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## **The implementation of international law in the national legal order : a legislative perspective**

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## 9.1 IMPLEMENTATION OF THE MARITIME LABOUR CONVENTION

## 9.1.1 General

The Maritime Labour Convention (MLC) was negotiated and adopted in the framework of the International Labour Organisation (ILO), an international organisation that was founded in 1919. In 1946 the ILO was incorporated in the newly established structure of the UN as a ‘specialised agency’.<sup>765</sup> Its aim is to promote social justice and respect for labour rights. To this end it develops international labour standards.<sup>766</sup> They encompass not only general topics, such as forced labour, child labour, equal remuneration etc., but also instruments that are applicable to specified groups of workers. An example of this latter category is the MLC, which lays down rights for seafarers. It was adopted at the 94<sup>th</sup> International Labour Conference in 2006, which marked the end of a five year period of negotiations between representatives of states, shipowners and seafarers.<sup>767</sup> This process had been instigated by the shipowning industry, which complained about the vast body of applicable legal instruments, each of which was ratified by a varying number of states. They believed a new and consolidated international treaty would limit the negative consequences of the existing ‘check-board of legal requirements’.<sup>768</sup> The MLC is considered to be the ‘fourth pillar’ of international law to make shipping safer and more humane, in addition to three instruments which are known under the abbreviations

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765 The Instrument of Amendment to the ILO Convention and ChUN art 57, first paragraph.

766 Constitution of the International Labour Organization (adopted 28 June 1919, entered into force 28 June 1919) 225 CTS 189 (Constitution of the ILO, as amended) preamble and art 1. Also General Conference of the International Labour Organisation, ‘Declaration concerning the aims and purposes of the International Labour Organisation (Declaration of Philadelphia)’ (26<sup>th</sup> session 10 May 1944) <[http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62\\_LIST\\_ENTRIE\\_ID:2453907:NO#declaration](http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO#declaration)> (accessed 29 March 2018).

767 International Labour Conference, ‘Adoption of an instrument to consolidate maritime labour standards’ Report I (1a) (94<sup>th</sup> session 7-23 February 2006) <<http://www.ilo.org/ilc/ILCSessions/94thSession/lang--en/index.htm>> (accessed 29 March 2018).

768 J.I. Blanck jr., ‘Reflections on the negotiation of the Maritime Labor Convention 2006 at the International Labor Organisation’ 31 *Tulane Maritime Law Journal* 1 (2006) 35-55, 39. Also P.B. Payoyo, ‘The contribution of the 2006 ILO Maritime Labour Convention to global governance’ in: A. Chircop, T. McDorman and S. Rolston (eds), *The future of ocean regime-building. Essays in tribute to Douglas M. Johnston* (Brill, Leiden 2009) 385-408, 399.

SOLAS, MARPOL and STCW.<sup>769</sup> It replaces 37 earlier ILO-Conventions, the first of which have been adopted in 1920.<sup>770</sup> Therefore, the MLC has been described as ‘the very first comprehensive consolidation of international labour standards’.<sup>771</sup> 84 States have ratified the MLC, which entered into force on August 20, 2013.<sup>772</sup>

### 9.1.2 Content of the Convention

The text of the MLC does not contain an express statement of its purpose, except for the preambular section that refers to the desire to ‘create a single, coherent instrument embodying as far as possible all up-to-date standards of existing international maritime labour Conventions and Recommendations, as well as the fundamental principles to be found in other international labour Conventions [...]’ and the reference to ‘decent employment’ in article I MLC.<sup>773</sup> However, its aim can be said to be twofold: the improvement of labour conditions for seafarers<sup>774</sup> and to provide for a ‘level playing field’ for the industry. In other words, the MLC aims to ensure that dishonest shipowners do not enjoy competition advantages at the expense of their personnel, thus preventing a ‘race to the bottom’ in the protection of decent working conditions for seafarers.<sup>775</sup>

The MLC’s structure and content may be summarised as follows. The MLC’s core obligation is laid down in article I, which imposes the obliga-

769 The abbreviations refer to the International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 277; International Convention for the Prevention of Pollution from Ships (adopted 2 November 1973, entered into force 2 October 1983) 1340 UNTS 184; International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (adopted 7 July 1987, entered into force 28 April 1984) 1361 UNTS 190 respectively. Blanck jr., ‘Reflections on the negotiation of the Maritime Labor Convention’ (n 768) 36-37. Also O. Adăscăltei, ‘The Maritime Labour Convention 2006. A long-awaited change in the maritime sector’ 149 *Procedia Social and Behavioral Sciences* (2014) 8-13, 9; Payoyo, ‘The contribution of the 2006 ILO Maritime Labour Convention to global governance’ (n 768) 402.

770 MLC art X.

771 Payoyo, ‘The contribution of the 2006 ILO Maritime Labour Convention to global governance’ (n 768) 387.

772 In accordance with article VIII, third paragraph, of the Convention.

773 See also article I of the Convention and paragraph 7 of the Explanatory note to the Regulations and the Code of the Maritime Labour Convention, which identifies three ‘underlying purposes’: to lay down a firm set of rights and principles, flexibility in implementation and compliance and enforcement of those rights and principles. ILO, ‘Explanatory note to the regulations and the code of the Maritime Labour Convention’ <[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:91:0:::P91\\_SECTION:MLCA\\_AMEND\\_N1](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:91:0:::P91_SECTION:MLCA_AMEND_N1)> (accessed 29 March 2018).

774 P.J. Bauer, ‘The Maritime Labour Convention: an adequate guarantee of seafarer rights, or an impediment to true reforms?’ 8 *Chicago Journal of International Law* 2 (2008) 643-659, 643.

775 Blanck jr., ‘Reflections on the negotiation of the Maritime Labor Convention’ (n 768) 37. Also Payoyo, ‘The contribution of the 2006 ILO Maritime Labour Convention to global governance’ (n 768) 389, 392 and 394-395.

tion on states to 'give complete effect to [the treaty's] provisions in the manner set out in Article VI in order to secure the rights of all seafarers to decent employment'. Article VI refers to the 'Regulations' and the 'Code' that are annexed to the MLC. It thus comprises three parts: the articles, the Regulations and the Code. The articles and Regulations contain the 'core rights and principles and basic obligations' of states. The Code provides for additional guidance in a more detailed manner, which consists of mandatory 'standards' and non-mandatory 'guidelines'.<sup>776</sup>

The Regulations and the Code apply to five subject areas: 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; and compliance and enforcement.<sup>777</sup> These areas are covered by five 'titles', each of which contains regulations, standards and guidelines. As a rule, the Regulations tend to be more concise than the (mandatory) standards and (non-mandatory) guidelines; the three categories combined comprise 28 regulations and cover 73 pages.

In addition, articles III and IV MLC codify several 'fundamental rights and principles' and seafarer's rights, jointly referred to as the 'Seafarer Bill of Rights'<sup>778</sup> encompassing *inter alia* the abolition of child labour and the right to a safe and secure workplace.<sup>779</sup> The rights embodied in article IV are to be 'fully implemented in accordance with the requirements of this Convention'.<sup>780</sup>

Finally, pursuant to article V, first paragraph, a state party has a duty to 'implement and enforce laws or regulations or other measures that it has adopted to fulfil its commitments under this Convention with respect to ships and seafarers under its jurisdiction'. This requirement entails *inter alia* the exercise of jurisdiction and control over ships by the flag state, which is to be achieved 'by establishing a system for ensuring compliance' with the MLC.<sup>781</sup> In addition to the responsibilities of the flag state, port states may conduct inspections in order to determine whether the ship meets the requirements of the MLC.<sup>782</sup>

776 Art VI, first paragraph, and ILO, 'Explanatory note' (n 773), par. 2-4. Also Blanck jr., 'Reflections on the negotiation of the Maritime Labor Convention' (n 768) 42-43.

777 ILO, 'Explanatory note' (n 773) par. 5.

778 Blanck jr., 'Reflections on the negotiation of the Maritime Labor Convention' (n 768) 45-46.

779 Artt III, sub c, and IV, first paragraph. As Payoyo notes, the fundamental rights enumerated in article III, refer to the 'core' ILO-Conventions which have been identified in the preamble to the Maritime Labour Convention. The rights referred to in article IV reflect the range of the 37 conventions, mentioned in article X, which the Maritime Labour Convention seeks to consolidate. Payoyo, 'The contribution of the 2006 ILO Maritime Labour Convention to global governance' (n 768) 404.

780 Art IV, fifth paragraph.

781 Art V, second paragraph.

782 Art V, fourth paragraph.

### 9.1.3 Legislative standards

#### 9.1.3.1 *Implementation, harmonisation and flexibility*

In the previous section it was stated that parties are under the obligation to give 'complete effect' to the MLC's provisions. First and foremost, they include the extensive body of requirements embodied in the Regulations and the Code, as stated in article VI, second paragraph. Second, the obligation to give effect to the MLC relates to the employment and social rights entrenched in article IV. For both categories, states are required to 'implement and enforce laws or regulations or other measures that is has adopted to fulfill its commitments under this Convention'.<sup>783</sup>

Above is was argued that the Code, which is part of the MLC, distinguishes between mandatory regulations and standards ('Part A') and non-mandatory guidelines ('Part B'). Whereas the former category of norms have to be respected and implemented, the implementation of the latter category 'should be given due consideration'.<sup>784</sup> The consequence of this distinction is explained as follows:

'If, having duly considered the relevant Guidelines, a Member decides to provide for different arrangements which ensure the proper storage, use and maintenance of the contents of the medicine chest, to take the example given above, as required by the Standard in Part A, then that is acceptable. On the other hand, by following the guidance provided in Part B, the Member concerned, as well as the ILO bodies responsible for reviewing implementation of international labour Conventions, can be sure without further consideration that the arrangements the Member has provided for are adequate to implement the responsibilities under Part A to which the Guideline relates.'<sup>785</sup>

From this it may be derived that states are not only required to abide by the compulsory provisions of the MLC, but are also encouraged to observe its optional norms. The treaty thus imposes minimum requirements. This is also reflected in article 19, eighth paragraph, of the Constitution of the ILO, which provides that the conventions adopted in the framework of the ILO contain minimum requirements; states are allowed to provide for additional protection.<sup>786</sup>

In addition to its harmonisation efforts which consist of both mandatory and non-mandatory provisions, the regime allows for some measure of

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<sup>783</sup> Artt I, first paragraph, and V, first paragraph.

<sup>784</sup> Art VI, second paragraph.

<sup>785</sup> ILO, 'Explanatory note' (n 773) par. 10. Also Bauer, 'The Maritime Labour Convention' (n 774) 646 and Payoyo, 'The contribution of the 2006 ILO Maritime Labour Convention to global governance' (n 768) 387.

<sup>786</sup> Article 19, eighth paragraph, of the Constitution of International Labour Convention, reads: 'In no case shall the adoption of any Convention or Recommendation by the Conference, or the ratification of any Convention by any Member, be deemed to affect any law, award, custom or agreement which ensures more favourable conditions to the workers concerned than those provided for in the Convention or Recommendation'.

flexibility in accordance with the statement ‘inflexible with respect to rights and flexible with respect to implementation’.<sup>787</sup> This flexibility is pursued in two ways. State parties may choose to give effect to the standards included in the Code through national measures which are ‘substantially equivalent’ to those standards, a term which was derived from the 1976 Merchant Shipping Convention.<sup>788</sup> This exemption does not apply to Title 5 of the Regulations and the Code regarding compliance and enforcement.<sup>789</sup> To determine whether the ‘substantial equivalence’-criterion is met, the state party should satisfy itself that the national measure ‘is conducive to the full achievement of the general object and purpose’ of the relevant provision and that it ‘gives effect’ to that provision.<sup>790</sup> Moreover, flexibility was anticipated by the formulation of the mandatory provisions ‘in a more general way, thus leaving a wider scope for discretion as to the precise action to be provided for at the national level’.<sup>791</sup>

### 9.1.3.2 *Observance of specified human rights*

Under the MLC, implementation must be performed in accordance with what we have termed ‘legislative standards’. Article III on ‘fundamental rights and principles’ which provides that a state party ‘shall satisfy itself that the provisions of its law and regulations respect, in the context of this Convention, the fundamental rights to freedom of association and the effective recognition of the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour and the elimination of discrimination in respect of employment and occupation’. The substance of this duty remains somewhat vague due to the choice of the term ‘satisfy’, which may possess a nature that is less compulsory than, for instance, an obligation to ‘ensure’ that its domestic laws respect to aforementioned rights. In this regard, it is noted in the commentary to the MLC that the state has to satisfy itself that ‘those fundamental rights are reflected in the relevant legislation’.<sup>792</sup> It is thus clear that domestic implementing legislation is circumscribed, to a certain extent at least, by the rights entrenched in article III.

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787 International Labour Conference, ‘Adoption of an instrument to consolidate maritime labour standards’ (n 767) 10.

788 Merchant Shipping (Minimum Standards) Convention (adopted 29 October 1976, entered into force 28 November 1981) ILO C147, art 2. Also Blanck jr, ‘Reflections on the negotiation of the Maritime Labor Convention’ (n 768) 51.

789 Title 5, paragraph 2, of the Regulations and the Code.

790 Art VI, third and fourth paragraph. Also I. Christodoulou-Varotsi, ‘Critical review of the consolidated Maritime Labour Convention (2006) of the International Labour Organisation. Limitations and perspectives’ 43 *Journal of Maritime Law and Commerce* 4 (2012) 467-489, 473-475.

791 ILO, ‘Explanatory note’ (n 773) par. 9.

792 International Labour Conference, ‘Adoption of an instrument to consolidate maritime labour standards’ (n 767) 19-20.

Interestingly, an inverse approach is taken with regard to the implementation of employment and social rights, embodied in article IV, to which seafarers are entitled. Contrary to the requirement of article III, discussed above, that fundamental rights shall be taken into account in the implementation of the convention, article IV prescribes that the MLC must be observed in the implementation of the employment and social rights.<sup>793</sup>

With regard to the implementation of the employment and social rights, it is noteworthy that it is expressly provided that '[...] such implementation may be achieved through national laws or regulations, through applicable collective bargaining agreements or through other measures or in practice'.<sup>794</sup> The MLC thus expressly addresses the nature of domestic measures aimed at the implementation of its codified human rights provisions. Although this may be considered remarkable as it specifically enumerates the various means of implementation that may be resorted to, the possible means of implementation are described in such a broad manner, especially as a result of the reference to 'other measures' and 'practice', that it is difficult to conceive of an implementing measure that would fall outside the scope of this provision.

### 9.1.3.3 *Observance of applicable international and national law*

In addition to the legislative standards which refer to human rights, which were discussed in the previous section and which are part of the MLC itself, one provision expressly requires that the adoption of domestic implementing measures should be performed in accordance with *other* norms of international law. As will be discussed below, the MLC contains an obligation to provide for sanctions in response to violations of the treaty. This obligation shall be performed 'in accordance with international law'.<sup>795</sup> What does this restriction entail? As may be derived from the commentary to the MLC, it encompasses 'other relevant Conventions, such as UNCLOS', referring to the United Nations Convention on the Law of the Sea.<sup>796</sup> The drafters may have had in mind article 217, eight paragraph, of this treaty, which reads: '[p]enalties provided for by the laws and regulations of States for vessels flying their flag shall be adequate in severity to discourage violations wherever they occur'. This phrase is almost identical to its equivalent that is included in the MLC and may thus serve as a reminder that, as regards penalties, the MLC should be interpreted in conformity with UNCLOS.

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793 Art IV, fifth paragraph, first sentence, provides: 'Each Member shall ensure, within the limits of its jurisdiction, that the seafarers' employment and social rights set out in the preceding paragraphs of this Article are fully implemented in accordance with the requirements of this Convention'.

794 Art IV, fifth paragraph, second sentence.

795 Art V, sixth paragraph.

796 International Labour Conference, 'Adoption of an instrument to consolidate maritime labour standards' (n 767) 21.



In addition, the obligations codified in the MLC which require the adoption of domestic implementing legislation contain references to *national law*. A few examples may suffice here. Standard A1.1, second paragraph, stipulates that night work of seafarers under the age of 18 is prohibited. It is added that the term 'night' is to be defined in national law. With regard to medical care state parties have a duty to 'ensure that, *to the extent consistent with the Member's national law and practice*, medical care and health protection services while a seafarer is on board ship or landed in a foreign port are provided free of charge to seafarers'.<sup>797</sup> Furthermore, under standard A.4.2, first paragraph, sub b, shipowners are required to 'provide financial security to assure compensation in the event of the death or long-term disability of seafarers due to an occupational injury, illness or hazard, *as set out in national law, the seafarers' employment agreement or collective agreement*'. Finally, a state party is under the obligation to ensure that all seafarers and, *to the extent provided for in its national law*, their dependents have access to social security protection.<sup>798</sup> The italicised phrase must be understood as to leave the determination of the particulars of coverage to the national law of the flag state.<sup>799</sup> The importance of these references to international law and national law lies in the fact that the drafters of the text have considered that the domestic implementing legislation should be subject to applicable international and national legal norms. In other words, the treaty obligations must be implemented in a way that is consistent with other applicable law of both national and international origin.

#### 9.1.3.4 Compliance and enforcement

Compared to other international legal instruments, the MLC contains elaborate norms applicable to its enforcement. They have been called the 'lynchpin'<sup>800</sup> of the MLC and can be derived from article V, second paragraph, which stipulates: '[e]ach Member shall effectively exercise its jurisdiction and control over ships that fly its flag by establishing a system for ensuring compliance with the requirements of this Convention, including regular inspections, reporting, monitoring and legal proceedings under the applicable laws'. In addition to this responsibility of the flag state, port states are permitted to inspect foreign ships in order to determine whether they abide by the Convention requirements.<sup>801</sup> Title 5 of the Regulations and Code on compliance and enforcement includes 18 pages of mandatory and

797 Standard A4.1, first paragraph, sub d.

798 Regulation 4.5, first paragraph.

799 International Labour Conference, 'Adoption of an instrument to consolidate maritime labour standards' (n 767) 45.

800 Blanck jr., 'Reflections on the negotiation of the Maritime Labor Convention' (n 768) 53.

801 Art V, fourth paragraph.

non-mandatory provisions that describe in detail the responsibilities of state parties.<sup>802</sup> The mandatory provisions may be summarised as follows.

Flag states are responsible for the establishment of an effective system for the inspection and certification of maritime labour conditions. This system may include the authorisation of public institutions or other organisations to carry out inspections and to issue maritime labour certificates.<sup>803</sup> The entities authorised to carry out the inspections should be competent and independent, which means *inter alia* that they should have the necessary expertise in the relevant aspects of the MLC and an appropriate knowledge of ship operations.<sup>804</sup> Inspectors must be qualified to adequately perform their tasks and must be bestowed with the necessary powers.<sup>805</sup> The presence of a maritime labour certificate is required for ships over 500 gross tonnage and is *prima facie* evidence that the ship has satisfied the requirements set forth in the MLC.<sup>806</sup> The document, a model of which is annexed to the MLC, can only be obtained after inspection and is usually valid for five years.<sup>807</sup> In addition, flag states have a duty to provide for on-board complaint procedures for the fair, effective and expeditious handling of seafarer complaints about alleged breaches MLC, to initiate an investigation into any serious marine casualty which results in injury or loss of life.<sup>808</sup>

Whereas flag states have an obligation to perform inspections, port states may subject ships to such procedures as well. In absence of any indication to the contrary, port states shall accept the maritime labour certificate as *prima facie* evidence of compliance with the MLC.<sup>809</sup> If, on the other hand, an official of the port state has reasons to believe that the ship does not entirely abide by the MLC's provisions, he may carry out a more detailed inspection and, if necessary, take appropriate measures, including the prevention of sailing.<sup>810</sup> Finally, a port state is, similar to the flag state, required to provide for an onshore procedure through which seafarers can file a complaint in relation to an alleged breach of the MLC.<sup>811</sup>

Enforcement also encompasses penalisation. Above it was noted that a state party is under the obligation to 'prohibit violations of the requirements of this Convention' and to establish, in accordance with international

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802 S. Ruano Albertos, and A. Vicente Palacio, 'Adopting European legislation to the Maritime Labour Convention 2006 regulations in relation to the state responsibilities of both the flag state and the control of ships by port state control' 4 *Beijing Law Review* 4 (2013) 141-146; Bauer, 'The Maritime Labour Convention' (n 774) 648.

803 Regulation 5.1.1, second and third paragraph.

804 Regulation 5.1.2, first paragraph, and standard A5.1.2, first paragraph.

805 Regulation 5.1.4 and standard A5.1.4, first, second, third and seventh paragraph.

806 Regulation 5.1.1, first and third paragraph.

807 Regulation 5.1.1, third and fifth paragraph, and standard A5.1.3, first paragraph, and appendix A5-II.

808 Regulations 5.1.5 and 5.1.6.

809 Regulation 5.2.1, second paragraph, and standard A5.2.1, first paragraph.

810 Standard 5.2.1.

811 Regulation 5.2.2.

law, 'sanctions or require the adoption of corrective measures under its laws which are adequate to discourage such violations'.<sup>812</sup> The prohibition and penalisation of transgressions of the MLC will, given the principles of *nullum crimen sine lege* and *nulla poena sine lege*, often require the adoption of domestic legislation. The standard which is imposed by the MLC thus does not go beyond the element of deterrence ('adequate to discourage violations').

In sum, the MLC provides for an extensive regulatory framework in order to ensure compliance with and enforcement of the treaty. The mandatory provisions of this framework must be included in the domestic implementing legislation.

#### 9.1.3.5 Prohibition of favourable treatment of third states

Finally, an important element of the MLC regime can be found in the prohibition of a more favourable treatment of states that are not a party in the implementation of [the] responsibilities under the treaty.<sup>813</sup> This, of course, is an important component of the international legal regime that aims to improve labour conditions of seafarers across the globe, as it removes competitive advantages that states, and ships flying under their flags, may enjoy as a consequence of non-ratification.<sup>814</sup> For the states party to the MLC, this means that domestic implementing legislation applicable to the treatment of foreign ships may not distinguish between states bound by the MLC and states that are not, if that distinction gives rise to more favourable treatment of ships flying the flag of a third state.

#### 9.1.4 Overview

The MLC consolidates many existing ILO-conventions and serves to protect the rights of seafarers. It does so by prescribing detailed standards laid down in mandatory and non-mandatory provisions. State parties are under the obligation to give effect to its provisions. To this end, they must adopt implementing measures on the national level. These implementing measures are governed by several elements of the MLC, which may be summarised as follows. First of all, domestic implementing legislation should not infringe on the fundamental rights to which seafarers are entitled. Second, national measures that serve to implement specific MLC obligations refer to (other) international law and national laws, thereby

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812 Art V, sixth paragraph.

813 Article V, seventh paragraph, provides: 'Each Member shall implement its responsibilities under this Convention in such a way as to ensure that the ships that fly the flag of any State that has not ratified this Convention do not receive more favourable treatment than the ships that fly the flag of any State that has ratified it'.

814 Blanck jr., 'Reflections on the negotiation of the Maritime Labor Convention' (n 768) 45-46.

ensuring consistency with other applicable norms. Third, particular attention has been given to compliance and enforcement of the MLC, which imposes obligations on flag states and port states to ensure that the MLC's provisions and domestic implementing legislation is respected. The importance attributed to issues of compliance and enforcement may be explained by the MLC's aim to create a 'level playing field' between shipowners across the globe. This objective was also the motivation for the inclusion of a prohibition of favourable treatment of third parties.

## 9.2 IMPLEMENTATION OF THE CONVENTION CONCERNING DECENT WORK FOR DOMESTIC WORKERS

### 9.2.1 General

While the ILO-Convention that was discussed in paragraph 9.1 is particularly aimed at seafarers' rights, the Convention concerning Decent Work for Domestic Workers (CDWDW) aims to enhance the protection of, as the name indicates, domestic workers. It has been estimated that the number of domestic workers worldwide is between 53 and 100 million persons, compared to roughly 1 million seafarers.<sup>815</sup> Domestic workers, often women, perform household tasks in a 'largely unregulated and unprotected sector of the economy'.<sup>816</sup> This may be explained by the fact that domestic work is performed in the privacy of the employer's household.<sup>817</sup> In this environment, domestic workers are confronted with poor working conditions and exploitation.<sup>818</sup> Moreover, the existing body of international labour standards were perceived to address the problems faced by domestic workers in an incomplete manner.<sup>819</sup> In order to provide the necessary protection to this group of workers, efforts were made to draft a legally binding international treaty, which was adopted in 2011. The underlying assumption of the CDWDW is that domestic workers should be treated as any other employee and therefore should receive equal protection. In other words, it is the employment relationship that counts, not the type of work.<sup>820</sup> Once such relationship has been established, the CDWDW

815 A. Blackett, 'Current developments. The Decent Work for Domestic Workers Convention and Recommendation, 2011' 106 *American Journal of International Law* 4 (2012) 778-794, 779-780.

816 M. Tomei and P. Belser, 'New ILO standards on decent work for domestic workers. A summary of the issues and discussions' 150 *International Labour Review* 3-4 (2011) 431-438, 432.

817 Ibid. Also E. Albin and V. Mantouvalou, 'Recent legislation. The ILO Convention on Domestic Workers. From the shadows to the light' 41 *Industrial Law Journal* 1 (2012) 67-78, 69.

818 Albin and Mantouvalou, 'Recent legislation' (n 817) 69.

819 M. Oelz, 'The ILO's Domestic Workers Convention and Recommendation. A window of opportunity for social justice' 153 *International Labour Review* 1 (2014) 143-172, 149.

820 Albin and Mantouvalou, 'Recent legislation' (n 817) 75-76. Also Blackett, 'Current developments' (n 815) 779-780.

provides for certain human rights to which the domestic worker is entitled. It was supplemented by the non-binding Recommendation concerning Decent Work for Domestic Workers, which offers additional guidance for the implementation of the Convention. As yet, 24 states have ratified the CDWDW, which entered into force in 2013.<sup>821</sup>

### 9.2.2 Content of the Convention

The purpose of the CDWDW is not expressly codified in the body of the treaty, but can be derived from its preamble. It is stated that domestic workers are ‘particularly vulnerable to discrimination in respect of condition of employment and of work, and to other abuses of human rights’. Against this background, it was considered ‘desirable to supplement the general [ILO-]standards with standards specific to domestic workers so as to enable them to enjoy their rights fully’.<sup>822</sup>

In order to achieve this objective, the CDWDW contains various obligations, such as the duty to set a minimum age for domestic workers in accordance with the provisions of the Minimum Age Convention and the Worst Forms of Child Labour Convention.<sup>823</sup> Furthermore, state parties must take measures to ensure that domestic workers enjoy effective protection against abuse, harassment and violence, and fair terms of employment and decent working conditions and, if domestic workers reside in the household, decent living conditions that respect their privacy.<sup>824</sup> Article 9 provides for additional rights for domestic workers, such as the freedom to reach agreement with their (potential) employer on whether to reside in the household and the right to keep their identity documents. Moreover, state parties are under the obligation to take measures ensuring equal treatment between domestic workers and workers generally in relation to ‘normal hours of work, overtime compensation, periods of daily and weekly rest and paid annual leave’ in accordance with domestic law.<sup>825</sup> These words were agreed upon after it was concluded that measuring working hours was impractical due to the varying intensity of domestic work as a result of the changing needs of the household throughout the day.<sup>826</sup> Domestic workers are also entitled to minimum wage coverage, if such coverage exists, and to a safe and healthy

821 Information available at: <[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300\\_INSTRUMENT\\_ID:2551460](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:2551460)> (accessed 29 March 2018).

822 In this regard, ‘[g]eneral’ refers to other ILO-Conventions and recommendations which are not *particularly* aimed at domestic workers, but which are applicable to domestic workers nonetheless, such as the Migration for Employment Convention.

823 Convention Concerning Minimum Age for Admission to Employment (adopted 26 June 1973, entered into force 19 June 1976) 1015 UNTS 297 (Minimum Age Convention) art 4, first paragraph.

824 Art 5 and 6.

825 Art 10, first paragraph.

826 Tomei and Belser, ‘New ILO standards on decent work for domestic workers’ (n 816) 435.

working environment.<sup>827</sup> Another important right which is created by the CDWDW is laid down in article 14, first paragraph, which provides that states have to ensure that domestic workers enjoy conditions that are not less favourable than those applicable to workers generally in respect of social security protection, including with respect to maternity.<sup>828</sup>

### 9.2.3 Legislative standards

#### 9.2.3.1 Implementation and harmonisation

Pursuant to article 3, first paragraph, '[e]ach Member shall take measures to ensure the effective promotion and protection of the human rights of all domestic workers, as set out in [the] Convention'. This provision may be viewed as the *general* obligation to adopt implementing legislation on the national level, which must be distinguished from various *particular* obligations to enact domestic legislation with a view of achieving a specified policy aim. An example of such particular obligation may be found in article 8, fourth paragraph, which reads: 'Each Member shall specify, by means of laws, regulations or other measures, the conditions under which migrant domestic workers are entitled to repatriation on the expiry or termination of the employment contract for which they were recruited'.

Article 3, first paragraph, is complemented by the requirement entrenched in article 18, which stipulates:

'Each Member shall implement the provisions of this Convention, in consultation with the most representative employers and workers organisations, through laws and regulations, as well as through collective agreements or additional measures consistent with national practice, by extending or adapting existing measures to cover domestic workers or by developing specific measures for them, as appropriate.'

Aside from the duty to consult employers and workers organisations, the normative value of this general provision is probably limited, however, as the suggested means and methods of implementation are formulated in a very broad manner; it may be hard to imagine a domestic implementing measure which cannot be accepted to meet the standards set out in article 18.

In addition to the general obligation embodied in article 3, first paragraph, the CDWDW also imposes the obligation to take the measures set out in the treaty to 'respect, promote and realize the fundamental principles and rights at work'. According to article 3, second paragraph, these encompass *inter alia* the freedom of association and the effective abolition of child labour.

As was noted with regard to the MLC, discussed in section 9.1 the CDWDW contains minimum standards; state parties are permitted to main-

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827 Artt 11 and 13, first paragraph.

828 Art 14, first paragraph.

tain or adopt national measures that are more favourable from the worker's perspective.

The efforts to harmonise national policies towards domestic workers have resulted in binding norms, codified in the CDWDW, which have to be observed by the state parties. As stated above, these norms are supplemented by the non-binding Recommendation concerning Decent Work for Domestic Workers, which should be considered in conjunction with the provisions of the CDWDW. Above it was stated that domestic workers are entitled, under article 6 CDWDW, to decent working conditions and, if they reside in the household, decent living conditions that respect their privacy. This may include the provision of food and accommodation, if the worker and his employer so agree in accordance with article 7 CDWDW. Pursuant to paragraph 17 of the Recommendation, these rights are supplemented with the following, non-mandatory provision:

'When provided, accommodation and food should include, taking into account national conditions, the following: (a) a separate, private room that is suitably furnished, adequately ventilated and equipped with a lock, the key to which should be provided to the domestic worker; (b) access to suitable sanitary facilities, shared or private; (c) adequate lighting and, as appropriate, heating and air conditioning in keeping with prevailing conditions within the household; and (d) meals of good quality and sufficient quantity, adapted to the extent reasonable to the cultural and religious requirements, if any, of the domestic worker concerned.'

Put briefly, the Recommendation contains additional guidelines, often with a more specific character than the provisions laid down in the CDWDW. Thus, the Recommendation's provisions go beyond what is strictly required by the CDWDW. In one respect, however, the CDWDW itself seems to make a distinction between mandatory and non-mandatory measures and thus permits states to go beyond the minimum requirements. According to article 7, states are under the obligation to take measures to ensure that domestic workers are informed of their terms and conditions of employment in an appropriate, verifiable and easily understandable manner. '[P]referably, where possible', it is added, such information must be provided 'through written contracts' which contain certain specified elements that are enumerated in the CDWDW.<sup>829</sup>

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829 These elements include: the name and address of the employer and of the worker; the address of the usual workplace or workplaces; the starting date and, where the contract is for a specified period of time, its duration; the type of work to be performed; the remuneration, method of calculation and periodicity of payments; the normal hours of work; paid annual leave, and daily and weekly rest periods; the provision of food and accommodation, if applicable; the period of probation or trial period, if applicable; the terms of repatriation, if applicable; and terms and conditions relating to the termination of employment, including any period of notice by either the domestic worker or the employer. For additional, non-mandatory elements, see paragraph 6, sub 2, of ILO Recommendation R201: Recommendation concerning Decent Work for Domestic Workers (100<sup>th</sup> Conference session Geneva 16 June 2011).

### 9.2.3.2 *Observance of applicable international and national law*

Some provisions of the CDWDW expressly refer to other international legal instruments that have to be observed during its implementation. Article 8, first paragraph, contains the right of migrant domestic workers, once they are recruited in one country to work in another, to receive written job offers or contracts of employment that are enforceable in the latter country. This provision, however, does not apply to 'domestic workers who enjoy freedom of movement for the purpose of employment under bilateral, regional and multilateral agreements, or within the framework of regional economic integration areas'. Of course, this exception aims to accommodate the existence of regions which consist of multiple states, such as the EU, in which employees can move freely.

There is another example of a CDWDW provision which refers to other international legal instruments for the purpose of its implementation. Pursuant to article 19, the CDWDW 'does not affect more favourable provisions applicable to domestic workers under other international labour Conventions'. In section 9.2.2 it was argued that the CDWDW was intended to 'supplement' the general ILO-standards to which domestic workers are entitled. The provision contained in article 19 emphasises the supplementary, instead of exclusive, nature of the CDWDW. In giving effect to the CDWDW's provisions, therefore, state authorities must ensure that the implementation is performed in a way that is consistent with other, for domestic workers more favourable, provisions which are applicable to domestic workers.

Other parts of the treaty prescribe that applicable domestic laws must be respected during the implementation. Article 13, first paragraph, requires state parties to 'take, *in accordance with national laws, regulations and practice*, effective measures [...] to ensure the occupational safety and health of domestic workers'. Furthermore, with regard to the right of domestic workers to be paid directly in cash at regular intervals at least once a month, as laid down in article 12, first paragraph, such payment can be made by bank transfer, bank cheque, postal cheque or other lawful means of monetary payment, '[u]nless provided for by national laws, regulations or collective agreements'.<sup>830</sup> These examples indicate that the implementation of the CDWDW should be performed in a way that is consistent with domestic laws.

Domestic law can be relevant in other, more subtle ways. Under the CDWDW, a domestic worker is 'any person engaged in domestic work within an employment relationship'.<sup>831</sup> Blackett notes that the use of terms 'employment relationship' bears the risk that migrant workers without legal

830 Similar references to domestic law can be found in articles 7, 10, first and third paragraph, 14, first paragraph, 15, first paragraph, sub a, 16 and 17, second and third paragraphs.

831 Art 1, sub b.



migration status fall outside the scope of the definition of 'domestic worker' if their employment contracts are considered unenforceable, since domestic legal practice varies on the effects of migrant status on the employment relationship.<sup>832</sup> Of course, such 'interaction with national legal doctrines',<sup>833</sup> with respect to the interpretation of terminology agreed upon on the international level, is inherent to any international regime that requires the adoption of national implementing measures.<sup>834</sup>

Furthermore, article 4, first paragraph, refers to both international law *and* national law, since it stipulates that state parties are under the obligation to 'set a minimum age for domestic workers consistent with the provisions of the the Minimum Age Convention [...] and the Worst Forms of Child Labour Convention, [...] and not lower than that established by national laws and regulations for workers generally'.<sup>835</sup> In practice, this means that domestic work is considered to be child labour when workers below the age of 18 are younger than the minimum age required for admission to work or if they are in a situation amounting to work that is detrimental to children, including slavery.<sup>836</sup> With regard to the determination of a minimum age for domestic workers, the adoption of implementing legislation must be consistent with these national and international legal provisions.

### 9.2.3.3 Remedies, complaint mechanisms, monitoring of compliance and enforcement

The codification of domestic workers' rights may remain without practical effect unless those rights can be enforced on the domestic level. Therefore, state parties have accepted the obligation to 'establish effective and accessible complaint mechanisms and means of ensuring compliance with national laws and regulations for the protection of domestic workers'. Similarly, they have to 'ensure [...] that all domestic workers, either by themselves or through a representative, have effective access to courts, tribunals or other dispute resolution mechanisms under conditions that are not less favourable than those available to workers generally'. Moreover, they have a duty to 'develop and implement measures for labour inspection, enforcement and penalties [...] in accordance with national laws and regulations'.<sup>837</sup> In other words, the enforcement of the CDWDW on the

832 Blackett, 'Current developments' (n 815) 787.

833 Ibid.

834 In this context, Oelz notes that the Convention's preamble contains a reference to the Employment Relationship Recommendation which contains some guidance on the existence of an employment relationship. Oelz, 'The ILO's Domestic Workers Convention and Recommendation' (n 819) 154.

835 Also Recommendation concerning Decent Work for Domestic Workers (n 829) par. 5.

836 Oelz, 'The ILO's Domestic Workers Convention and Recommendation' (n 819) 158.

837 Artt 16 and 17, first and second paragraph. With regard to migrant workers, see also Recommendation concerning Decent Work for Domestic Workers (n 829) par. 21, sub e and f.

national level, in accordance with the provisions cited above, is envisaged in two ways. First, enforcement by or on behalf of the domestic worker who claims that his rights have been violated through national courts, tribunals or similar complaint procedures. Second, enforcement by the public authorities through inspections and the imposition of penalties for violation of the domestic worker's rights. As regards the latter, the treaty negotiators were aware of the fact that labour inspections will, given the nature of domestic work, often require access to private premises. As a result, labour inspections were considered to be problematic, given the inviolability of the home, as entrenched in international human rights law and national constitutions.<sup>838</sup> This may explain why the CDWDW does not prescribe how the domestic worker's right to protection and the employer's right to privacy must be balanced; it is left to states to 'specify the conditions under which access to household premises may be granted, having due respect for privacy'.<sup>839</sup>

#### 9.2.3.4 Non-discrimination

In section 9.2.1 it was argued that the underlying assumption of the CDWDW is that domestic workers should be treated as any other employee and therefore should receive equal protection. Thus, the notion of non-discrimination of domestic workers (*vis-à-vis* other categories of workers) lies at the heart of the CDWDW and influences the adoption of national implementing legislation in several respects. For instance, article 10, first paragraph, provides that states must take measures towards 'ensuring equal treatment between domestic workers and workers generally in relation to normal hours of work, overtime compensation, periods of daily and weekly rest and paid annual leave in accordance with national laws, regulations and collective agreements, taking into account the special characteristics of domestic work'.<sup>840</sup> Arguably, it goes too far to derive from this provision a requirement that domestic legal regimes applicable to domestic workers on the one hand, and to other categories of workers on the other hand, must be identical. Nevertheless, discrepancies between the legal regimes seem to be acceptable only if they relate to the 'special characteristics of domestic work'.

838 Oelz, 'The ILO's Domestic Workers Convention and Recommendation' (n 819) 166-167.

839 Art 17, third paragraph. Paragraph 24 of the (non-binding) Recommendation adds: 'In so far as compatible with national law and practice concerning respect for privacy, Members may consider conditions under which labour inspectors or other officials entrusted with enforcing provisions applicable to domestic work should be allowed to enter the premises in which the work is carried out'. Also Tomei and Belser, 'New ILO standards on decent work for domestic workers' (n 816) 437-438.

840 See also artt 12, second paragraph, and 14, first paragraph.

### 9.2.3.5 Consultation with stakeholders

In several provisions of the CDWDW reference is made to the requirement of consultation with stakeholders. For example, pursuant to article 15, first paragraph, state parties should take various measures aimed at the protection of domestic workers, including migrant domestic workers, who are recruited or placed by private employment agencies against abusive practices. These measures include the obligation to regulate the operation of private employment agencies, to provide for procedures for the investigation of complaints, alleged abuses and fraudulent practices by those agencies and measures to ensure that fees charged by such agencies are not deducted from the remuneration of domestic workers.<sup>841</sup> In giving effect to these provisions, state parties shall 'consult with the most representative organisations of employers and workers and, where they exist, with organisations representative of domestic workers and those representative of employers of domestic workers'.<sup>842</sup>

Why was the obligation to consult the aforementioned organisations included in the treaty text? It may be explained by the important role they fulfill in the defense of the domestic workers' interests, which is also reflected by their involvement in the treaty negotiations. As Oelz puts it, 'the [CDWDW and the Recommendation] recognize that workers' and employers' organisations are important not only because they support their members and for the purpose of collective bargaining, but also because they are actors in the development of policies to promote decent work for domestic workers more generally.'<sup>843</sup>

### 9.2.3.6 Information to employers and domestic workers

Finally, it is 'recommended', instead of mandatory, that state parties take additional measures aimed at informing stakeholders of their rights and obligations, most notably employers and domestic workers. With regard to employers, it is suggested that employers' awareness of their obligations be enhanced by 'providing information on good practices in the employment of domestic workers, employment and immigration law obligations regarding migrant domestic workers, enforcement arrangements and sanctions in cases of violation'.<sup>844</sup> Furthermore, states are requested to provide

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841 Art 15, first paragraph, sub a, b and e.

842 Article 15, second paragraph. Similar obligations are contained in articles 13, second paragraph, 14, second paragraph and 18.

843 Oelz, 'The ILO's Domestic Workers Convention and Recommendation' (n 819) 165. Similarly, Blackett argues that the Convention and the Recommendation reaffirm the contemporary relevance of social dialogue in working to forge consensus in international law'. Blackett, 'Current developments' (n 815) 794.

844 Recommendation concerning Decent Work for Domestic Workers (n 829) par. 21, sub d, of the Recommendation concerning Decent Work for Domestic Workers.

for a 'public outreach service' to inform domestic workers of their rights, applicable laws, available complaint mechanisms and legal remedies etc.<sup>845</sup> This recommendation thus acknowledges the importance of complementing the adoption of domestic implementing legislation with the provision of information to the public, in particular to those groups to which the newly adopted legislation applies.

#### 9.2.4 Overview

From the foregoing it may be concluded that the CDWDW contains minimum standards. They may be supplemented with additional domestic measures, for which the non-binding Recommendation on Decent Work for Domestic Workers may be a source of inspiration. Furthermore, the CDWDW provides for several legislative standards that may derived from its text. First, states are under the obligation to ensure consistency with applicable international and national law. The applicable international legal provisions concern other international labour standards to which domestic workers are entitled and regional arrangements for the free movement of persons. The CDWDW relies on domestic laws to ensure, for instance, the occupational safety and health of domestic workers. A second legislative standard may be found in the duty of states to establish enforcement mechanisms, both in the form of procedures accessible to injured persons and of public enforcement through labour inspections. Third, domestic workers are entitled to treatment that, in principle, is equal to the treatment of other categories of workers. In other words, the CDWDW imposes the legislative standard of non-discrimination. Other legislative standards that have been identified above concern the consultation with stakeholders and the provision of information to workers and employers on their rights and obligations.

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845 Recommendation concerning Decent Work for Domestic Workers (n 829) par. 21, sub d, of the Recommendation concerning Decent Work for Domestic Workers.