

Joint IMO/ILO ad hoc Expert Working Group on liability and compensation regarding claims for death, personal injury and abandonment of Seafarers - Ninth session

Geneva
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*Note by the International Labour Office
Potential options for addressing the issue of liability and compensation for seafarer claims for death, personal injury and abandonment*

1. This Note considers, on a preliminary basis, options¹ for addressing the recommendation of the 94th session of the International Labour Conference (ILC) in its Resolution III concerning the Joint IMO/ILO Ad Hoc Expert Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers² (Joint Working Group), which noted that:

“...there was a gap in the international legal regime addressing this issue, [and that] the text in the Convention does not address many of the provisions set out in the Guidelines on Shipowners’ Responsibilities in respect of Contractual Claims for Personal Injury to or Death of Seafarers and the Guidelines on Provision of Financial Security in Cases of Abandonment of Seafarers, [and recommended that] ...the way forward would be for the Joint Ad Hoc Working Group to develop a standard accompanied by guidelines, which could be included in the Maritime Labour Convention or another existing instrument, at a later date.”
2. It is noted that this Resolution was adopted at the same time as the Maritime Labour Convention, 2006 (MLC, 2006) and in the context of existing IMO/ILO Guidelines³ dealing with both issues.
3. This Note takes into account: the provisional records of the 94th session of the ILC in connection with Resolution III⁴ and the Report of the 8th Session of the Joint Working Group⁵.
4. Consistent with the approach proposed by the 7th Session in February 2008 and followed in subsequent meetings, questions of principle and the content of mandatory provisions have been seen as needing agreement first before questions concerning form and placement. However, as a legal matter, the two are necessarily interrelated. While form

¹ A Note on options from the perspective of the IMO was prepared by the IMO Secretariat, IMO/ILO/WGLCCS 8/2/2 for the 8th Session of the Joint Working Group in July 2008.

² ILC94-PR3-1(Rev)-2006-02-0365-3-En.doc

³ IMO/ILO *Guidelines on Provision of Financial Security in the case of Abandonment of Seafarers* (IMO Resolution A. 930(22)); *Guidelines on Shipowners’ Responsibilities in Respect of Contractual Claims for Personal Injury to or Death of Seafarers* (IMO Resolution A. 931(22))

⁴ Id.

⁵ Report of the Eighth Session (21-24 July 2008), IMO Document No. IMO/ILO/WGLCCS 8/5, dated 8 August 2008

does not necessarily dictate all aspects of content, content may impact on potential viability of form.

5. Although submission to, and discussions at, the Joint Working Group have separated the issues of abandonment and seafarer claims for personal injury and death, there are some general considerations that apply to both concerns.
6. One basic question is whether or not the new provisions should be adopted within the framework of the International Labour Organization. If adoption within the ILO framework is recommended, a choice will need to be made between a new Convention or a protocol to the MLC, 2006 or to the Work in Fishing Convention, 2007, No. 188 and the amendment of the MLC, 2006 through the addition of a new Standard and Guidelines and/or the modification of existing Standards and Guidelines. Amendments to Convention No. 188 are not possible in the area covered by the proposed new provisions, but the provisions amending the MLC, 2006 could be made applicable to certain or all categories of fishing vessels.⁶
7. To adopt a new instrument in the form of an ILO Convention would be inconsistent with the process of consolidation which was one of the main objectives of the MLC, 2006⁷. A protocol, which would normally be open only to Members which had ratified the MLC, 2006 or Convention No. 188, would have an effect similar to that of an amendment, except for an important difference: whereas the protocol would be binding only on Members that accepted it, an amendment to the MLC, 2006 that enters into force would be binding on all Members that subsequently ratified the MLC, 2006, as well as on Members that had already ratified that Convention and had ratified or consented to the amendment. The main disadvantage of an ILO Convention or a protocol, however, is the long time needed before it would be likely to enter into force for a significant number of Members, whereas an amendment of the MLC, 2006 could enter into force in a relatively short time for most, if not all, Members ratifying the Convention, *provided that the accelerated amendment procedure can be used*. This is explained below.

⁶ Ships engaged in fishing or in similar pursuits are excluded from the application of the MLC, 2006 “except as expressly provided otherwise” (Article II, para. 4).

⁷ One possible advantage of adopting a new Convention, rather than a protocol, is that this might allow ratification by countries that were not yet in a position to ratify the MLC, 2006, because of its comprehensive character.

8. Any provision in the MLC, 2006 can be amended under Article XIV, which envisages a process similar to that used for the adoption of a Convention or a protocol, referred to above. An amendment under Article XIV would come into force 12 months after ratification of the amendment (or of the Convention in its amended form) by a least 30 ILO Members with a total share of the world gross tonnage of ships of at least 33 per cent. Any Member that ratifies the MLC, 2006 after the required level of ratifications has been reached will be bound by the amendment, as will Members that had already ratified the Convention, if they have ratified or consented to the amendment.
9. The Code of the MLC, 2006 (i.e., the Part A “Standards” and Part B “Guidelines” and the related appendices) can also be amended under the accelerated procedure set out under Article XV.⁸ This procedure envisages a period of up to two years before an amendment enters into force after approval of the text by the International Labour Conference. However, in the case of the Article XV procedure, the amendments adopted must be within the scope of an existing Article or Regulation of the Convention⁹. In other words, if an amendment is outside the scope of an Article or Regulation, it can still be adopted, but only under the Article XIV procedure, which would mean that the benefit of the accelerated amendment procedure would be lost.

⁸ The accelerated process under Article XV is based on a *tacit acceptance* procedure similar to the approach adopted in connection with amendments to IMO Conventions. Under this procedure, amendments to the Code are adopted by a Special Tripartite Committee and submitted to the ILC for approval. Approved amendments are then circulated to ILO Members that have ratified the MLC, 2006. These Members will be bound by amendments entering into force if they have not notified the ILO of their disagreement within a set period (from one to two years). An amendment will enter into force (six months after the end of the set period) unless more than 40 per cent of ratifying States that represent not less than 40 per cent of the world gross tonnage of the ships of the ratifying States have formally expressed disagreement. After the amendment enters into force the MLC, 2006 can only be ratified in its amended form.

⁹ The Articles and Regulations in the MLC, 2006 provide the core obligations for Member countries. The Standards and Guidelines are considered as implementing these obligations and the Articles in the MLC, 2006 (see Article VI, paras 2 and 3).