



IMO



**JOINT IMO/ILO AD HOC EXPERT WORKING GROUP
ON LIABILITY AND COMPENSATION REGARDING CLAIMS FOR DEATH,
PERSONAL INJURY AND ABANDONMENT OF SEAFARERS**

Ninth Session

**IMO/ILO/WGLCCS 9 / 3
ILO/IMO/WGPS/9/2009/3**

Geneva, March 2009

Examination of the issue of financial security for crew members/seafarers and their dependants with regard to compensation in cases of personal injury, death and abandonment.

**Submitted by the International Shipping Federation (ISF) and the
International Transport Workers' Federation (ITF)**

SUMMARY

Executive summary: This document explains the approach taken by the social partners in preparation for this meeting

Action to be taken: Paragraphs

Related documents: Annexes 1 and 2 of this document

1. This document is submitted following the decision of the eighth session of the Joint IMO/ILO Ad Hoc Expert Working Group on liability and compensation regarding claims for death, personal injury and abandonment of seafarers to request the social partners to meet and produce a joint proposal to progress the development of longer-term sustainable solutions to address the problems of liability and compensation regarding claims for death, personal injury and abandonment of seafarers.

General comments

2. The social partners met for a two-day meeting and based their discussions around a US/UK non-paper produced to assist the deliberations. As a result two annotated papers have been produced which are annexed to this document:

Annex 1

Proposal for the text for regulation on shipowners' liability and the associated financial security and

Annex 2

Proposal for the text of a draft instrument on the provision of financial security in case of abandonment of seafarers

3. A number of earlier concerns were discussed and have been resolved, however, there are still a few areas of difference which are explained in more detail immediately below.

Personal injury to or death of crewmembers

The Shipowners believe there is a legal need to take into account requirements of different countries national legislation and therefore believe that it is necessary to include words that convey that shipowners obligations under the draft instrument will arise when there is a legal liability to pay a claim and would therefore like to see inclusion of the term legally valid and agreed in paragraph 2 . It would be helpful to gain a view from the Secretariat on this matter.

With regard to paragraph 2a The Shipowners believe there should also be included a provision that shipowners are not put under pressure to make a payment that is more than is due.

With regard to paragraph 2C The Shipowners believe there may need to be some redrafting of this paragraph to clarify its meaning.

The Shipowners also believe it is important to use the word “may” in the text of Guideline B 4.2 as this is guideline text.

With regard to paragraph 4 the Shipowners can support the views expressed in the paper however consideration needs to be given as to how such notice is to be given.

With regard to paragraph 5 the seafarers have sought to include the text in the square brackets but the shipowners do not wish to have this in the text.

Abandonment of crewmembers

The Shipowners group believe there are a couple of points that need clarification from their perspective. The first is the issue of double indemnity where it would be helpful to hear from the governments specifically what they mean by this wording.

The shipowners also think it is important to maintain the concept of substantial equivalence to be specifically in the context of the instrument.

If the text is included in the MLC then the Shipowners will accept the tonnage requirements of the convention, however they would seek a requirement of 500 gt if this is a stand alone instrument.

The shipowners are unable to comment on behalf of the fishing vessel owners and therefore would prefer all references to fishing vessels to be discussed with their representatives directly at the meeting.

There are a number of questions regarding the issuance of certification or/and attestation that the Shipowners would like clarification on during the meeting. Governments are requested to consider this issue prior to the meeting. This is particularly true for paragraphs 8 and 9 of annex 2.

The issue of outstanding “entitlements” without some form of limit of liability and how this can be covered is still of major concern to the Shipowners. However they have agreed to discuss at a senior level and will advise their social partners with regard to the outcome prior to the meeting. Assistance from governments on this may be required to determine what this may comprise of at the meeting. In addition the Shipowners are concerned to ensure that financial security is available to cover this liability and would welcome attendance at the meeting by the Commercial insurers with whom the governments have been discussing this matter since the last meeting.

Action requested of the Group

4. The Group is invited to take into account the proposals contained in the annexes and the comments provided in this paper.

Annex 1

Regulation 4.2 Shipowners' Liability (No change of title)
Standard A 4.2.1 Shipowners' Liability (Previous Standard A 4.2)
Standard A 4.2.2 Financial Security (New, as provided below)

1. [A shipowner shall be liable for and pay compensation in respect of the death, illness and injury of a seafarer in accordance with the terms of conditions of the seafarers employment agreement or contract.]

Both Social Partners consider this paragraph may be superfluous and seek guidance as to whether it is necessary to include. (See MLC Reg 4.2.1 and Standard A4.2.1b).

2. National laws and regulations shall provide that the financial security to assure compensation as required by Standard A4.2.1, paragraph 1(b), for [legally valid and agreed] claims shall provide that:

(a) The contractual compensation where set out in the seafarer's employment agreement and without prejudice to (c) below, shall be paid in full and without delay; there shall be no pressure to accept a payment less than the contractual amount.

(b) Where the [nature] of the long term disability of a seafarer makes it difficult to assess the full compensation to which the seafarer may be entitled, an interim payment shall be made to the seafarer so as to avoid undue hardship.

(c) In accordance with Regulation 4.2, paragraph 2, the seafarer shall receive payment without prejudice to other legal rights, but such payment may be offset against any damages resulting from any non-contractual claim arising from the same incident;

~~Where applicable, such compensation shall be paid in full and without delay. Where the extent of a long term injury or disability of a seafarer is uncertain and will result in economic hardship a reasonable interim payment or payments shall be made.~~

The Social Partners agreed that the provisions in the UK/US non-paper would benefit from some further expansion as above. However, there was one significant point of difference where the Shipowners felt it necessary to include the text 'legally valid and agreed' in square brackets. The Seafarers could not accept this wording, they considered that this would cause delays in the payment of compensation. The intention behind the word 'nature' was considered important by both Social Partners however it was questioned as to whether a more appropriate word could be found.

3. Any claim for compensation under Standard A. 4.2.1 paragraph 1(b) may be brought directly [by the seafarer, their next of kin, or designated beneficiary] against the provider of the financial security [~~or alternatively, "Compensation payable under this Standard shall not be subject to the "Pay to be Paid" or "Retrospective Withdrawal of Cover" Rules"~~].

The Social Partners preferred option was to retain the first sentence. For avoidance of doubt both Social Partners considered it helpful to outline who can bring such a claim but have left this in square brackets for further consideration of the correct terms by the Secretariat.

4. The seafarer shall receive prior notification if the financial security is to be cancelled and be notified immediately if it is not to be renewed;

Both Social Partners thought this would be a necessary addition.

5. [The financial security shall provide for the payment of all claims under this Standard arising during the period for which the certificate is valid]

There is a difference in opinion amongst the Social Partners. The Seafarers wish to add this text to remain whereas the Shipowners would not to have it.

6. Members shall ensure that ships flying their flag carry on board a certificate issued by the financial security provider. The certificate shall be posted in a prominent position in the seafarers' accommodation. (Where more than one financial security provider provides cover, a certificate from each provider shall be carried on board).

Same as per UK/US point 4.

7. The certificate shall include details of the:

- a. Name of the ship
- b. Port of registry of the ship
- c. Call sign of the ship
- d. IMO number of the ship
- e. Name **and contact details** of the provider/s of the financial security
- f. Place of business of the provider/s of the financial security
- g. Name ~~or names~~ of the shipowner
- h. Period of validity of the financial security.
- i. [An attestation that the financial security meets the requirements of this standard.]

Minor amendments to para 7 have been made by the Social Partners to assist in the process. However subpara (i) is proposed by the Seafarers for further discussion in the meeting.

Guideline B 4.2, new paragraph 4:[**Notwithstanding**] [Without prejudice] to each Member's national laws and regulations, the parties to the payment of a contractual claim [**should**] [may] use the Model

Receipt and Release Form (attach as an appendix the model form from Assembly Resolution A. 931 (22) on claims for personal injury to or death of seafarers adopted on 29 November 2001).

Both Social Partners seek clarification as to the intent of the term 'Without prejudice' and whether this was to harmonize with the MLC. 'Notwithstanding' is suggested by the Seafarers as an alternative. The Shipowners believe the word "may" should be used given that this is a guideline. The Seafarers believe it is important to retain "should".

Annex 2

Proposal for the text of a draft instrument

Provision of financial security in case of abandonment of seafarers

NOTE: Text that is *italicized* would not be included if the draft instrument is in the form of a Standard and Guideline that would be an amendment to the Maritime Labour Convention, 2006.

Objectives and general principles

1. This [instrument] establishes requirements to ensure the provision of an adequate financial security system for seafarers in cases of abandonment.
2. The provisions in this [instrument] are not intended to be exclusive or to prejudice any other available rights, claims or remedies that may also be available to compensate seafarers who are abandoned. They are, in addition, without prejudice to the principle that the same set of circumstances should not be the subject of a double indemnity.

Both Social Partners would welcome clarification of the wording of this paragraph and in particular the reference to double indemnity.

3. A Party which is not in a position to implement the rights and principles in the manner set out in this [instrument] may, unless expressly provided otherwise in this [instrument], implement them through provisions in its laws and regulations or other measures which are substantially equivalent to the provisions of this [instrument]. Any law, regulation, collective agreement or other implementing measure shall be considered to be substantially equivalent **in the context of this instrument**, if the Party satisfies itself that:

Both Social Partners propose the additional text in bold for consistency with the MLC.

(a) it is conducive to the full achievement of the general object and purpose of the provision or provisions in this [instrument], and

(b) it gives effect to the provision or provisions of this [instrument].

Definition and scope

1. For the purposes of this instrument and unless provided otherwise in particular provisions, the term:

(a) shipowner means the owner of the ship or another organization 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~~ **instrument**, regardless of whether any other organization or persons fulfil certain of the duties or responsibilities on behalf of the shipowner;

Both Social Partners think the bolded text would be more correct.

(b) seafarer means any person who is employed or engaged or works in any capacity on board a ship to which this [instrument] applies;*

(c) ship means a ship other than one which navigates exclusively in inland waters or waters within, or closely adjacent to, sheltered waters or areas where port regulations apply;

(d) requirements of the Convention means the requirements of the Maritime Labour Convention, 2006;

(e) seafarers' employment agreement, which includes both a contract of employment and articles of agreement, means a seafarers' employment agreement conforming to the requirements of the Maritime Labour Convention, 2006;

The Social Partners seek guidance from the Secretariat in relation to points d, e and f with regard to the possible implications of cross referencing international organizations and conventions within another instrument.

2. This [instrument] applies to all ships of greater than [200 /500 ~~300~~ Gross Tonnage], whether publicly or privately owned, that are ordinarily engaged in commercial activities.

This issue would be non-existent if the text went into the MLC as we would keep to the articles of the convention. The seafarers believe the flexibility referred to in Article 2 of the MLC refers to ships of less than 200 GT and not engaged in international voyages. However this is not the view of the shipowners if this goes into a stand alone instrument.

3. This [instrument] does not apply to ships of traditional build such as dhows and junks and warships or naval auxiliaries ~~(or to ships engaged in fishing or in similar pursuits) unless provided otherwise under the law and practice of the Party whose flag is flown by the ship concerned.~~

The Shipowners cannot negotiate on behalf of fishing vessel owners and therefore this will need to be referred to them at the meeting. However both parties agree that the other text is non MLC text and should be deleted.

4. *Except as expressly provided otherwise this [instrument] applies to all seafarers.**

This is to be consistent with MLC article II.2.

5. Each Party shall implement its responsibilities under this [instrument] in such a way as to ensure that the ships that fly the flag of any State that has not ratified this [instrument] do not receive more favourable treatment than the ships that fly the flag of any State that has ratified it.

** The Social Partners agree that the issue of other persons on board may need to be considered and clarified.*

The Standard

1. Each Party shall ensure that a financial security system meeting the requirements of this Standard is in place for ships flying its flag.

2. The financial security system shall provide direct access, sufficient coverage and expedited financial assistance, in accordance with this Standard, to any abandoned seafarer who was employed or engaged or working in any capacity on a ship flying [its flag] [**the flag of the Party**].

The Social Partners would welcome clarification from the Secretariat as to whether the flag terminology is correct.

3. For the purposes of this Standard, a seafarer shall be deemed to have been abandoned where, in violation of the requirements of the Convention or the terms of the seafarers' employment agreement, the shipowner:

(a) is unable or unwilling to cover the cost of the seafarer's repatriation; or

(b) has left the seafarer without the necessary maintenance and support; or

(c) has otherwise unilaterally severed their ties with a seafarer.

4. For the purposes of this Standard, the necessary maintenance and support of seafarers while abandoned shall include: adequate food, clothing, accommodation, necessary medical care and other reasonable costs or charges arising from the abandonment.

5. Each Party shall ensure that the financial security system is operating in compliance with the requirements of this Standard and that seafarers on all ships flying its flag are covered by such a system. *[It may also verify that seafarers on ships calling in its ports, in the normal course of business or for operational reasons, are similarly covered by an adequate financial security system.]*

The Social Partners question whether this text offers the most appropriate way of addressing the Port State control issues covered in title 5 of the MLC.

6. Each Party shall require ships that fly its flag [and are engaged in international voyages] to carry an Abandonment Security Certificate certifying that the seafarers on the ship concerned are covered by a financial security system complying with the requirements of this Standard.

The Social Partners consider the issue of certificates and what constitutes international voyages is addressed in MLC Regulation 5.1.3 and there needs to be consistency between the two especially for vessels flying the flag of a member and operating from the port or ports in another country.

7. [The Abandonment Security Certificate shall be issued to a ship on behalf of the competent authority for a period not exceeding five years. The competent authority may either issue the Abandonment Security Certificate directly or authorize any other entity to do so in a manner satisfactory to the competent authority.

8. A copy of the current valid Abandonment Security Certificate shall be deposited with the authorities who keep the record of the ship's registry and shall be [made available in accordance with national laws and regulations, upon request, to seafarers, flag State inspectors, authorized officers in port States, and shipowners' and seafarers' representatives][[provided, when required, to the port State].

The Shipowners would like clarification from the Governments on points 7, 8 and 9.

9. A Party ~~may~~ **shall** fulfil the certification requirements of this Standard by issuing individual Abandonment Security Certificates bearing the particulars of each ship or, alternatively, ~~may~~ **shall** issue an Abandonment Security Certificate applicable to all ships flying its flag, [where appropriate.]

The Social Partners understand that this is an either / or option. Clarification on what is meant by 'where appropriate' would be helpful.

10. A valid Abandonment Security Certificate shall be accepted by other States Party as prima facie evidence that the ship is in compliance with the requirements of this Standard.

The Shipowners were concerned that this paragraph should be consistent with paragraph 5.

11. [The Abandonment Security Certificate shall be drawn up in the form corresponding to the models given in Appendix xX.] [The Abandonment Security Certificate shall contain the information required in Appendix xX]. It shall be in English or accompanied by an English translation.

12. The Abandonment Security Certificate shall be posted in a prominent position in the seafarers' accommodation.

13. The Abandonment Security Certificate shall be withdrawn by the competent authority if there is evidence that the ship concerned does not comply with the requirements of this Standard.]

1. Assistance provided by the financial security system shall be granted promptly upon request made by or on behalf of the seafarer concerned and supported by the necessary justification of entitlement in accordance with paragraph 3 above.

2. Assistance provided by the financial security system shall be sufficient to cover the following:
(a) [outstanding entitlements of the seafarer, including [three][four] months of accrued wages,]

This point is still of concern to the Shipowners, who are reviewing their position and will feedback as appropriate to their Social Partner prior to the meeting.

(b) all expenses reasonably incurred by the seafarer, including the cost of repatriation by appropriate and expeditious means (normally by air) and transport of personal effects,

(c) the cost of necessary maintenance and support from the act or omission constituting abandonment until the seafarer's arrival at the destination of repatriation.

3. For the purposes of this Standard, the repatriation of the seafarers shall be provided by appropriate and expeditious means, normally by air, and include provision for food and accommodation of the seafarers from the time of leaving the ship until arrival at the ~~place of repatriation~~ **seafarers home**, necessary medical care, passage and transport of personal effects and any other reasonable costs or charges arising from the abandonment.

The Social Partners agree for the avoidance of doubt that the place of repatriation should be the seafarer's home.

4. *Each Party shall give due consideration to implementing its responsibilities under this Standard in the manner provided for in the Guideline below.*

The Guideline

1. The financial security system required by the Standard may be in the form of a social security scheme or insurance or a national fund or other similar arrangements.

2. In implementation of paragraph 1 of the Standard, if time is needed to check the validity of certain aspects of the seafarer's request, this should not prevent the seafarer or their representative from immediately receiving such part of the assistance requested as is recognized as justified.

Appendix xX**[Model form for] [Mandatory Content of] an Abandonment Security Certificate**

1. name of the ship;
2. port of registry of the ship;
3. call sign of the ship;
4. IMO Number of the ship;
5. name and address of the provider of the financial security;
6. contact details of the persons or entity responsible for handling seafarers' requests for relief;
7. name of the shipowner;
8. period of validity of the financial security; and
9. an attestation that the financial security meets the requirements of the Standard.

Alternatively, a model certificate could be adopted along the lines of the existing IMO certificates submitted to the 7th Session.