Countdown to 20 August 2013
The Maritime Labour Convention 2006
Part 2 – Problem Areas

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In our previous **article** we set out some of the key issues relating to the Convention to alert the industry to the significant regime change which takes place next month. We also identified a number of problem areas which this article seeks to consider in more detail.

Problem 1: definitions of shipowner and seafarer

The Maritime Labour Convention (MLC) has deliberately sought to simplify and clarify the definitions of and the relationships between shipowner and seafarer. Given the opaque arrangements around the supply and employment of crew and the at times labyrinthine ownership structures which are put in place, sometimes to deliberately conceal the true beneficial ownership arrangements of the vessel, this is perhaps unsurprising.

It is important to remember that the Convention's aim is to create a level playing field and to attempt to eradicate sub-standard shipping. However, for responsible owners who are operating within the spirit of the MLC, these definitions do provide challenges which could prevent compliance within the letter of the Convention.

Definition of shipowner

The MLC defines shipowner as "The owner of the ship or another organisation 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 organisation or persons fulfil certain of the duties or responsibilities on behalf of the shipowner".

The principle, therefore, is that the employer of the seafarer must be either the actual owner of the vessel or an organisation who has the responsibility for the operation of the ship. The difficulty this poses for many operational structures within the industry is that it does not reflect current practice. Owners operate through managers, both technical and crew managers, and those crew managers source crews through manning agents in the various crew supply countries. Often there is an incomplete contractual chain in relation to these various relationships, especially around the sourcing and provision of crew. Crew managers are not happy to be stated to be the employer of a seafarer and therefore be deemed to be responsible for the operation of the ship. Technical managers feel likewise.

The certification requirements under the Convention require that the Maritime Labour Certificate and Part II of the Declaration of Maritime Labour Compliance (DMLC) must state the name of the shipowner. Where the shipowner has the crew sourced and managed through a crew manager, who would normally expect the employment relationship with the seafarer to be between the crew manager and the seafarer, it has been suggested by some that in those circumstances there should be dual signatures on the DMLC. But that would go against the principle under the Convention that there should be one employer and that employer should be the shipowner, or someone with responsibility for the operation of the vessel.

It will be for the flag states, in introducing the MLC into their domestic legislation, to determine how these relationships are to be dealt with. It has been feared that the current employing arrangements in the industry will be turned on their head. However, we think this is unlikely to require a wholesale change in the arrangements currently in place. Key flag states such as Cyprus, Panama and Liberia, are accepting that crew managers can be the employers of the crew, provided that the ultimate liability is with the shipowner. Those flags are generally allowing managers to be named on Part II DMLC provided they carry a Power of Attorney from the actual owner. Also, the definition cited above does envisage that another organisation or person's can fulfil certain of the duties or responsibilities of the shipowner under the Convention.

There is, therefore, acceptance that a crew manager can be responsible for the crew, but what will be needed are clear contractual terms between the crew manager and the owner to set out the duties and responsibilities upon each

party to ensure compliance with the MLC obligations. The contractual statement of responsibility can be supported by appropriate indemnities to ensure that it is clear where ultimate responsibility lies for any consequences of a breach of the Convention.

As we will discuss in our next article, much of the enforcement under the Convention will revolve around the Port State Control inspection process. We expect that the biggest impact of enforcement of the MLC will be delays caused to vessels through detailed inspections by Port State Control or, worse still, detentions. It will be essential to ensure that there are proper contractual provisions and indemnities in place so that the liability for delay is clearly spelt out.

Seafarer

The definition of seafarer in the Convention is remarkably simple: "any person who is employed or engaged or works in any capacity on board a ship to which this Convention applies". There is therefore vast potential for the people who are carried on board a vessel to come within the definition of seafarer under the Convention when the owner or operator who does not class them as seafarers for any other purpose. Flag states, wishing to appease the concerns of shipowners, have been attempting to restrict this broad definition when implementing the Convention into national law. For instance, Liberia has stated that they will exclude cadets and riding crews from the definition of seafarer. Panama has refined the definition, by limiting MLC coverage to those who work "as part of the routine business" of the ship.

Therefore they are intending to exclude pilots, superintendents, supernumeraries, offshore technicians, scientists, specialist and other repair technicians, surveyors, port workers and inspectors. Cyprus is taking a similar attitude and in addition also includes within their list guest entertainers on board cruise ships. However there are some qualifications to these exclusions, which will depend on the duration of stay on board, the frequency and periods of work spent on board, the location of the person's principal place of work, the purpose of that person's work on board and whether they have similar protection to that provided under the Convention. The Unions, predictably, take a more literal reading of the definition of seafarer and are emphatic that this will include riding crews and workers on cruise ships, whether they be entertainers or hairdressers. Essentially, if they are doing a ship board task, then they are seafarers in the eyes of the Unions and in particular the ITF. Their definition would also include armed security guards travelling on vessels crossing the Gulf of Aden.

The debate over who is and who is not a seafarer will rage for some time, no doubt resulting in accusations that some flag states have not properly implemented the Convention and counter accusations that the Unions are taking a totally uncommercial view. How does that leave responsible managers who are trying to comply with their MLC requirements?

A fresh assessment of who counts as crew, and who does not, needs to take place. Undoubtedly there will be some categories of personnel carried on board who previously were not considered to be crew who will now satisfy the definition of seafarer. There will of course be some grey areas. Riding crews are a particular issue and an assessment of frequency and duration of time at sea on particular vessels needs to be made.

Concessionaires and entertainers on cruise ships have already been identified as a source of dispute. Where it is decided that certain personnel carried on board will not be treated as seafarers under the employment of the shipowner (as defined) then it will be incumbent on the manager or owner to ensure that those who do employ such personnel are compliant with the MLC and have made a contractual declaration to that effect, with appropriate indemnities.

Problem 2: non-ratifying States

A simplistic view, taken by some, that if any State does not ratify the Convention then it is not subject to the MLC, and those coming under its jurisdiction (whether by flag or operating within its jurisdiction) do not need to be MLC compliant.

As identified in the first article, the whole purpose of the MLC is to create a level playing field so that non-ratifying States cannot be at an advantage over those who do ratify. The principle of "no more favourable treatment" should apply more harshly on non-ratifying States due to the certification requirements under the Convention. Some non-ratifying States consider that they can avoid the impact of Port State Control inspection and the requirements around certification by issuing their own quasi certificates or "statements of compliance". The US has not taken steps to, and many believe will not, ratify the Convention. The US Coast Guard has authorised some classification societies to inspect and issue Statements of Voluntary Compliance on its behalf to US flagged vessels. These Certificates can then be posted on board, ready for a Port State Control inspection. However, the ILO have made it clear that they will not recognise such statements or quasi certification and they will only instruct Port State Control inspectors to validate certification produced from ratifying States. We wait to see what attitude Port State Control take in different regions, but there is undoubtedly a risk that there will be more detailed inspections and therefore delays, for ships flagged by non-ratifying States.

On the crew supply side, some States have made categorical statements that they will not ratify the Convention. One such State is the Ukraine as it is not prepared to endorse the principle of recruitment and placement agencies charging no fees to seafarers for recruitment or placement. This presents a headache to flag states who are required, 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 to which the MLC does not apply, to ensure that those services conform with requirements set out in the Convention. It remains to be seen whether the Ukraine will be able to maintain its position as a crew supply country, without ratifying the Convention.

Problem 3: financial support and security

Our previous article outlined the requirement under the Convention to provide material support, together with evidence of financial security to meet shipowner obligations.

These are in relation to:

i) Sickness, injury or death;

ii) Repatriation of seafarers; and

iii) Recruitment and placement agents, as a result of a failure of either a manning agent or a relevant shipowner to meet its obligations to the seafarer.

There has been some debate in the shipping press as to whether existing insurance arrangements, in particular P&I cover, is sufficient to satisfy the financial security obligations under the MLC. Clearly, owners and operators would prefer that their obligations are covered under existing policies and indemnities. Others have suggested that current P&I cover is inadequate to satisfy all of the above obligations. Additional insurance products are appearing on the market to compliment existing policies. Views have been expressed that the financial security provisions should be available directly to the seafarer, akin to the types of benefits which shore workers receive, such as private medical cover, etc. Club cover does not operate in this way and indeed there are hurdles to individuals recovering directly from Clubs, caused by the "pay to be paid" principle, although an exception has been made where a member has failed to pay damages or compensation for crew injury, illness or death, or repatriation.

Looking at each of these three areas in turn:

(i) Sickness, injury and death

These are of course the traditional areas of P&I cover. However, Club cover has various exclusions which arise from war, terrorism, insolvency, biochemical attack, radioactive contamination, etc. where Club cover is either limited or unavailable. These exclusions are not permitted under the MLC. The only three exclusions under the MLC in relation to injury, sickness or death are as follows:

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.

This gap in coverage of seafarers' claims could amount to a failure to implement the provisions of the MLC. However, some flag states, notably Cyprus, have already accepted that a Club Certificate of Entry would be sufficient evidence of all the financial security provisions required under the MLC.

(ii) Repatriation of seafarers

The MLC only provides limited protection for seafarers in the event of abandonment. In its current form, the Convention only requires that seafarers have a right to be repatriated at no cost to themselves and that the flag states shall require ships to provide financial security to ensure that seafarers are duly repatriated. There are some provisions for maintenance pending repatriation, but the key missing element is the obligation to pay outstanding wages in circumstances where a shipowner has either failed to pay or become insolvent. This issue has been hotly contested within the tripartite discussions around the MLC and has been the subject of a joint IMO/ILO ad hoc expert working group since 2009. It is clear that one of the first amendments sought to the MLC will be a more expansive protection for seafarers in the event of abandonment. The first opportunity for this amendment to be tabled will be in the spring of 2014, where it is envisaged that there will be protection given, with a financial security obligation attached, for non-payment of wages, in these circumstances.

The owners' response to the financial security obligations in relation to repatriation as currently contained within the Convention has been to put pressure on the P&I Clubs to confirm that the repatriation obligation will be covered, even if a shipowner member becomes insolvent. The International Group of P&I Clubs issued a circular to its members in May 2013 confirming that Club cover would be extended to include repatriation in cases of insolvency. This is a departure from the standard P&I position that, being mutuals, they will not indemnify in respect of the insolvency of a member. It remains to be seen whether P&I cover will be so freely extended when the MLC is amended to include unpaid wages.

(iii) Recruitment and placement

Whilst there are limited financial security requirements in the event of abandonment under the current MLC wording, there are extensive obligations placed on recruitment and placement agencies in the event that shipowners fail to meet their obligations to seafarers. A ratifying State must ensure, in respect of recruitment and placement services operating in its territory, that a "system of protection by way of insurance or an equivalent appropriate measure, is established to compensate seafarers for monetary loss that they may incur as a result of the failure of recruitment and placement service or the relevant shipowner." Therefore, in the situation of abandonment, it could be the manning agent who is liable under the MLC to provide financial security for the failure of the shipowner. It is not envisaged that P&I cover will be available to recruitment and placement agencies and therefore specific insurance, if obtainable, will be required.

Problem 4: recruitment and placement

Over and above the financial security issues which have been highlighted above, the MLC puts a heavy burden on flag states in particular to ensure that not only are recruitment and placement services in their own jurisdiction properly regulated, but also that they ensure that the services of recruitment and placement organisations outside its own territory and/or in territories where the Convention does not apply must conform to the requirements in the MLC.

As referred to above, some crew supply countries are taking the view that they will not ratify the MLC and yet flag states who do ratify will somehow have to regulate recruitment and placement services in jurisdictions such as the Ukraine. Creating a system whereby seafarers have access to an efficient, adequate and accountable system for finding employment on board ship without charge to the seafarer is a considerable challenge to the industry.

Many States, including the UK, have yet to either ratify or finalise domestic legislation introducing the MLC into national law. Until those national laws are enacted, considerable uncertainty remains over how recruitment and placement services are to be regulated for those charged with sourcing and operating compliant crews from 20 August.

Conclusion

The MLC represents a major shift in manning arrangements in the marine sector. Responsible owners and managers will not be surprised at the content of most of the Convention and generally will be operating within the spirit of the Convention. As always, the devil is in the detail, not just within the MLC itself, but in the way different States introduce it into national law. The problems identified above and their interpretation by different ratifying States will, in time, resolve themselves. The next issue is how will the enforcement of the Convention, notably Port State Control, deal with these issues and non-compliance by vessels that their inspectors visit. This will be the subject of our next article.

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Paul joined Clyde & Co in 1982 and has been a partner since 1988. He has specialised in employment work since 1982.
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In the marine and energy sectors, aside from crewing and manning issues, Paul has dealt with major incidents in relation to health and safety, personal injury and loss of life. Paul has considerable experience in international employment law issues, especially in the US, Middle East, India and Europe. Paul recently spoke at the International Maritime Employers' Council (IMEC) conference on the subject of the MLC. Paul provides in-house employment training to several multinational companies. Paul is chairman of LawWorks, the operating name for the Solicitors Pro Bono Group, for which he received a CBE in the 2008 Queen's Birthday honours. He was selected by the Lawyer Magazine as one of the "Hot 100" lawyers for 2009.

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Heidi joined Clyde & Co in September 2001. Heidi was promoted to Legal Director in 2012, and then to Partner in 2013. Her practice encompasses all aspects of contentious and non-contentious employment law, including Tribunal and High Court proceedings, drafting contractual documents, advising HR and legal professionals on employee relations issues, handling team moves and restrictive covenants as well as developing an expertise in handling employment issues arising from outsourcing contracts. Heidi's experience spans a number of sectors including insurance, transportation and energy, focusing on the marine sector as the Maritime Labour Convention comes into force. Heidi recently spoke at the Intertanko/Intercargo seminar series where she presented a talk entitled "Getting to grips with the MLC".

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Trudy is a Legal Director in the Marine and International Trade department based in London. She joined Clyde & Co in 2002 from another London law firm. She specialises in shipping, trading and commercial litigation in both court and arbitration proceedings. Trudy acts for a wide range of shipowners, charterers, P&I clubs, offshore clients and traders in relation to contractual, commercial, shipping and trading matters. Her experience includes handling disputes relating to all types of maritime claims as well as the sale of goods and commodities and she regularly advises offshore support vessel owners on contractual issues. She has run numerous arbitrations, in particular LMAA and LCIA arbitrations, and has experience of mediations. Trudy recently also spoke at the Intertanko/Intercargo seminar where she focused on charterparty issues arising from the MLC. She also founded the Clyde & Co networking group "Women in Maritime Trade".

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Peter is a senior associate in Clyde & Co's Employment Team. Peter specialises in employment law and has acted for a broad range of clients in a number of different industry sectors, including the marine sector. He advises on all types of contentious and non-contentious matters relating to UK employment law.

In relation to the marine sector, he has advised regularly on crew contractual and relations issues, dealt with difficult terminations and cross-border disputes. He has spoken at several international industry seminars on the implementation of the Maritime Labour Convention (MLC) and has advised numerous clients in respect of crew and management contracts as well as providing advice on compliance with the MLC.

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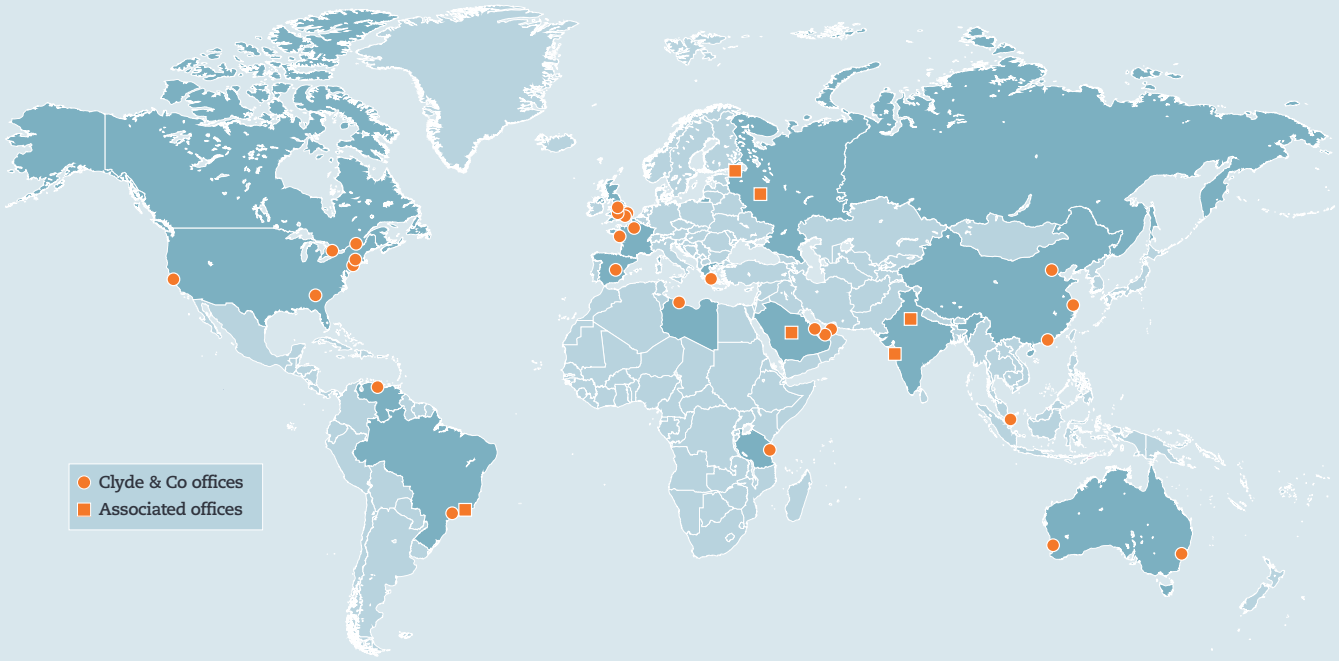

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