

SECTION 2

TITLE 2.6 AND 4.2 SEAFARER COMPENSATION AND SHIPOWNER LIABILITY

3.1 This section invites views on the MCA's proposals for implementation of Title 2.6 and 4.2 of the Maritime Labour Convention, 2006 on minimum standards on seafarer compensation and shipowner liability.

3.2 The current provisions relating to seafarer compensation for ship's loss or foundering are set out in section 38(1) of the Merchant Shipping Act 1995 (MSA 1995) which provides that:-

“Where a United Kingdom ship is wrecked or lost a seaman whose employment in the ship is thereby terminated before the date contemplated in the agreement under which he is so employed shall, subject to the following provisions of this section, be entitled to wages at the rate payable under the agreement at the date of the wreck or loss for every day on which he is unemployed in the two months following that date.”

and section 45(2) provides that:

“If a person dies while employed in a United Kingdom ship and is buried or cremated outside the United Kingdom, the expenses of his burial or cremation shall also be borne by those persons.”

3.3 Also, section 3(6)(b) of the Merchant Shipping (Repatriation) Regulations 1979 (MS(R) 1979) obliges an employer to pay for burial or cremation when a seafarer covered by section 2(1)(b) MS(R) 1979 (namely one who enters an employment agreement outside the UK and who is left or taken to the UK following shipwreck) dies. This appears to extend section 45(2) MSA 1995 to include that subset of seafarers.

3.4 It should be noted that any necessary amendments to section 45(1) MSA 1995 pertaining to shipowner liability for seafarers' medical treatment will be implemented separately under the Medical Care implementing regulations, which are discussed in more detail in the Medical Care consultation section.

MAIN CHANGES

3.5 The main changes to UK law which are required to comply with the MLC and which are proposed in these draft regulations are:

- a) statutory shipowner liability for losses suffered by the seafarer as a result from the loss or foundering of the ship (MLC Regulation 2.6.1);
- b) statutory requirement for shipowner to arrange financial security to assure compensation in the event of death or long-term disability of

- seafarers due to an occupational injury, illness or hazard (MLC Standard 4.2.1(b));
- c) extending the existing shipowner duties to meet costs of burial/cremation of seafarers who die during the course of their employment to cover burial/cremation in UK (MLC Standard 4.2.1(d)).

APPLICATION

3.6 The existing sections of the Act (s38 and s45(2)) have a broad scope, applying to fishing vessels as well as merchant ships. Regulation 5 inserts a new subsection (1A) into section 38 of the Merchant Shipping Act 1995 and a new section (2A) into section 45 of the Merchant Shipping Act 1995. As a result, liability for ships covered by the MLC will be governed by the proposed regulations and not sections 38 and 45(2), but sections 38 and 45(2) will continue to apply to ships which are not covered by the MLC.

SUMMARY OF THE PROPOSALS

3.7 The way we envisage implementing the changes identified in paragraph 4 above are outlined below.

Seafarer Losses arising from the Loss or Foundering of a Ship

3.7 Regulation 2.6 provides that the shipowner shall ensure adequate compensation for injury and loss resulting from the loss or foundering of the ship. This is without prejudice to any other rights which may exist under national law. It is considered that sub-section 38(1) MSA 1995 has the same effect as MLC Guidance B2.6.1.1 in that it is considered that “*wreck or loss*” has the same effect as the MLC terminology “*loss or foundering*”. So this is already in force in UK law and it is intended to retain it when implementing the Convention.

3.8 Standard A2.6 also requires the shipowner to compensate the seafarer for unemployment resulting from the loss or foundering of the ship. Guideline B2.6.1 suggests that this may be limited to two months. As a two month limit is already provided for in s38(1) MSA 1995, it is proposed that this limit be continued in UK law. (Although s38(1) MSA 1995 does not mention injury or loss resulting from these causes.)

3.9 The wages obligation is, however, qualified by sub-section 38(3)(a) which provides for the shipowner to avoid liability if the unemployment was not due to the wreck or loss of the ship and s38(3)(b) the seaman was able to obtain suitable employment for that day but unreasonably refused or failed to take it. Arguably the s38(3)(b) safeguard is not provided for in MLC Guideline B2.6.1 which amplifies Standard A2.6 – the Guideline only mentions that the seafarer should remain, in fact, be unemployed - however, as a general principle in UK law, where losses are to be compensated, it is standard to expect the person seeking compensation to have done their best to mitigate the loss, and it is not proposed to amend the legislation on this point.

Do you agree that this is the proper approach to take, particularly in relation to s38(3)(b)? If you consider that another approach would be preferable, please explain whether, and if so how, you consider that the alternative approach is compatible with the provisions of Title 2.6 of the Convention.

3.10 Turning to the “loss” aspect of Regulation 2.6, it is considered that this includes eg., personal possessions, following the loss or foundering of the ship. There is no provision in UK law to cover this at present, so the UK is under an obligation to implement this provision. This obligation is introduced in Regulation 7(5) of the draft Regulations.

3.11 We have considered whether legislation should specify financial maximum and/or minimum cover to be provided for seafarers in respect of losses other than personal injury or death. There is a counter view which suggests that to impose levels of cover in legislation may encourage some shipowners to lower the amount of cover which is already in place, thus reducing the standards in place for the seafarer. Also, any figures specified in primary and secondary legislation are notoriously resource intensive and time consuming to amend when updating is required, and it is believed that creating this situation would place an unnecessary burden on the public purse. Variations on the idea include specifying maxima and/or minima in a Merchant Shipping Notice (MSN), which would make them obligatory, or a Marine Guidance Note (MGN), which would make them only advisory. It is expected that whatever happens, there will be a requirement for amounts of cover to be specified in the Seafarer Employment Agreement (SEA), and it is thought that this alone may be considered sufficient. At least for the time being, the approach being taken is that it is not intended to specify any maxima or minima in legislation or guidance.

You are invited to indicate your view on whether maximum and/or minimum amounts of cover for losses (other than personal injury or death) following the loss or foundering of the ship should be:

- a) included in secondary legislation (a legal obligation on the shipowner);**
- b) a Merchant Shipping Notice (MSN), (a legal obligation on the shipowner);**
- c) a Marine Guidance Note (MGN) (voluntary guidance for the shipowner);**
- d) specified by the shipowner in the Seafarer Employment agreement, either solely or in addition to one of the above.**

Drafting amendments to reflect changes in other areas

3.12 Sub Section 38(1), being orientated towards the (collective) Crew Agreements which have been used for many years in the shipping industry, refers to termination of the seafarer’s employment “.... *before the date contemplated in the agreement under which he is so employed*”.

3.13 It is proposed that this phrase be removed from the MSA 1995 to take into account the fact that, under the new obligation in the Convention (Regulation 2.1) to have (individual) Seafarer Employment Agreements (SEAs), the seafarer's contract of employment is less likely to be end-dated, and also to remove the gender-specific reference.

3.14 We will be consulting separately on UK implementation of the MLC titles relating to seafarer employment agreements.

3.15 It is also proposed, after the words “..... payable under the ...” in ss38(1) to replace the word “*agreement*” with the words “*relevant employment*”, again to take into account the introduction of SEAs.

3.16 Standard 4.2.1(a) requires shipowner to bear the costs of sickness and injury from commencement of duty until repatriation. This will be covered by the Repatriation Regulations (which will be subject to separate consultation) and is therefore outside the scope of this Consultation.

3.17 Likewise the shipowner liability for “*costs in respect of sickness and injury of the seafarers occurring between the date of commencing duty and the date upon which they are deemed duly repatriated, or arising from their employment between those dates;*” in Standard A4.2.1(a) is being dealt with under the new Medical Care Regulations and is covered in more detail in the Medical Care consultation section.

Burial/ Cremation

3.18 Section 45(2) MSA 1995 provides that the shipowner must meet the cost of burial or cremation expenses for persons employed on a UK ship if the burial/cremation takes place outside the UK, and section 3(6)(b) of the Merchant Shipping (Repatriation) Regulations 1979 (MS(R)R 1979) obliges an employer to pay for burial or cremation when a seafarer covered by those Regulations, ie., a seafarer who has entered their employment agreement outside the UK, thus shrinking the pool of seafarers not covered even further. Standard A4.2.1(d) requires that the shipowner meets burial expenses but does not specify geographical parameters. This is in keeping with the fact that, in today's modern shipping industry, many of the seafarers working on ships of a particular flag state are not nationals of that flag state. It is therefore intended that the requirement for burial/cremation to be outside the UK is removed.

3.19 The MLC does not mention cremation, but as it appears specifically for seafarers who die outside the UK in the MSA 1995, and some who die inside the UK by MS(R)R 1979, we intend to carry this forward, so as to maintain existing standards. There is also a risk that, due to the fact that religious and cultural practices of some seafarers dictate they must be cremated rather than buried, that not to include cremation could be considered discriminatory against those seafarers and their families. One might argue that the MLC does not require cremation to be applied without geographical parameters, so for the very small residual subset this is “gold plating”, but we understand that

some member states implementing the Convention understand the word “burial” to include “cremation”.

Financial Security

3.20 Standard A4.2.2 of the Maritime Labour Convention 2006 requires that the shipowner provides financial security to assure compensation for the seafarer in the event of their death, long-term disability due to occupational injury, illness or hazard. The draft Regulations introduce this requirement. It would seem that the simplest method is by the shipowner taking out an insurance policy with a recognised insurance company to cover the relevant risks, evidencing this is by a Certificate of Insurance from that insurance provider. However, it has also been suggested that some shipowners should be allowed to self-insure.

3.21 Early anecdotal evidence suggests that some nations may be taking the view that self-insurance could only be feasible for state owned companies. While the possibility of companies self-insuring has not specifically been ruled in or out, either in the draft legislation or stakeholders deliberations, it has not yet been established whether it is feasible. For example, how could compensation be assured if the company were to go into liquidation? Could some money be ring-fenced for such an eventuality? Would it be possible to take out a bond which would satisfy the requirements of the Convention? Who would administer such a scheme? How would a surveyor be able to check that satisfactory arrangements are in place, without a certificate from an insurance company to check?

You are therefore invited to indicate, given that even apparently financially stable companies can go into liquidation, if you believe that there are circumstances under which self-insurance should be permitted. If so, please describe how you would envisage this working in practice and being verified by a surveyor.

3.22 Please bear in mind that some medical liabilities (pending Repatriation and resulting from loss or foundering of the ship) will be addressed by the draft Medical Care and Repatriation Regulations, and further details will be set out in the consultation provisions relating to those Regulations.

Exclusions and limitations

3.23 Standard A4.2.3(b) outlines a shipowner’s liability:

“to pay wages in whole or in part as prescribed by national laws or regulations or as provided for in collective agreements from the time when the seafarers are repatriated or landed until their recovery or, if earlier, until they are entitled to cash benefits under the legislation of the Member concerned.”

3.24 Standard A4.2.3(a) imposes a liability on the shipowner to pay wages to an incapacitated seafarer until repatriation.

3.25 Standard A4.2.3(b) permits the shipowner's liability to pay a seafarer's wages to be limited to the extent to which the seafarer is not entitled to receive cash benefits under national legislation. This is implemented in regulation 9(4) of the Regulations.

3.26 Standard A4.2.4 permits the shipowner's liability to pay a seafarer's wages to sick and injured seafarers to be limited to a period of 16 weeks from the day of injury or sickness. This is implemented in regulation 9(5) of the draft Regulations.

You are asked to comment on whether you consider the provisions in Standard A4.2.3(a) should be limited by Standards A4.2.3(b) and A4.2.4 as drafted in the Merchant Shipping (MLC)(Shipowner Liability) Regulations 201*.

3.27 Standard 4.2.5 provides that implementing nations may exclude the shipowner from liability in respect of:

- (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."*

3.28 The draft Liability Regulations reflect these exclusions in respect of the payment of wages. This is considered not to be a lowering of existing standards because, although these exclusions are not expressly mentioned in s38, which provides that wages must be paid for a period of two months, this only relates to the period following the loss or foundering of a ship, and so does not cover the payment of wages in any of the situations outlined in the exemptions.

You are asked to indicate whether you agree that these exclusions are appropriate and reasonable, having regard to existing standards.