that time, and will not return in the subsequent three months of the voyage. Such measures could consist of their repatriation at no expense to themselves to the place of original engagement in their country of residence for the purpose of taking any leave earned during the voyage.

Regulation 2.5 – Repatriation

Purpose: To ensure that seafarers are able to return home

1. Seafarers have a right to be repatriated at no cost to themselves in the circumstances and under the conditions specified in the Code.

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

Standard A2.5 – Repatriation

1. Each Member shall ensure that seafarers on ships that fly its flag are entitled to repatriation in the following circumstances:

(a) if the seafarers' employment agreement expires while they are abroad;

(b) when the seafarers' employment agreement is terminated:

  (i) by the shipowner; or

  (ii) by the seafarer for justified reasons; and also

(c) when the seafarers are no longer able to carry out their duties under their employment agreement or cannot be expected to carry them out in the specific circumstances.

2. Each Member shall ensure that there are appropriate provisions in its laws and regulations or other measures or in collective bargaining agreements, prescribing:

(a) the circumstances in which seafarers are entitled to repatriation in accordance with paragraph 1(b) and (c) of this Standard;

(b) the maximum duration of service periods on board following which a seafarer is entitled to repatriation – such periods to be less than 12 months; and

(c) the precise entitlements to be accorded by shipowners for repatriation, including those relating to the destinations of repatriation, the mode of transport, the items of expense to be covered and other arrangements to be made by shipowners.

3. Each Member shall prohibit shipowners from requiring that seafarers make an advance payment towards the cost of repatriation at the beginning of their employment, and also from recovering the cost of repatriation from the seafarers' wages or other entitlements except where the seafarer has been found, in accordance with national laws or regulations or other measures or applicable collective bargaining agreements, to be in serious default of the seafarer's employment obligations.

4. National laws and regulations shall not prejudice any right of the shipowner to recover the cost of repatriation under third-party contractual arrangements.

5. If a shipowner fails to make arrangements for or to meet the cost of repatriation of seafarers who are entitled to be repatriated:

(a) the competent authority of the Member whose flag the ship flies shall arrange for repatriation of the seafarers concerned; if it fails to do so, the State from which the seafarers are to be repatriated or the State of which they are a national may arrange for their repatriation and recover the cost from the Member whose flag the ship flies;

(b) costs incurred in repatriating seafarers shall be recoverable from the shipowner by the Member whose flag the ship flies;

(c) the expenses of repatriation shall in no case be a charge upon the seafarers, except as provided for in paragraph 3 of this Standard.

6. Taking into account applicable international instruments, including the International Convention on Arrest of Ships, 1999, a Member which has paid the cost of repatriation pursuant to this Code may detain, or request the detention of, the ships of the shipowner concerned until the reimbursement has been made in accordance with paragraph 5 of this Standard.

7. Each Member shall facilitate the repatriation of seafarers serving on ships which call at its ports or pass through its territorial or internal waters, as well as their replacement on board.

8. In particular, a Member shall not refuse the right of repatriation to any seafarer because of the financial circumstances of a shipowner or because of the shipowner's inability or unwillingness to replace a seafarer.

9. Each Member shall require that ships that fly its flag carry and make available to seafarers a copy of the applicable national provisions regarding repatriation written in an appropriate language.

Guideline B2.5 – Repatriation

Guideline B2.5.1 – Entitlement

1. Seafarers should be entitled to repatriation:

(a) in the case covered by Standard A2.5, paragraph 1(a), upon the expiry of the period of notice given in accordance with the provisions of the seafarers' employment agreement;

(b) in the cases covered by Standard A2.5, paragraph 1(b) and (c):

  (i) in the event of illness or injury or other medical condition which requires their repatriation when found medically fit to travel;

  (ii) in the event of shipwreck;

  (iii) in the event of the shipowner not being able to continue to fulfil their legal or contractual obligations as an employer of the seafarers by reason of insolvency, sale of ship, change of ship's registration or any other similar reason;

  (iv) in the event of a ship being bound for a war zone, as defined by national laws or regulations or seafarers' employment agreements, to which the seafarer does not consent to go; and

  (v) in the event of termination or interruption of employment in accordance with an industrial award or collective agreement, or termination of employment for any other similar reason.

2. In determining the maximum duration of service periods on board following which a seafarer is entitled to repatriation, in accordance with this Code, account should be taken of factors affecting the seafarers' working environment. Each Member should seek, wherever possible, to reduce these periods in the light of technological changes and developments and might be guided by any recommendations made on the matter by the Joint Maritime Commission.

3. The costs to be borne by the shipowner for repatriation under Standard A2.5 should include at least the following:

(a) passage to the destination selected for repatriation in accordance with paragraph 6 of this Guideline;

(b) accommodation and food from the moment the seafarers leave the ship until they reach the repatriation destination;
(c) pay and allowances from the moment the seafarers leave the ship until they reach the repatriation destination, if provided for by national laws or regulations or collective agreements;
(d) transportation of 30 kg of the seafarers' personal luggage to the repatriation destination; and
(e) medical treatment when necessary until the seafarers are medically fit to travel to the repatriation destination.

4. Time spent awaiting repatriation and repatriation travel time should not be deducted from paid leave accrued to the seafarers.

5. Shipowners should be required to continue to cover the costs of repatriation until the seafarers concerned are landed at a destination prescribed pursuant to this Code or are provided with suitable employment on board a ship proceeding to one of those destinations.

6. Each Member should require that shipowners take responsibility for repatriation arrangements by appropriate and expeditious means. The normal mode of transport should be by air. The Member should prescribe the destinations to which seafarers may be repatriated. The destinations should include the countries with which seafarers may be deemed to have a substantial connection including:
(a) the place at which the seafarer agreed to enter into the engagement;
(b) the place stipulated by collective agreement;
(c) the seafarer's country of residence; or
(d) such other place as may be mutually agreed at the time of engagement.

7. Seafarers should have the right to choose from among the prescribed destinations the place to which they are to be repatriated.

8. The entitlement to repatriation may lapse if the seafarers concerned do not claim it within a reasonable period of time to be defined by national laws or regulations or collective agreements.

Guideline B2.5.2 – Implementation by Members

1. Every possible practical assistance should be given to a seafarer stranded in a foreign port pending repatriation and in the event of delay in the repatriation of the seafarer, the competent authority in the foreign port should ensure that the consular or local representative of the flag State and the seafarer's State of nationality or State of residence, as appropriate, is informed immediately.

2. Each Member should have regard to whether proper provision is made:
(a) for the return of seafarers employed on a ship that flies the flag of a foreign country who are put ashore in a foreign port for reasons for which they are not responsible:
  (i) to the port at which the seafarer concerned was engaged; or
  (ii) to a port in the seafarer's State of nationality or State of residence, as appropriate; or
  (iii) to another port agreed upon between the seafarer and the master or shipowner, with the approval of the competent authority or under other appropriate safeguards;

(b) for medical care and maintenance of seafarers employed on a ship that flies the flag of a foreign country who are put ashore in a foreign port in consequence of sickness or injury incurred in the service of the ship and not due to their own wilfulmisconduct.

3. If, after young seafarers under the age of 18 have served on a ship for at least four months during their first foreign-going voyage, it becomes apparent that they are unsuited to life at sea, they should be given the opportunity of being repatriated at no expense to themselves from the first suitable port of call in which there are consular services of the flag State, or the State of nationality or residence of the young seafarer. Notification of any such repatriation, with the reasons therefor, should be given to the authority which issued the papers enabling the young seafarers concerned to take up seagoing employment.

Regulation 2.6 – Seafarer compensation for the ship's loss or foundering

Purpose: To ensure that seafarers are compensated when a ship is lost or has foundered

1. Seafarers are entitled to adequate compensation in the case of injury, loss or unemployment arising from the ship's loss or foundering.

Standard A2.6 – Seafarer compensation for the ship's loss or foundering

1. Each Member shall make rules ensuring that, in every case of loss or foundering of any ship, the shipowner shall pay to each seafarer on board an indemnity against unemployment resulting from such loss or foundering.

2. The rules referred to in paragraph 1 of this Standard shall be without prejudice to any other rights a seafarer may have under the national law of the Member concerned for losses or injuries arising from a ship's loss or foundering.

Guideline B2.6 – Seafarer compensation for the ship's loss or foundering

Guideline B2.6.1 – Calculation of indemnity against unemployment

1. The indemnity against unemployment resulting from a ship's foundering or loss should be paid for the days during which the seafarer remains in fact unemployed at the same rate as the wages payable under the employment agreement, but the total indemnity payable to any one seafarer may be limited to two months' wages.

2. Each Member should ensure that seafarers have the same legal remedies for recovering such indemnities as they have for recovering arrears of wages earned during the service.

Regulation 2.7 – Manning levels

Purpose: To ensure that seafarers work on board ships with sufficient personnel for the safe, efficient and secure operation of the ship

1. Each Member shall require that all ships that fly its flag have a sufficient number of seafarers employed on board to ensure that ships are operated safely, effi-

ciently and with due regard to security under all conditions, taking into account concerns about seafarer fatigue and the particular nature and conditions of the voyage.

Standard A2.7 – Manning levels

1. Each Member shall require that all ships that fly its flag have a sufficient number of seafarers on board to ensure that ships are operated safely, efficiently and with due regard to security. Every ship shall be manned by a crew that is adequate, in terms of size and qualifications, to ensure the safety and security of the ship and its personnel, under all operating conditions, in accordance with the minimum safe manning document or an equivalent issued by the competent authority, and to comply with the standards of this Convention.

2. When determining, approving or revising manning levels, the competent authority shall take into account the need to avoid or minimize excessive hours of work to ensure sufficient rest and to limit fatigue, as well as the principles in applicable international instruments, especially those of the International Maritime Organization, on manning levels.

3. When determining manning levels, the competent authority shall take into account all the requirements within Regulation 3.2 and Standard A3.2 concerning food and catering.

Guideline B2.7 – Manning levels

Guideline B2.7.1 – Dispute settlement

1. Each Member should maintain, or satisfy itself that there is maintained, efficient machinery for the investigation and settlement of complaints or disputes concerning the manning levels on a ship.

2. Representatives of shipowners' and seafarers' organizations should participate, with or without other persons or authorities, in the operation of such machinery.

Regulation 2.8 – Career and skill development and opportunities for seafarers' employment

Purpose: To promote career and skill development and employment opportunities for seafarers

1. Each Member shall have national policies to promote employment in the maritime sector and to encourage career and skill development and greater employment opportunities for seafarers domiciled in its territory.

Standard A2.8 – Career and skill development and employment opportunities for seafarers

1. Each Member shall have national policies that encourage career and skill development and employment opportunities for seafarers, in order to provide the maritime sector with a stable and competent workforce.

2. The aim of the policies referred to in paragraph 1 of this Standard shall be to help seafarers strengthen their competencies, qualifications and employment opportunities.

3. Each Member shall, after consulting the shipowners' and seafarers' organizations concerned, establish clear objectives for the vocational guidance, education and training of seafarers whose duties on board ship primarily relate to the safe operation and navigation of the ship, including ongoing training.

Guideline B2.8 – Career and skill development and employment opportunities for seafarers

Guideline B2.8.1 – Measures to promote career and skill development and employment opportunities for seafarers

1. Measures to achieve the objectives set out in Standard A2.8 might include:

(a) agreements providing for career development and skills training with a shipowner or an organization of shipowners; or

(b) arrangements for promoting employment through the establishment and maintenance of registers or lists, by categories, of qualified seafarers; or

(c) promotion of opportunities, both on board and ashore, for further training and education of seafarers to provide for skill development and portable competencies in order to secure and retain decent work, to improve individual employment prospects and to meet the changing technology and labour market conditions of the maritime industry.

Guideline B2.8.2 – Register of seafarers

1. Where registers or lists govern the employment of seafarers, these registers or lists should include all occupational categories of seafarers in a manner determined by national law or practice or by collective agreement.

2. Seafarers on such a register or list should have priority of engagement for seafaring.

3. Seafarers on such a register or list should be required to be available for work in a manner to be determined by national law or practice or by collective agreement.

4. To the extent that national laws or regulations permit, the number of seafarers on such registers or lists should be periodically reviewed so as to achieve levels adapted to the needs of the maritime industry.

5. When a reduction in the number of seafarers on such a register or list becomes necessary, all appropriate measures should be taken to prevent or minimize detrimental effects on seafarers, account being taken of the economic and social situation of the country concerned.

TITLE 3. ACCOMMODATION, RECREATIONAL FACILITIES, FOOD AND CATERING

Regulation 3.1 – Accommodation and recreational facilities

Purpose: To ensure that seafarers have decent accommodation and recreational facilities on board

1. Each Member shall ensure that ships that fly its flag provide and maintain decent accommodations and recreational facilities for seafarers working or living on board, or both, consistent with promoting the seafarers' health and well-being.

2. The requirements in the Code implementing this Regulation which relate to ship construction and equipment apply only to ships constructed on or after the date when this Convention comes into force for the Member concerned. For ships constructed before that date, the requirements relating to ship construction and equipment that are set out in the Accommodation of Crews Convention (Revised), 1949 (No. 92), and the Accommodation of Crews (Supplementary Provisions) Convention, 1970 (No. 133), shall continue to apply to the extent that they were applicable, prior to that date, under the law or practice of the Member concerned. A ship shall be deemed to have been constructed on the date when its keel is laid or when it is at a similar stage of contruction.

3. Unless expressly provided otherwise, any requirement under an amendment to the Code relating to the provision of seafarer accommodation and recreational facilities shall apply only to ships constructed on or after the amendment takes effect for the Member concerned.

Standard A3.1 – Accommodation and recreational facilities

1. Each Member shall adopt laws and regulations requiring that ships that fly its flag:

(a) meet minimum standards to ensure that any accommodation for seafarers, working or living on board, or both, is safe, decent and in accordance with the relevant provisions of this Standard; and

(b) are inspected to ensure initial and ongoing compliance with those standards.

2. In developing and applying the laws and regulations to implement this Standard, the competent authority, after consulting the shipowners' and seafarers' organizations concerned, shall:

(a) take into account Regulation 4.3 and the associated Code provisions on health and safety protection and accident prevention, in light of the specific needs of seafarers that both live and work on board ship, and

(b) give due consideration to the guidance contained in Part B of this Code.

3. The inspections required under Regulation 5.1.4 shall be carried out when:

(a) a ship is registered or re-registered; or

(b) the seafarer accommodation on a ship has been substantially altered.

4. The competent authority shall pay particular attention to ensuring implementation of the requirements of this Convention relating to:

(a) the size of rooms and other accommodation spaces;

(b) heating and ventilation;

(c) noise and vibration and other ambient factors;

(d) sanitary facilities;

(e) lighting; and

(f) hospital accommodation.

5. The competent authority of each Member shall require that ships that fly its flag meet the minimum standards for on-board accommodation and recreational facilities that are set out in paragraphs 6 to 17 of this Standard.

6. With respect to general requirements for accommodation:

(a) there shall be adequate headroom in all seafarer accommodation; the minimum permitted headroom in all seafarer accommodation where full and free movement is necessary shall be not less than 203 centimetres; the competent authority may permit some limited reduction in headroom in any space, or part of any space, in such accommodation where it is satisfied that such reduction:

   (i) is reasonable; and

   (ii) will not result in discomfort to the seafarers;

(b) the accommodation shall be adequately insulated;

(c) in ships other than passenger ships, as defined in Regulation 2(e) and (f) of the International Convention for the Safety of Life at Sea, 1974, as amended (the 'SOLAS Convention'), sleeping rooms shall be situated above the load line amidships or aft, except that in exceptional cases, where the size, type or intended service of the ship renders any other location impracticable, sleeping rooms may be located in the fore part of the ship, but in no case forward of the collision bulkhead;

(d) in passenger ships, and in special ships constructed in compliance with the IMO *Code of Safety for Special Purpose Ships*, 1983, and subsequent versions (hereinafer called 'special purpose ships'), the competent authority may, on condition that satisfactory arrangements are made for lighting and ventilation, permit the location of sleeping rooms below the load line, but in no case shall they be located immediately beneath working alleyways;

(e) there shall be no direct openings into sleeping rooms from cargo and machinery spaces or from galleys, storerooms, drying rooms or communal sanitary areas; that part of a bulkhead separating such places from sleeping rooms and external bulkheads shall be efficiently constructed of steel or other approved substance and be watertight and gas-tight;

(f) the materials used to construct internal bulkheads, panelling and sheeting, floors and joinings shall be suitable for the purpose and conducive to ensuring a healthy environment;

(g) proper lighting and sufficient drainage shall be provided; and

(h) accommodation and recreational and catering facilities shall meet the requirements in Regulation 4.3, and the related provisions in the Code, on health and safety protection and accident prevention, with respect to preventing the risk of exposure to hazardous levels of noise and vibration and other ambient factors

and chemicals on board ships, and to provide an acceptable occupational and on-board living environment for seafarers.

7. With respect to requirements for ventilation and heating:

(a) sleeping rooms and mess rooms shall be adequately ventilated;

(b) ships, except those regularly engaged in trade where temperate climatic conditions do not require this, shall be equipped with air conditioning for seafarer accommodation, for any separate radio room and for any centralized machinery control room;

(c) all sanitary spaces shall have ventilation to the open air, independently of any other part of the accommodation; and

(d) adequate heat through an appropriate heating system shall be provided, except in ships exclusively on voyages in tropical climates.

8. With respect to requirements for lighting, subject to such special arrangements as may be permitted in passenger ships, sleeping rooms and mess rooms shall be lit by natural light and provided with adequate artificial light.

9. When sleeping accommodation on board ships is required, the following requirements for sleeping rooms apply:

(a) in ships other than passenger ships, an individual sleeping room shall be provided for each seafarer; in the case of ships of less than 3,000 gross tonnage or special purpose ships, exemptions from this requirement may be granted by the competent authority after consultation with the shipowners' and seafarers' organizations concerned;

(b) separate sleeping rooms shall be provided for men and for women;

(c) sleeping rooms shall be of adequate size and properly equipped so as to ensure reasonable comfort and to facilitate tidiness;

(d) a separate berth for each seafarer shall in all circumstances be provided;

(e) the minimum inside dimensions of a berth shall be at least 198 centimetres by 80 centimetres;

(f) in single berth seafarers' sleeping rooms the floor area shall not be less than:

  (i) 4.5 square metres in ships of less than 3,000 gross tonnage;

  (ii) 5.5 square metres in ships of 3,000 gross tonnage or over but less than 10,000 gross tonnage;

  (iii) 7 square metres in ships of 10,000 gross tonnage or over;

(g) however, in order to provide single berth sleeping rooms on ships of less than 3,000 gross tonnage, passenger ships and special purpose ships, the competent authority may allow a reduced floor area;

(h) in ships of less than 3,000 gross tonnage other than passenger ships and special purpose ships, sleeping rooms may be occupied by a maximum of two seafarers; the floor area of such sleeping rooms shall not be less than 7 square metres;

(i) on passenger ships and special purpose ships the floor area of sleeping rooms for seafarers not performing the duties of ships' officers shall not be less than:

  (i) 7.5 square metres in rooms accommodating two persons;

  (ii) 11.5 square metres in rooms accommodating three persons;

  (iii) 14.5 square metres in rooms accommodating four persons;

(j) on special purpose ships sleeping rooms may accommodate more than four persons; the floor area of such sleeping rooms shall not be less than 3.6 square metres per person;

(k) on ships other than passenger ships and special purpose ships, sleeping rooms for seafarers who perform the duties of ships' officers, where no private sitting room or day room is provided, the floor area per person shall not be less than:

(i) 7.5 square metres in ships of less than 3,000 gross tonnage;

(ii) 8.5 square metres in ships of 3,000 gross tonnage or over but less than 10,000 gross tonnage;

(iii) 10 square metres in ships of 10,000 gross tonnage or over;

(l) on passenger ships and special purpose ships the floor area for seafarers performing the duties of ships' officers where no private sitting room or day room is provided, the floor area per person for junior officers shall not be less than 7.5 square metres and for senior officers not less than 8.5 square metres; junior officers are understood to be at the operational level, and senior officers at the management level;

(m) the master, the chief engineer and the chief navigating officer shall have, in addition to their sleeping rooms, an adjoining sitting room, day room or equivalent additional space; ships of less than 3,000 gross tonnage may be exempted by the competent authority from this requirement after consultation with the shipowners' and seafarers' organizations concerned;

(n) for each occupant, the furniture shall include a clothes locker of ample space (minimum 475 litres) and a drawer or equivalent space of not less than 56 litres; if the drawer is incorporated in the clothes locker then the combined minimum volume of the clothes locker shall be 500 litres; it shall be fitted with a shelf and be able to be locked by the occupant so as to ensure privacy;

(o) each sleeping room shall be provided with a table or desk, which may be of the fixed, drop-leaf or slide-out type, and with comfortable seating accommodation as necessary.

10. With respect to requirements for mess rooms:

(a) mess rooms shall be located apart from the sleeping rooms and as close as practicable to the galley; ships of less than 3,000 gross tonnage may be exempted by the competent authority from this requirement after consultation with the shipowners' and seafarers' organizations concerned; and

(b) mess rooms shall be of adequate size and comfort and properly furnished and equipped (including ongoing facilities for refreshment), taking account of the number of seafarers likely to use them at any one time; provision shall be made for separate or common mess room facilities as appropriate.

11. With respect to requirements for sanitary facilities:

(a) all seafarers shall have convenient access on the ship to sanitary facilities meeting minimum standards of health and hygiene and reasonable standards of comfort, with separate sanitary facilities being provided for men and for women;

(b) there shall be sanitary facilities within easy access of the navigating bridge and the machinery space or near the engine room control centre; ships of less than 3,000 gross tonnage may be exempted by the competent authority from this requirement after consultation with the shipowners' and seafarers' organizations concerned;

(c) in all ships a minimum of one toilet, one wash basin and one tub or shower or both for every six persons or less who do not have personal facilities shall be provided at a convenient location;

(d) with the exception of passenger ships, each sleeping room shall be provided with a washbasin having hot and cold running fresh water, except where such a washbasin is situated in the private bathroom provided;

(e) in passenger ships normally engaged on voyages of not more than four hours' duration, consideration may be given by the competent authority to special arrangements or to a reduction in the number of facilities required; and

(f) hot and cold running fresh water shall be available in all wash places.

12. With respect to requirements for hospital accommodation, ships carrying 15 or more seafarers and engaged in a voyage of more than three days' duration shall provide separate hospital accommodation to be used exclusively for medical purposes; the competent authority may relax this requirement for ships engaged in coastal trade; in approving on-board hospital accommodation, the competent authority shall ensure that the accommodation will, in all weathers, be easy of access, provide comfortable housing for the occupants and be conducive to their receiving prompt and proper attention.

13. Appropriately situated and furnished laundry facilities shall be available.

14. All ships shall have a space or spaces on open deck to which the seafarers can have access when off duty, which are of adequate area having regard to the size of the ship and the number of seafarers on board.

15. All ships shall be provided with separate offices or a common ship's office for use by deck and engine departments; ships of less than 3,000 gross tonnage may be exempted by the competent authority from this requirement after consultation with the shipowners' and seafarers' organizations concerned.

16. Ships regularly trading to mosquito-infested ports shall be fitted with appropriate devices as required by the competent authority.

17. Appropriate seafarers' recreational facilities, amenities and services, as adapted to meet the special needs of seafarers who must live and work on ships, shall be provided on board for the benefit of all seafarers, taking into account Regulation 4.3 and the associated Code provisions on health and safety protection and accident prevention.

18. The competent authority shall require frequent inspections to be carried out on board ships, by or under the authority of the master, to ensure that seafarer accommodation is clean, decently habitable and maintained in a good state of repair. The results of each such inspection shall be recorded and be available for review.

19. In the case of ships where there is need to take account, without discrimination, of the interests of seafarers having differing and distinctive religious and social practices, the competent authority may, after consultation with the shipowners' and seafarers' organizations concerned, permit fairly applied variations in respect of this Standard on condition that such variations do not result in overall facilities less favourable than those which would result from the application of this Standard.

20. Each Member may, after consultation with the shipowners' and seafarers' organizations concerned, exempt ships of less than 200 gross tonnage where it is reasonable to do so, taking account of the size of the ship and the number of persons on board in relation to the requirements of the following provisions of this Standard:

(a) paragraphs 7(b), 11(d) and 13; and
(b) paragraph 9(f) and (h) to (l) inclusive, with respect to floor area only.

21. Any exemptions with respect to the requirements of this Standard may be made only where they are expressly permitted in this Standard and only for particular circumstances in which such exemptions can be clearly justified on strong grounds and subject to protecting the seafarers' health and safety.

Guideline B3.1 – Accommodation and recreational facilities

Guideline B3.1.1 – Design and construction

1. External bulkheads of sleeping rooms and mess rooms should be adequately insulated. All machinery casings and all boundary bulkheads of galleys and other spaces in which heat is produced should be adequately insulated where there is a possibility of resulting heat effects in adjoining accommodation or passageways. Measures should also be taken to provide protection from heat effects of steam or hot-water service pipes or both.

2. Sleeping rooms, mess rooms, recreation rooms and alleyways in the accommodation space should be adequately insulated to prevent condensation or overheating.

3. The bulkhead surfaces and deckheads should be of material with a surface easily kept clean. No form of construction likely to harbour vermin should be used.

4. The bulkhead surfaces and deckheads in sleeping rooms and mess rooms should be capable of being easily kept clean and light in colour with a durable, non-toxic finish.

5. The decks in all seafarer accommodation should be of approved material and construction and should provide a non-slip surface impervious to damp and easily kept clean.

6. Where the floorings are made of composite materials, the joints with the sides should be profiled to avoid crevices.

Guideline B3.1.2 – Ventilation

1. The system of ventilation for sleeping rooms and mess rooms should be controlled so as to maintain the air in a satisfactory condition and to ensure a sufficiency of air movement in all conditions of weather and climate.

2. Air-conditioning systems, whether of a centralized or individual unit type, should be designed to:

(a) maintain the air at a satisfactory temperature and relative humidity as compared to outside air conditions, ensure a sufficiency of air changes in all air-conditioned spaces, take account of the particular characteristics of operations at sea and not produce excessive noises or vibrations; and
(b) facilitate easy cleaning and disinfection to prevent or control the spread of disease.

3. Power for the operation of the air conditioning and other aids to ventilation required by the preceding paragraphs of this Guideline should be available at all times

when seafarers are living or working on board and conditions so require. However, this power need not be provided from an emergency source.

Guideline B3.1.3 – Heating

1. The system of heating the seafarer accommodation should be in operation at all times when seafarers are living or working on board and conditions require its use.

2. In all ships in which a heating system is required, the heating should be by means of hot water, warm air, electricity, steam or equivalent. However, within the accommodation area, steam should not be used as a medium for heat transmission. The heating system should be capable of maintaining the temperature in seafarer accommodation at a satisfactory level under normal conditions of weather and climate likely to be met within the trade in which the ship is engaged. The competent authority should prescribe the standard to be provided.

3. Radiators and other heating apparatus should be placed and, where necessary, shielded so as to avoid risk of fire or danger or discomfort to the occupants.

Guideline B3.1.4 – Lighting

1. In all ships, electric light should be provided in the seafarer accommodation. If there are not two independent sources of electricity for lighting, additional lighting should be provided by properly constructed lamps or lighting apparatus for emergency use.

2. In sleeping rooms an electric reading lamp should be installed at the head of each berth.

3. Suitable standards of natural and artificial lighting should be fixed by the competent authority.

Guideline B3.1.5 – Sleeping rooms

1. There should be adequate berth arrangements on board, making it as comfortable as possible for the seafarer and any partner who may accompany the seafarer.

2. Where the size of the ship, the activity in which it is to be engaged and its layout make it reasonable and practicable, sleeping rooms should be planned and equipped with a private bathroom, including a toilet, so as to provide reasonable comfort for the occupants and to facilitate tidiness.

3. As far as practicable, sleeping rooms of seafarers should be so arranged that watches are separated and that no seafarers working during the day share a room with watchkeepers.

4. In the case of seafarers performing the duty of petty officers there should be no more than two persons per sleeping room.

5. Consideration should be given to extending the facility referred to in Standard A3.1, paragraph 9(m), to the second engineer officer when practicable.

6. Space occupied by berths and lockers, chests of drawers and seats should be included in the measurement of the floor area. Small or irregularly shaped spaces which do not add effectively to the space available for free movement and cannot be used for installing furniture should be excluded.

7. Berths should not be arranged in tiers of more than two; in the case of berths placed along the ship's side, there should be only a single tier where a sidelight is situated above a berth.

8. The lower berth in a double tier should be not less than 30 centimetres above the floor; the upper berth should be placed approximately midway between the bottom of the lower berth and the lower side of the deckhead beams.

9. The framework and the lee-board, if any, of a berth should be of approved material, hard, smooth, and not likely to corrode or to harbour vermin.

10. If tubular frames are used for the construction of berths, they should be completely sealed and without perforations which would give access to vermin.

11. Each berth should be fitted with a comfortable mattress with cushioning bottom or a combined cushioning mattress, including a spring bottom or a spring mattress. The mattress and cushioning material used should be made of approved material. Stuffing of material likely to harbour vermin should not be used.

12. When one berth is placed over another, a dust-proof bottom should be fitted beneath the bottom mattress or spring bottom of the upper berth.

13. The furniture should be of smooth, hard material not liable to warp or corrode.

14. Sleeping rooms should be fitted with curtains or equivalent for the sidelights.

15. Sleeping rooms should be fitted with a mirror, small cabinets for toilet requisites, a book rack and a sufficient number of coat hooks.

Guideline B3.1.6 – Mess rooms

1. Mess room facilities may be either common or separate. The decision in this respect should be taken after consultation with seafarers' and shipowners' representatives and subject to the approval of the competent authority. Account should be taken of factors such as the size of the ship and the distinctive cultural, religious and social needs of the seafarers.

2. Where separate mess room facilities are to be provided to seafarers, then separate mess rooms should be provided for:

(a) master and officers; and

(b) petty officers and other seafarers.

3. On ships other than passenger ships, the floor area of mess rooms for seafarers should be not less than 1.5 square metres per person of the planned seating capacity.

4. In all ships, mess rooms should be equipped with tables and appropriate seats, fixed or movable, sufficient to accommodate the greatest number of seafarers likely to use them at any one time.

5. There should be available at all times when seafarers are on board:

(a) a refrigerator, which should be conveniently situated and of sufficient capacity for the number of persons using the mess room or mess rooms;

(b) facilities for hot beverages; and
(c) cool water facilities.

6. Where available pantries are not accessible to mess rooms, adequate lockers for mess utensils and proper facilities for washing utensils should be provided.

7. The tops of tables and seats should be of damp-resistant material.

Guideline B3.1.7 – Sanitary accommodation

1. Washbasins and tub baths should be of adequate size and constructed of approved material with a smooth surface not liable to crack, flake or corrode.

2. All toilets should be of an approved pattern and provided with an ample flush of water or with some other suitable flushing means, such as air, which are available at all times and independently controllable.

3. Sanitary accommodation intended for the use of more than one person should comply with the following:
(a) floors should be of approved durable material, impervious to damp, and should be properly drained;
(b) bulkheads should be of steel or other approved material and should be watertight up to at least 23 centimetres above the level of the deck;
(c) the accommodation should be sufficiently lit, heated and ventilated;
(d) toilets should be situated convenient to, but separate from, sleeping rooms and wash rooms, without direct access from the sleeping rooms or from a passage between sleeping rooms and toilets to which there is no other access; this requirement does not apply where a toilet is located in a compartment between two sleeping rooms having a total of not more than four seafarers; and
(e) where there is more than one toilet in a compartment, they should be sufficiently screened to ensure privacy.

4. The laundry facilities provided for seafarers' use should include:
(a) washing machines;
(b) drying machines or adequately heated and ventilated drying rooms; and
(c) irons and ironing boards or their equivalent.

Guideline B3.1.8 – Hospital accommodation

1. The hospital accommodation should be designed so as to facilitate consultation and the giving of medical first aid and to help prevent the spread of infectious diseases.

2. The arrangement of the entrance, berths, lighting, ventilation, heating and water supply should be designed to ensure the comfort and facilitate the treatment of the occupants.

3. The number of hospital berths required should be prescribed by the competent authority.

4. Sanitary accommodation should be provided for the exclusive use of the occupants of the hospital accommodation, either as part of the accommodation or in close proximity thereto. Such sanitary accommodation should comprise a minimum of one toilet, one washbasin and one tub or shower.

Guideline B3.1.9 – Other facilities

1. Where separate facilities for engine department personnel to change their clothes are provided, they should be:

(a) located outside the machinery space but with easy access to it; and

(b) fitted with individual clothes lockers as well as with tubs or showers or both and washbasins having hot and cold running fresh water.

Guideline B3.1.10 – Bedding, mess utensils and miscellaneous provisions

1. Each Member should consider applying the following principles:

(a) clean bedding and mess utensils should be supplied by the shipowner to all seafarers for use on board during service on the ship, and such seafarers should be responsible for their return at times specified by the master and on completion of service in the ship;

(b) bedding should be of good quality, and plates, cups and other mess utensils should be of approved material which can be easily cleaned; and

(c) towels, soap and toilet paper for all seafarers should be provided by the shipowner.

Guideline B3.1.11 – Recreational facilities, mail and ship visit arrangements

1. Recreational facilities and services should be reviewed frequently to ensure that they are appropriate in the light of changes in the needs of seafarers resulting from technical, operational and other developments in the shipping industry.

2. Furnishings for recreational facilities should as a minimum include a bookcase and facilities for reading, writing and, where practicable, games.

3. In connection with the planning of recreation facilities, the competent authority should give consideration to the provision of a canteen.

4. Consideration should also be given to including the following facilities at no cost to the seafarer, where practicable:

(a) a smoking room;

(b) television viewing and the reception of radio broadcasts;

(c) showing of films, the stock of which should be adequate for the duration of the voyage and, where necessary, changed at reasonable intervals;

(d) sports equipment including exercise equipment, table games and deck games;

(e) where possible, facilities for swimming;

(f) a library containing vocational and other books, the stock of which should be adequate for the duration of the voyage and changed at reasonable intervals;

(g) facilities for recreational handicrafts;

(h) electronic equipment such as a radio, television, video recorders, DVD/CD player, personal computer and software and cassette recorder/player;

(i) where appropriate, the provision of bars on board for seafarers unless these are contrary to national, religious or social customs; and

(j) reasonable access to ship-to-shore telephone communications, and email and Internet facilities, where available, with any charges for the use of these services being reasonable in amount.

5. Every effort should be given to ensuring that the forwarding of seafarers' mail is as reliable and expeditious as possible. Efforts should also be considered for avoiding seafarers being required to pay additional postage when mail has to be re-addressed owing to circumstances beyond their control.

6. Measures should be considered to ensure, subject to any applicable national or international laws or regulations, that whenever possible and reasonable seafarers are expeditiously granted permission to have their partners, relatives and friends as visitors on board their ship when in port. Such measures should meet any concerns for security clearances.

7. Consideration should be given to the possibility of allowing seafarers to be accompanied by their partners on occasional voyages where this is practicable and reasonable. Such partners should carry adequate insurance cover against accident and illness; the shipowners should give every assistance to the seafarer to effect such insurance.

Guideline B3.1.12 – Prevention of noise and vibration

1. Accommodation and recreational and catering facilities should be located as far as practicable from the engines, steering gear rooms, deck winches, ventilation, heating and air-conditioning equipment and other noisy machinery and apparatus.

2. Acoustic insulation or other appropriate sound-absorbing materials should be used in the construction and finishing of bulkheads, deckheads and decks within the sound-producing spaces as well as self-closing noise-isolating doors for machinery spaces.

3. Engine rooms and other machinery spaces should be provided, wherever practicable, with soundproof centralized control rooms for engine-room personnel. Working spaces, such as the machine shop, should be insulated, as far as practicable, from the general engine-room noise and measures should be taken to reduce noise in the operation of machinery.

4. The limits for noise levels for working and living spaces should be in conformity with the ILO international guidelines on exposure levels, including those in the ILO code of practice entitled *Ambient factors in the workplace*, 2001, and, where applicable, the specific protection recommended by the International Maritime Organization, and with any subsequent amending and supplementary instruments for acceptable noise levels on board ships. A copy of the applicable instruments in English or the working language of the ship should be carried on board and should be accessible to seafarers.

5. No accommodation or recreational or catering facilities should be exposed to excessive vibration.

Regulation 3.2 – Food and catering

Purpose: To ensure that seafarers have access to good quality food and drinking water provided under regulated hygienic conditions

1. Each Member shall ensure that ships that fly its flag carry on board and serve food and drinking water of appropriate quality, nutritional value and quantity that

adequately covers the requirements of the ship and takes into account the differing cultural and religious backgrounds.

2. Seafarers on board a ship shall be provided with food free of charge during the period of engagement.

3. Seafarers employed as ships' cooks with responsibility for food preparation must be trained and qualified for their position on board ship.

Standard A3.2 – Food and catering

1. Each Member shall adopt laws and regulations or other measures to provide minimum standards for the quantity and quality of food and drinking water and for the catering standards that apply to meals provided to seafarers on ships that fly its flag, and shall undertake educational activities to promote awareness and implementation of the standards referred to in this paragraph.

2. Each Member shall ensure that ships that fly its flag meet the following minimum standards:

(a) food and drinking water supplies, having regard to the number of seafarers on board, their religious requirements and cultural practices as they pertain to food, and the duration and nature of the voyage, shall be suitable in respect of quantity, nutritional value, quality and variety;

(b) the organization and equipment of the catering department shall be such as to permit the provision to the seafarers of adequate, varied and nutritious meals prepared and served in hygienic conditions; and

(c) catering staff shall be properly trained or instructed for their positions.

3. Shipowners shall ensure that seafarers who are engaged as ships' cooks are trained, qualified and found competent for the position in accordance with requirements set out in the laws and regulations of the Member concerned.

4. The requirements under paragraph 3 of this Standard shall include a completion of a training course approved or recognized by the competent authority, which covers practical cookery, food and personal hygiene, food storage, stock control, and environmental protection and catering health and safety.

5. On ships operating with a prescribed manning of less than ten which, by virtue of the size of the crew or the trading pattern, may not be required by the competent authority to carry a fully qualified cook, anyone processing food in the galley shall be trained or instructed in areas including food and personal hygiene as well as handling and storage of food on board ship.

6. In circumstances of exceptional necessity, the competent authority may issue a dispensation permitting a non-fully qualified cook to serve in a specified ship for a specified limited period, until the next convenient port of call or for a period not exceeding one month, provided that the person to whom the dispensation is issued is trained or instructed in areas including food and personal hygene as well as handling and storage of food on board ship.

7. In accordance with the ongoing compliance procedures under Title 5, the competent authority shall require that frequent documented inspections be carried out on board ships, by or under the authority of the master, with respect to:

(a) supplies of food and drinking water;
(b) all spaces and equipment used for the storage and handling of food and drinking water; and
(c) galley and other equipment for the preparation and service of meals.

8. No seafarer under the age of 18 shall be employed or engaged or work as a ship's cook.

Guideline B3.2 – Food and catering

Guideline B3.2.1 – Inspection, education, research and publication

1. The competent authority should, in cooperation with other relevant agencies and organizations, collect up-to-date information on nutrition and on methods of purchasing, storing, preserving, cooking and serving food, with special reference to the requirements of catering on board a ship. This information should be made available, free of charge or at reasonable cost, to manufacturers of and traders in ships' food supplies and equipment, masters, stewards and cooks, and to shipowners' and seafarers' organizations concerned. Appropriate forms of publicity, such as manuals, brochures, posters, charts or advertisements in trade journals, should be used for this purpose.

2. The competent authority should issue recommendations to avoid wastage of food, facilitate the maintenance of a proper standard of hygiene, and ensure the maximum practicable convenience in working arrangements.

3. The competent authority should work with relevant agencies and organizations to develop educational materials and on-board information concerning methods of ensuring proper food supply and catering services.

4. The competent authority should work in close cooperation with the shipowners' and seafarers' organizations concerned and with national or local authorities dealing with questions of food and health, and may where necessary utilize the services of such authorities.

Guideline B3.2.2 – Ships' cooks

1. Seafarers should only be qualified as ships' cooks if they have:
(a) served at sea for a minimum period to be prescribed by the competent authority, which could be varied to take into account existing relevant qualifications or experience;
(b) passed an examination prescribed by the competent authority or passed an equivalent examination at an approved training course for cooks.

2. The prescribed examination may be conducted and certificates granted either directly by the competent authority or, subject to its control, by an approved school for the training of cooks.

3. The competent authority should provide for the recognition, where appropriate, of certificates of qualification as ships' cooks issued by other Members, which have ratified this Convention or the Certification of Ships' Cooks Convention, 1946 (No. 69), or other approved body.

TITLE 4. HEALTH PROTECTION, MEDICAL CARE, WELFARE AND SOCIAL SECURITY PROTECTION

Regulation 4.1 – Medical care on board ship and ashore

Purpose: To protect the health of seafarers and ensure their prompt access to medical care on board ship and ashore

1. Each Member shall ensure that all seafarers on ships that fly its flag are covered by adequate measures for the protection of their health and that they have access to prompt and adequate medical care whilst working on board.

2. The protection and care under paragraph 1 of this Regulation shall, in principle, be provided at no cost to the seafarers.

3. Each Member shall ensure that seafarers on board ships in its territory who are in need of immediate medical care are given access to the Member's medical facilities on shore.

4. The requirements for on-board health protection and medical care set out in the Code include standards for measures aimed at providing seafarers with health protection and medical care as comparable as possible to that which is generally available to workers ashore.

Standard A4.1 – Medical care on board ship and ashore

1. Each Member shall ensure that measures providing for health protection and medical care, including essential dental care, for seafarers working on board a ship that flies its flag are adopted which:

(a) ensure the application to seafarers of any general provisions on occupational health protection and medical care relevant to their duties, as well as of special provisions specific to work on board ship;

(b) ensure that seafarers are given health protection and medical care as comparable as possible to that which is generally available to workers ashore, including prompt access to the necessary medicines, medical equipment and facilities for diagnosis and treatment and to medical information and expertise;

(c) give seafarers the right to visit a qualified medical doctor or dentist without delay in ports of call, where practicable;

(d) ensure that, to the extent consistent with the Member's national law and practice, medical care and health protection services while a seafarer is on board ship or landed in a foreign port are provided free of charge to seafarers; and

(e) are not limited to treatment of sick or injured seafarers but include measures of a preventive character such as health promotion and health education programmes.

2. The competent authority shall adopt a standard medical report form for use by the ships' masters and relevant onshore and on-board medical personnel. The form,

when completed, and its contents shall be kept confidential and shall only be used to facilitate the treatment of seafarers.

3. Each Member shall adopt laws and regulations establishing requirements for on-board hospital and medical care facilities and equipment and training on ships that fly its flag.

4. National laws and regulations shall as a minimum provide for the following requirements:

(a) all ships shall carry a medicine chest, medical equipment and a medical guide, the specifics of which shall be prescribed and subject to regular inspection by the competent authority; the national requirements shall take into account the type of ship, the number of persons on board and the nature, destination and duration of voyages and relevant national and international recommended medical standards;

(b) ships carrying 100 or more persons and ordinarily engaged on international voyages of more than three days' duration shall carry a qualified medical doctor who is responsible for providing medical care; national laws or regulations shall also specify which other ships shall be required to carry a medical doctor, taking into account, inter alia, such factors as the duration, nature and conditions of the voyage and the number of seafarers on board;

(c) ships which do not carry a medical doctor shall be required to have either at least one seafarer on board who is in charge of medical care and administering medicine as part of their regular duties or at least one seafarer on board competent to provide medical first aid; persons in charge of medical care on board who are not medical doctors shall have satisfactorily completed training in medical care that meets the requirements of the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended ('STCW'); seafarers designated to provide medical first aid shall have satisfactorily completed training in medical first aid that meets the requirements of STCW; national laws or regulations shall specify the level of approved training required taking into account, inter alia, such factors as the duration, nature and conditions of the voyage and the number of seafarers on board; and

(d) the competent authority shall ensure by a prearranged system that medical advice by radio or satellite communication to ships at sea, including specialist advice, is available 24 hours a day; medical advice, including the onward transmission of medical messages by radio or satellite communication between a ship and those ashore giving the advice, shall be available free of charge to all ships irrespective of the flag that they fly.

Guideline B4.1 – Medical care on board ship and ashore

Guideline B4.1.1 – Provision of medical care

1. When determining the level of medical training to be provided on board ships that are not required to carry a medical doctor, the competent authority should require that:

(a) ships which ordinarily are capable of reaching qualified medical care and medical facilities within eight hours should have at least one designated seafarer with the approved medical first-aid training required by STCW which will enable such persons to take immediate, effective action in case of accidents or illnesses likely

to occur on board a ship and to make use of medical advice by radio or satellite communication; and

(b) all other ships should have at least one designated seafarer with approved training in medical care required by STCW, including practical training and training in life-saving techniques such as intravenous therapy, which will enable the persons concerned to participate effectively in coordinated schemes for medical assistance to ships at sea, and to provide the sick or injured with a satisfactory standard of medical care during the period they are likely to remain on board.

2. The training referred to in paragraph 1 of this Guideline should be based on the contents of the most recent editions of the *International Medical Guide for Ships*, the *Medical First Aid Guide for Use in Accidents Involving Dangerous Goods*, the *Document for Guidance – An International Maritime Training Guide*, and the medical section of the *International Code of Signals* as well as similar national guides.

3. Persons referred to in paragraph 1 of this Guideline and such other seafarers as may be required by the competent authority should undergo, at approximately five-year intervals, refresher courses to enable them to maintain and increase their knowledge and skills and to keep up-to-date with new developments.

4. The medicine chest and its contents, as well as the medical equipment and medical guide carried on board, should be properly maintained and inspected at regular intervals, not exceeding 12 months, by responsible persons designated by the competent authority, who should ensure that the labelling, expiry dates and conditions of storage of all medicines and directions for their use are checked and all equipment functioning as required. In adopting or reviewing the ship's medical guide used nationally, and in determining the contents of the medicine chest and medical equipment, the competent authority should take into account international recommendations in this field, including the latest edition of the *International Medical Guide for Ships*, and other guides mentioned in paragraph 2 of this Guideline.

5. Where a cargo which is classified dangerous has not been included in the most recent edition of the *Medical First Aid Guide for Use in Accidents Involving Dangerous Goods*, the necessary information on the nature of the substances, the risks involved, the necessary personal protective devices, the relevant medical procedures and specific antidotes should be made available to the seafarers. Such specific antidotes and personal protective devices should be on board whenever dangerous goods are carried. This information should be integrated with the ship's policies and programmes on occupational safety and health described in Regulation 4.3 and related Code provisions.

6. All ships should carry a complete and up-to-date list of radio stations through which medical advice can be obtained; and, if equipped with a system of satellite communication, carry an up-to-date and complete list of coast earth stations through which medical advice can be obtained. Seafarers with responsibility for medical care or medical first aid on board should be instructed in the use of the ship's medical guide and the medical section of the most recent edition of the *International Code of Signals* so as to enable them to understand the type of information needed by the advising doctor as well as the advice received.

Guideline B4.1.2 – Medical report form

1. The standard medical report form for seafarers required under Part A of this Code should be designed to facilitate the exchange of medical and related information concerning individual seafarers between ship and shore in cases of illness or injury.

Guideline B4.1.3 – Medical care ashore

1. Shore-based medical facilities for treating seafarers should be adequate for the purposes. The doctors, dentists and other medical personnel should be properly qualified.

2. Measures should be taken to ensure that seafarers have access when in port to:

(a) outpatient treatment for sickness and injury;

(b) hospitalization when necessary; and

(c) facilities for dental treatment, especially in cases of emergency.

3. Suitable measures should be taken to facilitate the treatment of seafarers suffering from disease. In particular, seafarers should be promptly admitted to clinics and hospitals ashore, without difficulty and irrespective of nationality or religious belief, and, whenever possible, arrangements should be made to ensure, when necessary, continuation of treatment to supplement the medical facilities available to them.

Guideline B4.1.4 – Medical assistance to other ships and international cooperation

1. Each Member should give due consideration to participating in international cooperation in the area of assistance, programmes and research in health protection and medical care. Such cooperation might cover:

(a) developing and coordinating search and rescue efforts and arranging prompt medical help and evacuation at sea for the seriously ill or injured on board a ship through such means as periodic ship position reporting systems, rescue coordination centres and emergency helicopter services, in conformity with the International Convention on Maritime Search and Rescue, 1979, as amended, and the *International Aeronautical and Maritime Search and Rescue (IAMSAR) Manual*;

(b) making optimum use of all ships carrying a doctor and stationing ships at sea which can provide hospital and rescue facilities;

(c) compiling and maintaining an international list of doctors and medical care facilities available worldwide to provide emergency medical care to seafarers;

(d) landing seafarers ashore for emergency treatment;

(e) repatriating seafarers hospitalized abroad as soon as practicable, in accordance with the medical advice of the doctors responsible for the case, which takes into account the seafarer's wishes and needs;

(f) arranging personal assistance for seafarers during repatriation, in accordance with the medical advice of the doctors responsible for the case, which takes into account the seafarer's wishes and needs;

(g) endeavouring to set up health centres for seafarers to:

  (i) conduct research on the health status, medical treatment and preventive health care of seafarers; and

  (ii) train medical and health service staff in maritime medicine;

(h) collecting and evaluating statistics concerning occupational accidents, diseases and fatalities of seafarers and integrating and harmonizing the statistics with any existing national system of statistics on occupational accidents and diseases covering other categories of workers;

(i) organizing international exchanges of technical information, training material and personnel, as well as international training courses, seminars and working groups;

(j) providing all seafarers with special curative and preventive health and medical services in port, or making available to them general health, medical and rehabilitation services; and

(k) arranging for the repatriation of the bodies or ashes of deceased seafarers, in accordance with the wishes of the next of kin and as soon as practicable.

2. International cooperation in the field of health protection and medical care for seafarers should be based on bilateral or multilateral agreements or consultations among Members.

Guideline B4.1.5 – Dependants of seafarers

1. Each Member should adopt measures to secure proper and sufficient medical care for the dependants of seafarers domiciled in its territory pending the development of a medical care service which would include within its scope workers generally and their dependants where such services do not exist and should inform the International Labour Office concerning the measures taken for this purpose.

Regulation 4.2 – Shipowners' liability

Purpose: To ensure that seafarers are protected from the financial consequences of sickness, injury or death occurring in connection with their employment

1. Each Member shall ensure that measures, in accordance with the Code, are in place on ships that fly its flag to provide seafarers employed on the ships with a right to material assistance and support from the shipowner with respect to the financial consequences of sickness, injury or death occurring while they are serving under a seafarers' employment agreement or arising from their employment under such agreement.

2. This Regulation does not affect any other legal remedies that a seafarer may seek.

Standard A4.2 – Shipowners' liability

1. Each Member shall adopt laws and regulations requiring that shipowners of ships that fly its flag are responsible for health protection and medical care of all seafarers working on board the ships in accordance with the following minimum standards:

(a) shipowners shall be liable to bear the costs for seafarers working on their ships in respect of sickness and injury of the seafarers occurring between the date of commencing duty and the date upon which they are deemed duly repatriated, or arising from their employment between those dates;

(b) shipowners shall provide financial security to assure compensation in the event of the death or long-term disability of seafarers due to an occupational injury, illness or hazard, as set out in national law, the seafarers' employment agreement or collective agreement;

(c) shipowners shall be liable to defray the expense of medical care, including medical treatment and the supply of the necessary medicines and therapeutic appliances, and board and lodging away from home until the sick or injured seafarer has recovered, or until the sickness or incapacity has been declared of a permanent character; and

(d) shipowners shall be liable to pay the cost of burial expenses in the case of death occurring on board or ashore during the period of engagement.

2. National laws or regulations may limit the liability of the shipowner to defray the expense of medical care and board and lodging to a period which shall not be less than 16 weeks from the day of the injury or the commencement of the sickness.

3. Where the sickness or injury results in incapacity for work the shipowner shall be liable:

(a) to pay full wages as long as the sick or injured seafarers remain on board or until the seafarers have been repatriated in accordance with this Convention; and

(b) to pay wages in whole or in part as prescribed by national laws or regulations or as provided for in collective agreements from the time when the seafarers are repatriated or landed until their recovery or, if earlier, until they are entitled to cash benefits under the legislation of the Member concerned.

4. National laws or regulations may limit the liability of the shipowner to pay wages in whole or in part in respect of a seafarer no longer on board to a period which shall not be less than 16 weeks from the day of the injury or the commencement of the sickness.

5. National laws or regulations may exclude the shipowner from liability in respect of:

(a) injury incurred otherwise than in the service of the ship;

(b) injury or sickness due to the wilful misconduct of the sick, injured or deceased seafarer; and

(c) sickness or infirmity intentionally concealed when the engagement is entered into.

6. National laws or regulations may exempt the shipowner from liability to defray the expense of medical care and board and lodging and burial expenses in so far as such liability is assumed by the public authorities.

7. Shipowners or their representatives shall take measures for safeguarding property left on board by sick, injured or deceased seafarers and for returning it to them or to their next of kin.

Guideline B4.2 – Shipowners' liability

1. The payment of full wages required by Standard A4.2, paragraph 3(a), may be exclusive of bonuses.

2. National laws or regulations may provide that a shipowner shall cease to be liable to bear the costs of a sick or injured seafarer from the time at which that seafarer can claim medical benefits under a scheme of compulsory sickness insurance, compulsory accident insurance or workers' compensation for accidents.

3. National laws or regulations may provide that burial expenses paid by the shipowner shall be reimbursed by an insurance institution in cases in which funeral benefit is payable in respect of the deceased seafarer under laws or regulations relating to social insurance or workers' compensation.

Regulation 4.3 – Health and safety protection and accident prevention

Purpose: To ensure that seafarers' work environment on board ships promotes occupational safety and health

1. Each Member shall ensure that seafarers on ships that fly its flag are provided with occupational health protection and live, work and train on board ship in a safe and hygienic environment.

2. Each Member shall develop and promulgate national guidelines for the management of occupational safety and health on board ships that fly its flag, after consultation with representative shipowners' and seafarers' organizations and taking into account applicable codes, guidelines and standards recommended by international organizations, national administrations and maritime industry organizations.

3. Each Member shall adopt laws and regulations and other measures addressing the matters specified in the Code, taking into account relevant international instruments, and set standards for occupational safety and health protection and accident prevention on ships that fly its flag.

Standard A4.3 – Health and safety protection and accident prevention

1. The laws and regulations and other measures to be adopted in accordance with Regulation 4.3, paragraph 3, shall include the following subjects:

(a) the adoption and effective implementation and promotion of occupational safety and health policies and programmes on ships that fly the Member's flag, including risk evaluation as well as training and instruction of seafarers;

(b) reasonable precautions to prevent occupational accidents, injuries and diseases on board ship, including measures to reduce and prevent the risk of exposure to harmful levels of ambient factors and chemicals as well as the risk of injury or disease that may arise from the use of equipment and machinery on board ships;

(c) on-board programmes for the prevention of occupational accidents, injuries and diseases and for continuous improvement in occupational safety and health protection, involving seafarers' representatives and all other persons concerned in their implementation, taking account of preventive measures, including engineering and design control, substitution of processes and procedures for collective and individual tasks, and the use of personal protective equipment; and

(d) requirements for inspecting, reporting and correcting unsafe conditions and for investigating and reporting on-board occupational accidents.

2. The provisions referred to in paragraph 1 of this Standard shall:

(a) take account of relevant international instruments dealing with occupational safety and health protection in general and with specific risks, and address all matters relevant to the prevention of occupational accidents, injuries and diseases that may be applicable to the work of seafarers and particularly those which are specific to maritime employment;

(b) clearly specify the obligation of shipowners, seafarers and others concerned to comply with the applicable standards and with the ship's occupational safety and health policy and programme with special attention being paid to the safety and health of seafarers under the age of 18;

(c) specify the duties of the master or a person designated by the master, or both, to take specific responsibility for the implementation of and compliance with the ship's occupational safety and health policy and programme; and

(d) specify the authority of the ship's seafarers appointed or elected as safety representatives to participate in meetings of the ship's safety committee. Such a committee shall be established on board a ship on which there are five or more seafarers.

3. The laws and regulations and other measures referred to in Regulation 4.3, paragraph 3, shall be regularly reviewed in consultation with the representatives of the shipowners' and seafarers' organizations and, if necessary, revised to take account of changes in technology and research in order to facilitate continuous improvement in occupational safety and health policies and programmes and to provide a safe occupational environment for seafarers on ships that fly the Member's flag.

4. Compliance with the requirements of applicable international instruments on the acceptable levels of exposure to workplace hazards on board ships and on the development and implementation of ships' occupational safety and health policies and programmes shall be considered as meeting the requirements of this Convention.

5. The competent authority shall ensure that:

(a) occupational accidents, injuries and diseases are adequately reported, taking into account the guidance provided by the International Labour Organization with respect to the reporting and recording of occupational accidents and diseases;

(b) comprehensive statistics of such accidents and diseases are kept, analysed and published and, where appropriate, followed up by research into general trends and into the hazards identified; and

(c) occupational accidents are investigated.

6. Reporting and investigation of occupational safety and health matters shall be designed to ensure the protection of seafarers' personal data, and shall take account of the guidance provided by the International Labour Organization on this matter.

7. The competent authority shall cooperate with shipowners' and seafarers' organizations to take measures to bring to the attention of all seafarers information concerning particular hazards on board ships, for instance, by posting official notices containing relevant instructions.

8. The competent authority shall require that shipowners conducting risk evaluation in relation to management of occupational safety and health refer to appropriate statistical information from their ships and from general statistics provided by the competent authority.

Guideline B4.3 – Health and safety protection and accident prevention

Guideline B4.3.1 – Provisions on occupational accidents, injuries and diseases

1. The provisions required under Standard A4.3 should take into account the ILO code of practice entitled *Accident prevention on board ship at sea and in port*, 1996, and subsequent versions and other related ILO and other international standards and guidelines and codes of practice regarding occupational safety and health protection, including any exposure levels that they may identify.

2. The competent authority should ensure that the national guidelines for the management of occupational safety and health address the following matters, in particular:

(a) general and basic provisions;
(b) structural features of the ship, including means of access and asbestos-related risks;
(c) machinery;
(d) the effects of the extremely low or high temperature of any surfaces with which seafarers may be in contact;
(e) the effects of noise in the workplace and in shipboard accommodation;
(f) the effects of vibration in the workplace and in shipboard accommodation;
(g) the effects of ambient factors, other than those referred to in subparagraphs (e) and (f), in the workplace and in shipboard accommodation, including tobacco smoke;
(h) special safety measures on and below deck;
(i) loading and unloading equipment;
(j) fire prevention and fire-fighting;
(k) anchors, chains and lines;
(l) dangerous cargo and ballast;
(m) personal protective equipment for seafarers;
(n) work in enclosed spaces;
(o) physical and mental effects of fatigue;
(p) the effects of drug and alcohol dependency;
(q) HIV/AIDS protection and prevention; and
(r) emergency and accident response.

3. The assessment of risks and reduction of exposure on the matters referred to in paragraph 2 of this Guideline should take account of the physical occupational health effects, including manual handling of loads, noise and vibration, the chemical and biological occupational health effects, the mental occupational health effects, the physical and mental health effects of fatigue, and occupational accidents. The necessary measures should take due account of the preventive principle according to which, among other things, combating risk at the source, adapting work to the individual, especially as regards the design of workplaces, and replacing the dangerous by the non-dangerous or the less dangerous, have precedence over personal protective equipment for seafarers.

4. In addition, the competent authority should ensure that the implications for health and safety are taken into account, particularly in the following areas:

(a) emergency and accident response;
(b) the effects of drug and alcohol dependency; and
(c) HIV/AIDS protection and prevention.

Guideline B4.3.2 – Exposure to noise

1. The competent authority, in conjunction with the competent international bodies and with representatives of shipowners' and seafarers' organizations concerned,

should review on an ongoing basis the problem of noise on board ships with the objective of improving the protection of seafarers, in so far as practicable, from the adverse effects of exposure to noise.

2. The review referred to in paragraph 1 of this Guideline should take account of the adverse effects of exposure to excessive noise on the hearing, health and comfort of seafarers and the measures to be prescribed or recommended to reduce shipboard noise to protect seafarers. The measures to be considered should include the following:

(a) instruction of seafarers in the dangers to hearing and health of prolonged exposure to high noise levels and in the proper use of noise protection devices and equipment;

(b) provision of approved hearing protection equipment to seafarers where necessary; and

(c) assessment of risk and reduction of exposure levels to noise in all accommodation and recreational and catering facilities, as well as engine rooms and other machinery spaces.

Guideline B4.3.3 – Exposure to vibration

1. The competent authority, in conjunction with the competent international bodies and with representatives of shipowners' and seafarers' organizations concerned, and taking into account, as appropriate, relevant international standards, should review on an ongoing basis the problem of vibration on board ships with the objective of improving the protection of seafarers, in so far as practicable, from the adverse effects of vibration.

2. The review referred to in paragraph 1 of this Guideline should cover the effect of exposure to excessive vibration on the health and comfort of seafarers and the measures to be prescribed or recommended to reduce shipboard vibration to protect seafarers. The measures to be considered should include the following:

(a) instruction of seafarers in the dangers to their health of prolonged exposure to vibration;

(b) provision of approved personal protective equipment to seafarers where necessary; and

(c) assessment of risks and reduction of exposure to vibration in all accommodation and recreational and catering facilities by adopting measures in accordance with the guidance provided by the ILO code of practice entitled *Ambient factors in the workplace*, 2001, and any subsequent revisions, taking account of the difference between exposure in those areas and in the workplace.

Guideline B4.3.4 – Obligations of shipowners

1. Any obligation on the shipowner to provide protective equipment or other accident prevention safeguards should, in general, be accompanied by provisions requiring their use by seafarers and by a requirement for seafarers to comply with the relevant accident prevention and health protection measures.

2. Account should also be taken of Articles 7 and 11 of the Guarding of Machinery Convention, 1963 (No. 119), and the corresponding provisions of the Guarding of Machinery Recommendation, 1963 (No. 118), under which the obligation to ensure compliance with the requirement that machinery in use is properly guarded, and its use

without appropriate guards prevented, rests on the employer, while there is an obligation on the worker not to use machinery without the guards being in position nor to make inoperative the guards provided.

Guideline B4.3.5 – Reporting and collection of statistics

1. All occupational accidents and occupational injuries and diseases should be reported so that they can be investigated and comprehensive statistics can be kept, analysed and published, taking account of protection of the personal data of the seafarers concerned. Reports should not be limited to fatalities or to accidents involving the ship.

2. The statistics referred to in paragraph 1 of this Guideline should record the numbers, nature, causes and effects of occupational accidents and occupational injuries and diseases, with a clear indication, as applicable, of the department on board a ship, the type of accident and whether at sea or in port.

3. Each Member should have due regard to any international system or model for recording accidents to seafarers which may have been established by the International Labour Organization.

Guideline B4.3.6 – Investigations

1. The competent authority should undertake investigations into the causes and circumstances of all occupational accidents and occupational injuries and diseases resulting in loss of life or serious personal injury, and such other cases as may be specified in national laws or regulations.

2. Consideration should be given to including the following as subjects of investigation:

(a) working environment, such as working surfaces, layout of machinery, means of access, lighting and methods of work;
(b) incidence in different age groups of occupational accidents and occupational injuries and diseases;
(c) special physiological or psychological problems created by the shipboard environment;
(d) problems arising from physical stress on board a ship, in particular as a consequence of increased workload;
(e) problems arising from and effects of technical developments and their influence on the composition of crews; and
(f) problems arising from any human failures.

Guideline B4.3.7 – National protection and prevention programmes

1. In order to provide a sound basis for measures to promote occupational safety and health protection and prevention of accidents, injuries and diseases which are due to particular hazards of maritime employment, research should be undertaken into general trends and into such hazards as are revealed by statistics.

2. The implementation of protection and prevention programmes for the promotion of occupational safety and health should be so organized that the competent authority, shipowners and seafarers or their representatives and other appropriate bodies may

play an active role, including through such means as information sessions, on-board guidelines on maximum exposure levels to potentially harmful ambient workplace factors and other hazards or outcomes of a systematic risk evaluation process. In particular, national or local joint occupational safety and health protection and accident prevention committees or ad hoc working parties and on-board committees, on which shipowners' and seafarers' organizations concerned are represented, should be established.

3. Where such activity takes place at company level, the representation of seafarers on any safety committee on board that shipowner's ships should be considered.

Guideline B4.3.8 – Content of protection and prevention programmes

1. Consideration should be given to including the following in the functions of the committees and other bodies referred to in Guideline B4.3.7, paragraph 2:

(a) the preparation of national guidelines and policies for occupational safety and health management systems and for accident prevention provisions, rules and manuals;

(b) the organization of occupational safety and health protection and accident prevention training and programmes;

(c) the organization of publicity on occupational safety and health protection and accident prevention, including films, posters, notices and brochures; and

(d) the distribution of literature and information on occupational safety and health protection and accident prevention so that it reaches seafarers on board ships.

2. Relevant provisions or recommendations adopted by the appropriate national authorities or organizations or international organizations should be taken into account by those preparing texts of occupational safety and health protection and accident prevention measures or recommended practices.

3. In formulating occupational safety and health protection and accident prevention programmes, each Member should have due regard to any code of practice concerning the safety and health of seafarers which may have been published by the International Labour Organization.

Guideline B4.3.9 – Instruction in occupational safety and health protection and the prevention of occupational accidents

1. The curriculum for the training referred to in Standard A4.3, paragraph 1(a), should be reviewed periodically and brought up to date in the light of development in types and sizes of ships and in their equipment, as well as changes in manning practices, nationality, language and the organization of work on board ships.

2. There should be continuous occupational safety and health protection and accident prevention publicity. Such publicity might take the following forms:

(a) educational audiovisual material, such as films, for use in vocational training centres for seafarers and where possible shown on board ships;

(b) display of posters on board ships;

(c) inclusion in periodicals read by seafarers of articles on the hazards of maritime employment and on occupational safety and health protection and accident prevention measures; and

(d) special campaigns using various publicity media to instruct seafarers, including campaigns on safe working practices.

3. The publicity referred to in paragraph 2 of this Guideline should take account of the different nationalities, languages and cultures of seafarers on board ships.

Guideline B4.3.10 – Safety and health education of young seafarers

1. Safety and health regulations should refer to any general provisions on medical examinations before and during employment and on the prevention of accidents and the protection of health in employment, which may be applicable to the work of seafarers. Such regulations should specify measures which will minimize occupational dangers to young seafarers in the course of their duties.

2. Except where a young seafarer is recognized as fully qualified in a pertinent skill by the competent authority, the regulations should specify restrictions on young seafarers undertaking, without appropriate supervision and instruction, certain types of work presenting special risk of accident or of detrimental effect on their health or physical development, or requiring a particular degree of maturity, experience or skill. In determining the types of work to be restricted by the regulations, the competent authority might consider in particular work involving:

(a) the lifting, moving or carrying of heavy loads or objects;
(b) entry into boilers, tanks and cofferdams;
(c) exposure to harmful noise and vibration levels;
(d) operating hoisting and other power machinery and tools, or acting as signallers to operators of such equipment;
(e) handling mooring or tow lines or anchoring equipment;
(f) rigging;
(g) work aloft or on deck in heavy weather;
(h) nightwatch duties;
(i) servicing of electrical equipment;
(j) exposure to potentially harmful materials, or harmful physical agents such as dangerous or toxic substances and ionizing radiations;
(k) the cleaning of catering machinery; and
(l) the handling or taking charge of ships' boats.

3. Practical measures should be taken by the competent authority or through the appropriate machinery to bring to the attention of young seafarers information concerning the prevention of accidents and the protection of their health on board ships. Such measures could include adequate instruction in courses, official accident prevention publicity intended for young persons and professional instruction and supervision of young seafarers.

4. Education and training of young seafarers both ashore and on board ships should include guidance on the detrimental effects on their health and well-being of the abuse of alcohol and drugs and other potentially harmful substances, and the risk and concerns relating to HIV/AIDS and of other health risk related activities.

Guideline B4.3.11 – International cooperation

1. Members, with the assistance as appropriate of intergovernmental and other international organizations, should endeavour, in cooperation with each other, to achieve the greatest possible uniformity of action for the promotion of occupational safety and health protection and prevention of accidents.

2. In developing programmes for promoting occupational safety and health protection and prevention of accidents under Standard A4.3, each Member should have due regard to relevant codes of practice published by the International Labour Organization and the appropriate standards of international organizations.

3. Members should have regard to the need for international cooperation in the continuous promotion of activity related to occupational safety and health protection and prevention of occupational accidents. Such cooperation might take the form of:

(a) bilateral or multilateral arrangements for uniformity in occupational safety and health protection and accident prevention standards and safeguards;
(b) exchange of information on particular hazards affecting seafarers and on means of promoting occupational safety and health protection and preventing accidents;
(c) assistance in testing of equipment and inspection according to the national regulations of the flag State;
(d) collaboration in the preparation and dissemination of occupational safety and health protection and accident prevention provisions, rules or manuals;
(e) collaboration in the production and use of training aids; and
(f) joint facilities for, or mutual assistance in, the training of seafarers in occupational safety and health protection, accident prevention and safe working practices.

Regulation 4.4 – Access to shore-based welfare facilities

Purpose: To ensure that seafarers working on board a ship have access to shore-based facilities and services to secure their health and well-being

1. Each Member shall ensure that shore-based welfare facilities, where they exist, are easily accessible. The Member shall also promote the development of welfare facilities, such as those listed in the Code, in designated ports to provide seafarers on ships that are in its ports with access to adequate welfare facilities and services.

2. The responsibilities of each Member with respect to shore-based facilities, such as welfare, cultural, recreational and information facilities and services, are set out in the Code.

Standard A4.4 – Access to shore-based welfare facilities

1. Each Member shall require, where welfare facilities exist on its territory, that they are available for the use of all seafarers, irrespective of nationality, race, colour, sex, religion, political opinion or social origin and irrespective of the flag State of the ship on which they are employed or engaged or work.

2. Each Member shall promote the development of welfare facilities in appropriate ports of the country and determine, after consultation with the shipowners' and seafarers' organizations concerned, which ports are to be regarded as appropriate.

3. Each Member shall encourage the establishment of welfare boards which shall regularly review welfare facilities and services to ensure that they are appropriate in the light of changes in the needs of seafarers resulting from technical, operational and other developments in the shipping industry.

Guideline B4.4 – Access to shore-based welfare facilities

Guideline B4.4.1 – Responsibilities of Members

1. Each Member should:

(a) take measures to ensure that adequate welfare facilities and services are provided for seafarers in designated ports of call and that adequate protection is provided to seafarers in the exercise of their profession; and

(b) take into account, in the implementation of these measures, the special needs of seafarers, especially when in foreign countries and when entering war zones, in respect of their safety, health and spare-time activities.

2. Arrangements for the supervision of welfare facilities and services should include participation by representative shipowners' and seafarers' organizations concerned.

3. Each Member should take measures designed to expedite the free circulation among ships, central supply agencies and welfare establishments of welfare materials such as films, books, newspapers and sports equipment for use by seafarers on board their ships and in welfare centres ashore.

4. Members should cooperate with one another in promoting the welfare of seafarers at sea and in port. Such cooperation should include the following:

(a) consultations among competent authorities aimed at the provision and improvement of seafarers' welfare facilities and services, both in port and on board ships;

(b) agreements on the pooling of resources and the joint provision of welfare facilities in major ports so as to avoid unnecessary duplication;

(c) organization of international sports competitions and encouragement of the participation of seafarers in sports activities; and

(d) organization of international seminars on the subject of welfare of seafarers at sea and in port.

Guideline B4.4.2 – Welfare facilities and services in ports

1. Each Member should provide or ensure the provision of such welfare facilities and services as may be required, in appropriate ports of the country.

2. Welfare facilities and services should be provided, in accordance with national conditions and practice, by one or more of the following:

(a) public authorities;

(b) shipowners' and seafarers' organizations concerned under collective agreements or other agreed arrangements; and

(c) voluntary organizations.

3. Necessary welfare and recreational facilities should be established or developed in ports. These should include:

(a) meeting and recreation rooms as required;

(b) facilities for sports and outdoor facilities, including competitions;

(c) educational facilities; and

(d) where appropriate, facilities for religious observances and for personal counselling.

4. These facilities may be provided by making available to seafarers in accordance with their needs facilities designed for more general use.

5. Where large numbers of seafarers of different nationalities require facilities such as hotels, clubs and sports facilities in a particular port, the competent authorities or bodies of the countries of origin of the seafarers and of the flag States, as well as the international associations concerned, should consult and cooperate with the competent authorities and bodies of the country in which the port is situated and with one another, with a view to the pooling of resources and to avoiding unnecessary duplication.

6. Hotels or hostels suitable for seafarers should be available where there is need for them. They should provide facilities equal to those found in a good-class hotel, and should wherever possible be located in good surroundings away from the immediate vicinity of the docks. Such hotels or hostels should be properly supervised, the prices charged should be reasonable in amount and, where necessary and possible, provision should be made for accommodating seafarers' families.

7. These accommodation facilities should be open to all seafarers, irrespective of nationality, race, colour, sex, religion, political opinion or social origin and irrespective of the flag State of the ship on which they are employed or engaged or work. Without in any way infringing this principle, it may be necessary in certain ports to provide several types of facilities, comparable in standard but adapted to the customs and needs of different groups of seafarers.

8. Measures should be taken to ensure that, as necessary, technically competent persons are employed full time in the operation of seafarers' welfare facilities and services, in addition to any voluntary workers.

Guideline B4.4.3 – Welfare boards

1. Welfare boards should be established, at the port, regional and national levels, as appropriate. Their functions should include:

(a) keeping under review the adequacy of existing welfare facilities and monitoring the need for the provision of additional facilities or the withdrawal of under-utilized facilities; and

(b) assisting and advising those responsible for providing welfare facilities and ensuring coordination between them.

2. Welfare boards should include among their members representatives of shipowners' and seafarers' organizations, the competent authorities and, where appropriate, voluntary organizations and social bodies.

3. As appropriate, consuls of maritime States and local representatives of foreign welfare organizations should, in accordance with national laws and regulations, be associated with the work of port, regional and national welfare boards.

Guideline B4.4.4 – Financing of welfare facilities

1. In accordance with national conditions and practice, financial support for port welfare facilities should be made available through one or more of the following:

(a) grants from public funds;

(b) levies or other special dues from shipping sources;

(c) voluntary contributions from shipowners, seafarers, or their organizations; and

(d) voluntary contributions from other sources.

2. Where welfare taxes, levies and special dues are imposed, they should be used only for the purposes for which they are raised.

Guideline B4.4.5 – Dissemination of information and facilitation measures

1. Information should be disseminated among seafarers concerning facilities open to the general public in ports of call, particularly transport, welfare, entertainment and educational facilities and places of worship, as well as facilities provided specifically for seafarers.

2. Adequate means of transport at moderate prices should be available at any reasonable time in order to enable seafarers to reach urban areas from convenient locations in the port.

3. All suitable measures should be taken by the competent authorities to make known to shipowners and to seafarers entering port any special laws and customs, the contravention of which may jeopardize their freedom.

4. Port areas and access roads should be provided by the competent authorities with adequate lighting and signposting and regular patrols for the protection of seafarers.

Guideline B4.4.6 – Seafarers in a foreign port

1. For the protection of seafarers in foreign ports, measures should be taken to facilitate:

(a) access to consuls of their State of nationality or State of residence; and

(b) effective cooperation between consuls and the local or national authorities.

2. Seafarers who are detained in a foreign port should be dealt with promptly under due process of law and with appropriate consular protection.

3. Whenever a seafarer is detained for any reason in the territory of a Member, the competent authority should, if the seafarer so requests, immediately inform the flag State and the State of nationality of the seafarer. The competent authority should promptly inform the seafarer of the right to make such a request. The State of nationality of the seafarer should promptly notify the seafarer's next of kin. The competent authority should allow consular officers of these States immediate access to the seafarer and regular visits thereafter so long as the seafarer is detained.

4. Each Member should take measures, whenever necessary, to ensure the safety of seafarers from aggression and other unlawful acts while ships are in their territorial waters and especially in approaches to ports.

5. Every effort should be made by those responsible in port and on board a ship to facilitate shore leave for seafarers as soon as possible after a ship's arrival in port.

Regulation 4.5 – Social security

Purpose: To ensure that measures are taken with a view to providing seafarers with access to social security protection

1. Each Member shall ensure that all seafarers and, to the extent provided for in its national law, their dependants have access to social security protection in accordance with the Code without prejudice however to any more favourable conditions referred to in paragraph 8 of article 19 of the Constitution.

2. Each Member undertakes to take steps, according to its national circumstances, individually and through international cooperation, to achieve progressively comprehensive social security protection for seafarers.

3. Each Member shall ensure that seafarers who are subject to its social security legislation, and, to the extent provided for in its national law, their dependants, are entitled to benefit from social security protection no less favourable than that enjoyed by shoreworkers.

Standard A4.5 – Social security

1. The branches to be considered with a view to achieving progressively comprehensive social security protection under Regulation 4.5 are: medical care, sickness benefit, unemployment benefit, old-age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit and survivors' benefit, complementing the protection provided for under Regulations 4.1, on medical care, and 4.2, on shipowners' liability, and under other titles of this Convention.

2. At the time of ratification, the protection to be provided by each Member in accordance with Regulation 4.5, paragraph 1, shall include at least three of the nine branches listed in paragraph 1 of this Standard.

3. Each Member shall take steps according to its national circumstances to provide the complementary social security protection referred to in paragraph 1 of this Standard to all seafarers ordinarily resident in its territory. This responsibility could be satisfied, for example, through appropriate bilateral or multilateral agreements or contribution-based systems. The resulting protection shall be no less favourable than that enjoyed by shoreworkers resident in their territory.

4. Notwithstanding the attribution of responsibilities in paragraph 3 of this Standard, Members may determine, through bilateral and multilateral agreements and through provisions adopted in the framework of regional economic integration organizations, other rules concerning the social security legislation to which seafarers are subject.

5. Each Member's responsibilities with respect to seafarers on ships that fly its flag shall include those provided for by Regulations 4.1 and 4.2 and the related provisions of the Code, as well as those that are inherent in its general obligations under international law.

6. Each Member shall give consideration to the various ways in which comparable benefits will, in accordance with national law and practice, be provided to seafarers in the absence of adequate coverage in the branches referred to in paragraph 1 of this Standard.

7. The protection under Regulation 4.5, paragraph 1, may, as appropriate, be contained in laws or regulations, in private schemes or in collective bargaining agreements or in a combination of these.

8. To the extent consistent with their national law and practice, Members shall cooperate, through bilateral or multilateral agreements or other arrangements, to ensure the maintenance of social security rights, provided through contributory or non-contributory schemes, which have been acquired, or are in the course of acquisition, by all seafarers regardless of residence.

9. Each Member shall establish fair and effective procedures for the settlement of disputes.

10. Each Member shall at the time of ratification specify the branches for which protection is provided in accordance with paragraph 2 of this Standard. It shall subsequently notify the Director-General of the International Labour Office when it provides social security protection in respect of one or more other branches stated in paragraph 1 of this Standard. The Director-General shall maintain a register of this information and shall make it available to all interested parties.

11. The reports to the International Labour Office pursuant to Article 22 of the Constitution, shall also include information regarding steps taken in accordance with Regulation 4.5, paragraph 2, to extend protection to other branches.

Guideline B4.5 – Social security

1. The protection to be provided at the time of ratification in accordance with Standard A4.5, paragraph 2, should at least include the branches of medical care, sickness benefit and employment injury benefit.

2. In the circumstances referred to in Standard A4.5, paragraph 6, comparable benefits may be provided through insurance, bilateral and multilateral agreements or other effective means, taking into consideration the provisions of relevant collective bargaining agreements. Where such measures are adopted, seafarers covered by such measures should be advised of the means by which the various branches of social security protection will be provided.

3. Where seafarers are subject to more than one national legislation covering social security, the Members concerned should cooperate in order to determine by mutual agreement which legislation is to apply, taking into account such factors as the type and level of protection under the respective legislations which is more favourable to the seafarer concerned as well as the seafarer's preference.

4. The procedures to be established under Standard A4.5, paragraph 9, should be designed to cover all disputes relevant to the claims of the seafarers concerned, irrespective of the manner in which the coverage is provided.

5. Each Member which has national seafarers, non-national seafarers or both serving on ships that fly its flag should provide the social security protection in the Convention as applicable, and should periodically review the branches of social security protection in Standard A4.5, paragraph 1, with a view to identifying any additional branches appropriate for the seafarers concerned.

6. The seafarers' employment agreement should identify the means by which the various branches of social security protection will be provided to the seafarer by the shipowner as well as any other relevant information at the disposal of the shipowner, such as statutory deductions from the seafarers' wages and shipowners' contributions which may be made in accordance with the requirements of identified authorized bodies pursuant to relevant national social security schemes.

7. The Member whose flag the ship flies should, in effectively exercising its jurisdiction over social matters, satisfy itself that the shipowners' responsibilities concerning social security protection are met, including making the required contributions to social security schemes.

TITLE 5. COMPLIANCE AND ENFORCEMENT

1. The Regulations in this Title specify each Member's responsibility to fully implement and enforce the principles and rights set out in the Articles of this Convention as well as the particular obligations provided for under its Titles 1, 2, 3 and 4.

2. Paragraphs 3 and 4 of Article VI, which permit the implementation of Part A of the Code through substantially equivalent provisions, do not apply to Part A of the Code in this Title.

3. In accordance with paragraph 2 of Article VI, each Member shall implement its responsibilities under the Regulations in the manner set out in the corresponding Standards of Part A of the Code, giving due consideration to the corresponding Guidelines in Part B of the Code.

4. The provisions of this Title shall be implemented bearing in mind that seafarers and shipowners, like all other persons, are equal before the law and are entitled to the equal protection of the law and shall not be subject to discrimination in their access to courts, tribunals or other dispute resolution mechanisms. The provisions of this Title do not determine legal jurisdiction or a legal venue.

Regulation 5.1 – Flag State responsibilities

Purpose: To ensure that each Member implements its responsibilities under this Convention with respect to ships that fly its flag

Regulation 5.1.1 – General principles

1. Each Member is responsible for ensuring implementation of its obligations under this Convention on ships that fly its flag.

2. Each Member shall establish an effective system for the inspection and certification of maritime labour conditions, in accordance with Regulations 5.1.3 and 5.1.4 ensuring that the working and living conditions for seafarers on ships that fly its flag meet, and continue to meet, the standards in this Convention.

3. In establishing an effective system for the inspection and certification of maritime labour conditions, a Member may, where appropriate, authorize public institutions or other organizations (including those of another Member, if the latter agrees) which it recognizes as competent and independent to carry out inspections or to issue certificates or to do both. In all cases, the Member shall remain fully responsible for the inspection and certification of the working and living conditions of the seafarers concerned on ships that fly its flag.

4. A maritime labour certificate, complemented by a declaration of maritime labour compliance, shall constitute prima facie evidence that the ship has been duly inspected by the Member whose flag it flies and that the requirements of this Convention

relating to working and living conditions of the seafarers have been met to the extent so certified.

5. Information about the system referred to in paragraph 2 of this Regulation, including the method used for assessing its effectiveness, shall be included in the Member's reports to the International Labour Office pursuant to Article 22 of the Constitution.

Standard A5.1.1 – General principles

1. Each Member shall establish clear objectives and standards covering the administration of its inspection and certification systems, as well as adequate overall procedures for its assessment of the extent to which those objectives and standards are being attained.

2. Each Member shall require all ships that fly its flag to have a copy of this Convention available on board.

Guideline B5.1.1 – General principles

1. The competent authority should make appropriate arrangements to promote effective cooperation between public institutions and other organizations, referred to in Regulations 5.1.1 and 5.1.2, concerned with seafarers' shipboard working and living conditions.

2. In order to better ensure cooperation between inspectors and shipowners, seafarers and their respective organizations, and to maintain or improve seafarers' working and living conditions, the competent authority should consult the representatives of such organizations at regular intervals as to the best means of attaining these ends. The manner of such consultation should be determined by the competent authority after consulting with shipowners' and seafarers' organizations.

Regulation 5.1.2 – Authorization of recognized organizations

1. The public institutions or other organizations referred to in paragraph 3 of Regulation 5.1.1 ('recognized organizations') shall have been recognized by the competent authority as meeting the requirements in the Code regarding competency and independence. The inspection or certification functions which the recognized organizations may be authorized to carry out shall come within the scope of the activities that are expressly mentioned in the Code as being carried out by the competent authority or a recognized organization.

2. The reports referred to in paragraph 5 of Regulation 5.1.1 shall contain information regarding any recognized organization, the extent of authorizations given and the arrangements made by the Member to ensure that the authorized activities are carried out completely and effectively.

Standard A5.1.2 – Authorization of recognized organizations

1. For the purpose of recognition in accordance with paragraph 1 of Regulation 5.1.2, the competent authority shall review the competency and independence of the organization concerned and determine whether the organization has demonstrated, to the extent necessary for carrying out the activities covered by the authorization conferred on it, that the organization:

(a) has the necessary expertise in the relevant aspects of this Convention and an appropriate knowledge of ship operations, including the minimum requirements for seafarers to work on a ship, conditions of employment, accommodation, recreational facilities, food and catering, accident prevention, health protection, medical care, welfare and social security protection;
(b) has the ability to maintain and update the expertise of its personnel;
(c) has the necessary knowledge of the requirements of this Convention as well as of applicable national laws and regulations and relevant international instruments; and
(d) is of the appropriate size, structure, experience and capability commensurate with the type and degree of authorization.

2. Any authorizations granted with respect to inspections shall, as a minimum, empower the recognized organization to require the rectification of deficiencies that it identifies in seafarers' working and living conditions and to carry out inspections in this regard at the request of a port State.

3. Each Member shall establish:
(a) a system to ensure the adequacy of work performed by recognized organizations, which includes information on all applicable national laws and regulations and relevant international instruments; and
(b) procedures for communication with and oversight of such organizations.

4. Each Member shall provide the International Labour Office with a current list of any recognized organizations authorized to act on its behalf and it shall keep this list up to date. The list shall specify the functions that the recognized organizations have been authorized to carry out. The Office shall make the list publicly available.

Guideline B5.1.2 – Authorization of recognized organizations

1. The organization seeking recognition should demonstrate the technical, administrative and managerial competence and capacity to ensure the provision of timely service of satisfactory quality.

2. In evaluating the capability of an organization, the competent authority should determine whether the organization:
(a) has adequate technical, managerial and support staff;
(b) has sufficient qualified professional staff to provide the required service, representing an adequate geographical coverage;
(c) has proven ability to provide a timely service of satisfactory quality; and
(d) is independent and accountable in its operations.

3. The competent authority should conclude a written agreement with any organization that it recognizes for purposes of an authorization. The agreement should include the following elements:
(a) scope of application;
(b) purpose;
(c) general conditions;
(d) the execution of functions under authorization;
(e) legal basis of the functions under authorization;

(f) reporting to the competent authority;

(g) specification of the authorization from the competent authority to the recognized organization; and

(h) the competent authority's supervision of activities delegated to the recognized organization.

4. Each Member should require the recognized organizations to develop a system for qualification of staff employed by them as inspectors to ensure the timely updating of their knowledge and expertise.

5. Each Member should require the recognized organizations to maintain records of the services performed by them such that they are able to demonstrate achievement of the required standards in the items covered by the services.

6. In establishing the oversight procedures referred to in Standard A5.1.2, paragraph 3(b), each Member should take into account the *Guidelines for the Authorization of Organizations Acting on Behalf of the Administration*, adopted in the framework of the International Maritime Organization.

Regulation 5.1.3 – Maritime labour certificate and declaration of maritime labour compliance

1. This Regulation applies to ships of:

(a) 500 gross tonnage or over, engaged in international voyages; and

(b) 500 gross tonnage or over, flying the flag of a Member and operating from a port, or between ports, in another country.

For the purpose of this Regulation, 'international voyage' means a voyage from a country to a port outside such a country.

2. This Regulation also applies to any ship that flies the flag of a Member and is not covered by paragraph 1 of this Regulation, at the request of the shipowner to the Member concerned.

3. Each Member shall require ships that fly its flag to carry and maintain a maritime labour certificate certifying that the working and living conditions of seafarers on the ship, including measures for ongoing compliance to be included in the declaration of maritime labour compliance referred to in paragraph 4 of this Regulation, have been inspected and meet the requirements of national laws or regulations or other measures implementing this Convention.

4. Each Member shall require ships that fly its flag to carry and maintain a declaration of maritime labour compliance stating the national requirements implementing this Convention for the working and living conditions for seafarers and setting out the measures adopted by the shipowner to ensure compliance with the requirements on the ship or ships concerned.

5. The maritime labour certificate and the declaration of maritime labour compliance shall conform to the model prescribed by the Code.

6. Where the competent authority of the Member or a recognized organization duly authorized for this purpose has ascertained through inspection that a ship that flies the Member's flag meets or continues to meet the standards of this Convention, it shall issue or renew a maritime labour certificate to that effect and maintain a publicly available record of that certificate.

7. Detailed requirements for the maritime labour certificate and the declaration of maritime labour compliance, including a list of the matters that must be inspected and approved, are set out in Part A of the Code.

Standard A5.1.3 – Maritime labour certificate and declaration of maritime labour compliance

1. The maritime labour certificate shall be issued to a ship by the competent authority, or by a recognized organization duly authorized for this purpose, for a period which shall not exceed five years. A list of matters that must be inspected and found to meet national laws and regulations or other measures implementing the requirements of this Convention regarding the working and living conditions of seafarers on ships before a maritime labour certificate can be issued is found in Appendix A5-I.

2. The validity of the maritime labour certificate shall be subject to an intermediate inspection by the competent authority, or by a recognized organization duly authorized for this purpose, to ensure continuing compliance with the national requirements implementing this Convention. If only one intermediate inspection is carried out and the period of validity of the certificate is five years, it shall take place between the second and third anniversary dates of the certificate. Anniversary date means the day and month of each year which will correspond to the date of expiry of the maritime labour certificate. The scope and depth of the intermediate inspection shall be equal to an inspection for renewal of the certificate. The certificate shall be endorsed following satisfactory intermediate inspection.

3. Notwithstanding paragraph 1 of this Standard, when the renewal inspection has been completed within three months before the expiry of the existing maritime labour certificate, the new maritime labour certificate shall be valid from the date of completion of the renewal inspection for a period not exceeding five years from the date of expiry of the existing certificate.

4. When the renewal inspection is completed more than three months before the expiry date of the existing maritime labour certificate, the new maritime labour certificate shall be valid for a period not exceeding five years starting from the date of completion of the renewal inspection.

5. A maritime labour certificate may be issued on an interim basis:

(a) to new ships on delivery;

(b) when a ship changes flag; or

(c) when a shipowner assumes responsibility for the operation of a ship which is new to that shipowner.

6. An interim maritime labour certificate may be issued for a period not exceeding six months by the competent authority or a recognized organization duly authorized for this purpose.

7. An interim maritime labour certificate may only be issued following verification that:

(a) the ship has been inspected, as far as reasonable and practicable, for the matters listed in Appendix A5-I, taking into account verification of items under subparagraphs (b), (c) and (d) of this paragraph;

(b) the shipowner has demonstrated to the competent authority or recognized organization that the ship has adequate procedures to comply with this Convention;

(c) the master is familiar with the requirements of this Convention and the responsibilities for implementation; and

(d) relevant information has been submitted to the competent authority or recognized organization to produce a declaration of maritime labour compliance.

8. A full inspection in accordance with paragraph 1 of this Standard shall be carried out prior to expiry of the interim certificate to enable issue of the full-term maritime labour certificate. No further interim certificate may be issued following the initial six months referred to in paragraph 6 of this Standard. A declaration of maritime labour compliance need not be issued for the period of validity of the interim certificate.

9. The maritime labour certificate, the interim maritime labour certificate and the declaration of maritime labour compliance shall be drawn up in the form corresponding to the models given in Appendix A5-II.

10. The declaration of maritime labour compliance shall be attached to the maritime labour certificate. It shall have two parts:

(a) Part I shall be drawn up by the competent authority which shall: (i) identify the list of matters to be inspected in accordance with paragraph 1 of this Standard; (ii) identify the national requirements embodying the relevant provisions of this Convention by providing a reference to the relevant national legal provisions as well as, to the extent necessary, concise information on the main content of the national requirements; (iii) refer to ship-type specific requirements under national legislation; (iv) record any substantially equivalent provisions adopted pursuant to paragraph 3 of Article VI; and (v) clearly indicate any exemption granted by the competent authority as provided in Title 3; and

(b) Part II shall be drawn up by the shipowner and shall identify the measures adopted to ensure ongoing compliance with the national requirements between inspections and the measures proposed to ensure that there is continuous improvement.

The competent authority or recognized organization duly authorized for this purpose shall certify Part II and shall issue the declaration of maritime labour compliance.

11. The results of all subsequent inspections or other verifications carried out with respect to the ship concerned and any significant deficiencies found during any such verification shall be recorded, together with the date when the deficiencies were found to have been remedied. This record, accompanied by an English-language translation where it is not in English, shall, in accordance with national laws or regulations, be inscribed upon or appended to the declaration of maritime labour compliance or made available in some other way to seafarers, flag State inspectors, authorized officers in port States and shipowners' and seafarers' representatives.

12. A current valid maritime labour certificate and declaration of maritime labour compliance, accompanied by an English-language translation where it is not in English, shall be carried on the ship and a copy shall be posted in a conspicuous place on board where it is available to the seafarers. A copy shall be made available in accordance with national laws and regulations, upon request, to seafarers, flag State inspectors, authorized officers in port States, and shipowners' and seafarers' representatives.

13. The requirement for an English-language translation in paragraphs 11 and 12 of this Standard does not apply in the case of a ship not engaged in an international voyage.

14. A certificate issued under paragraph 1 or 5 of this Standard shall cease to be valid in any of the following cases:

(a) if the relevant inspections are not completed within the periods specified under paragraph 2 of this Standard;

(b) if the certificate is not endorsed in accordance with paragraph 2 of this Standard;

(c) when a ship changes flag;

(d) when a shipowner ceases to assume the responsibility for the operation of a ship; and

(e) when substantial changes have been made to the structure or equipment covered in Title 3.

15. In the case referred to in paragraph 14(c), (d) or (e) of this Standard, a new certificate shall only be issued when the competent authority or recognized organization issuing the new certificate is fully satisfied that the ship is in compliance with the requirements of this Standard.

16. A maritime labour certificate shall be withdrawn by the competent authority or the recognized organization duly authorized for this purpose by the flag State, if there is evidence that the ship concerned does not comply with the requirements of this Convention and any required corrective action has not been taken.

17. When considering whether a maritime labour certificate should be withdrawn in accordance with paragraph 16 of this Standard, the competent authority or the recognized organization shall take into account the seriousness or the frequency of the deficiencies.

Guideline B5.1.3 – Maritime labour certificate and declaration of maritime labour compliance

1. The statement of national requirements in Part I of the declaration of maritime labour compliance should include or be accompanied by references to the legislative provisions relating to seafarers' working and living conditions in each of the matters listed in Appendix A5-I. Where national legislation precisely follows the requirements stated in this Convention, a reference may be all that is necessary. Where a provision of the Convention is implemented through substantial equivalence as provided under Article VI, paragraph 3, this provision should be identified and a concise explanation should be provided. Where an exemption is granted by the competent authority as provided in Title 3, the particular provision or provisions concerned should be clearly indicated.

2. The measures referred to in Part II of the declaration of maritime labour compliance, drawn up by the shipowner, should, in particular, indicate the occasions on which ongoing compliance with particular national requirements will be verified, the persons responsible for verification, the records to be taken, as well as the procedures to be followed where non-compliance is noted. Part II may take a number of forms. It could make reference to other more comprehensive documentation covering policies and procedures relating to other aspects of the maritime sector, for example documents required by the *International Safety Management (ISM) Code* or the information required by Regulation 5 of the SOLAS Convention, Chapter XI-1 relating to the ship's Continuous Synopsis Record.

3. The measures to ensure ongoing compliance should include general international requirements for the shipowner and master to keep themselves informed of the

latest advances in technology and scientific findings concerning workplace design, taking into account the inherent dangers of seafarers' work, and to inform the seafarers' representatives accordingly, thereby guaranteeing a better level of protection of the seafarers' working and living conditions on board.

4. The declaration of maritime labour compliance should, above all, be drafted in clear terms designed to help all persons concerned, such as flag State inspectors, authorized officers in port States and seafarers, to check that the requirements are being properly implemented.

5. An example of the kind of information that might be contained in a declaration of maritime labour compliance is given in Appendix B5-I.

6. When a ship changes flag as referred to in Standard A5.1.3, paragraph 14(c), and where both States concerned have ratified this Convention, the Member whose flag the ship was formerly entitled to fly should, as soon as possible, transmit to the competent authority of the other Member copies of the maritime labour certificate and the declaration of maritime labour compliance carried by the ship before the change of flag and, if applicable, copies of the relevant inspection reports if the competent authority so requests within three months after the change of flag has taken place.

Regulation 5.1.4 – Inspection and enforcement

1. Each Member shall verify, through an effective and coordinated system of regular inspections, monitoring and other control measures, that ships that fly its flag comply with the requirements of this Convention as implemented in national laws and regulations.

2. Detailed requirements regarding the inspection and enforcement system referred to in paragraph 1 of this Regulation are set out in Part A of the Code.

Standard A5.1.4 – Inspection and enforcement

1. Each Member shall maintain a system of inspection of the conditions for seafarers on ships that fly its flag which shall include verification that the measures relating to working and living conditions as set out in the declaration of maritime labour compliance, where applicable, are being followed, and that the requirements of this Convention are met.

2. The competent authority shall appoint a sufficient number of qualified inspectors to fulfil its responsibilities under paragraph 1 of this Standard. Where recognized organizations have been authorized to carry out inspections, the Member shall require that personnel carrying out the inspection are qualified to undertake these duties and shall provide them with the necessary legal authority to perform their duties.

3. Adequate provision shall be made to ensure that the inspectors have the training, competence, terms of reference, powers, status and independence necessary or desirable so as to enable them to carry out the verification and ensure the compliance referred to in paragraph 1 of this Standard.

4. Inspections shall take place at the intervals required by Standard A5.1.3, where applicable. The interval shall in no case exceed three years.

5. If a Member receives a complaint which it does not consider manifestly unfounded or obtains evidence that a ship that flies its flag does not conform to the requirements of this Convention or that there are serious deficiencies in the implementation of the measures set out in the declaration of maritime labour compliance, the Member shall take the steps necessary to investigate the matter and ensure that action is taken to remedy any deficiencies found.

6. Adequate rules shall be provided and effectively enforced by each Member in order to guarantee that inspectors have the status and conditions of service to ensure that they are independent of changes of government and of improper external influences.

7. Inspectors, issued with clear guidelines as to the tasks to be performed and provided with proper credentials, shall be empowered:

(a) to board a ship that flies the Member's flag;

(b) to carry out any examination, test or inquiry which they may consider necessary in order to satisfy themselves that the standards are being strictly observed; and

(c) to require that any deficiency is remedied and, where they have grounds to believe that deficiencies constitute a serious breach of the requirements of this Convention (including seafarers' rights), or represent a significant danger to seafarers' safety, health or security, to prohibit a ship from leaving port until necessary actions are taken.

8. Any action taken pursuant to paragraph 7(c) of this Standard shall be subject to any right of appeal to a judicial or administrative authority.

9. Inspectors shall have the discretion to give advice instead of instituting or recommending proceedings when there is no clear breach of the requirements of this Convention that endangers the safety, health or security of the seafarers concerned and where there is no prior history of similar breaches.

10. Inspectors shall treat as confidential the source of any grievance or complaint alleging a danger or deficiency in relation to seafarers' working and living conditions or a violation of laws and regulations and give no intimation to the shipowner, the shipowner's representative or the operator of the ship that an inspection was made as a consequence of such a grievance or complaint.

11. Inspectors shall not be entrusted with duties which might, because of their number or nature, interfere with effective inspection or prejudice in any way their authority or impartiality in their relations with shipowners, seafarers or other interested parties. In particular, inspectors shall:

(a) be prohibited from having any direct or indirect interest in any operation which they are called upon to inspect; and

(b) subject to appropriate sanctions or disciplinary measures, not reveal, even after leaving service, any commercial secrets or confidential working processes or information of a personal nature which may come to their knowledge in the course of their duties.

12. Inspectors shall submit a report of each inspection to the competent authority. One copy of the report in English or in the working language of the ship shall be furnished to the master of the ship and another copy shall be posted on the ship's notice board for the information of the seafarers and, upon request, sent to their representatives.

13. The competent authority of each Member shall maintain records of inspections of the conditions for seafarers on ships that fly its flag. It shall publish an annual report on inspection activities within a reasonable time, not exceeding six months, after the end of the year.

14. In the case of an investigation pursuant to a major incident, the report shall be submitted to the competent authority as soon as practicable, but not later than one month following the conclusion of the investigation.

15. When an inspection is conducted or when measures are taken under this Standard, all reasonable efforts shall be made to avoid a ship being unreasonably detained or delayed.

16. Compensation shall be payable in accordance with national laws and regulations for any loss or damage suffered as a result of the wrongful exercise of the inspectors' powers. The burden of proof in each case shall be on the complainant.

17. Adequate penalties and other corrective measures for breaches of the requirements of this Convention (including seafarers' rights) and for obstructing inspectors in the performance of their duties shall be provided for and effectively enforced by each Member.

Guideline B5.1.4 – Inspection and enforcement

1. The competent authority and any other service or authority wholly or partly concerned with the inspection of seafarers' working and living conditions should have the resources necessary to fulfil their functions. In particular:

(a) each Member should take the necessary measures so that duly qualified technical experts and specialists may be called upon, as needed, to assist in the work of inspectors; and

(b) inspectors should be provided with conveniently situated premises, equipment and means of transport adequate for the efficient performance of their duties.

2. The competent authority should develop a compliance and enforcement policy to ensure consistency and otherwise guide inspection and enforcement activities related to this Convention. Copies of this policy should be provided to all inspectors and relevant law-enforcement officials and should be made available to the public and shipowners and seafarers.

3. The competent authority should establish simple procedures to enable it to receive information in confidence concerning possible breaches of the requirements of this Convention (including seafarers' rights) presented by seafarers directly or by representatives of the seafarers, and permit inspectors to investigate such matters promptly, including:

(a) enabling masters, seafarers or representatives of the seafarers to request an inspection when they consider it necessary; and

(b) supplying technical information and advice to shipowners and seafarers and organizations concerned as to the most effective means of complying with the requirements of this Convention and of bringing about a continual improvement in seafarers' on-board conditions.

4. Inspectors should be fully trained and sufficient in numbers to secure the efficient discharge of their duties with due regard to:

(a) the importance of the duties which the inspectors have to perform, in particular the number, nature and size of ships subject to inspection and the number and complexity of the legal provisions to be enforced;
(b) the resources placed at the disposal of the inspectors; and
(c) the practical conditions under which inspections must be carried out in order to be effective.

5. Subject to any conditions for recruitment to the public service which may be prescribed by national laws and regulations, inspectors should have qualifications and adequate training to perform their duties and where possible should have a maritime education or experience as a seafarer. They should have adequate knowledge of seafarers' working and living conditions and of the English language.

6. Measures should be taken to provide inspectors with appropriate further training during their employment.

7. All inspectors should have a clear understanding of the circumstances in which an inspection should be carried out, the scope of the inspection to be carried out in the various circumstances referred to and the general method of inspection.

8. Inspectors provided with proper credentials under the national law should at a minimum be empowered:
(a) to board ships freely and without previous notice; however, when commencing the ship inspection, inspectors should provide notification of their presence to the master or person in charge and, where appropriate, to the seafarers or their representatives;
(b) to question the master, seafarer or any other person, including the shipowner or the shipowner's representative, on any matter concerning the application of the requirements under laws and regulations, in the presence of any witness that the person may have requested;
(c) to require the production of any books, log books, registers, certificates or other documents or information directly related to matters subject to inspection, in order to verify compliance with the national laws and regulations implementing this Convention;
(d) to enforce the posting of notices required under the national laws and regulations implementing this Convention;
(e) to take or remove, for the purpose of analysis, samples of products, cargo, drinking water, provisions, materials and substances used or handled;
(f) following an inspection, to bring immediately to the attention of the shipowner, the operator of the ship or the master, deficiencies which may affect the health and safety of those on board ship;
(g) to alert the competent authority and, if applicable, the recognized organization to any deficiency or abuse not specifically covered by existing laws or regulations and submit proposals to them for the improvement of the laws or regulations; and
(h) to notify the competent authority of any occupational injuries or diseases affecting seafarers in such cases and in such manner as may be prescribed by laws and regulations.

9. When a sample referred to in paragraph 8(e) of this Guideline is being taken or removed, the shipowner or the shipowner's representative, and where appropriate a seafarer, should be notified or should be present at the time the sample is taken or removed. The quantity of such a sample should be properly recorded by the inspector.

10. The annual report published by the competent authority of each Member, in respect of ships that fly its flag, should contain:

(a) a list of laws and regulations in force relevant to seafarers' working and living conditions and any amendments which have come into effect during the year;
(b) details of the organization of the system of inspection;
(c) statistics of ships or other premises subject to inspection and of ships and other premises actually inspected;
(d) statistics on all seafarers subject to its national laws and regulations;
(e) statistics and information on violations of legislation, penalties imposed and cases of detention of ships; and
(f) statistics on reported occupational injuries and diseases affecting seafarers.

Regulation 5.1.5 – On-board complaint procedures

1. Each Member shall require that ships that fly its flag have on-board procedures for the fair, effective and expeditious handling of seafarer complaints alleging breaches of the requirements of this Convention (including seafarers' rights).

2. Each Member shall prohibit and penalize any kind of victimization of a seafarer for filing a complaint.

3. The provisions in this Regulation and related sections of the Code are without prejudice to a seafarer's right to seek redress through whatever legal means the seafarer considers appropriate.

Standard A5.1.5 – On-board complaint procedures

1. Without prejudice to any wider scope that may be given in national laws or regulations or collective agreements, the on-board procedures may be used by seafarers to lodge complaints relating to any matter that is alleged to constitute a breach of the requirements of this Convention (including seafarers' rights).

2. Each Member shall ensure that, in its laws or regulations, appropriate on board complaint procedures are in place to meet the requirements of Regulation 5.1.5. Such procedures shall seek to resolve complaints at the lowest level possible. However, in all cases, seafarers shall have a right to complain directly to the master and, where they consider it necessary, to appropriate external authorities.

3. The on-board complaint procedures shall include the right of the seafarer to be accompanied or represented during the complaints procedure, as well as safeguards against the possibility of victimization of seafarers for filing complaints. The term 'victimization' covers any adverse action taken by any person with respect to a seafarer for lodging a complaint which is not manifestly vexatious or maliciously made.

4. In addition to a copy of their seafarers' employment agreement, all seafarers shall be provided with a copy of the on-board complaint procedures applicable on the ship. This shall include contact information for the competent authority in the flag State and, where different, in the seafarers' country of residence, and the name of a person or persons on board the ship who can, on a confidential basis, provide seafarers with impartial advice on their complaint and otherwise assist them in following the complaint procedures available to them on board the ship.

Guideline B5.1.5 – On-board complaint procedures

1. Subject to any relevant provisions of an applicable collective agreement, the competent authority should, in close consultation with shipowners' and seafarers' organizations, develop a model for fair, expeditious and well-documented on-board complaint-handling procedures for all ships that fly the Member's flag. In developing these procedures the following matters should be considered:

(a) many complaints may relate specifically to those individuals to whom the complaint is to be made or even to the master of the ship. In all cases seafarers should also be able to complain directly to the master and to make a complaint externally; and

(b) in order to help avoid problems of victimization of seafarers making complaints about matters under this Convention, the procedures should encourage the nomination of a person on board who can advise seafarers on the procedures available to them and, if requested by the complainant seafarer, also attend any meetings or hearings into the subject matter of the complaint.

2. At a minimum the procedures discussed during the consultative process referred to in paragraph 1 of this Guideline should include the following:

(a) complaints should be addressed to the head of the department of the seafarer lodging the complaint or to the seafarer's superior officer;

(b) the head of department or superior officer should then attempt to resolve the matter within prescribed time limits appropriate to the seriousness of the issues involved;

(c) if the head of department or superior officer cannot resolve the complaint to the satisfaction of the seafarer, the latter may refer it to the master, who should handle the matter personally;

(d) seafarers should at all times have the right to be accompanied and to be represented by another seafarer of their choice on board the ship concerned;

(e) all complaints and the decisions on them should be recorded and a copy provided to the seafarer concerned;

(f) if a complaint cannot be resolved on board, the matter should be referred ashore to the shipowner, who should be given an appropriate time limit for resolving the matter, where appropriate, in consultation with the seafarers concerned or any person they may appoint as their representative; and

(g) in all cases seafarers should have a right to file their complaints directly with the master and the shipowner and competent authorities.

Regulation 5.1.6 – Marine casualties

1. Each Member shall hold an official inquiry into any serious marine casualty, leading to injury or loss of life, that involves a ship that flies its flag. The final report of an inquiry shall normally be made public.

2. Members shall cooperate with each other to facilitate the investigation of serious marine casualties referred to in paragraph 1 of this Regulation.

Standard A5.1.6 – Marine casualties

(No provisions)

Guideline B5.1.6 – Marine casualties

(No provisions)

Regulation 5.2 – Port State responsibilities

Purpose: To enable each Member to implement its responsibilities under this Convention regarding international cooperation in the implementation and enforcement of the Convention standards on foreign ships

Regulation 5.2.1 – Inspections in port

1. Every foreign ship calling, in the normal course of its business or for operational reasons, in the port of a Member may be the subject of inspection in accordance with paragraph 4 of Article V for the purpose of reviewing compliance with the requirements of this Convention (including seafarers' rights) relating to the working and living conditions of seafarers on the ship.

2. Each Member shall accept the maritime labour certificate and the declaration of maritime labour compliance required under Regulation 5.1.3 as prima facie evidence of compliance with the requirements of this Convention (including seafarers' rights). Accordingly, the inspection in its ports shall, except in the circumstances specified in the Code, be limited to a review of the certificate and declaration.

3. Inspections in a port shall be carried out by authorized officers in accordance with the provisions of the Code and other applicable international arrangements governing port State control inspections in the Member. Any such inspection shall be limited to verifying that the matter inspected is in conformity with the relevant requirements set out in the Articles and Regulations of this Convention and in Part A only of the Code.

4. Inspections that may be carried out in accordance with this Regulation shall be based on an effective port State inspection and monitoring system to help ensure that the working and living conditions for seafarers on ships entering a port of the Member concerned meet the requirements of this Convention (including seafarers' rights).

5. Information about the system referred to in paragraph 4 of this Regulation, including the method used for assessing its effectiveness, shall be included in the Member's reports pursuant to Article 22 of the Constitution.

Standard A5.2.1 – Inspections in port

1. Where an authorized officer, having come on board to carry out an inspection and requested, where applicable, the maritime labour certificate and the declaration of maritime labour compliance, finds that:

(a) the required documents are not produced or maintained or are falsely maintained or that the documents produced do not contain the information required by this Convention or are otherwise invalid; or

(b) there are clear grounds for believing that the working and living conditions on the ship do not conform to the requirements of this Convention; or

(c) there are reasonable grounds to believe that the ship has changed flag for the purpose of avoiding compliance with this Convention; or

(d) there is a complaint alleging that specific working and living conditions on the ship do not conform to the requirements of this Convention;

a more detailed inspection may be carried out to ascertain the working and living conditions on board the ship. Such inspection shall in any case be carried out where the working and living conditions believed or alleged to be defective could constitute a clear hazard to the safety, health or security of seafarers or where the authorized officer has grounds to believe that any deficiencies constitute a serious breach of the requirements of this Convention (including seafarers' rights).

2. Where a more detailed inspection is carried out on a foreign ship in the port of a Member by authorized officers in the circumstances set out in subparagraph (a), (b) or (c) of paragraph 1 of this Standard, it shall in principle cover the matters listed in Appendix A5-III.

3. In the case of a complaint under paragraph 1(d) of this Standard, the inspection shall generally be limited to matters within the scope of the complaint, although a complaint, or its investigation, may provide clear grounds for a detailed inspection in accordance with paragraph 1(b) of this Standard. For the purpose of paragraph 1(d) of this Standard, 'complaint' means information submitted by a seafarer, a professional body, an association, a trade union or, generally, any person with an interest in the safety of the ship, including an interest in safety or health hazards to seafarers on board.

4. Where, following a more detailed inspection, the working and living conditions on the ship are found not to conform to the requirements of this Convention, the authorized officer shall forthwith bring the deficiencies to the attention of the master of the ship, with required deadlines for their rectification. In the event that such deficiencies are considered by the authorized officer to be significant, or if they relate to a complaint made in accordance with paragraph 3 of this Standard, the authorized officer shall bring the deficiencies to the attention of the appropriate seafarers' and shipowners' organizations in the Member in which the inspection is carried out, and may:

(a) notify a representative of the flag State;

(b) provide the competent authorities of the next port of call with the relevant information.

5. The Member in which the inspection is carried out shall have the right to transmit a copy of the officer's report, which must be accompanied by any reply received from the competent authorities of the flag State within the prescribed deadline, to the Director-General of the International Labour Office with a view to such action as may be considered appropriate and expedient in order to ensure that a record is kept of such information and that it is brought to the attention of parties which might be interested in availing themselves of relevant recourse procedures.

6. Where, following a more detailed inspection by an authorized officer, the ship is found not to conform to the requirements of this Convention and:

(a) the conditions on board are clearly hazardous to the safety, health or security of seafarers; or

(b) the non-conformity constitutes a serious or repeated breach of the requirements of this Convention (including seafarers' rights);

the authorized officer shall take steps to ensure that the ship shall not proceed to sea until any non-conformities that fall within the scope of subparagraph (a) or (b) of this paragraph have been rectified, or until the authorized officer has accepted a plan of action to rectify such non-conformities and is satisfied that the plan will be implemented in an expeditious manner. If the ship is prevented from sailing, the authorized officer shall forthwith notify the flag State accordingly and invite a representative of the flag State to be present, if possible, requesting the flag State to reply within a prescribed deadline. The authorized officer shall also inform forthwith the appropriate shipowners' and seafarers' organizations in the port State in which the inspection was carried out.

7. Each Member shall ensure that its authorized officers are given guidance, of the kind indicated in Part B of the Code, as to the kinds of circumstances justifying detention of a ship under paragraph 6 of this Standard.

8. When implementing their responsibilities under this Standard, each Member shall make all possible efforts to avoid a ship being unduly detained or delayed. If a ship is found to be unduly detained or delayed, compensation shall be paid for any loss or damage suffered. The burden of proof in each case shall be on the complainant.

Guideline B5.2.1 – Inspections in port

1. The competent authority should develop an inspection policy for authorized officers carrying out inspections under Regulation 5.2.1. The objective of the policy should be to ensure consistency and to otherwise guide inspection and enforcement activities related to the requirements of this Convention (including seafarers' rights). Copies of this policy should be provided to all authorized officers and should be available to the public and shipowners and seafarers.

2. When developing a policy relating to the circumstances warranting a detention of the ship under Standard A5.2.1, paragraph 6, of the competent authority should consider that, with respect to the breaches referred to in Standard A5.2.1, paragraph 6(b), the seriousness could be due to the nature of the deficiency concerned. This would be particularly relevant in the case of the violation of fundamental rights and principles or seafarers' employment and social rights under Articles III and IV. For example, the employment of a person who is under age should be considered as a serious breach even if there is only one such person on board. In other cases, the number of different defects found during a particular inspection should be taken into account: for example, several instances of defects relating to accommodation or food and catering which do not threaten safety or health might be needed before they should be considered as constituting a serious breach.

3. Members should cooperate with each other to the maximum extent possible in the adoption of internationally agreed guidelines on inspection policies, especially those relating to the circumstances warranting the detention of a ship.

Regulation 5.2.2 – Onshore seafarer complaint-handling procedures

1. Each Member shall ensure that seafarers on ships calling at a port in the Member's territory who allege a breach of the requirements of this Convention (including seafarers' rights) have the right to report such a complaint in order to facilitate a prompt and practical means of redress.

Standard A5.2.2 – Onshore seafarer complaint-handling procedures

1. A complaint by a seafarer alleging a breach of the requirements of this Convention (including seafarers' rights) may be reported to an authorized officer in the port at which the seafarer's ship has called. In such cases, the authorized officer shall undertake an initial investigation.

2. Where appropriate, given the nature of the complaint, the initial investigation shall include consideration of whether the on-board complaint procedures provided under Regulation 5.1.5 have been explored. The authorized officer may also conduct a more detailed inspection in accordance with Standard A5.2.1.

3. The authorized officer shall, where appropriate, seek to promote a resolution of the complaint at the ship-board level.

4. In the event that the investigation or the inspection provided under this Standard reveals a non-conformity that falls within the scope of paragraph 6 of Standard A5.2.1, the provisions of that paragraph shall be applied.

5. Where the provisions of paragraph 4 of this Standard do not apply, and the complaint has not been resolved at the ship-board level, the authorized officer shall forthwith notify the flag State, seeking, within a prescribed deadline, advice and a corrective plan of action.

6. Where the complaint has not been resolved following action taken in accordance with paragraph 5 of this Standard, the port State shall transmit a copy of the authorized officer's report to the Director-General. The report must be accompanied by any reply received within the prescribed deadline from the competent authority of the flag State. The appropriate shipowners' and seafarers' organizations in the port State shall be similarly informed. In addition, statistics and information regarding complaints that have been resolved shall be regularly submitted by the port State to the Director-General. Both such submissions are provided in order that, on the basis of such action as may be considered appropriate and expedient, a record is kept of such information and is brought to the attention of parties, including shipowners' and seafarers' organizations, which might be interested in availing themselves of relevant recourse procedures.

7. Appropriate steps shall be taken to safeguard the confidentiality of complaints made by seafarers.

Guideline B5.2.2 – Onshore seafarer complaint-handling procedures

1. Where a complaint referred to in Standard A5.2.2 is dealt with by an authorized officer, the officer should first check whether the complaint is of a general nature which concerns all seafarers on the ship, or a category of them, or whether it relates only to the individual case of the seafarer concerned.

2. If the complaint is of a general nature, consideration should be given to undertaking a more detailed inspection in accordance with Standard A5.2.1.

3. If the complaint relates to an individual case, an examination of the results of any on-board complaint procedures for the resolution of the complaint concerned should be undertaken. If such procedures have not been explored, the authorized officer should suggest that the complainant take advantage of any such procedures available. There should be good reasons for considering a complaint before any on-board

complaint procedures have been explored. These would include the inadequacy of, or undue delay in, the internal procedures or the complainant's fear of reprisal for lodging a complaint.

4. In any investigation of a complaint, the authorized officer should give the master, the shipowner and any other person involved in the complaint a proper opportunity to make known their views.

5. In the event that the flag State demonstrates, in response to the notification by the port State in accordance with paragraph 5 of Standard A5.2.2, that it will handle the matter, and that it has in place effective procedures for this purpose and has submitted an acceptable plan of action, the authorized officer may refrain from any further involvement with the complaint.

Regulation 5.3 – Labour-supplying responsibilities

Purpose: To ensure that each Member implements its responsibilities under this Convention as pertaining to seafarer recruitment and placement and the social protection of its seafarers

1. Without prejudice to the principle of each Member's responsibility for the working and living conditions of seafarers on ships that fly its flag, the Member also has a responsibility to ensure the implementation of the requirements of this Convention regarding the recruitment and placement of seafarers as well as the social security protection of seafarers that are its nationals or are resident or are otherwise domiciled in its territory, to the extent that such responsibility is provided for in this Convention.

2. Detailed requirements for the implementation of paragraph 1 of this Regulation are found in the Code.

3. Each Member shall establish an effective inspection and monitoring system for enforcing its labour-supplying responsibilities under this Convention.

4. Information about the system referred to in paragraph 3 of this Regulation, including the method used for assessing its effectiveness, shall be included in the Member's reports pursuant to Article 22 of the Constitution.

Standard A5.3 – Labour-supplying responsibilities

1. Each Member shall enforce the requirements of this Convention applicable to the operation and practice of seafarer recruitment and placement services established on its territory through a system of inspection and monitoring and legal proceedings for breaches of licensing and other operational requirements provided for in Standard A1.4.

Guideline B5.3 – Labour-supplying responsibilities

1. Private seafarer recruitment and placement services established in the Member's territory and securing the services of a seafarer for a shipowner, wherever located, should be required to assume obligations to ensure the proper fulfilment by shipowners of the terms of their employment agreements concluded with seafarers.

APPENDIX A5-I

The working and living conditions of seafarers that must be inspected and approved by the flag State before certifying a ship in accordance with Standard A5.1.3, paragraph 1:

Minimum age

Medical certification

Qualifications of seafarers

Seafarers' employment agreements

Use of any licensed or certified or regulated private recruitment and placement service

Hours of work or rest

Manning levels for the ship

Accommodation

On-board recreational facilities

Food and catering

Health and safety and accident prevention On-

board medical care

On-board complaint procedures

Payment of wages

APPENDIX A5-II

Maritime Labour Certificate

(Note: This Certificate shall have a Declaration of Maritime Labour Compliance attached)

Issued under the provisions of Article V and Title 5 of the Maritime Labour Convention, 2006 (referred to below as 'the Convention') under the authority of the Government of:

.....

(full designation of the State whose flag the ship is entitled to fly)

by .....

(full designation and address of the competent authority or recognized organization duly authorized under the provisions of the Convention)

Particulars of the ship

Name of ship .....

Distinctive number or letters .....

Port of registry .....

Date of registry .....

Gross tonnage [1] .....

IMO number .....

Type of ship .....

Name and address of the shipowner [2] .....

.....

.....

[1] For ships covered by the tonnage measurement interim scheme adopted by the IMO, the gross tonnage is that which is included in the REMARKS column of the International Tonnage Certificate (1969). See Article II(1)(c) of the Convention.

[2] *Shipowner* means the owner of the ship or another organization or person, such as the manager, agent or bareboat charterer, 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 this Convention, regardless of whether any other organizations or persons fulfil certain of the duties or responsibilities on behalf of the shipowner. See Article II(1)(j) of the Convention.

This is to certify:

1. That this ship has been inspected and verified to be in compliance with the requirements of the Convention, and the provisions of the attached Declaration of Maritime Labour Compliance.

2. That the seafarers' working and living conditions specified in Appendix A5-I of the Convention were found to correspond to the abovementioned country's national requirements implementing the Convention. These national requirements are summarized in the Declaration of Maritime Labour Compliance, Part I.

This Certificate is valid until ..... subject to inspections in accordance with Standards A5.1.3 and A5.1.4 of the Convention.

This Certificate is valid only when the Declaration of Maritime Labour Compliance issued

at ..... on ..... is attached.

Completion date of the inspection on which this Certificate is based was .....

Issued at ..... on .....

Signature of the duly authorized official issuing the Certificate

(Seal or stamp of issuing authority, as appropriate)

Endorsements for mandatory intermediate inspection and, if required, any additional inspection

This is to certify that the ship was inspected in accordance with Standards A5.1.3 and A5.1.4 of the Convention and that the seafarers' working and living conditions specified in Appendix A5-I of the Convention were found to correspond to the abovementioned country's national requirements implementing the Convention.

Intermediate inspection:
(to be completed between the second and third anniversary dates)

Signed .....
(Signature of authorized official)

Place .....

Date .....
(Seal or stamp of the authority, as appropriate)

Additional endorsements (if required)

This is to certify that the ship was the subject of an additional inspection for the purpose of verifying that the ship continued to be in compliance with the national requirements implementing the Convention, as required by Standard A3.1, paragraph 3, of the Convention (re-registration or substantial alteration of accommodation) or for other reasons.

Additional inspection:
(if required)

Signed .....
(Signature of authorized official)

Place .....

Date .....
(Seal or stamp of the authority,
as appropriate)

Additional inspection:
(if required)

Signed .....
(Signature of authorized official)

Place .....

Date .....
(Seal or stamp of the authority,
as appropriate)

Additional inspection:
(if required)

Signed .....
(Signature of authorized official)

Place .....

Date .....
(Seal or stamp of the authority,
as appropriate)

Maritime Labour Convention, 2006

Declaration of Maritime Labour Compliance – Part I

(Note: This Declaration must be attached to the ship's Maritime Labour Certificate)

Issued under the authority of: ..... *(insert name of competent authority as defined in Article II, paragraph 1(a), of the Convention)*

With respect to the provisions of the Maritime Labour Convention, 2006, the following referenced ship:

Name of ship	IMO number	Gross tonnage

is maintained in accordance with Standard A5.1.3 of the Convention.

The undersigned declares, on behalf of the abovementioned competent authority, that:

(a) the provisions of the Maritime Labour Convention are fully embodied in the national requirements referred to below;

(b) these national requirements are contained in the national provisions referenced below; explanations concerning the content of those provisions are provided where necessary;

(c) the details of any substantial equivalencies under Article VI, paragraphs 3 and 4, are provided <under the corresponding national requirement listed below> <in the section provided for this purpose below> *(strike out the statement which is not applicable)*;

(d) any exemptions granted by the competent authority in accordance with Title 3 are clearly indicated in the section provided for this purpose below; and

(e) any ship-type specific requirements under national legislation are also referenced under the requirements concerned.

1. Minimum age (Regulation 1.1)
2. Medical certification (Regulation 1.2) .....
3. Qualifications of seafarers (Regulation 1.3) .....
4. Seafarers' employment agreements (Regulation 2.1) .....
5. Use of any licensed or certified or regulated private recruitment and placement service (Regulation 1.4) .....
6. Hours of work or rest (Regulation 2.3) .....
7. Manning levels for the ship (Regulation 2.7) .....
8. Accommodation (Regulation 3.1) .....
9. On-board recreational facilities (Regulation 3.1) .....
10. Food and catering (Regulation 3.2) .....
11. Health and safety and accident prevention (Regulation 4.3) .....

12. On-board medical care (Regulation 4.1) .....
13. On-board complaint procedures (Regulation 5.1.5) .....
14. Payment of wages (Regulation 2.2) .....

Name: .....

Title: .....

Signature: .....

Place: .....

Date: .....

(Seal or stamp of the authority,
as appropriate)

Substantial equivalencies

(Note: Strike out the statement which is not applicable)

The following substantial equivalencies, as provided under Article VI, paragraphs 3 and 4, of the Convention, except where stated above, are noted *(insert description if applicable)*:

.....

.....

No equivalency has been granted.

Name: .....

Title: .....

Signature: .....

Place: .....

Date: .....

(Seal or stamp of the authority,
as appropriate)

Exemptions

(Note: Strike out the statement which is not applicable)

The following exemptions granted by the competent authority as provided in Title 3 of the Convention are noted:

.....

.....

No exemption has been granted.

Name: .....

Title: .....

Signature: .....

Place: .....

Date: .....

(Seal or stamp of the authority,
as appropriate)

Declaration of Maritime Labour Compliance – Part II

Measures adopted to ensure ongoing compliance between inspections

The following measures have been drawn up by the shipowner, named in the Maritime Labour Certificate to which this Declaration is attached, to ensure ongoing compliance between inspections:

(State below the measures drawn up to ensure compliance with each of the items in Part I)

1. Minimum age (Regulation 1.1) ❑
   .....
2. Medical certification (Regulation 1.2) ❑
   .....
3. Qualifications of seafarers (Regulation 1.3) ❑
   .....
4. Seafarers' employment agreements (Regulation 2.1) ❑
   .....
5. Use of any licensed or certified or regulated private recruitment and placement service (Regulation 1.4) ❑
   .....
6. Hours of work or rest (Regulation 2.3) ❑
   .....
7. Manning levels for the ship (Regulation 2.7) ❑
   .....
8. Accommodation (Regulation 3.1) ❑
   .....
9. On-board recreational facilities (Regulation 3.1) ❑
   .....
10. Food and catering (Regulation 3.2) ❑
    .....
11. Health and safety and accident prevention (Regulation 4.3) ❑
    .....
12. On-board medical care (Regulation 4.1) ❑
    .....
13. On-board complaint procedures (Regulation 5.1.5) ❑
    .....
14. Payment of wages (Regulation 2.2) ❑
    .....

I hereby certify that the above measures have been drawn up to ensure ongoing compliance, between inspections, with the requirements listed in Part I.

Name of shipowner:[1] .....

.....

Company address: .....

.....

Name of the authorized signatory: .....

.....

Title: .....

Signature of the authorized signatory:

.....

Date: .....

(Stamp or seal of the shipowner[1])

The above measures have been reviewed by *(insert name of competent authority or duly recognized organization)* and, following inspection of the ship, have been determined as meeting the purposes set out under Standard A5.1.3, paragraph 10(b), regarding measures to ensure initial and ongoing compliance with the requirements set out in Part I of this Declaration.

Name: .....

Title: .....

Address: .....

.....

.....

Signature: .....

Place: .....

Date: .....

(Seal or stamp of the authority,
as appropriate)

[1] *Shipowner* means the owner of the ship or another organization or person, such as the manager, agent or bareboat charterer, 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 this Convention, regardless of whether any other organizations or persons fulfil certain of the duties or responsibilities on behalf of the shipowner. See Article II(1)(j) of the Convention.

Interim Maritime Labour Certificate

Issued under the provisions of Article V and Title 5 of the
Maritime Labour Convention, 2006
(referred to below as 'the Convention')
under the authority of the Government of:

.....

(full designation of the State whose flag the ship is entitled to fly)

by .....

(full designation and address of the competent authority or recognized organization duly authorized under the provisions of the Convention)

Particulars of the ship

Name of ship .....

Distinctive number or letters .....

Port of registry .....

Date of registry .....

Gross tonnage [1] .....

IMO number .....

Type of ship .....

Name and address of the shipowner [2] .....

.....

This is to certify, for the purposes of Standard A5.1.3, paragraph 7, of the Convention, that:

(a) this ship has been inspected, as far as reasonable and practicable, for the matters listed in Appendix A5-I to the Convention, taking into account verification of items under (b), (c) and (d) below;

(b) the shipowner has demonstrated to the competent authority or recognized organization that the ship has adequate procedures to comply with the Convention;

(c) the master is familiar with the requirements of the Convention and the responsibilities for implementation; and

(d) relevant information has been submitted to the competent authority or recognized organization to produce a Declaration of Maritime Labour Compliance.

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[1] For ships covered by the tonnage measurement interim scheme adopted by the IMO, the gross tonnage is that which is included in the REMARKS column of the International Tonnage Certificate (1969). See Article II(1)(c) of the Convention.

[2] *Shipowner* means the owner of the ship or another organization or person, such as the manager, agent or bareboat charterer, 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 this Convention, regardless of whether any other organizations or persons fulfil certain of the duties or responsibilities on behalf of the shipowner. See Article II(1)(j) of the Convention.

This Certificate is valid until ..... subject to inspections in accordance with Standards A5.1.3 and A5.1.4.

Completion date of the inspection referred to under (a) above was .....

Issued at ..... on .....

Signature of the duly authorized official
issuing the interim certificate .....

(Seal or stamp of issuing authority, as appropriate)

APPENDIX A5-III

General areas that are subject to a detailed inspection by an authorized officer in a port of a Member carrying out a port State inspection pursuant to Standard A5.2.1:

Minimum age

Medical certification

Qualifications of seafarers

Seafarers' employment agreements

Use of any licensed or certified or regulated private recruitment and placement service

Hours of work or rest

Manning levels for the ship

Accommodation

On-board recreational facilities

Food and catering

Health and safety and accident prevention On-

board medical care

On-board complaint procedures

Payment of wages

APPENDIX B5-I – EXAMPLE OF A NATIONAL DECLARATION

See Guideline B5.1.3, paragraph 5

Maritime Labour Convention, 2006
Declaration of Maritime Labour Compliance – Part I

(Note: This Declaration must be attached to the ship's Maritime Labour Certificate)

Issued under the authority of: **The Ministry of Maritime Transport of Xxxxxx**

With respect to the provisions of the Maritime Labour Convention, 2006, the following referenced ship:

Name of ship	IMO number	Gross tonnage
M.S. EXAMPLE	12345	1,000

is maintained in accordance with Standard A5.1.3 of the Convention.

The undersigned declares, on behalf of the abovementioned competent authority, that:

(a) the provisions of the Maritime Labour Convention are fully embodied in the national requirements referred to below;

(b) these national requirements are contained in the national provisions referenced below; explanations concerning the content of those provisions are provided where necessary;

(c) the details of any substantial equivalencies under Article VI, paragraphs 3 and 4, are provided <under the corresponding national requirement listed below> <in the section provided for this purpose below> *(strike out the statement which is not applicable)*;

(d) any exemptions granted by the competent authority in accordance with Title 3 are clearly indicated in the section provided for this purpose below; and

(e) any ship-type specific requirements under national legislation are also referenced under the requirements concerned.

1. Minimum age (Regulation 1.1)

Shipping Law, No. 123 of 1905, as amended ('Law'), Chapter X; Shipping Regulations ('Regulations'), 2006, Rules 1111-1222.

Minimum ages are those referred to in the Convention.

'Night' means 9 p.m. to 6 a.m. unless the Ministry of Maritime Transport ('Ministry') approves a different period.

Examples of hazardous work restricted to 18-year-olds or over are listed in Schedule A hereto. In the case of cargo ships, no one under 18 may work in the areas marked on the ship's plan (to be attached to this Declaration) as 'hazardous area'.

2. Medical certification (Regulation 1.2)

Law, Chapter XI; Regulations, Rules 1223-1233.

Medical certificates shall conform to the STCW requirements, where applicable; in other cases, the STCW requirements are applied with any necessary adjustments.

Qualified opticians on list approved by Ministry may issue certificates concerning eyesight.

Medical examinations follow the ILO/WHO Guidelines referred to in Guideline B1.2.1

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Declaration of Maritime Labour Compliance – Part II

Measures adopted to ensure ongoing compliance between inspections

The following measures have been drawn up by the shipowner, named in the Maritime Labour Certificate to which this Declaration is attached, to ensure ongoing compliance between inspections:

(State below the measures drawn up to ensure compliance with each of the items in Part I)

1. Minimum age (Regulation 1.1) [X]

   Date of birth of each seafarer is noted against his/her name on the crew list.

   The list is checked at the beginning of each voyage by the master or officer acting on his or her behalf ('competent officer'), who records the date of such verification.

   Each seafarer under 18 receives, at the time of engagement, a note prohibiting him/her from performing night work or the work specifically listed as hazardous (see Part I, section 1, above) and any other hazardous work, and requiring him/her to consult the competent officer in case of doubt. A copy of the note, with the seafarer's signature under 'received and read', and the date of signature, is kept by the competent officer.

2. Medical certification (Regulation 1.2) [X]

   The medical certificates are kept in strict confidence by the competent officer, together with a list, prepared under the competent officer's responsibility and stating for each seafarer on board: the functions of the seafarer, the date of the current medical certificate(s) and the health status noted on the certificate concerned.

   In any case of possible doubt as to whether the seafarer is medically fit for a particular function or functions, the competent officer consults the seafarer's doctor or another qualified practitioner and records a summary of the practitioner's conclusions, as well as the practitioner's name and telephone number and the date of the consultation.

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