Countdown to 20 August 2013
The Maritime Labour Convention 2006
Part 3 – Implementation and Enforcement

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In our previous articles we looked at some of the key issues relating to the Convention to alert the industry to the significant regime change and identified a number of problem areas which we then studied in greater details.

This last article explores the implementation of the Maritime Labour Convention and how enforcement will be achieved.

Introduction

It has been a long journey. The creation of an International Convention through the tripartite agreement between Governments, shipowners' organisations and seafarers' organisations which resulted in the Maritime Labour Convention 2006 took long enough.

Since then it has taken 6 years for the ratification thresholds to be reached and then a further year before the Convention enters into force on 20 August 2013. As that dawn breaks, we look to see how and when the shipping world will change. But change it must. As we discussed in our previous articles, the MLC is not an optional extra. It will apply to all sea-going vessels, with only limited exceptions. Non-ratification does not exempt any state or vessels who fly its flag from compliance with the MLC. The principle of no less favourable treatment means that all vessels of international trade will be subject to the MLC regime from this date. Two key issues remain to be addressed:

- How and when will implementation take place
- How enforcement will be achieved

Implementation

Flag State

Despite the celebration each time a new ratification takes place, seen this month as Japan and the UK ratified, and the fanfare of the Convention coming into force, there will not be universal application of the Convention from 20 August 2013. The Convention provides that ratifying states (whether they be flag states, port states or crew supply countries) shall implement the provisions of the Convention by national laws or regulations. The Convention goes further than this, in allowing the member states flexibility in the method of implementation and will also allow implementation through "applicable collective bargaining agreements or through other measures or in practice". This is the principle of "substantial equivalence", which was a deliberate response to the criticism of Member States finding previous ILO Conventions difficult to implement into their national provisions.

Although it is laudable to provide such flexibility on Member States, for those dealing at the sharp end of the maritime world, an amount of uncertainty and confusion is created. Add to this the "no less favourable treatment" provisions on non-ratifying states and vessels flying their flag being subject to the regime of ratifying states, and more confusion reigns.

Whilst it is beyond the scope of this article to review each of the 45 ratifying States and analyse their method and progress of implementation, we can provide some clarity around some timing issues. Although the Convention is stated to enter into force on 20 August 2013, this does not mean that all ratifying states will have to have their implementation measures in place on that date. The Convention provides a period of one year from ratification for each Member State to design its implementation plan and put it into effect before the Convention comes into full force in its jurisdiction. Therefore, only those States who had ratified as at 20 August 2012 will need to be fully compliant with the MLC when it comes into force.

The timing issue is further complicated by the involvement of the EU. In 2009 a European Directive was issued (2009/13/EC) to implement the MLC into EU law. The Directive is stated to enter into force on the date of entry into force of the MLC, namely 20 August 2013. The Directive also imposes obligations on Member States which requires them to bring into force laws, regulations, etc. to comply with the Directive by no later than 12 months after the date of entry into force of the Directive. Therefore, all EU states (whether they have ratified the Convention or not) will have to be in conformity with the MLC by 20 August 2014, or risk being in breach of EU law.

Those States who were ratified in the last year (or who ratify in the future) will have 12 months from the date of ratification to effect implementation. Therefore for the UK, despite its earlier intention to implement the MLC immediately upon ratification (having spent the last several years preparing amending legislation and regulation) it will have until 7 August 2014 to have all its implementation provisions in place. However, that does not mean that UK flying vessels will be immune from any MLC compliance in the interim period. For instance, the Netherlands ratified the Convention on 30 December 2011 and therefore the Convention will enter into full force in the Netherlands from 20 August 2013. For UK ships visiting Dutch ports, they will be subject to the Port State Control inspection regime which will be part of the Netherlands implementation process. We will deal below with how enforcement will work, but this is an illustration of how vessels flying the flags of recently ratifying or even non-ratifying States, will be subject to the MLC regime in certain jurisdictions, true to the "no less favourable treatment" principle embodied in the Convention.

A full list of those States who have ratified and the dates on which the Convention comes into force in their jurisdiction is available on the **ILO website**.

Once domestic legislation, regulation or "substantial equivalence" is in place, then ratifying flag states will need to deal with inspecting vessels and issuing certificates. The Maritime and Coastguard Agency of the UK anticipate that inspection of vessels will range from eight hours to two days depending on the size and number of crew.

Once inspected, a vessel will acquire a Maritime Labour Certificate for a maximum period of five years and an intermediate inspection is required between the 2nd and 3rd years. There are some provisions for interim certificates to be issued on new deliveries, change of ownership or a change of flag. A further full inspection is required at the end of the interim certificate.

The flag state is also required to make a declaration of maritime labour compliance, part 1 of which is drawn up by the flag state and part 2 has to be drawn up by the shipowner.

The ILO has provided examples of specimen certificates and has produced a guide on implementing the MLC, including model national provisions. It is therefore hoped that there will be some uniformity in the method of implementation by ratifying states.

The MLC also stipulates that the system of inspection by flag states has to be carried out by suitably qualified inspectors who have adequate training, competence, terms of reference, powers, status and independence necessary to carry out a proper inspection.

Beyond the obligation to implement an inspection and certification regime, the flag state also has to have a system to deal with complaints from seafarers. So long as a complaint is not "manifestly unfounded" then the flag state will have an obligation to investigate any complaint received and to ensure that action is taken to remedy any deficiencies found.

Port State

Whilst the primary responsibility under the Convention is for flag states to establish a compliant regime to enable them to inspect and issue the appropriate certification, the real teeth in the Convention is in the power it provides to Port State Control to enforce the Convention through inspection and possible detention as we shall see below. For some time the Memorandum of Understanding ("MOU") on Port State Control in each of the regions of the world has been devising new inspection regimes which will incorporate the MLC. The timing considerations set out above apply equally to port states as to flag states, namely there is a period of one year from ratification for a port state to implement the provisions of the Convention before it comes into force. It remains to be seen whether some port states will voluntarily implement the provisions of the MLC immediately upon ratification given the preparation which has taken place and at the various regional MOUs.

Enforcement

As can be seen above, flag states are charged with the burden of implementing the provisions into national law, inspecting vessels and issuing certification. The real power in the Convention is the enforcement regime which is entrusted to Port State Control.

This has three phases:

1 Inspection of certification;

2 A more detailed inspection;

3 Detention.

Dealing with each in turn:

1 Inspection of certification

Provided a vessel has a compliant Maritime Labour Certificate and Declaration of Maritime Labour Compliance, then the inspection should be a short one. MLC provides that compliance with certification will be prima facie evidence of compliance with the requirements of the Convention.

This should be straightforward for a vessel flying the flag of a ratifying state. The picture is less clear as to the attitude Port State Control will take to vessels which do not fly the flag of a ratifying state. The ILO states that Port State Control should apply guidelines for non-ratifying ships in order to ensure the equivalent inspections are conducted and equivalent levels of seafarers' living and working conditions (including seafarers' rights) apply on board those ships. It is clear that non-ratifying states will be subject to greater scrutiny than those who are ratified. As discussed in the previous article, those States who appear to have no intention of ratifying, such as the US, are devising documentation which will mirror the MLC certification requirements in the hope that this will satisfy Port State Control inspectors. It remains to be seen whether this will satisfy the inspectors.

2 More detailed inspection

Port State Control have an obligation to carry out a more detailed inspection where either the documentation produced is not compliant or has been falsely maintained (for instance the recording of working hours on board the vessel) or there are clear grounds for believing the working living conditions on the ship do not conform to the Convention, or there is a belief that the ship has changed flag for the purpose of avoiding compliance or, and most importantly, there is a complaint alleging that specific working and living conditions on the ship do not conform to the requirements of the Convention.

The complaint can come from "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". The ITF, in particular, are already well aware of their ability to raise complaints on behalf of seafarers under the MLC, and as one would expect, have issued detailed guidance to seafarers about their rights under the Convention.

Upon a more detailed inspection, if deficiencies are found, then the inspector can require rectification, with deadlines. If the inspector considers the deficiencies to be "significant" the inspector will bring the deficiencies to the attention of the appropriate seafarers' and shipowners' organisations in the Member State in which the inspection is carried out. If the vessel is allowed to sail, then the inspector can notify the competent authorities at the next port of call with the information gathered.

The significance of the more detailed inspection powers is not so much whether there is ultimately a finding of a deficiency or not; it is more about the time that will be taken in an inspection in port, which could seriously impact on the operation of the vessel.

3 Detention

Where, following a more detailed inspection the ship is found not to conform with the Convention and the conditions on board are clearly hazardous to the safety, health or security of the seafarers or if non-conformity constitutes a serious or repeated breach of the requirements of the Convention, the vessel can be detained. That detention will continue until the inspector has accepted a plan of action to rectify the non-conformities and is satisfied the plan will be implemented in an expeditious manner. Notifications to the flag state, to appropriate shipowners' and seafarers' organisations in the port state will be made.

The Solution: on board complaints

The Port State Control inspection requirements coupled with the ability of not just seafarers, but those who represent and champion them, to raise complaints and thus to create disruption to a vessel's operations is quite evident. How can an operator best guard against the risk of this disruption?

The key to a quiet life under the new MLC regime, in our view, is to have effective onboard complaints procedures which are trusted by the seafarers and operated by those who manage them in a way that effectively resolves complaints on board (or at least within the owning or managing company). The scope for a complaint escalating beyond the control of the owner or manager during port operations which will involve not only the flag state but seafarers' and shipowners' organisations in the port state should be a sufficient incentive for owners and managers to look carefully at their onboard complaints procedures to try to contain and deal with complaints in an effective manner.

The MLC makes the on board complaints process an obligatory one and therefore it must be in shipowners' and mangers interests to invest in a complaints procedure which is more than words written in a manual or handbook. For some organisations, this will require cultural change, but for all organisations the requirement will be to properly train not just those who deal with complaints, but those who are entitled to make complaints, to ensure that they both understand, trust and use the internal process. That will involve creating better dialogue between seafarers and those who manage and employ them, but the investment in that relationship must be a more sound one than gambling on getting through a port state control inspection without complaints, inconvenience or, most importantly, delay.

The Solution: review your charterparties

Given, as we have seen, that MLC deficiencies can lead to delays, and possibly fines and detention of the vessel by Port State Control, both shipowners and charterers will wish to minimise their exposure for any delay and expenses associated such deficiencies. The key question is who pays for this under the charterparty?

There are two ways in which parties can identify and, where appropriate, manage this potential risk. The first is to consider the issues that may arise under existing charterparties and the second is to consider provisions that may be included in future contracts.

Under time charterparties there are a number of provisions that are likely to come under scrutiny. By way of illustration, the following issues are amongst those that may arise, with particular reference to the Shelltime 4 wording:

Seaworthiness

At the time of delivery owners will generally be under an obligation to provide a vessel that is fit for service and has all certification on board. Therefore, if owners do not have their correct MLC documentation on board when the vessel is delivered and these results in delay, charterers may seek to reduce the amount of hire they pay to owners by setting off any period of delay against hire due.

Deficiency of crew

Similarly, and with the same consequence, owners could find their hire reduced if charterers make a claim under provisions relating to deficiency of crew. This is because at the date of delivery under the charter owners may well be under an absolute obligation to have a full complement of master, officers and crew. For example, the number of such crew are stated in Shelltime 4 to be *"not less than the number required by the laws of the flag state"*.

Maintenance of the vessel

The obligation to maintain the vessel under clause 3 of the Shelltime 4 charterparty is not absolute. As a consequence, if there are regulatory changes after delivery that render the vessel unfit, owners only have to exercise due diligence to rectify the deficiency. However, they could receive from charterers a 30 day notice under Clause 3 (c) requiring them to demonstrate they have exercised due diligence to maintain or restore the vessel. If owners do not satisfy charterers that they have taken all reasonable steps, the vessel will be off hire and no further hire will be due until owners can demonstrate they have exercised due diligence.

Failure of Port State Control inspection

In practice, if the vessel fails a Port State Control inspection, owners will need to tell charterers that this has happened and how the problem can be rectified. If the problem prevents normal commercial operations, the vessel could again be off hire (Clause 3(e), Shelltime 4)

Off Hire: Breach of Regulations

Potentially the vessel could also be placed off hire if she is detained for breach of regulations, for example under Clause 21(a)(v) of Shelltime 4.

Although the above scenarios can result in owners not receiving the amount of hire they were expecting when they entered into the time charterparty, it should also be remembered that in some cases the consequences of delay could well be more serious. For example, there may be provisions such as Clause 3(f) of Shelltime 4 that would entitle charterers to issue a notice of termination of the charterparty within a period of off-hire.

An additional practical point for owners where the vessel is nearing the end of the agreed charter period is that charterers may be entitled to add an off-hire period to the end of the charterparty (e,g, under Clause 4(b) and Clause 21(e) of Shelltime 4). Not only could this create logistical issues for owners when fixing a subsequent charter, it should also be noted that any extension will be at the existing charterparty hire rate, which is not necessarily the rate owners would like to achieve at the end of a long time charter if the market has changed.

As for voyage charterparties, although there are fewer issues to consider, the question of seaworthiness will also be relevant. For example, under Asbatankvoy Clause 1, the owners' obligation is to provide a vessel that is seaworthy, with all pipes, pumps and heating coils in good working order and in every way fitted for the voyage. The obligation is to exercise due diligence and applies for the voyage as a whole. So the question arises, is the vessel fitted for the voyage and seaworthy if she is not MLC complaint? This leads in turn to the further question as to what, in practical terms, would an owner have to do to demonstrate they have exercised reasonable care and skill under the MLC? Clearly these are potential areas of dispute that are likely to come under scrutiny in due course.

As the above examples illustrate, in the case of existing charterparties there are a number of areas where parties may wish to review their potential rights and exposure regarding issues that may arise in relation to MLC. But what about charterparties that have yet to be fixed? Undoubtedly owners and charterers will wish to consider the appropriate balance of risk relating to MLC issues and include additional wording where appropriate.

For example, in response to particular concerns raised in the offshore sector, BIMCO formed a Working Group to explore the potential impact of the MLC on commercial agreements and to develop a set of recommended clauses to address this issue. The clauses are intended for incorporation into existing standard contracts (such as SUPPLYTIME) and were published in June 2013.

Taking the SUPPLYTIME 2005 example, the new clause provides definitions for the "MLC" and "Charterers' personnel". It also places certain obligations on charterers for ensuing that they provide written evidence of compliance with the MLC where they apply to charterers personnel (such as medical certificates, wages, hours of work etc).

An interesting point to note is that under this clause Charterers are liable to indemnify Owners for any *"claims, costs, expenses, actions, proceedings, suits, demands and liabilities whatsoever"* arising out of Charterers' failure to comply with that clause and also that the vessel will remain on hire in respect of any time lost as a result. The clause provides a useful illustration as to how the responsibility for MLC compliance, and the consequences of non-compliance, may be anticipated and addressed in custom wordings.

At this early stage of implementation of MLC it is already clear that dialogue will be essential between owners and charterers, not only in reviewing and managing charterparties that are in existence now and run beyond 20 August 2013, but also in anticipating and addressing the relevant issues under new charterparties commencing after that date.

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Paul Newdick joined Clyde & Co in 1982 and has been a partner since 1988. He has specialised in employment work since 1982. He is an accredited Mediator focusing on employment disputes.

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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Trudy Grey 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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Heidi Watson 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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Peter Roser 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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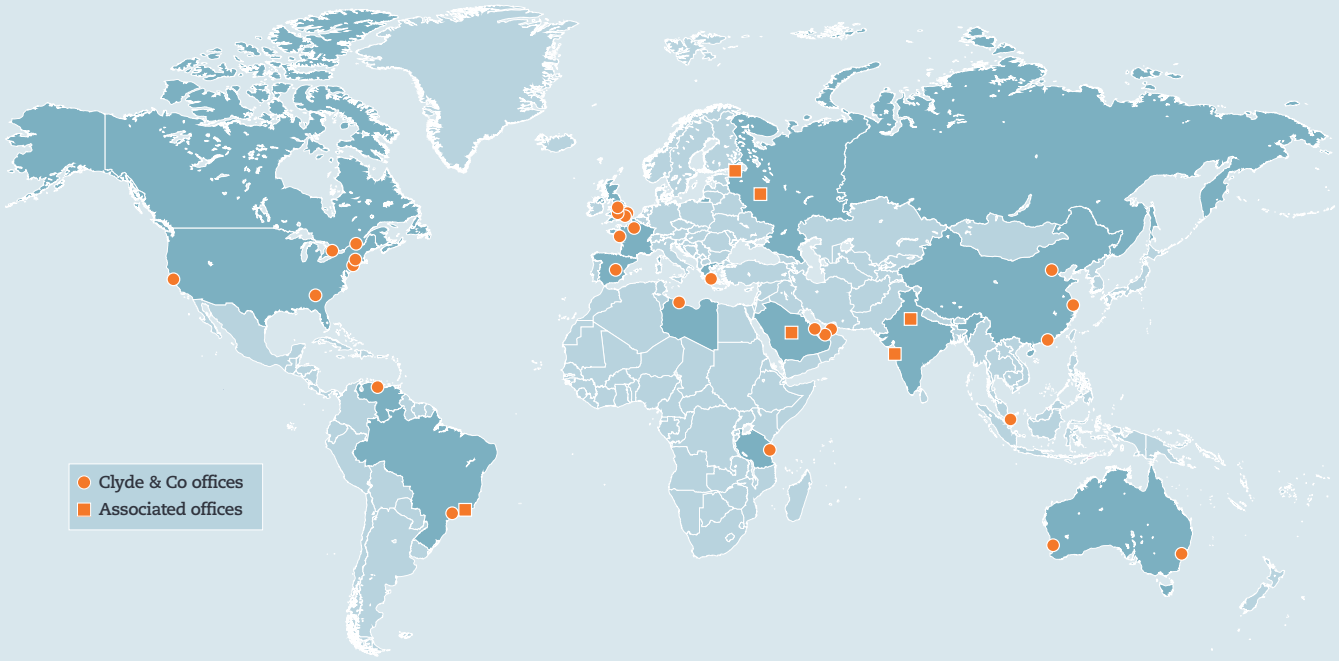

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