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Maritime Labour Convention, 2006: Observations arising from an examination of the first reports

In its 2012 report the Committee made a general observation with respect to getting ready for the entry into force of the Maritime Labour Convention, 2006 (MLC, 2006). That observation noted a number of innovative features of the Convention, particularly in connection with the compliance and enforcement system of the Convention which includes certification of seafarers' working and living conditions on ships. The MLC, 2006 entered into force for 30 Members on 20 August 2013 and has, as of November 2014, been ratified by 65 Members. This year the first national reports on the application of the Convention were requested from 32 Members for examination by the Committee. The Committee has had the opportunity to examine the majority of reports that have been received and, in accordance with its usual practice with first reports on Conventions; the Committee has made specific comments in the form of direct requests to the governments concerned.
The Committee has noted with interest the recent public report issued by the secretariat of a regional port State control Memorandum of Understanding, with respect to the number of inspections of ships, by port State control officers, for compliance with the requirements of the MLC, 2006. That report included a list of deficiencies that had been identified on board ships, as well as reporting a significant number of detentions of ships for MLC, 2006 related matters in this first year following entry into force of the Convention. The Committee notes that this shipboard-level system, involving both flag State inspections and inspections of foreign ships entering ports of ratifying Members, is important and supports, on an ongoing basis, and in a concrete manner, the cyclical national-level examination of the application of Conventions under the ILO's supervisory system. Although the MLC, 2006 is still relatively new and the system it establishes is still being put into operation, this information, along with the information provided by governments in their reports and the observations by shipowners' and seafarers' organizations, indicates that there is a significant level of implementation in practice, well

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beyond the adoption of legislation in many cases, and a high level of engagement by relevant actors in the industry. This implementation also indicates that questions relating to consistency of application in this, the earliest and one of the most international industries are of significant concern to governments, and to shipowners and seafarers.

In view of the number of first national reports that will be requested over the next few years and the need to provide guidance and promote a common understanding of the requirements of the MLC, 2006, the Committee has decided to make a general observation on several matters that it has noted in its examination of these first reports under article 22 of the ILO Constitution.

Implementation and national tripartite consultation

The Committee notes that observations were received from a number of workers' (seafarers') organizations, the majority of which indicated that there has been a good, even high, level of consultation and social dialogue in the process of national implementation. There were, however, some concerns raised in observations from workers' organizations in a few cases, as indicated in the direct requests. In addition, a number of Members indicated some difficulty as they do not yet have representative organizations established for consultation to assist with national implementation. The Committee recalls that the Special Tripartite Committee under Article XIII of the MLC, 2006 has now been established by the Governing Body, and held its first meeting in April 2014. The Special Tripartite Committee, in accordance with the Convention, adopted interim arrangements for consultation with shipowners' and seafarers' organizations, as provided for in Article VII of the MLC, 2006, in cases where representative organizations do not exist within a Member.

National reports and implementing measures. The function and importance of the Declaration of Maritime Labour Compliance (DMLC), Parts I and II

The Committee recalls that the innovative structure of the Convention and its length resulted in the adoption by the Governing Body of a new form for national reports that would also facilitate electronic reporting and make use of national documentation prepared for use on board ships. The Committee notes that a number of governments provided detailed information in the report as well as substantial documentation and/or internet links to documents and websites related to implementation. Others, however, preferred to rely on the Declaration of Maritime Labour Compliance (DMLC), Parts I and II, as providing sufficient information on the 14 areas covered in the DMLC. In that context the Committee observed difficulties in the DMLC, Parts I and II, in some cases, apart from the question of sufficiency of information for the purposes of the national report. The Committee noted, in particular, that often the sample national DMLC, Part I, contains only a list of titles or references to national implementing legislation or other measures and in some cases, incorrect references, with no, or very little, additional information. The Committee recalls that paragraph 10(a) of Standard A5.1.3 provides that the DMLC, Part I, drawn up by the competent authority shall not only "identify the national requirements embodying the relevant provisions of this Convention by providing a reference to the relevant national legal provisions" but also provide, "to the extent necessary, concise information on the main content of the national requirements". The Committee also recalls that paragraph 1 of Guideline B5.1.3 provides guidance with respect to the statement of national requirements, including recommending that "where national legislation precisely follows the requirement stated in this

Convention, a reference may be all that is necessary". However, in many cases a reference will not provide enough information on national requirements where they relate to matters for which the Convention envisages some differences in national practices. Similarly, the Committee noted that many of the examples of an approved DMLC, Part II (a document which is intended to identify the measures adopted by shipowners to implement the national requirements), also often contain only references to other documents. Unless all of these referenced documents are carried on board ship and are easily accessible to all concerned, it would be difficult for port State control officers or seafarers to understand what the national requirements are on these matters. In these cases the DMLC, Part I, does not appear to fulfil the purpose for which it, along with the DMLC, Part II, is required under the Convention, which is to help all persons concerned, such as flag State inspectors, authorized officers in port States and seafarers, to check that the national requirements on the 14 listed matters are being properly implemented on board ship.

The Committee also recalls, in that respect, that the DMLC does not address all the areas of the MLC, 2006 which must also be implemented by Members.

Article II. Definitions and scope of application

The Committee observes, in connection with the scope of application of the MLC, 2006 to seafarers, as provided for in Article II, governments have indicated that when making a determination after consultation with the relevant representative organizations concerned, they follow the definitions in the Convention and take into account the guidance and criteria set out in the resolution concerning information on occupational groups that was adopted by the 94th Session of the International Labour Conference (February 2006). However, in connection with the application of the flexibility provided in paragraphs 3, 5 and 6 of Article II, the Committee observed some difficulty. The Committee notes in that regard that the concept of "substantial equivalence", as provided for in paragraphs 3 and 4 of Article VI, and discussed in more detail below, is not applicable to cases of doubt as to whether the Convention applies to a category of persons or ships.

The Committee also notes that the MLC, 2006 does not allow for the partial application of the national law implementing its provisions if the workers concerned are seafarers covered by the Convention. Exclusion of workers from the scope of the Convention is possible only where: (a) they clearly do not come within the definition of "seafarer"; (b) the ship on which they work is clearly not a "ship" covered by the Convention; (c) a doubt can arise in regard to (a) or (b) above and a determination has been made, in accordance with the Convention, that the categories of workers concerned are not seafarers or are not working on ships covered by the Convention; or (d) the provisions in the relevant legislation that do not apply to such workers relate to subjects that are not covered by the Convention.

In connection with the standards for seafarers working on board ships of less than 200 gross tonnage (gt) that do not engage in international voyages, paragraph 6 of Article II provides additional flexibility with respect to the application of "certain details of the Code" to these ships. The flexibility provided in paragraph 6 can only be exercised by the competent authority, in consultation with the shipowners' and seafarers' organizations concerned, for cases where it determines that it would not be reasonable or practicable to apply the details of the Code provisions concerned at the present time and that the subject matter of the relevant Code provisions is dealt with differently by national legislation or

collective agreements or other measures. The Committee underlines that paragraph 6 of Article II does not provide for the exclusion of a ship, or a category of ships, from the protection offered by the Convention and, even if a determination has been made, it can only apply to details of the Code (the Standards and Guidelines). The provisions of the Regulations must still be applied.

The Committee has also observed several cases where the national legislation concerned provides the competent authority with power to make general exemptions, in specific circumstances, from the national requirements implementing the Convention. The Committee notes, however, that exemptions are possible only to a limited extent and only where they are expressly permitted by the MLC, 2006.

Article III. Fundamental rights and principles. Article VI. Regulations and Part A and B of the Code

In connection with the application of Articles III and VI, in the context of the MLC, 2006, the Committee considers, as a matter of approach, that in its examination of government reports on the application of the Convention, it cannot usefully form an opinion on general questions as to whether a Member has properly satisfied itself that its laws and regulations respect the fundamental rights referred to in Article III or whether, in the adoption of its legislation implementing the MLC, 2006, the Member has given due consideration to the provisions of Part B of the Code. Instead, the Committee's review will, in principle, relate to concrete requirements in Titles 1–5 of the Convention, and will look at national provisions implementing those requirements which indicate that insufficient account may have been taken of a fundamental right referred to in Article III, as well as at practices related to implementation of particular requirements in Titles 1–5 that could indicate that the relevant national laws and regulations have taken insufficient account of a fundamental right referred to in Article III. Similarly, with regard to paragraph 2 of Article VI, the Committee will focus its review on national implementing provisions relating to concrete requirements for which due consideration does not appear to have been given to Part B of the Code.

In addition, the Committee recalls that the concept of substantial equivalence is not a matter for administrative discretion but is a matter to be decided by a Member that must first make sure, in accordance with paragraphs 3 and 4 of Article VI, that it is not in a position to implement the rights and principles in the manner set out in Part A of the Code of the MLC, 2006. Unless expressly provided otherwise in the Convention, the Member may implement the Standards in Part A of the Code in laws and regulations or other measures if it satisfies itself that the relevant legislation or other implementing measures "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 "gives effect to the provision or provisions of Part A of the Code concerned". The Member's obligation is principally to "satisfy itself", which nevertheless does not imply total autonomy, since it is incumbent on the authorities responsible for monitoring implementation at the national and international levels to determine not only whether the necessary procedure of "satisfying themselves" has been carried out, but also whether it has been carried out in good faith in such a way as to ensure that the objective of implementing the principles and rights set out in the Regulations is adequately achieved in some way other than that indicated in Part A of the Code. It is in this context that ratifying Members should assess their national provisions from the point of view of substantial equivalence, identifying the general object and purpose of the provision concerned (in accordance with paragraph 4(a) of Article VI) and determining whether or not the

proposed national provision could, in good faith, be considered as giving effect to the Part A of the Code provision as required by paragraph 4(b) of Article VI. Any substantial equivalences that have been adopted must be stated in Part I of the DMLC that is to be carried on board ships that have been certified. As stated in the practical guidance (paragraph 7) at the beginning of the national report form for the MLC, 2006, explanations are required where a national implementing measure of the reporting Member differs from the requirements of Part A of the Code. In connection with the adoption of a substantial equivalence, the Committee will normally need information on the reason why the Member was not in a position to implement the requirement in Part A of the Code, as well as (unless obvious) on the reason why the Member was satisfied that the substantial equivalence met the criteria set out in paragraph 4 of Article VI.

Regulation 1.4 and the Code. Recruitment and placement

In connection with the application of requirements in paragraph 5 of Article V and Regulation 1.4 and the Code, the Committee observes that, where ratifying Members, with recruitment and placement services operating in their territory, have not implemented these requirements, it is important to recall that shipowners and flag State inspectors of other ratifying Members are relying on all ratifying Members to effectively implement these requirements. A failure to move forward on this matter can result in an unfair advantage for a Member that has ratified the MLC, 2006, relative to Members that have not ratified, but whose seafarer recruitment and placement services are required to comply with the Convention's requirements in order for seafarers to be able to obtain employment through these services. The Committee has also noted that a number of countries rely on certification of recruitment and placement services, and in some cases appear to equate ratification of the Recruitment and Placement of Seafarers Convention, 1996 (No. 179), with the ratification and implementation of the MLC, 2006. The Committee recalls that the MLC, 2006 does not contain exactly the same provisions as Convention No. 179, particularly with respect to the requirements in paragraph 5(b) and (c)(vi) of Standard A1.4 of the MLC, 2006.

Regulation 2.1 and the Code. Seafarers' employment agreements

In connection with seafarers' employment agreements, the Committee stresses the importance of the basic legal relationship that the MLC, 2006 establishes between the seafarer and the person defined as "shipowner" under Article II. In accordance with paragraph 1 of Standard A2.1, every seafarer must have an original agreement that is signed by the seafarer and the shipowner or a representative of the latter (whether or not the shipowner is considered to be the employer of the seafarer).

Regulation 2.3 and the Code. Hours of work and hours of rest

The Committee notes, in connection with flexibility regarding the limits provided in Standard A2.3 for the minimum hours of rest or maximum hours of work, that any exceptions, including those provided for in the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW), as amended, must follow the requirements of paragraph 13 of Standard A2.3.

Regulation 4.5 and the Code. Social security

In connection with social security protection, the Committee recalls that the obligation, under paragraphs 2 and 3 of Standard A4.5, is for each Member to take steps according to its national circumstances to provide at least three branches of social security protection to all seafarers ordinarily resident in its territory. It notes that on ratification, in accordance with paragraphs 2 and 10 of Standard A4.5, each Member has specified the branches of social security protection that are provided to seafarers ordinarily resident in its territory. This obligation may be implemented in a number of ways, as set out in paragraphs 3 and 7 of Standard A4.5, and the attribution of responsibility may also be the subject of bilateral and multilateral agreements adopted within the framework of a regional economic integration organization, as provided for under paragraph 4. The Committee has noted that regional arrangements have indeed been made among some Members and that, in some cases, Members may have made bilateral agreements with other countries. However these mechanisms and arrangements do not appear to be widespread and information is not clear on this important issue.

The Committee also wishes to point out that, although the primary obligation rests with the Member in which the seafarer is ordinarily resident, under paragraph 6 of Standard A4.5 Members also have an obligation to 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 nine branches of social security. As noted above, in accordance with paragraph 7, this can be provided in different ways, including laws or regulations, in private schemes, in collective bargaining agreements or a combination of these.

Technical assistance for implementation

The Committee has noted that several governments have indicated that at present they are not flag States as they do not have any ships to which the Convention applies. They have, therefore, not moved to adopt detailed legislation to implement the MLC, 2006. However, the Committee observes that other obligations in the MLC, 2006, to the extent relevant to the country concerned, such as the regulation of any private recruitment and placement services, promotion of shore-based welfare facilities and fulfilling port State responsibilities, still apply and need to be implemented. In some cases the Committee observed that the Member concerned would benefit from technical assistance and cooperation to help move forward on implementation.

Disseminating and updating information on MLC, 2006 implementation. The ILO's MLC, 2006 website and database

Finally, the Committee recalls that, in order to fulfil the requirements in the MLC, 2006 regarding dissemination of information, the Office has developed a dedicated website and database which contains information provided by governments in accordance with the Convention. It is a useful source of information for other Members and shipowners and seafarers. It is important that Members ensure that they provide this information to the Office and take steps to keep their national information up to date.

Conclusion

Overall the Committee wishes to recognize the contribution of these first reporting Members, who were among those that first ratified the MLC, 2006 and brought it into force and who are now, in many respects, leading the way for others.

REFERENCES:

- MLC 2006

ATTACHMENTS: No.

Kindest Regards,
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