Whilst the shipping community has prepared for the Maritime Labour Convention 2006 to enter into force on 20 August 2013, many questions have been asked about the impact this Convention will have on the shipping sector. Following our three part series over the summer, this document combines these articles, in which we:

- examine the scope and operation of the Convention, and its significance for the industry
- identify the key problems and look at them in more detail
- look at the challenges of implementation and enforcement
The Maritime Labour Convention 2006 (MLC) was adopted by the International Labour Organisation (ILO) in February 2006, but it was only last year, on 20 August 2012, that the minimum requirements set out for its entry into force were met when the Philippines became the 30th country to ratify the Convention.

As the Convention was designed to enter into force 12 months after the minimum requirement was reached, the MLC will enter into force on 20 August 2013 but only as far as the first 30 ratifying countries are concerned. Entry into force for other countries will take place 12 months after each ratification is registered by the ILO. However, despite the fact that entry into force of the Convention will vary from country to country, it should be noted that from 20 August 2013 Port State Control in countries which have not ratified the Convention will still apply the MLC requirements to ships flagged in ratifying countries. Similarly, through the “no more favourable treatment” clause (discussed below), ships flagged with nonratifying countries will have to comply with the 14 minimum requirements set out under the Convention (see below) when calling at ports of ratifying countries.

At the time of writing this update, 42 countries representing approximately 70 percent of the world gross tonnage have ratified the MLC including important Flag States such as Panama and Liberia, as well as the key Port states and jurisdictions of the majority of seafarers and seafarer recruitment providers.

The United Kingdom only recently ratified on 7 August 2013, but for now, some notable Flag States such as the United States have still not yet ratified and the situation is unclear as to what will happen in the coming months. For the full list of ratifying countries, please click here.

In brief, the MLC constitutes a major shift in maritime labour law. It links strength of rights with flexibility in application and a strong regime of enforcement. In this way, it aims for and is likely to achieve almost universal ratification, a result which past Conventions (and there have been over 70) have failed to achieve. Fundamentally, it is a set of maritime labour principles and rights, and aims to transform shipping into a more socially responsible industry, manned by better informed seafarers operating in improved working and living conditions. Importantly, it is intended to level the playing field so that unscrupulous operators cannot undercut on price those operators already providing decent living and working conditions.

The Convention is based on a certification system operated by Flag States whereby all relevant ships flagged by a ratifying state will need to be certified and, once certified, they will be deemed to have complied with the MLC unless Port State Control obtain evidence of noncompliance. Importantly, nonratifying state ships (which will not have an MLC certificate of compliance) calling at ports of ratifying states will be subject to Port State Control inspections aimed at ensuring compliance with the Convention’s minimum 14 requirements regarding seafarers’ working and living conditions. If these vessels do not comply with those minimum terms, they are likely to encounter long delays and possibly detention. The “no more favourable treatment” clause, as it is known, aims to ensure that shipowners are not able to evade minimum obligations to their seafarers by sailing under a nonratifying Flag State.
The main provisions of the Convention

The preamble to the MLC lists fundamental labour principles which ratifying states need to satisfy themselves are respected in their national laws in the context of the MLC. These are:

(a) freedom of association;
(b) effective recognition of the right to collective bargaining;
(c) the elimination of forced or compulsory labour;
(d) the effective abolition of child labour;
(e) the elimination of discrimination in respect of employment and occupation.

The MLC then sets out the essential rights, principles and obligations of its Members (i.e. the countries which have ratified the Convention). The five main areas on which the Convention focuses are:

(a) Minimum requirements for seafarers to work on a ship;
(b) Conditions of employment;
(c) Accommodation, recreational facilities, food and catering;
(d) Health, protection, medical care, welfare and social security protection;
(e) Compliance and enforcement.

The MLC is made up of three different but related parts: the Articles, the Regulations and the Code. The Articles and Regulations set out the core rights and principles and the basic obligations of Members.

The Code contains the details for the implementation of the Regulations. It comprises Part A (mandatory Standards) which must be implemented in each Member state through the enactment of national laws, and Part B which constitutes non-mandatory Guidelines.

What are the 14 minimum requirements set out under the Convention?

The 14 areas which are required to be inspected (and where appropriate certified) under the MLC are:

1. Minimum age;
2. Medical certification;
3. Qualification of seafarers;
4. Seafarers’ employment agreements;
5. Use of any licensed or certified or regulated private recruitment and placement service;
6. Hours of work or rest;
7. Manning levels;
8. Accommodation;
9. On-board recreational facilities;
10. Food and catering;
11. Health and safety and accident prevention;
12. On-board medical care;
13. On-board complaint procedures;
14. Payment of wages.
Financial support and security

The MLC sets out the general principle that shipowners owe seafarers material support in the event of sickness, injury or death occurring while they are serving under a seafarer’s employment agreement or arising from their employment under such agreement.

Under the Convention, the minimum costs which are to be covered are:

- Costs related to sickness and injury of their seafarers from the moment they commence their duty to the time they are deemed duly repatriated. These costs include the expenses of medical care, full wages while the seafarer remains on board or until he or she has been repatriated, and depending on national provisions, wages until the time of recovery.

- 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 a collective agreement.

- Burial costs where the death occurred on board or ashore during the period of employment.

- The cost of safeguarding the property of seafarers absent as a result of illness, injury or death.

National laws may exclude a shipowner’s liability in respect of injury incurred otherwise than in the service of the ship, injury or sickness due to the wilful misconduct of the seafarer, or sickness intentionally concealed at the time of entering the employment contract.

Shipowners are required to provide evidence of “financial security” to ensure that they are able to meet their obligations towards seafarers in respect of compensation in the event of death or long-term disability. The Convention does not provide a list of suitable financial instruments so that it will fall upon each Member Flag State to determine what it considers to be suitable financial security.

It should be noted that financial security (or insurance) is also required under the MLC in two other circumstances:

(i) Repatriation of seafarers. At present, the obligation relates just to repatriation and does not extend to payment of outstanding wages in circumstances where the crew are abandoned. The important issue of abandonment is due to be addressed during an ILO meeting in early 2014. It will be some time before measures to tackle this issue are agreed.

(ii) Recruitment and Placement (Manning) Agents. A system of protection by way of insurance or other appropriate measure to compensate seafarers for monetary loss as a result of failure of a manning agent or relevant shipowner to meet its obligations to the seafarer.

There is much debate on how Flag States will implement the Financial Security obligations. Many shipowners are hoping that P&I cover will be sufficient but specific insurance products are being created to cover these risks. Our next article will look in more detail at these issues.

Will the Convention apply directly to Flag States?

As the MLC is an international legal instrument, it will not apply directly to shipowners and seafarers. Instead, through national laws and other measures, Member states will adopt the regulations set out in the Convention, ensuring that these comply with the minimum standards set out under the MLC. For Flag States, this will require a considerable amount of work. The requirements for implementation by Member states are very flexible. Mandatory standards may be implemented in a way that is substantially equivalent to that provided for by the MLC. This is commonly referred to as the “substantially equivalent principle”.

Our next article will look in more detail at these issues.
Whether the ratifying states will have enacted the necessary laws and be ready to start implementation in time for August 2013 remains to be seen. The ILO is working hard with ratifying states, particularly the developing nations, to assist them in getting ready. However, it is likely that many states will not be ready. The UK, which has not ratified yet, has stated that it believes it is already 85% compliant with the MLC and draft legislation has been prepared, subject to consultation.

**Who is a “seafarer” under the Convention?**
As the MLC aims to protect seafarers, clarifying who falls under this term is essential. Under the MLC, a “seafarer” is defined as “any person who is employed or engaged or works in any capacity on board a ship to which this Convention applies.” The definition is deliberately broad and certainly is broader than the definitions found in previous Conventions. The question of who is covered, particularly when it comes to those temporarily on board or those carrying out hospitality services has led to fierce debate in the industry and is yet to be resolved.

**To which ships will the Convention apply?**
The MLC will apply to ships of all tonnages, whether publicly or privately owned, which are “ordinarily engaged in commercial activities.” The Convention does not provide a definition for what constitutes “ordinarily engaged in commercial activities” and there has been much debate in, for example, the superyacht industry as to whether superyachts will be included. Indeed, some Flag States have been publicising their narrow interpretation of this issue as a means of encouraging shipowners to change flags. Whilst such opportunistic publicity is innovative, unfortunately it is not an answer to the “no less favourable treatment” principle which underpins the MLC.

**Which ships are excluded from the Convention?**
The Convention will not apply to ships which navigate “exclusively in inland waters within, or closely adjacent to, sheltered waters or areas where port regulations apply.” The Convention refrains from defining “sheltered waters” and “closely adjacent” and calls upon the national “competent authority” of each state to determine this. Notably, certain states have taken a very wide view of this in order to exclude a larger number of vessels from MLC application.

Other categories of ships to which the Convention does not apply are:
(a) Ships engaged in fishing or in similar pursuits;
(b) Ships of traditional build such as dhows and junks;
(c) Warships or naval auxiliaries.

**Who is the shipowner?**
Central to the principles of the MLC is the idea that the obligation to ensure compliance falls on the shipowner. Therefore, the definition of the shipowner is a key concern for the industry. Under the Convention, the term “shipowner” includes not only the owner of the vessel, but also any “other 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.” Debate has centred on the often complex arrangements between shipowner, manager and manning agents in the operation of the vessel and the management of the crew. We will discuss this thorny subject and the attitudes of Flag States to implementation, later in this article.
What is the requirement for “certification”?
Flag States will play a key role in reviewing and issuing certificates of compliance with the MLC. They may delegate this responsibility to a “recognised organisation” (e.g., a classification society) but the Flag State remains fully responsible for both inspection and certification.

The requirement for certification under the Convention will only apply to:
(a) Ships of 500 gt or over, which are engaged in international waters; and
(b) Ships of 500 gt or over, flying the flag of a Member state and operating from a port, or between ports, in another country.

Shipowners of vessels requiring certification must submit a Declaration of Maritime Labour Compliance (DMLC) to their Flag State. Once satisfied that all the MLC requirements for seafarers’ working and living conditions have been met, the Flag State will issue a Maritime Labour Certificate. This Certificate will be valid for a maximum of five years, with an inspection being required between the second and third year of this period. Vessels will have to carry on board the DMLC and the Maritime Labour Certificate.

In the build up to the implementation of the MLC, we have seen certain non-ratifying Flag States seeking to issue “pseudo MLC certificates” aimed at showing compliance with the MLC. We discuss the validity and impact of those certificates in the section of this article on implementation.

In addition, Flag States will need to ensure that smaller ships (below 500 gt), which are not covered by the MLC’s requirement for certification, and which sail on international voyages, or voyages between foreign ports, do nevertheless respect domestic laws and other measures implementing the Convention.

Who is responsible for enforcing the terms of the Convention?
The Convention can be enforced internationally both by Flag State inspection and by Port State Control.

Flag state inspectors
Flag States are responsible for inspection and certification. The MLC requires Flag State inspectors to be issued with clear guidelines regarding the tasks to be performed and ILO have issued a lengthy guide for Flag and Port state inspectors. An inspector will have the right to board a ship of its Flag State, carry out the necessary examinations, and require deficiencies to be remedied. Where such deficiencies constitute a serious breach of MLC requirements, or where the safety, health or security of seafarers is significantly compromised, an inspector may detain a vessel until the deficiencies are remedied.

Port state control
Port State Control officers are tasked with inspecting foreign ships calling into their ports, and assessing whether they comply with MLC requirements relating to working and living conditions. In case of non-compliance, officers have the power to prevent a ship from sailing. Under the MLC, the Maritime Labour Certificate and the DMLC constitute prima facie evidence that the ship is compliant with its requirements; the inspection should in principle be limited to a review of those documents. However, there are four exceptions to this which would enable an officer to carry out a more detailed inspection aboard the ship: where there are issues with the documentation; where there are doubts concerning the seafarers’ actual working and living conditions; where there is suspicion that a change of flag was motivated by the desire to avoid compliance with the Convention requirements; and where there is a complaint regarding working and living conditions (in this regard, all vessels must have a properly documented on board complaints procedure).

Detailed inspections will inevitably cause delays which will impact on charterparty requirements and obligations. If the inspection reveals a serious or repeated breach of the Convention or conditions on board are hazardous to safety, health or security of seafarers, then Port State Control can detain the vessel until the non-conformities have been rectified.

The importance of turning rights on paper into rights in action, and the practical difficulties in enforcing the MLC, will be discussed later in this article.
The 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.

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 earlier in this 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.
The requirements under the Convention to provide material support, together with evidence of financial security to meet shipowner obligations are in relation to:

- Sickness, injury or death;
- Repatriation of seafarers; and
- 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:

**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 MLC. The only three exclusions under 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.
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.

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 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.
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.
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:

**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 earlier, 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.

**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, 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.

**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 managers 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 compliant? 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 ensuring 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.
Conclusion

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 entered 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 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.

It is difficult to say how this new regime will work in practice as it is such a radical departure from previous regimes as the MLC represents such 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.

Much will depend on the practicalities of implementation and enforcement and the ironing out of any problems if this Convention is to be workable. It will be interesting to see whether the overwhelming support mustered at the time of its adoption will continue through to implementation and beyond. Given this is the first maritime labour convention with real teeth, the tools are certainly there to make that happen. We wait to see how well the industry responds to the challenge.
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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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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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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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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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