

**SHIPOWNERS' AND EMPLOYERS' BRIEFING:**

**SHORE-BASED WELFARE FACILITIES AND PORT STATES UNDER THE CONSOLIDATED  
MARITIME LABOUR CONVENTION**

In February 2006, at the International Labour Conference's 94<sup>th</sup> Session in Geneva, the International Labour Organization adopted the Consolidated Maritime Labour Convention – the result of years of negotiation between governments, shipowners' groups, and seafarers' groups from around the world. The Convention is now open for ratification by individual governments.

***Q1: Why should I be concerned about labour laws in a Port State where my vessel/my client's vessel calls?***

Upon entering into force, the Convention could signal a shift in the management of employees in the shipping industry.

The Convention is now open for countries to ratify it, or join the Convention, making its provisions enforceable in that state. The time at which the Convention will enter into force is still not certain, since it has not been decided how many countries must join before it becomes effective. However, the formula is that it will be 12 months after (a) a certain number of countries join, and (b) the countries that join are the Flag State for a certain percentage of worldwide gross tonnage. The number of countries will likely be between 25 and 35. The percentage will ultimately be somewhere between 30 and 50.

The thinking behind the formula is that a small number of Flag States' registers comprise the vast majority of world tonnage. Table 1 shows the 23 Flag States with the highest percentage of gross tonnage.

<b>Table 1. FLAG STATES WITH HIGHEST REGISTERED GROSS TONNAGE (2004)</b>		
<b>Registration</b>	<b>Gross tonnage</b>	<b>Percentage</b>
Panama	131,451,672	20.76%
Liberia	53,898,761	8.51%
Bahamas	35,388,244	5.59%
Greece	32,040,682	5.06%
Singapore	26,282,777	4.15%
Hong Kong	26,085,134	4.12%
Malta	22,352,570	3.53%
Marshall Islands	22,294,505	3.55%
Cyprus	21,283,373	3.36%
China	20,369,157	3.22%
Norway (NIS)	15,416,521	2.43%
Japan	13,180,189	2.08%
United Kingdom	11,122,871	1.76%

Italy	10,955,957	1.73%
United States	10,744,126	1.70%
Russian Federation	8,638,887	1.36%
Germany	8,246,428	1.30%
Korea (Republic of)	7,826,141	1.24%
India	7,517,583	1.19%
Denmark (DIS)	7,284,769	1.15%
Isle of Man	7,168,533	1.13%
Antigua and Barbuda	6,914,568	1.09%
Saint Vincent and the Grenadines	6,324,289	1.00%
All other (each below 1 percent)	120,206,382	18.99%
<b>TOTAL</b>	<b>632,994,119</b>	<b>100.00%</b>

Together, these 23 Flag States account for 81.01% of worldwide gross tonnage (note that 18.99% of gross tonnage is split among all other Flag States). Most notable is Panama, which has more than 20% of worldwide gross tonnage. The top seven Flag States alone have more than 50%.

A country joining the Convention is significant in various ways for shipowners whose vessels are registered under the flag of that country, for employers operating in that country, and for vessels calling at ports in that country. In this article, we will focus on the effect on Port States that join the Convention.

The Convention establishes requirements concerning both port facilities in the Port State, as well as the potential for labour inspections to be conducted by Port States.

### Port Welfare Facilities

#### *Q2: What are the Convention's requirements affecting welfare facilities in Port States?*

The Convention has three principal requirements (Standard A4.4), all of which must be carried out by the governments of Port States that join the Convention:

- **Access to existing facilities.** Any existing facilities must be made available for all seafarers, regardless of nationality, race, colour, sex, religion, political opinion, social origin or the Flag of the vessel on which they work. It would therefore seem inevitable that the intention (through resource funding or the withdrawal of it) is to move away from single faith facilities, towards multi-denominational centres.
- **Development of facilities.** Port States must '*promote the development of port facilities*' in different ports on their territory. In doing this, the Port States must consult shipowners' and seafarers' organisations regarding which ports are appropriate. And yes, '*promote the development*' does not necessarily mean that port facilities must be established. A Port State that does not establish any port facilities could still in theory be in compliance, so long as they were doing something that could be characterised as promoting development, such as bringing together industrial groups or independent organisations.
- **Creation of welfare boards.** Port States must '*encourage the development*' of welfare boards which regularly review available welfare facilities and services and

ensure that they meet the needs of seafarers as the industry changes over time. Again, this is not mandatory language requiring the establishment of welfare boards. In States where there is more than one port, the welfare board should establish port welfare committees. These should be administered by and report to, the welfare board. The principal role of a committee is to ensure that the local welfare resources available are used to the best possible effect without duplication, such as may occur where there are several interests, such as charities and religious organisations, operating at the same port. The goal of the Convention is to get the welfare board established so that it becomes their conduit, keeping track of port facilities and serving as a go-between for seafarers and shipowners.

**Q3: What is it going to cost me?**

The Convention does not provide for a specific due or fee; it is left to the Port State to decide what and how to impose it.

The Convention does not set forth any **mandatory** provisions on funding port welfare facilities (Report of Committee No. 3, ¶ 269) leaving this question to the individual Port States that join the Convention. Potentially, a levy or due on ships using the port, or dues from employers, could be imposed.

The Convention does contain **non-mandatory** guidelines that give a good clue. The Guidelines (B4.4.4(1)) provide that financial support should be provided through one or more of the following four sources:

- Government grants;
- Levies or dues from ‘*shipping sources*’;
- Voluntary contributions from shipowners, seafarers, or their organisations; and
- Voluntary contributions from other sources.

Traditionally, voluntary sources such as religious organisations have provided a critical source of funding for port welfare facilities. However, the Convention aims to make larger sources available by encouraging Port State governments to open up public funding or industry sources.<sup>1</sup> Yes, that’s your pocket they are eyeing.

So it is really down to the government of the Port State, their fiscal policy, the effectiveness of the domestic welfare board in lobbying for more funding and the relative positions of the shipowners and unions operating in the domestic ports.

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<sup>1</sup> A previous treaty was designed to put an obligation on Port States to ‘*ensure*’ that funding from one source or another was arranged (Article 2(2), Seafarers’ Welfare Convention 1987). However, it appears that even that Convention was not designed to put any obligation on governments to fund port facilities themselves, but rather to maintain existing funding (Report of Committee No. 3, ¶ 262). However, as that treaty proved to be unpopular and few countries joined it, the language in the Convention does not force governments to provide or even ‘*ensure*’ funding from one source or another.

The countries who have joined the previous treaty are: Brazil, Bulgaria, Czech Republic, Denmark, Finland, France, Georgia, Hungary, Mexico, Norway, Romania, Slovakia, Spain, Sweden and Switzerland.

It is not unrealistic to imagine the imposition of a port levy or even an annual contribution from an employer. An earlier draft of the Convention included a comment assuring the governments that the Convention created no obligation on them to provide financial support. If the political will and economic factors were against the need for more facilities, the fact that the provisions are not mandatory would result in things remaining as they are.

The guidelines also provide that where any taxes are imposed, they must be used only for the purpose raised, e.g. ringfencing them solely for port welfare facilities. Technically, however, the Port State government can stipulate any purpose for which the funds can be used. But, if they specify the purpose in legislation, then the taxes collected must be used for that purpose. So if a Government made a law that says it is taxing vessels to provide port welfare facilities, then, legally, the money collected cannot be used for any other purpose.

***Q4: Who will decide whether taxes are levied on shipowners or employers to fund port welfare facilities?***

**Port States:** As masters of their own territories, Port States will determine who funds port facilities, assuming they have decided they should be funded.

During the negotiation of the Convention, Port States were eager to clarify that they would not be saddled with financing port welfare facilities.

Without spelling it out directly, the drafters of the Convention seem to have pushed forward an 'advocate' for the maintenance, establishment and expansion of port facilities, through the welfare board(s) at port, regional and national levels. This is not surprising, since revenue and donations may come from a number of sources and it is preferable to have a single administrative board to assess which port and thus which facilities are to benefit from the available income. The welfare board would then be well placed to keep track of the needs of seafarers throughout the State, oversee the administration of welfare facilities at ports, assist in the provision of welfare facilities, withdrawing those that are under utilised and lobbying government for more funding, as and when required.<sup>2</sup>

Just as with the creation of new welfare facilities, the Convention creates **no obligation** on Port States to create welfare board(s), let alone grant them any power. Nevertheless, for Port States that follow through with more of the Convention's non-mandatory guidelines, the Convention seeks to establish more welfare boards to monitor, administer, liaise with related organisations (charities, trade unions, etc.) and lobby for port facilities. Historically, these are responsibilities government has not been willing to take on.

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<sup>2</sup> In the case of the UK, the Merchant Navy Welfare Board (MNWB), has principal objectives of assessing the welfare needs of merchant seafarers and their dependants and the co-ordination of the work of the societies and charitable organisations concerned with the provision of welfare services. In general it provides charitable donations to seafarers' charities for capital investment in infrastructure – not day-to-day running costs. To finance running costs and thus fulfil the Convention's concept for welfare boards, would require a change in the MNWB constitution. This new role could cause a conflict in ideals between charities and the welfare board, particularly where the welfare board does not subscribe to all the ideals of the charities concerned but controls the purse strings.

**Q5: *If there are levies or dues, will they cut into my profit margin?***

As shipowners, not necessarily. The costs might be passed on to charterers or shippers in the form of a sum included in the port dues, or within the CIF price, but indirectly the cost will be paid by the consumer.

This result seems the most likely in the event that Port States begin imposing levies or dues to fund port facilities. As a result, the charterers' operational costs and freight for routes calling at Convention Port States may be slightly higher than before ratification. However, the cost per ship is small, probably between £10~£20 per ship per call at each port, with a maximum contribution for vessels calling frequently at the same port. It will be more difficult for shipowners, employers, and seafarers in tramp trades to lobby Port State governments, since these groups often will not know at which ports a vessel will call, and will usually be on charter, with charterers paying the port costs. It may well be the ferry, liner and pool operators who will be the mouthpiece of the industry.

With several seafarers' charities competing for funding, possibly at the same ports, it remains to be seen how conflicts in funding and ideals are resolved. It is noted that the Convention makes no reference to the fishing fleet. In the UK historically, the fishing fleet is not part of the merchant navy and therefore funding and administration of their charities is out with the ambit of the MNWB in its present form.

In the end, the impact of any levies or dues will be an economic question to which the market must adjust.

**Port State Control**

**Q6: *What is this about a Port State carrying out a labour inspection on my vessel?***

A Port State which has joined the Convention, can inspect a vessel when calling at one of its ports, even if the vessel is registered with a Flag State that has not joined the Convention. A key word here is '*can*' – Port States are not **required** to carry out any such inspections. It will be down to Convention Port States as to how the right to inspect will be carried out.

**Q7: *How can a Port State inspect my vessel if my Flag State has not even joined the Convention?***

Vessels registered with Flag States that have not signed up to the Convention cannot escape the effect and enforcement of the Convention by moving to a non-signatory Flag State.

Under the Convention, countries that join the Convention – even when they are merely the Port State – must ensure that vessels from Flag States that have not joined the Convention '*do not receive more favourable treatment*' (Article V(7)). These clauses aim to establish Port-State control over all vessels.

Therefore, a Port State that decides to carry out inspections under the Convention (remember, they are not required to do so) may inspect vessels from non-Convention Flag States as well as those from Convention Flag States. If Port-State control is as effective as hoped, all vessels stopping at Convention state ports will ultimately be subject to the requirements of the Convention.

**Q8: When can a Port State inspect my vessel?**

The Port-State inspection can be triggered by any one of the following four situations (A5.2.1(1)):

- **Irregular documents.** Something wrong with the labour certificate or compliance declaration;

Under the Convention, each vessel is required to carry a Maritime Labour Certificate and a Declaration of Labour Compliance, issued by the vessel's Flag State. A Port State is permitted to inspect those documents to see if on their face they are in order. If they are not, the Port State may then inspect the vessel – **regardless of whether the vessel's Flag State has joined the Convention or not.**

What if the Flag State has not joined the Convention? Obviously, there would not be any Maritime Labour Certificate or Declaration of Labour Compliance. The Convention is silent on this point. However, in that case, it is unlikely a Port State would require the specific documents issued by Convention Flag States. That said, the current trade union practices used to force compliance are almost certain to continue.

Shipowners are currently at risk of a work stoppage by shoreworkers (usually the stevedores) if ILO-approved or union-negotiated credentials are not presented (for example, the 'Green card' issued by the International Transport Workers' Federation (ITF)).

- **Conditions on board.** 'Clear grounds' for believing that conditions on board are sub-standard (as per the Convention's provisions, which are detailed and beyond the scope of this summary);
- **Flag flight.** Reason to believe the ship has changed flags to avoid complying with the Convention;

This is what might be referred to as the 'flag flight' trigger. It is designed to prevent shipowners from simply re-registering ships under non-Convention flags when the Flag State ratifies the Convention. If the flag was changed, it would be grounds for a Port State inspection. Two points apply to this:

First, there would have to be some connection between a Flag State joining the Convention and the vessel changing flags.

Second, the Convention does not come into force until one year after the necessary number and gross tonnage of countries join. Shipowners and employers concerned about inspections should be aware that a Flag State could agree to join the Convention, but the Convention might not take force until a year or two later. If the vessel changes flags during that time, it could be construed as an attempt to avoid the requirements of the Convention.

This might not necessarily be noticeable by an inspector in a Port State. However, any seafarer or trade union or other person who did notice would be able to make a complaint to the Port State (see the following section on "Complaints").

If the vessel changed flags after the Convention came into force, such a change would be noticed because the Maritime Labour Certificates required by the Convention are issued every five years by the Flag State. So the named flag on the Certificate would differ from the vessel's flag.

- **Complaints.** If there is a complaint that conditions on board do not meet the requirements of the Convention.

The final ground for inspection is likely to be the one with the most 'teeth'. Any person can make a complaint leading to an inspection – a trade union, a seafarer on board or any other person. The complaint can be made to the competent authority or authorities of the Port State at which the vessel is alongside and under which an inspector in the Port State could carry out an inspection.

The Convention recognises how far-reaching the complaint inspection could be, and limits it to the matters mentioned in the complaint. Still, the Convention also specifies that a complaint could constitute '*clear grounds*' for believing that the conditions on board are sub-standard (see '*Conditions on board*' above) potentially leading to a broader inspection.

**Q9: What can the Port State do if the inspector finds deficiencies in conditions on board?**

If the Port State's inspecting officer finds deficiencies, the officer will do **all** of the following three things (A5.2.1(4)):

- Notify the Master and the vessel's Flag State authorities;
- Notify the authorities at the next port of call; and
- Notify seafarers' and shipowners' organisations in the Port State where the vessel is alongside about the deficiencies and the measures required to put them right.

Because of the grave potential impact this can have on business, shipowners and employers must be aware of the requirements of the Convention. But it gets worse...**it is possible for the Port State to detain the vessel.**

**Q10: What will lead to my vessel being detained?**

**The Port State can detain the vessel** for the following two reasons (A5.2.1(6)):

- The conditions on board are clearly hazardous to the safety, health or security of the seafarers; or
- The problems are a '*serious or repeated breach of the requirements of [the] Convention (including seafarers' rights)*'.

The vessel can be detained until a plan of action to correct any problems is accepted by the officer of the Port State and the officer is satisfied that the plan will be carried out as soon as possible. If the vessel is detained, the Flag State will be notified, as well as seafarers' and shipowners' organisations in the Port State where the vessel is being detained.

18 August 2006

Shipowners have a bit of relief in that they may claim against the Port State for any loss or damage resulting from improper detention. However, it should be borne in mind that government agencies generally have a wide discretion in their ability to enforce the law. Therefore, in practice, the detention of the vessel is likely to have to be seen as an 'abuse of process' under the Port State's law to have any chance of securing damages from the Port State.

***Q11: What is the best way to ensure that I am in compliance with the requirements of the Convention?***

You already know the answer – consult Sach Solicitors!

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