

UPDATE

The Maritime Labour Convention and Seafarer Recruitment – are you compliant?

Update prepared by Rachel Guthrie (Counsel, Guernsey)

Whilst The Seafarer Recruitment and Placement Services (Maritime Labour Convention 2006) (Guernsey and Alderney) Ordinance, 2013 (the Guernsey and Alderney Ordinance) has been in force since 1 November 2013, The Seafarer Recruitment and Placement Services (Maritime Labour Convention 2006) (Sark) Ordinance, 2015 (the Sark Ordinance) came into force (on almost identical terms) for Sark businesses on 2 November 2015 (together the Ordinances).

The Ordinances were proposed by the States of Guernsey, after an extensive period of consultation, to ensure that seafarers have access to an efficient and well-regulated seafarer recruitment and placement service and that local manning agencies do not lose business as a result of the MLC coming into the force.

If any of the companies that you administer employ seafarers; if any of your clients own Super Yachts; or if your business recruits and places seafarers on maritime vessels, this update will be of vital importance to you.

Background – The Maritime Labour Convention

The International Labour Organisation's 'fourth pillar' of the international maritime regulatory regime for the world's 1.2 million seafarers, the Maritime Labour Convention 2006 (MLC), came into force for all member states on 20 August 2013.

On 7 August 2013, the UK ratified the MLC and it came into force for all UK flagged ships on 7 August 2014.

Whilst Guernsey, Alderney and Sark are not (and do not intend to become) 'member states' (and are therefore not required to ratify the MLC), they are committed to ensuring that the rights of their seafarers are protected and that their reputations as an employing maritime jurisdictions are maintained. They acknowledge that there are globally agreed standards and rights to decent working conditions for seafarers and that despite the fact that some of the seafarer entitlements protected under the MLC are more favourable than protections offered to other categories of employees under domestic law, there is an acknowledgement that the plight of seafarers is unique and they need to be treated differently.

From an employment perspective, this means that if you (either directly, as a recruitment agency, as an employment business, or as a trust company on behalf of a client) employ any person in the capacity of seafarer, there is an expectation (and in the cases of 'recruitment agencies' and 'employment businesses', an absolute obligation) to comply with certain provisions of the MLC. The Regulations of particular importance include: Regulation 1 (Minimum Requirements for Seafarers to Work on a Ship), Regulation 2 (Conditions of Employment), Regulation 3 (Accommodation, Recreational Facilities, Food and Catering) Regulation 4 (Health Protection, Medical Care, Welfare and Social Security Protection) and Regulation 5 (Compliance and Enforcement).

It is not uncommon for ships to be flagged and registered in different jurisdictions and for employment to be offered to seafarers by a company registered in one jurisdiction (usually off-shore jurisdictions like Guernsey and Sark) but operating in and out of a different jurisdiction. Whilst the MLC may not apply directly to Guernsey or Sark employers as a matter of law, it will certainly apply as a matter of practice,

since inspections (by flag state inspectors or otherwise) can take place in foreign ports, which has now created a global expectation of compliance.

Since the enforcement of the Ordinances, the flag state of vessels require vessels flagged in their jurisdictions to submit a Declaration of Maritime Labour Compliance which confirms, variably, that the conditions of the MLC are met by the flagged vessel. Port states can also request inspection of MLC compliance documentation. In particular, there are 14 items that a Declaration of Maritime Labour Compliance will review, including:

- minimum age of seafarers;
- medical certification and fitness to work of seafarers;
- qualification of seafarers;
- seafarer employment agreements (including terms relating to repatriation, medical insurance and leave);
- use of licenced or certified or regulated private recruitment and placement services (see Part II of our article below);
- hours of work or rest provided to seafarers;
- manning levels for the ship;
- accommodation provided for seafarers on-board any vessel;
- on-board recreational facilities;
- food and catering;
- health and safety and accident prevention;
- on-board medical care available for seafarers (including insurance provisions for sickness and accident);
- on-board complaint procedures (consistent with the Merchant Navy Code of Conduct); and
- payment of wages to seafarers.

The Guernsey and Alderney and Sark Ordinances

The Ordinances give domestic effect to Regulation 1.4 of the MLC (**Regulation 1.4**) in Guernsey, Alderney and Sark. Regulation 1.4 is concerned with the regulation of seafarer recruitment and placement services (or 'manning agencies') and, in particular, it requires that those shipowners who use manning agencies that are based in other non-contracting member states (such as Guernsey) ensure that those agencies conform to the MLC's requirements.

Applicability of the Ordinances

The Ordinances apply to any 'employment agencies' or 'employment businesses' that employ or contract 'seafarers' to work on a 'seagoing commercial ship'. To really understand what this means, we need to explore the meaning of each of those words as they are defined and intended in the Ordinances so we can understand to whom the Ordinances apply.

- **Seafarer** means a person who is seeking to do maritime work on board a ship;
- **Seagoing commercial ship** means a ship, other than a 'pleasure vessel' which navigates in waters (other than exclusively inland waters, sheltered waters or areas where port regulations apply);
- **Pleasure vessel** means any ship owned by an individual and used only for the sport or pleasure of the owner (or their immediate family/friends); or any ship wholly owned by a body corporate and used only for the sport or pleasure of the employees or officers of the body corporate (or their immediate family/friends); or any ship wholly owned by an unincorporated association where its use is only for its members and their immediate family and friends. Therefore, any ship which is chartered for any commercial purpose (even if it is only chartered from season to season) cannot be defined as a 'pleasure vessel' and will be considered a 'seagoing commercial ship' for the purposes of the MLC;
- **Crew administration companies** being those businesses who provide record keeping and monitoring services, services relating to the checking of qualifications and services relating to complaints and disciplinary matters are also caught within the scope of the Ordinance. The Ordinance is specifically extended to apply to crew administration companies (as defined), notwithstanding that they are neither the employers nor the recruiters of the seafarers.

- **Employment agency** means the business of providing services for the purpose of finding seafarers employment with employers or supplying employers with workers for employment by them. This definition is relatively simple to understand and is intended to catch all recruitment-type agencies that recruit and place seafarers on-board ships; and
- **Employment business** means the business (whether or not carried out with a view to profit or in conjunction with any other business) of supplying persons in their employment, to act for, and under the control of, other persons in any capacity, ie to work on board a ship. At first glance, this definition appears very wide. For example, does it extend to the scenario where say Trust Company A is the owner of a Yacht B (on behalf of, or in trust for, its client) and directly employs seafarer C to work on board Yacht B? We are of the preliminary view that it does not. Regulation 1.4.2 of the MLC provides that regulation is required in respect of 'private seafarers' recruitment and placement services operating in a members territory whose primary purpose is the recruitment and placement of seafarers or which recruit and place a significant number of seafarers'. Notwithstanding that the wording of the Guernsey Ordinance appears wider than the wording of the definition in the MLC, identical wording in respect of the definition of 'employment business' has been adopted in the Isle of Man regulations where it is understood that the trust company scenario that we posed above would not fall within the definition of an 'employment business'.

This is because Trust Company A is the ship owner and is therefore directly employing seafarer C to work on-board Yacht B, rather than operating an employment business. If our analysis is correct (which, of course, is yet to be tested) and the Ordinance does not apply to Trust Company A, the company will still be obliged to prepare and provide appropriately compliant Seafarer Employment Agreements for its seafarers.

It is important to be aware that the Ordinances apply to all companies registered in Guernsey, Alderney and Sark – even if those companies may be carrying out recruitment and placement of seafarers to serve on flagged ships in other jurisdictions.

Obligations under the Ordinances

Now that we understand to whom the Ordinances apply, let us explore precisely what obligations the Ordinances place on what we shall, for the purposes of this update, refer to as 'manning agencies'.

First and foremost, the Ordinances place an obligation on manning agencies to be registered with the Commerce and Employment Department (the **Department**). The manning agency will be inspected by an approved inspector for the purpose of determining whether it is compliant with the requirements of Regulation 1.4 (unless it has been audited by an approved inspector within the last 12 months) and the Department will either grant or refuse the registration application by serving a written notice of its decision.

In short, it may only refuse an application if the correct fee has not been paid; it appears that any information provided is false or misleading; or the manning agency has failed to comply with Regulation 1.4.

Once registration has been granted, a certificate of registration will be issued which the manning agency must make available to any person reasonably requesting to see it at its principal place of business in the Bailiwick. Registration is valid for five years, although manning agencies are required to submit to an annual inspection by an approved inspector to confirm continued compliance with the Ordinance and pay an annual fee.

It is a summary offence (punishable by a fine of up to £10,000) to introduce or supply, or purport to introduce or supply, a seafarer to provide services on board any vessel without being registered to do so. The Ordinance sets out the process of registration and requires a small fee to cover the administrative costs of the registration.

So, other than the requirement for registration, what impact do the Ordinances have on manning agencies? Below is a brief summary of the prohibitions, restrictions and obligations owed by manning agencies pursuant to the Ordinances:

- prohibition on the compiling, selling, supplying or selling mechanisms or lists intended to prevent or deter seafarers from gaining suitable employment;

- restriction on subjecting a seafarer to any detriment on the basis that they have terminated their contract of employment or have, or intend to, take up employment with another entity;
- requirement to verify that seafarers recruited or placed by them are who they claim to be and that they are qualified and hold the documents necessary for the relevant position;
- requirement to provide every seafarer with a Seafarer's Employment Agreement that complies with the terms of the MLC; to explain to the seafarer his rights and duties under such agreement; and to provide him with a copy of the agreement once signed;
- requirement to maintain an up-to-date register of all seafarers recruited or placed through the business and to maintain records (for at least one year after the seafarer has left the employment for any reason) that prove compliance with the Ordinance in respect of each seafarer;
- prohibition on charging fees or imposing other charges for seafarer recruitment, placement or employment on-board vessels;
- requirement to ensure that the shipowner will repatriate any seafarer in accordance with the terms of the MLC and that the shipowner has the means to protect seafarers from being stranded in a foreign port. Whilst the obligation to repatriate a seafarer is absolute, the obligation to meet the costs of such repatriation is with exception and shipowners should be clear on what circumstances will justify a clawback of repatriation costs;
- requirement to advise seafarers of their right to make a complaint; the means by which they can make a complaint; and report any complaint made to the Department; and
- requirement to establish a system of protection by way of insurance or other appropriate measure to compensate seafarers for monetary loss that they may incur by the manning agency not meeting their obligations under any Seafarers Employment Agreement.

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