

## SUPERYACHTS LEGAL UPDATE 2009

23<sup>rd</sup> April 2009



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## Introduction & Welcome

Vaughan Jones



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## The Maritime Labour Convention 2006

John Morris  
Senior Partner



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## Background

- No comprehensive protection
  - 67 International Conventions
  - old and out of date
  - discrete issues
  - various signatories and ratifications



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## Context

- The 'fourth pillar'
  - International Convention for the Safety of Life at Sea 1974 (SOLAS)
  - International Convention for the Prevention of Pollution from Ships 1973/78 (MARPOL)
  - International Convention on Standards of Training, Certification and Watch keeping for Seafarers 1978/95 (STCW)



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## Adoption

- The MLC was adopted by the ILO in Geneva on 23 February 2006



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## Coming into force

- 12 months after
  - ratification by at least 30 ILO member countries having
  - 33 % of the world's gross tonnage of ships
- So far
  - Panama, Norway, the Marshall Islands, Liberia and the Bahamas
  - the tonnage requirement has been satisfied
- Expectation
  - into force by 2011
  - action plan to achieve this
  - 24 ratifications (or 24% of tonnage) in 2009



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## Stance of the European Community

- Council decision 2007/431/EC – 7 June 2007
  - authorises member states to ratify the MLC
- Council Directive proposal – 2 July 2008
  - to implement MLC within European member states
  - member states expected to conclude ratification process by end of 2010
- Most Red Ensign Group registries are
  - outwith the EU or the EEA
  - not members of ILO



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## MLC Purpose

- For seafarers
  - a comprehensive document containing minimum requirements for improved working and living conditions
- For ship owners
  - fairer competition
  - safer ships
  - fewer problems and delays



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## MLC Structure (1)

- Articles including
  - general provisions, fundamental requirements, application, entry into force, etc
- Five operative sections or “Titles” setting out
  - minimum requirements for seafarers to work on a ship
  - conditions of employment
  - accommodation, recreational facilities, food and catering
  - health protection, medical care, welfare and social security protection
  - compliance and enforcement



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## MLC Structure (2)

- In respect of each Title
  - a Regulation – fundamental principles to be achieved
  - a Standard – mandatory standards re: how the Regulation should be implemented and interpreted (or substantial equivalence)
  - a Guideline – recommendations to be pursued
- Apply to ratifying Member States



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## Title 1: Minimum Requirements for Seafarers

- Minimum age
- Medical Certificate
- Training and qualifications
- Recruitment and placement



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**Title 2:**  
**Conditions of Employment**

- Seafarers' employment agreements
- Wages
- Hours of work and hours of rest
- Entitlement to leave
- Repatriation
- Seafarer compensation for the ship's loss or foundering
- Manning levels
- Career and skill development and opportunities for seafarers' employment



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**Title 3:**  
**Accommodation, Recreation  
Facilities, Food and Catering**

- Accommodation and recreational facilities
- Food and catering



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**Title 4:**  
**Health Protection, Medical Care,  
Welfare and Social Security Protection**

- Medical care onboard ship and ashore
- Shipowners' liability
- Health and safety protection and accident prevention
- Access to shore-based welfare facilities
- Social security



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### Impact (1)

- Following ratification, States are to pass national laws to implement MLC eg
  - employment conditions
  - new yacht design
- Direct effect on yacht brokers and crewing agencies



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### Impact (2) A “shipowner”

- Article II1(j)  
“the owner of the ship or another organisation 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, regardless of whether any other organisation or persons fulfil certain of the duties or responsibilities on behalf of the shipowner”



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### Title 1: Recruitment and Placement (1)

- Intention to ensure that seafarers
  - are aware of their rights and duties when placed on ships
  - are properly qualified
  - will be adequately protected if shipowners do not meet their obligations towards them



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Title 1:

Recruitment and Placement (2)

- States must ensure that private recruitment agencies carrying on businesses within their territory operate in accordance with a standardised system eg: to ensure
  - an up-to-date register of all seafarers recruited or placed through them is maintained
  - seafarers are informed of their rights and duties under their employment agreements prior to or in the process of engagement
  - shipowners have the means to protect seafarers from being stranded in a foreign port



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Title 1:

Recruitment and Placement (3)

- Members must advise their own nationals on the possible problems of signing on a ship of a State that has not ratified MLC



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Title 2:

Employment Agreements

- Shipowners must ensure that all seafarers have a written employment agreement
  - contents must be subject to review, advice, negotiation and be freely accepted
  - collective bargaining agreements may be incorporated: if so must be held on-board
  - must contain specified terms eg: wages, annual leave and minimum notice



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Title 2:  
Wages

- Shipowners must ensure seafarers
  - are paid regularly (at least monthly) and in full accordance with the terms of their employment agreements
  - are provided with a means to transmit a proportion of their wages home
  - receive a monthly account



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Title 2:  
Working Time (1)

- MLC mirrors the Council Directive 1999/63/EC of 21 June 1999
- The Directive
  - relates to seafarers
  - made following agreement by the European Shipowners' Association and the Federation of Transport Workers' Unions in the European Union



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Title 2:  
Working Time (2)

- Flag State may elect for maximum work or minimum rest regime
- Shipowners must ensure that either
  - maximum hours
    - 14 hours in any 24 hour period
    - 72 hours in any 7 day period
  - minimum rest
    - not less than 10 hours in any 24 hour period
    - not less than 77 hours in any 7 day period
- Exception
  - to secure safety of the ship or another ship to which assistance is given
  - subsequent adequate rest must be given
- Shipowners must keep individual records of work and rest



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**Title 2:  
Annual Leave**

- Annual leave
  - guidelines on calculation and taking
  - basis
    - 2.5 calendar days (min) per month



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**Title 2:  
Manning Levels**

- Sufficient seafarers to ensure safe, efficient secure operation under all conditions
- Must comply with the MLC and accord with the national minimum safe manning document



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**Title 3:  
Accommodation, Recreation  
Facilities, Food and Catering**

- Very specific requirements eg.
  - headroom
  - floorspace
  - heating, lighting and insulation
- Applies to 'new builds' after MLC in force for the State concerned



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Title 4:  
Social Security (1)

- The intention is to secure for seafarers the same level of social security protection as shore-based workers

*"each member shall ensure that seafarers who are subject to its social security legislation... are entitled to benefit from social security protection no less favourable than that enjoyed by shore workers"*



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Title 4:  
Social Security (2)

- Branches to be considered by State
  - medical care
  - sickness benefit
  - unemployment benefit
  - old age benefit
  - employment injury benefit
  - family benefit
  - maternity benefit
  - invalidity benefit
  - survivors' benefit
- At ratification, 3 to be included in national law



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Title 4:  
Social Security (3)

- Standard of protection will vary
  - UK
  - Cayman Islands



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**Title 4:**  
**Social Security (4)**

- Under UK law, seafarers who
  - work for or are paid by a UK based company or
  - serve in designated inshore waters or
  - are resident or domiciled in the UK and are working on a vessel flying the UK ensign or
  - work on a vessel outside the UK but are domiciled or resident in the UK and the contract of employment was entered into in the UK and the employer has a place of business in the UK
- Cayman Islands
  - no social security legislation



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**Title 5:**  
**Enforcement**  
**Flag State Responsibilities (1)**

- Re ships over 500 gross tonnage and
  - engaged in international voyages, or
  - operating from a port or between ports in another country
- Put in place system of inspection and certification of such ships to check compliance with MLC eg
  - working and living conditions comply with national laws implementing the MLC
  - use of a licenced, certified or regulated private recruitment and placement service
- Issue Maritime Labour Certificate (ML Cert)



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**Title 5:**  
**Enforcement**  
**Flag State Responsibilities (2)**

- Require its ships to
  - maintain a Declaration of Maritime Labour compliance
  - provide on-board complaint procedures
- ML Cert subject to interim inspection after 2/3 years and a renewal inspection after 5 years



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Title 5:

Enforcement

Port State Responsibilities

- May inspect visiting foreign ships to review compliance with MLC requirements re: working and living conditions
- Regardless of whether ship's flag state has ratified MLC
- Shall accept the ML Cert and Declaration as prima facie evidence of compliance



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Title 5:

Enforcement

Labour Supplying Responsibilities

- Member has responsibility re: its nationals or residents
  - to ensure implementation of MLC regarding recruitment and placement
  - for social security protection of seafarers
- Members shall enforce MLC applicable to the operation and practice of seafarer recruitment and placement services established on its territory through
  - inspection
  - monitoring
  - legal proceedings for breaches



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Title 5:

Compliance (1)

Shipowners' obligations

- To carry and maintain on board each ship
  - a Maritime Labour Certificate
  - a Declaration of Maritime Labour Compliance
    - to be drawn up by the ship owner for approval stating the national requirements implementing MLC and the measures adopted to ensure compliance
  - a copy of the MLC



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Title 5:  
Compliance (2)  
Shipowners' obligations

- To ensure provision of onboard procedures for fair handling of seafarers' complaints alleging breaches of MLC
  - must provide all seafarers with a copy of the onboard complaints procedures
  - any victimisation is prohibited and subject to penalties



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Example:  
Hypothesis

- France and Norway have ratified the MLC
- Germany has not
- Norwegian worker seeks work through a French privately-operated crewing agency
- Through that agency he has become interested in working on a German flagged yacht



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Example:  
Questions

- What are the obligations of the States?
- What are the obligations of the crewing agency?



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**Example:**  
**States' Obligations (1)**

- France
  - ensure the agency maintains a register recording the placement of the seafarer
  - ensure that the seafarer is aware of his rights and duties and all other matters set out in the MLC
- Norway
  - ensure that the seafarer is aware of the problem of signing on a ship that has not ratified the MLC



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**Example:**  
**States' Obligations (2)**

- Germany
  - no obligations under the MLC
  - should comply with current international conventions
  - comply with aspects of MLC that have the force of law through custom



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**Example:**  
**Crewing Agency's Obligations (1)**

- To comply with the requirements of the national law implementing MLC eg
  - maintain up-to-date register of seafarers recruited and placed
  - ensure that he is aware of his rights and duties under his employment agreement prior to or in the process of engagement
  - verify that he is appropriately qualified and holds any necessary documents



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**Example:**  
**Crewing Agency's  
Obligations (2)**

- ensure German shipowner has the means to protect the seafarer from being stranded in a foreign port
- establish a system of protection (eg. insurance) to compensate the seafarer for any monetary loss incurred as a result of a failure of the agency or the shipowner to meet respective obligations



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**Example:**  
**If Germany had ratified MLC?**

- Flag state responsibilities including legislating for
  - compensation for ship's loss or foundering
  - determining manning levels
  - quality of catering
  - provision of medical equipment and facilities on-board
  - liability of shipowners in respect of illness or injury of seafarers
  - standards in respect of occupational health and safety
  - ensuring any welfare facilities on its territory are available without discrimination
  - ensuring relevant social security protection no less than that enjoyed by shore workers
  - establishing system for inspection and certification of labour conditions
  - ensuring that its ships maintain ML Cert and Declaration



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**Example:**  
**If Germany had ratified MLC?**

- Shipowner responsibilities – numerous including
  - provision of employment agreement
  - monthly pay and account
  - compliance with hours of work or rest
  - provision for repatriation
  - compliant accommodation
  - provision of food and catering
  - provision of compliant medical care
  - provision of personal injury compensation
  - on-board ML Cert and Declaration



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## Coffee Break



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## National Insurance & Tax

**Hazel Phillips**



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- General Rules
  - tax regulations of the Flag State
  - problems with management companies
  - residency/domicile



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- Different treatment
  - UK
  - France
  - EU
  - Other



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- National Insurance/Society Security
  - UK split liability
  - HMRC litigation



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- Seafarers' earnings deduction
  - 100% income tax relief
  - at least 365 days absence
  - Pride of South America



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- To pay or not to pay?
  - British chef
  - superyacht bought by British pop star
  - superyacht flagged in Marshall Islands
  - managed by company based in France



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## Drugs & Alcohol

Hazel Phillips



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## Problems

- Health & Safety
- Accidents
- Use on-board
- Trafficking



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## Special Considerations

- Special rules in some ports
- Prescription drugs
- Dry boats V<sup>s</sup> strict limits
- Practical issues



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## Incidents

- Testing
- Liability
- MLC changes



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## Deterrents/ Contractual Issues

- Policies
- Searching
- Testing
- Deductions



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## Disciplinary Measures

- Suspension
- Dismissal
- Deduction of wages/withholding pay



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## Addicts

- More tolerance required?
- Should assistance be given?



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## Current Issues in Contracts

Vaughan Jones



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English law



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- Rights of a third party to sue on a contract
- Endeavouring to be reasonable
- Liability of directors for company debt



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### Third Party Rights to Enforce Contracts (1)

Owner/agent contract: owner agrees to provide certain crew benefits; confirms insurance adequate .....

Can e.g. members of the crew sue for non-performance?



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## Third Party Rights to Enforce Contracts (2)

Contracts (Rights of Third Parties) Act 1999

- reformed the “Privity of Contract” rule
- a third party may enforce a contract if it confers a benefit on the third party and the third party is identified by name or class or description
- exclusions include enforcement against employees/workers



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## Third Party Rights to Enforce Contracts (3)

“If on a proper construction of the contract ... the parties did not intend the term to be enforceable by the third party ....”  
(section 1(2))

“ A person who is not a party to this agreement shall not have any rights under or in connection with it”



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## Endeavours (1)

- “Reasonable endeavours”
- “All reasonable endeavours”
- “Best endeavours”

- *2007 Rhodia International -v- Huntsman;*  
*Yewbelle -v- London Green Developments*



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## Endeavours (2)

- What an endeavours obligation means depends on the other terms and the surrounding commercial context
- Is the underlying objective unenforceable because of lack of certainty? If so, an obligation to endeavour to achieve that objective will fail



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## Endeavours (3)

“Best Endeavours”:

- May require significant expenditure (but not ruin)
- What a prudent, determined and reasonable person acting in his own interests would do - litigation



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## Endeavours (4)

“Reasonable Endeavours”:

- No requirement to sacrifice commercial interests
- May require limited expenditure
- Balance obligation against commercial considerations

“All Reasonable Endeavours” – hybrid?



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### Endeavours (5)

Specify extent of obligation:

- Must obligor commit to expenditure (how much?)
- Period of obligation
- Obligation (or not) to take legal action
- Specific actions to be taken (or not taken)



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### Personal Liability of Company Directors (1)

***Contex Drouzhba -v- Wiseman (2007)***

W was a director of Scott Daniel Ltd and signed on its behalf a contract relating to the supply of goods. W knew Scott Daniel Ltd could not pay for goods ordered from Contex Drouzhba as Scott Daniel Ltd was insolvent.



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### Personal Liability of Company Directors (2)

- Principle not limited to payment obligations, but each case depends on its own facts.
- Not clear if director must be “controlling mind” of the company (as Wiseman was)
- Might the principle be extended from fraud (Wiseman) to negligence? (The *Contex* case concerned fraud only)



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## Personal Liability of Company Directors (3)

- Be careful what you sign
- A contract could include a disclaimer of personal liability by the director signing, but this would be effective only in respect of negligent representations, not fraud



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## Questions?



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The presentations accompanied by the enclosed notes, and the notes themselves, have been prepared on the basis of the law of England. Of necessity, certain aspects are subject to interpretation and/or have been generalised, and points of detail have been omitted in the interests of brevity.

They are therefore intended purely as a guide for the purposes of the Superyachts Legal Briefing 2009, and therefore reliance should not be placed upon the presentation or the notes for the purposes of any actual case or set of circumstances; specific advice should be sought in relation to each case and/or circumstance as it arises.



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