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## CHAPTER 8

# The Ship Master and the Maritime Labour Convention<sup>1</sup>

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**Abstract :** *The Maritime Labour Convention, which entered into force on 20 August 2013, applies to all seafarers working on commercial vessels flying the flag of States having ratified it. The Ship Master occupies a single position. As a seafarer, he is entitled to the Convention. As a master, he needs to ensure its implementation. This social function, transpires from reading the convention, is not expressly stated. It complements the nautical, commercial and public functions of the master. She maybe draws a substantive change in the responsibilities of the master.*



**Résumé :** *La Convention du Travail Maritime, entrée en vigueur qui est entrée en vigueur le 20 août 2013, s'applique à tous les gens de mer travaillant sur un navire commercial, battant le pavillon d'un Etat qui l'a ratifiée. Le capitaine de navire occupe une position unique. Comme un marin, il est soumis à la Convention. En tant que capitaine, il doit assurer sa mise en œuvre. Cette fonction sociale, qui transparait à la lecture de la convention, n'est expressément déclarée. Elle complète les fonctions nautiques, commerciales et publiques du capitaine. Elle dessine peut-être un changement de fond dans les responsabilités du capitaine.*

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1) Article from the annual Confederation of European Shipmasters' Association Congress, CESMA / ACOMM, May 11, 2013, Maison de la Mer, Nantes, AFCAN, October 2014, <http://www.afcan.org/dossiers1.html>, *Droit Maritime Français*, 2015, n° 770, pp. 481-498.



The Maritime Labour Convention (MLC) is an International Labour Convention (ILO) established in 2006. It entered force on August 20, 2013 and stipulates the minimum requirements for seafarers to work<sup>2</sup>.

It applies to all seafarers who work on commercial ships flying the flag of ratifying countries<sup>3</sup>. The Convention also applies to all ships flying non-member flags and entering the harbours of State parties.

**Philosophy and challenges** – The philosophy of the convention is set out in the preface. The objective was to «create a single and 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»<sup>4</sup>. The objectives and challenges are not only social but also economical. The Convention seeks to contribute to improved commercial maritime trade. Unfair competition is the result of flags of convenience that allow these ships from avoiding to pay for costs generated from respecting international standards regarding navigation safety, maritime social law and low cost vessel chartering. If the later cannot be eliminated, they must be reduced. The first effects of the entry into force of the convention can already be observed. On September 5, 2013, the offshore Atlantic Carrier vessel flying the flag of Panama was detained in the Danish port of Esbjerg after the Port state conducted an inspection and found that the crew lacked employment contracts<sup>5</sup>.

**Historical overview** – This specific event cannot overshadow the twelve years it took to draft the convention<sup>6</sup>. The process began in 2001 by means of when of an agreement reached by the ILO Joint Maritime Commission. Working sessions were organized from 2001 to 2006<sup>7</sup> and lead to the adoption of the Convention in Geneva

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2) I. Christodoulou-Varotsi, «Critical Review of the Consolidated Maritime Labour Convention (2006) of the International Labour Organization: limitations and perspectives», *Journal of Maritime Law & Commerce*, Vol. 43, No. 4, Oct. 2012. 467-489; M. Marin and A. Charbonneau, «Une convention innovante pour le travail maritime? Les apports de la Convention du travail maritime (CTM) 2006», *Annuaire de Droit Maritime et Océanique*, University of Nantes, t. XXVII, 2009, pp. 445-469.

3) Art. II. 2 & 4, Definitions and scope of application, MLC, 2006.

4) Preamble, MLC, 2006. V. on the international sphere: A. Charbonneau, *Marché international du travail maritime, un cadre juridique en formation*, coll. «Berthold Goldman», PUAM, 2009.

5) <http://www.meretmarine.com/fr/content/une-premiere-detention-de-navire-au-titre-de-la-convention-mlc> - Convention du travail maritime. Première application, <http://blogs.univ-poitiers.fr/jp-pancracio/category/droit-de-la-mer-traites-gestion-des-oceans/> September 25, 2013.

6) M. Guillou-Marin, «Vers la reconnaissance d'un statut juridique international des gens de mer: le rapport préliminaire de convention du travail maritime consolidée», *Annuaire de Droit Maritime et Océanique*, University of Nantes, 2003, t. XXI. p. 225.

7) P. Chaumette, «La Convention OIT du travail maritime en mouvement», *Neptunus*, e-magazine, Vol. 17, 2011/3, <http://www.cdmo.univ-nantes.fr/>

with 314 votes and only 4 abstentions on February 2006. Its entry into force was subject to the following conditions: ratification of the convention by a minimum of 30 ILO Member States and representing at least 33 per cent of the world gross tonnage of ships, a delay of 12 months between the ratification and the entry into force. These conditions were fulfilled on August 20, 2012 and allowed the entry into force of the convention on August 20, 2013.

France ratified the Convention on November 29, 2012<sup>8</sup>, which led to a significant overhaul of the Code of Transport, in particular Book 5 regarding Seafarers<sup>9</sup>.

**Architecture and content** – The consolidation logic that guided the development of the convention allowed conserving the existing law while clarifying and consolidating it into a single document. The convention is organized into two parts. The first part is comprised of sixteen articles stipulating provisions and standards. The second part of the convention is called «Rules and Codes» and it is organized into five titles. The first four titles set out the minimum age requirements (Title 1), employment conditions (Title 2), Accommodation, Recreational Facilities, Food and Catering (Title 3), Health Protection, Medical Care, Welfare and Social Security (Title 4). Title 5 Compliance and Enforcement stipulates requirements for flag states and port states, and for the first time, labour agencies.

Each title is organized around three categories that address: requirements, standards and guidelines. The provisions in the convention are numerically divided up (1 for Title 1, 2 for Title 2 and so forth) while the standards and guidelines are alphabetized, and then numerical. Letter A identifies standards and Letter B the guidelines. Letters A and B are followed by the number 1 in Title 1. Letters A and B followed by the number 2 fall under Title 2 and so forth.

The provisions in the convention are of variable scope. Article VI «Standards and Guidelines of Code A and B» differentiates between the regulations, the standards and the guidelines. The regulations and standards (A) are of mandatory compliance. The regulations and standards are subject to direct applicability and cannot be ignored by signatory states. The mandatory compliance of the convention allows differentiating

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8) Law No. 2012-1320, adopted on November 29, 2012 authorizing the ratification of ILO's Maritime Labour Convention, JO No. 0279 adopted on November 30, 2012.

9) Law No. 2013-431 adopted on May 28, 2013 regarding several provisions infrastructure and transportation services JO No. 0122 adopted on May 29, 2013, page 8794; Law No. 2013-619 adopted on July 16, 2013 regarding the adoption of EU law in the field of sustainable development (Title II – Provisions regarding transport, Chapter III: Provisions regarding the transposition of decree 2009/13/CE adopted by the Council on February 16, 2009 regarding the implementation of the agreement reached between EC shipowner associations and (ECSA) et the European Transport Federation (ETF) regarding the Maritime Labour Convention, 2006, and modifying instruction 1999/63/CE and regarding the modernization of seafarers social rights).

the guidelines (B). The guidelines act as a kind of call for action.

**Issue** – The rights were drafted for Seafarers, the largest maritime category. For the longest time, the ship master was responsible for recruiting the crew. The ship master was also the shipowner's proxy and his commercial role and as such he held a special position: he was dismissible ad num; he was a voter and eligible to be elected to the Commercial Court of France, without being a merchant. It was only in 1997 that the right to dismiss was applicable to ship masters<sup>10</sup>. «*In many countries ships' masters, and often engineers, are not considered 'seafarers' for propose of the application of hours of work or rest. During the negotiation to develop the MLC, 2006 many governments did not agree that the master should be covered by hours of work or rest provisions.*»<sup>11</sup> «*The Convention changes the legal climate for the master. For the master, the MLC is a substantive step to consolidation the primacy and protection of the master in command and to bring about owners' cooperation with him in best command practices, often with the force of flag State law*»<sup>12</sup>.

The ship master now falls within the category of seafarers. The application of the convention to this stakeholder who is a key player on a ship and the last to abandon it, should not pose any challenges. The ship master is a seafarer and unless he is self-employed, is employed by the shipowner or ship operator. That being said, the ship master is not a regular employee, he is a merchant navy officer and a leader. There are prerogatives attached to his rank of ship master<sup>13</sup>. They are independent from his duties of ship master, even if they are activated upon signing a maritime employment contract. Firstly, the ship master has nautical skills. He is the leader of a maritime expedition. He is the master of the vessel and thus ensures the nautical operation of the vessel and is responsible for the safety of the expedition. Secondly, the ship master has commercial skills. He is the shipowner's proxy. The ship master must see to the normal vessel operation. The ship master also represents the shipowner's commercial interests. Lastly, the ship master has public authority responsibilities. A vessel is an asset tied to a nationality and where a crew is recognized as a community of individuals. This means the ship master can act as a representative of the State and perform duties of a civil, public and ministry official. The ship master

10) P. Chaumette, «Du capitaine responsable de la préservation du navire, de sa cargaison et de la sécurité des personnes se trouvant à bord», *Annuaire de Droit Maritime et Océanique*, University of Nantes, t. XXVI, 2008, pp. 411-437.

11) M. Mc Connel, D. Devlin & Cl. Doumbia-Henry, *The Maritime Labour Convention*, Martinus Nijhoff Publishers, 2011, p. 308.

12) J. AC Cartner, «The Ship master and the Maritime Labour Convention 2006», in J. Lavelle, *The Maritime Labour Convention 2006 – International Labour Law Redefined*, Informa Law, Routledge, 2014, pp. 47-68.

13) A. Montas, «Capitaine : attributions et responsabilité», *Droits Maritimes*, J.-P. Beurier dir., Dalloz Action, 3<sup>rd</sup> Ed., 2014, Chapter 351 and «Droit pénal de la sécurité maritime», No. 381.21 and s.

can also take on a judicial role.

These responsibilities place the ship master at a crossroads of several rights, particularly those associated to shipowners and states and also contemplated by the convention. Individuals who exercise the role of a ship master are also holders of rights and responsibilities that apply to all seafarers. It also falls within the scope of maritime labour law. This combination of statuses raises several questions in regards to the convention. Is the ship master subject to the convention? Does the convention provide ship masters specific social responsibilities? Do these responsibilities place ship masters in a specific category? If the ship master is considered just a seafarer, how do labour rights address their specific roles? The convention does not provide any clarity on the ambivalent character of the ship master. This ambivalence brings to light two sets of observations. The first is with how the Maritime Labour Convention is applicable to ship masters (I) and the second is in regards to the content of the rights and responsibilities of the ship master (II).

## I – Applying the convention to ship masters

The Maritime Labour Convention, like all regulations, created a legal space that governs the acts and/or facts entering this space. It should therefore be determined if the convention is applicable to ship masters and if it should set the boundaries of the created space (who and what does it affect and where the convention is applicable). However, determining the scope of the Maritime Labour Convention is not enough to determine if the convention is applicable to ship masters. The judicial nature of the convention as well as its structure, in particular the distinction made between mandatory and non-mandatory standards<sup>14</sup>, allow for various modes of implementation. Is it also necessary to address if the convention is applicable within the scope of the convention (A) and how it shall be implemented (B).

### A – The scope of the convention

The scope of the Maritime Labour Convention is governed by Article II and in particular by Article II.2 and II.4. The first article addresses seafarers and does not address the situation of the ship master. The second article addresses vessels engaged in commercial activities. The following two cumulative conditions must be met for the convention to be applicable to ship masters: ship masters must belong to the category of seafarers (1) and serve aboard a commercial vessel (2).

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<sup>14</sup>) Article VI. 1, Regulations and parts A and B of the code, MLC 2006.

## 1 – Ship masters belonging to the category of seafarers

The Maritime Labour Convention is applicable to all seafarers. Categories, for the purpose of the convention, that seem synonymous, refer to «individuals who are employed, engaged or working in any capacity on board a ship»<sup>15</sup>. The fact that ship masters belong to this category does not seem to pose any challenges. Ship masters are hired by shipowners —by means of a maritime labour agreement—to work aboard a vessel and manage it just like a company on land would be managed and ensure command of the ship. Ship masters thus work under the subordination of shipowners<sup>16</sup>. More broadly, the convention does not isolate ship masters in any particular manner. Ship masters are treated like any other seafarer and are entitled to the rights recognized by the convention. In addition, the convention provides that «measures shall be taken to ensure that clear information as to the conditions of their employment can be easily obtained on board by seafarers, including the ship's master, and that such information, including a copy of the seafarers' employment agreement, is also accessible for review by officers of a competent authority, including those in ports to be visited»<sup>17</sup>.

However, the incision «including the ship's mater» reveals the particularity of the ship master's position. The Maritime Labour Convention assigns social roles to the ship master, in particular in regards to health protection, occupational safety and accident prevention, which goes beyond his duties. These attributes are additional or are confused with the more traditional attributes associated to ship masters. The convention provides that ship masters can, in the same manner as a public officer, receive complaints on board regarding violations of the convention. Ship masters are also shipowners' proxies and this role is not well defined by the convention. Article II defines shipowners and also states that this role is multi-faceted. The term «shipowner» for the purpose of the convention means «the owner of the ship or another organization or person, such as the manager, agent or bareboat charterer, who has assumed the responsibility of 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 organization or persons fulfil certain of the duties or responsibilities on behalf of the shipowner»<sup>18</sup>. Ship masters can thus be assigned a mandate with commercial powers.

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15) Art. II, § 1 f, Convention, MLC 2006.

16) The situation was addressed by French law in the *Lamoricière case*: Cass. Civ. June 18, 1951, *Droit Maritime Français* 1951, p. 429 ; *Recueil Dalloz* 1951, p. 717, note G. Ripert.

17) Standard A2.1 d) – Maritime employment contract (Title 2 Employment conditions, MLC 2006).

18) Art. II j, Definition and scope of application, MLC.



These commercial, public and social powers do not preclude to maritime employment agreements. The fact that the ship master is autonomous when dictating vessel operations, managing crews, does not remove the relationship of subordination. The autonomy ship masters' exercise when fulfilling their responsibilities is not compatible with the figure of a salaried seafarer. Terrestrial labour law solutions are transferable to maritime labour laws. Ship masters are not regular workers. Within the meaning of terrestrial law, ship masters should be considered autonomous workers<sup>19</sup> rather than to senior officers. Ship masters are autonomous when implementing shipowners' instructions but they do not participate in the management of the company, which is a criterion of eligibility to be considered a senior officer<sup>20</sup>. Nonetheless, the convention is not applicable to all ship masters. It only governs ship masters working on vessels engaged in commercial activities.

## 2 – Working onboard commercial vessels

The Maritime Labour Convention applies to all ship masters and more generally to all seafarers working on vessels engaged in international shipping and commercial activities. Tonnage criterion is not a determining factor<sup>21</sup>.

Ship progress area – The convention applies to all ships which «do not navigate exclusively in inland waters or waters within, or closely adjacent to, sheltered waters or areas where port regulations apply». How should this negation be interpreted? Should it be based on the size of a ship and that ships only navigating in inland waters are exempt from international criteria? The convention does not expressly take into account this criterion. Should we then take into consideration the operating conditions of vessels and understand that concerned vessels are those navigating outside inland waters? If so, should this type of navigation be regular, timely or prospective so as not to be exclusive? This applies, for instance, to professional yachting. This type of navigation, although frequent, is not exclusively limited to inland waters. The convention allows a large number of vessels of being detained based on a negative criterion. If any doubt exists, the convention provides that «questions shall be answered by a competent national authority, after consultation with the concerned shipowners' and seafarers' organizations<sup>22</sup>. The question again

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19) En ce sens : P. Chaumette, «Le Capitaine de navire : statut et responsabilités; La voie pénale crée-t-elle des remous?», Magazine: AFCAN, French Association of Ship Captains, April 2008, [http://www.afcan.org/dossiers\\_juridiques/statut\\_cdt2.html](http://www.afcan.org/dossiers_juridiques/statut_cdt2.html)

20) Cass. soc. January 31, 2012, Sté Bruno Saint-Hilaire c/ Mme R.Soc., Bull. civ. 2012, 45; Cass. soc., November 30, 2011, M. B. c/ SARL Vitauto and a., obs. B. Bossu, Criteria to identify quality by the executive management of *La Semaine Juridique Sociale*, JCP-S 2012, 1133

21) B8, FAQ Maritime Labour Convention, 2006 (MLC2006), ILO, 2012.

22) B4. Which ships are governed by the MLC, 2006? Maritime Labour Convention, 2006 (MLC, 2006), FAQ Revised edition, 2012.

is should these vessels be engaged in commercial activities?

Commercial assignment to vessels – The convention applies to «vessels, whether publicly or privately owned, and ordinarily engaged in commercial activities». Although the commercial assignment criterion is determinative, it is not defined. This criterion applies to vessels transporting merchandise and people. 24-metre yachts should be included<sup>23</sup>. Ship masters working on vessels engaged in other activities are not subject to the convention. The two different types of exclusion need to be differentiated. The first regarding warships and naval auxiliaries is absolute and does not withstand any exceptions. Personnel working on these types of vessels are excluded from the scope of the convention. The second type of exclusion, under specific conditions, can extend the scope of the convention to personnel that were initially excluded. It applies to ship masters working aboard vessels «engaged in fishing or in similar pursuits [...] and ships of traditional built such as dhows and junks». The Maritime Labour Convention can be extended to these types of seafarers if expressly provided by a provision. The choice remains with the state but remains under the control of the ILO<sup>24</sup>.

## B – Implementation of the convention

The implementation of the convention varies as its entry into force depends on State parties or seafarers. The Maritime Labour Convention is directly applicable to State parties. However, it does not seem to have the same effect on seafarers. In fact, the ship master, and more specifically seafarers, cannot take advantage of the rights recognized by the convention a priori contrary to shipowners. The convention is not directly applicable. It must be the subject of a national transposition law or equivalent measure<sup>25</sup>. The ship master must (if he considers that the shipowner has violated his rights) assert national law. It is an important limitation to ensure the effectiveness of the convention<sup>26</sup>. Some legal systems, such as that of France, allow limitations to be bypassed by recognizing a direct effect on international conventions. The effectiveness of seafarers' rights is directly linked to States complying with their obligations. It is thus necessary to focus first on the obligations of State parties (1) before addressing

23) B13. Is the MLC, 2006 applicable to yachts? MLC, 2006, FAQ Revised edition, 2012.

24) B5. When is a ship considered to be regularly engaged in commercial activities? MLC, 2006, FAQ Revised edition, 2012. – M. Bek, «Yachting and the Maritime Labour Convention 2006», in J. Lavelle, *The Maritime Labour Convention 2006 – International Labour Law Redefined*, Informa Law, Routledge, 2014, pp. 69-93.

25) A7. Is the MLC, 2006, directly applicable to shipowners and seafarers? FAQ MLC2006, ILO, 2012.

26) In regards to effective Ness: A. Charbonneau, «Le bien-être après l'adoption de la Convention du travail maritime consolidée (OIT) : quelles avancées pour quelles lacunes ?», *Neptunus*, Volume 12, 2006/4 e-magazine Vol. 12, 2006/4, <http://www.cdmo.univ-nantes.fr>

the rights of ship masters (2).

### 1 – State party obligations

In accordance with Article I.1 of the convention, all members who have ratified the convention must respect and implement the convention. This is a classic example of the principle *Pacta sunt servanda* where every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Compliance with the convention – State parties are free, except as otherwise provided in the convention, to choose legal instruments to incorporate the convention into their domestic legal systems, applicable collective conventions; practices or measures with the equivalent effect<sup>27</sup>. The ILO manual «Maritime Labour Convention, 2006-Frequently asked questions» emphasises that each country is free to decide whether a specific provision in the Maritime Labour Convention, 2006, should be the subject of a law (such as a decree passed by Parliament or Congress), a rule or another subsidiary instrument such as an administrative instruction or an official notice from the maritime administration<sup>28</sup>. There is thus no unity. The choice of which measure to implement is based on the legal system of each country<sup>29</sup>. France decided to use legislation to incorporate Maritime Labour Convention provisions into their Code of Transportation.

This incorporation of MLC provisions trumps the alignment of national law the rights recognized by the convention. The convention imposes that Members satisfy that the provision of its law and regulations the fundamental rights it sets forth: freedom of association and the effective recognition of the right to collective bargaining; 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<sup>30</sup>. Members must, in the case of a discrepancy between the convention and national law, make the necessary amendments. This obligation falls

Applying the convention – The convention places the onus on Members to ensure the convention is respected. This obligation pertains firstly to vessels that fly its

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27) Article IV. 5 Convention MLC, 2006. V. également : D. Fitzpatrick et M. Anderson, «International compliance and enforcement mechanism», in *Seafarers' Rights*, D. Fitzpatrick et M. Anderson, dir., Oxford University Press, 2005, p. 83.

28) A8. Quelles mesures un pays doit-il prendre pour garantir que la MLC, 2006, soit appliquée convenablement?

29) F. Wolf, « L'application des Conventions internationales du Travail par voie de conventions collectives », *Annuaire français de droit international*, volume 20, 1974. pp. 103-114.

[http://www.persee.fr/web/revues/home/prescript/article/afdi\\_0066-3085\\_1974\\_num\\_20\\_1\\_2263](http://www.persee.fr/web/revues/home/prescript/article/afdi_0066-3085_1974_num_20_1_2263)

30) Art. III. MLC, 2006.

flag<sup>31</sup>. Although the convention allows State parties to choose their means of control, it forces them to ensure that «ships that fly its flag carry a maritime labour certificate and a declaration of maritime labour compliance»<sup>32</sup>. State parties can, if they believe the vessel falls within the scope of the convention, inspect a vessel flying the flag of a non-signatory country to ensure the vessel complies with requirements of the convention. These inspections can be conducted if the vessel falls within the scope of the convention and if it ship is in one of its ports<sup>33</sup>. More generally, the convention requires that members ensure that «ships that fly the flag of any State that have not ratified the Convention do not receive more favourable treatment than the ships that fly the flag of any State that has ratified it»<sup>34</sup>.

## 2 – The rights of ship masters

The Maritime Labour Convention sets up rights for seafarers. The convention does not specify, however, if ship masters can directly claim these rights or should they rely on national law implemented by the convention. In this regard, two situations must be differentiated. The first does not present any challenges as it involves ship masters of vessels that fly the flag of a State that has implemented a law or measure equivalent to the convention. The second situation is more complex as it involves ship masters working on ships that do not fly the flag of a State party, or ships that fly the flag of signatory countries but that have not implemented the convention. Could it not be said that since the vessel is navigating in French territorial waters, the ship master can claim the rights granted by the convention?

Based on the interpretation provided by the ILO, the convention does not directly apply to ship masters<sup>35</sup>. This interpretation is debatable. It does seem illogical to conclude in the absence of direct effect when the convention seeks to consolidate a set of national rights which members can use against non-signatory states. There are two possible ways to bypass the later. The first can be done administratively as set out in the convention. Ship masters can put into play the procedure *complaint on board*<sup>36</sup>. The complaint would lead to the State port conducting an inspection<sup>37</sup>. The

31) Art. V.2, Implementation and Enforcement Responsibilities, MLC 206.

32) Art. V. 3, Implementation and Enforcement Responsibilities, MLC 206.

33) Art. V. 4, Implementation and Enforcement Responsibilities, MLC 206.

34) Art. V. 7, Implementation and Enforcement Responsibilities, MLC 206.

35) A7. Is the MLC 2006 directly applicable to shipowners, vessels and seafarers? FAQ MLC 2006, ILO, 2012.

36) *Standard A5.1.5 – Onboard complaint procedures*

37) *Standard A5.1.4 point 5 – Inspection and enforcement*: «If a Member receives a complaint that seems clearly unfounded or acquires proof that a ship sailing under its flag is in violation of the provisions set forth in the Maritime Labour Convention, it shall undertake the necessary measures to investigate and address the shortcomings»

second is to undertake a judicial route, which would be more complex. *It is thus preferable to determine the provisions of the convention that would have a direct effect, if the authority of the judge is left aside.* The case law of the Social Chamber of the French Supreme Court and State Council would be an example. The Social Chamber ruled in 2006, without justification that «Article 1, Article 2, paragraph 2.b and article 11 of the International Labour Convention No. 158 regarding the termination of the employment relationship at the request of the employer is of direct application before national courts»<sup>38</sup>. In a more recent ruling, the Social Chamber ruled that the first three articles in the ILC No. 180 regarding the length of seafarers' and ship personnel hours of work are self-executory. This decision is notable. The judges did in fact apply the convention during legal proceedings after it was ratified but before a decree was passed incorporating the instruction into the French legal system<sup>39</sup>.

The Maritime Labour Convention could be the subject of a direct application in light of these rulings. On one hand the Social Chamber applies Convention No. 158 unconditionally. On the other hand, Convention No. 158 is more restrictive than the Maritime Labour Convention. ILO No. 158<sup>40</sup> imposes a complimentary act compared to the MLC<sup>41</sup>. For its part, the State Council deemed that the provisions of an international convention such as Article 6 of the ILC No. 97, adopted on July 1, 1948, regarding migration for employment «can be therefore evoked [...] when it creates rights individuals are entitled to exercise»<sup>42</sup>. It is subject to two requirements: The provision in question is recognized as a direct effect if on one hand «its sole purpose is not govern the relations among States» and on the other it «does not require the intervention of any complementary act to generate effects on individuals»<sup>43</sup>.

38) Cass. soc., March 29, 2006, Sté Euromédia Télévision c/ Peter. Obs. R. Vatinet, Direct application of the ILC No. 158 before the national courts, *La Semaine Juridique- Sociale, JCP-S.*, 2006, No. 1427.

39) After referring to ILC No. 180 regarding seafarers' hours of work and the manning of ships, ratified on April 27, 2004 in their visa, and having established that the convention was adopted via decree No. 2004-1216 on November 8, 2004, as well as Articles 3, 4, 5 and 18-3, the Social Law Chamber of the French Supreme Court ruled that it follows that the first three articles are self-executory under domestic law on October 27, 2004—six months after the International Labour Office (ILO) registered said convention—that the hours of work for seafarers and other workers is technically eight hours per day with one day of rest per week, in addition to the rest days associated to bank holidays. When seafarers are on call, they must benefit from compensatory rest periods if the normal length of his rest is disturbed by calls»: Cass. soc., January 23, 2013, obs. P. Chaumette, «Le temps de travail du capitaine de navire clarifié par l'effet direct de la convention numéro 180 de l'OIT», *Droit social* 2013, p. 287.

40) ILC No. 158 regarding involuntary termination of employment.

41) «The provisions of this Convention shall, in so far as they are not otherwise made effective by means of collective agreements, arbitration awards or court decisions or in such other manner as may be consistent with national practice, be given effect by laws or regulations». Article 1, ILC No. 158 regarding involuntary termination of employment.

42) Cass. soc., March 29, 2006, op. cit..

43) Conseil d'Etat, CE, April 1, 2012, No. 322326, Gisti and a, Thibaut Fleury, *Conditions de l'effet direct des traités internationaux, Droit Administratif*, 2012, comm. 76.

The Maritime Labour Convention fulfils the first of the two conditions. The sole purpose of the MLC is not to govern relations among States but to ensure seafarers have the right to decent employment by establishing an international body of common law. As such, the convention contains precise and unconditional regulations. For example, Title 1.1 regarding the minimum age stipulates that no person under the minimum age can be employed, engaged or working aboard a vessel. The purpose of Title 2.1- Maritime employment contracts is to ensure that seafarers have 1) access to fair maritime employment agreements. The terms and conditions for employments of a seafarer are set out or referred to in a clear written, legally enforceable agreement and shall be consistent with the standards set out in the Code; and 2) the maritime employment agreement shall be agreed to by the seafarer under conditions which ensure that the seafarer has the opportunity to review and seek advice on the terms and conditions in the agreement and freely accepts them before signing.

However, the fulfilment of the second condition can be disputed. The convention provided that «unless otherwise specified in the convention, such implementation may be achieved through national laws or regulations through application collective agreements or through other measures or in practice»<sup>44</sup>. The convention thus suggests, without imposing, transposition measures. In this regard, the convention shall not have a direct effect. Nevertheless, other provisions in the convention call to conclude in favour of the direct effect. The convention stipulates under *General Obligations* that each member who ratifies the Convention undertakes to give complete effect to its provisions in the manner set out in Article VI in order to secure the right of all seafarers to decent employment<sup>45</sup>. Article VI, which is referred to by Article I, provides that the regulations and provisions of Part A of the Code are mandatory. The provisions of Part B of the Code are not mandatory<sup>46</sup>. The convention would thus impose itself only by ratification and would be swept by this positioning. The MLC could be directly evoked by seafarers, especially the ship master since it grants him a set of rights and duties.

## II – The content of the convention: the rights and duties of the ship master

The convention does not isolate the ship master in general terms. The ship master is considered a seafarer like any other, who benefits from the rights recognized by the convention to seafarers (A). However, the ship master is not a seafarer like the rest.

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44) Art. IV, Seafarers' Employment and Social Rights

45) Art. I, General Obligations, MLC 2006.

46) Art. VI, General Obligations, MLC 2006.

The convention sets out a series of rights and obligations stemming from common law (B).

### **A – The rights and duties of ship masters common to all seafarers: The ship master, a seafarer among others**

The MLC was drafted with the view of consolidating a series of international maritime labour regulations and recommendations. It thus establishes a core of coherent regulations at the international level setting out the rights of seafarers in terms of employment, work and social protection. It constitutes as a response to the particular nature of maritime employment<sup>47</sup>. Article IV stipulates that every seafarer has the right to a safe and secure workplace that complies with safety standards; to fair terms of employment; to decent working and living conditions on board ship; and to health protection, medical care, welfare measures and other forms of social protection. In this regard, the convention states the rights of seafarers in the manner of a code<sup>48</sup>. This affects the conditions governing admission to the occupation of seafarer. Firstly, it governs the minimum requirements for seafarers such as age, medical fitness, training, qualifications, recruitment and placement. Secondly, it governs the terms and conditions of employment. The convention stipulates the minimum standards regarding maritime employment contracts, wages, length of working days, rest periods but also—and specific to seafarers—repatriation, compensation in the event a vessel is lost or foundered; career and skill development and employment opportunities. The convention also sets out standards regarding accommodation, recreational facilities as well as food and catering. Lastly, the convention stipulates requirements in terms of health protection, medical care, welfare and social security of seafarers. The convention also contemplates medical attention onboard ship and ashore as well as shipowner liability

The convention does not differentiate ship masters from seafarers in regards to employment, work and social protection rights. These rights are applicable to the category of seafarers and the ship master falls in this category. This precision would be superfluous but one exception should be pointed out. Standard A.2.1. d) stipulates «seafarers' employment agreement includes both seafarers and ship masters. It also provides that measures shall be taken to ensure that clear information as the conditions of their employment can be easily obtained on board by seafarers, including the ship's mater, and that such information, including a copy of the seafarers' employment agreement, is also accessible for review by officers of a competent

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47) D. Fitzpatrick & M. Anderson, «International standards» in *Seafarers' Rights*, D. Fitzpatrick & M. Anderson dir., Oxford University Press, 2005, p. 39.

48) M. Marin & A. Charbonneau, «La convention du travail maritime 2006: vers une codification du droit du travail maritime international », *Droit Maritime Français* 2007, pp. 110-116.

authority, including those in ports to be visited»<sup>49</sup>. The distinction is rooted in the fact that the ship master, even if he is a shipowner's proxy, is above all a salaried seafarer who operates under the direct authority of the shipowner. These functions, which are not to be confused, indicate that the ship master is not a seafarer like the rest.

**B – The rights and obligations of the master, the same as other sailors:  
The ship master, a seafarer unlike the restship mastership master**

The ship master is not an ordinary seafarer who must provide a service like the other seafarers. There are specific skills linked to position of ship master. There are three conventional skills linked to the role of the ship master: nautical, commercial and public skills. The MLC completes these skills by allocating a series of social rights and responsibilities to the ship master<sup>50</sup>. The only specific and distinctive right allocated to ship masters, as per stipulated in the convention, is his own private accommodations. The ship master shall have, in addition to their sleeping rooms, an adjoining room or equivalent additional space. The convention stipulates that this additional space may serve as a sitting room or an office<sup>51</sup>. The convention also stipulates under its main guidelines to provide separate mess rooms are to be provided to masters and officers when mess separate mess rooms facilities are provided to seafarers<sup>52</sup>. The rights regarding accommodation should not be interpreted as specific social rights. The spaces considered are not associated the right and respect to privacy. This public space is destined to allow the ship master to fulfil his different responsibilities, in particular social.

The ship master's social obligations

The convention provides the ship master a series of responsibilities. These responsibilities are not compiled under a single title, contrary to French Law, the ship master. They appear on a case by case basis in the regulations, standards and/or the guidelines stipulated in the convention. They should be referred to by adopting the manner by which they are referred to in the convention among the standards of mandatory compliance (Regulation and standard, Reference A) and the guidelines (guidelines, Reference B).

49) Standard A2.1 – Maritime employment agreement, MLC 2006.

50) J. AC Cartner, «The Ship master and the Maritime Labour Convention 2006», In J. Lavelle, *The Maritime Labour Convention 2006 – International Labour Law Redefined*, Informa Law, Routledge pp. 47-68.

51) Standard A3.1 § 9 m Accommodation and Leisure, MLC 2006.

52) «In the event different mess rooms are set up for seafarers, different mess rooms need to be set up for: a) the captain and officers; b) other ship personnel and seafarers.» (Guideline: B3.1.6§ – Mess rooms B3.1 – Accommodation and recreational facilities).



## Wages

The ship master is mentioned in regards to seafarer wages and his specific responsibility in regarding overtime. The convention does not assign regulations of mandatory compliance on the ship master. However, the convention sets out a guideline. The convention suggest that for the calculation and payment of overtime, records all overtime worked would be maintained by the master, or a person assigned by the master, and endorsed by the seafarer at no greater than monthly intervals<sup>53</sup>.

## Hours of work and hours of rest

This guideline should be correlated with the *Standard A2.3 – Hours of work and hours of rest* set out in Regulation 2.3–*Hours of work and hours of rest*. The ship master or a person authorized by the ship master and the seafarer are responsible for ensuring the records of seafarers' daily hours of work of rest are duly signed.<sup>54</sup> The ship master is responsible for maintaining records of hours worked. The ship master has a specific responsibility in this case. He is at a crossroads between the social rights of seafarers and the vessel's profitability imperative. Counting hours, including overtime, requires a rigorous management of count of working hours. Poor management of counted hours could cause disputes between seafarers and the shipowner, and could lead to the ship master being liable.

The issue is more sensitive because the ship master is responsible for the safety of the vessel and thus must take all the necessary measures to ensure the vessel reaches its destination. Therefore, the ship master has the right to require seafarers to perform any hours of work necessary for the immediate safety of the vessel, persons onboard, the cargo or for the purpose of providing assistance to other ships or persons in distress at sea. The ship master can also suspend the schedule of hours of work or hours of rest and require seafarers to perform any hours of work necessary until the normal situation has been restored. The ship master must ensure that seafarers receive adequate rest periods between assignments<sup>55</sup>. The ship master exercises a discretionary power regarding social and economic imperatives. The convention emphasizes in fact that «nothing in this convention limits» the power the ship master has to require a seafarers to perform a safety-related duty.

Lastly, the convention provides a guideline for Young Seafarers. The guideline

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53) Guideline B2.2.2 § 1, d) – Calculation and payment (Regulation 2.2 – Wages under Guideline B2.2 – Wages, MLC, 2006).

54) Standard A2.3 § 12 – Hours of work and hours of rest (Regulation 2.3 - Hours of work and hours of rest, MLC, 2006).

55) Standard A2.3 § 14 – Hours of work and hours of rest (Regulation 2.3 - Hours of work and hours of rest, MLC, 2006).

stipulates that the ship master must record hours of work and rest periods of young seafarers and the reasons for this exceptional situation<sup>56</sup>.

### Repatriation

Maritime employment has the particularity of keeping seafarers away from any furnished area and especially from their home. The right to repatriation is therefore an essential right which could almost be considered a fundamental right.

The convention refers to an agreement of repatriation that is struck between the seafarer and the ship master when seafarers put ashore in a foreign port for reasons for which they are not responsible and to remind members of the convention are responsible for ensuring repatriation of seafarers on ships that fly its flag. The convention does not state any particular obligation to the ship master. It is important to understand that should a seafarer be put ashore in a foreign port for reasons for which they are not responsible; ship masters can work with seafarers to decide on the landing port. This agreement could be subject of a control<sup>57</sup>.

### Accommodation, recreational facilities, food and catering<sup>58</sup>

Accommodation – The ship master is assigned as the competent authority to inspect accommodations. These inspections are performed to ensure that seafarer accommodations are clean and decently habitable. Inspection periods are not stipulated though the convention refers to frequent inspections. It does not stipulate how the inspections are to be conducted, in particular to the presence of the seafarer(s) who occupy the unit. The inspection seems to be limited to its purpose and does not go beyond ensuring the good state of the unit. The ship master must record the results of each inspection<sup>59</sup>. The ship master is also the competent authority responsible for ensuring the return of bedding and mess utensils should members consider applying the guideline set forth by the convention and inviting shipowners to supply seafarers with the abovementioned<sup>60</sup>.

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56) Guideline B2.3. § 3 – Young seafarers, (Regulation 2.3 - Hours of work and hours of rest, Guideline B2.3 – Hours of work and hours of rest, MLC, 2006).

57) Guideline B2.5.2 § 2, iii) – Implementation by members (Regulation 2.5 – Repatriation, Guideline B2.5 – Repatriation, MLC, 2006).

58) I. Christodoulou-Varotsi, «Les défis du bien-être des marins dans le nouveau contexte de la convention du travail maritime consolidée de l'OIT», *Annuaire de Droit Maritime et Océanique*, University of Nantes, t. XXV. 2007, pp. 141-156.

59) Standard A3.1 § 18– Accommodation and Recreational Facilities (Regulation 3.1 – Accommodation and Recreational Facilities, MLC, 2006)

60) Guideline B3.1.10 § 1 – Bedding, mess utensils and miscellaneous provisions (TITLE 3. Accommodation, recreational facilities, food and catering, Regulation 3.1 – Accommodation and recreational facilities, Guideline B3.1 – Accommodation and recreational facilities, MLC, 2006)

Food and catering – The ship master must ensure adequate supplies of food, drinking water and proper stocking of galleys and kitchens. The ship master is required to conduct «frequent documented inspections»<sup>61</sup>. This requirement has a direct impact on the health and wellbeing of seafarers as it affects essential elements. The target ensures collect up-to-date information on nutrition and on methods of purchasing, storing, preserving, cooking and serving food, and catering on board a ship<sup>62</sup>.

### Health protection, medical care, welfare and social security

Ships are living spaces but also work spaces. In this respect, seafarers have the right (like any other worker) to the protection of their health. This protection is founded on risk prevention (occupational health and safety) coverage (medical care, welfare and social security). Shipowners are responsible for the general provision of such services. The convention in particular emphasizes that each member shall provide seafarers employed on the ships with a right to material assistance and support from the shipowner with respect to the financial consequences of sickness, injury or death occurring while they are serving under a seafarers' employment agreement or arising from their employment under such agreement»<sup>63</sup>.

However, the daily management of safety-, hygiene- and health-related events fall upon the ship master.

Medical attention on board ship and ashore – The ship master must record the medical care provided onboard ship and ashore in a standard medical report adopted by members<sup>64</sup>.

Health and safety protection and accident prevention – It is probably in the area of health and safety protection and accident prevention (Standard A4.3) that the responsibilities of a ship master are more substantial. The convention specifies that the duties of the ship master take specific responsibility. This signifies the importance of the role of the ship master. However, the object of this responsibility seems strictly defined. It is not up to the ship master to implement the ship's occupational safety and health policy program<sup>65</sup>. This obligation falls upon the shipowner. In this respect,

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61) Standard A3.2 § 7– Food and catering (Regulation 3.2– Food and catering, MLC, 2006).

62) Guideline B3.2.1 § 1 – Inspection, education, research and publication (Guideline B3.2 –Food and catering, Regulation 3.2– Food and catering, MLC, 2006)

63) Regulation 4.2 – Shipowners Liability, MLC 2006.

64) Standard A4.1 § 2– Medical attention on board ship and ashore (Regulation 4.1 – Medical attention on board ship and ashore, MLC 2006).

65) Standard A4.3 § 2, c) – Health and Safety Protection and Accident Prevention (Standard A4.3 – Health and Safety Protection and Accident Prevention, Regulation 4.3, Health and Safety Protection and Accident Prevention, MLC, 2006).

it is unfortunate that the convention does not have a regulation concerning the liability of shipowners as such is the case for the protection of seafarers from financial consequences of sickness, injury or death as a result of their job. The convention allows Members to adopt the necessary measures which shipowners will have to comply with. However, the convention relies on the ship master to ensure compliance and it is up to the ship master to implement the decision adopted by the shipowner in regards to occupational health and safety. The shipowner takes on a secondary role. It could result in the ship master being held accountable for the shipowner's shortcomings. We understand as such that the ship master does have a special responsibility.

Maritime labour certificate and declaration of maritime labour compliance Regulation 5.1.3 – There is also another special responsibility that falls upon the ship master in regards to the maritime labour certificate and declaration of maritime labour compliance. This certificate attests that the working and living conditions on board the ship comply with the provisions set forth by national regulations and «14 points» subject to the certification. The ship master must be familiar with the requirement of the convention and the responsibilities for implementation even if it is an interim maritime labour certificate<sup>66</sup>. The convention also states in a guideline that to ensure ongoing compliance should include general international requirements for ship masters keep themselves informed of the latest advances in technology and scientific findings concerning workplace design, taking into account the inherent dangers of seafarers' work, and to inform the seafarers accordingly, thereby guaranteeing a better level of protection of the seafarers' working and living conditions on board<sup>67</sup>.

Inspection and Enforcement – Ship masters are not responsible for the implementation of the convention. This responsibility falls upon the members. Members must inspect and enforce the provisions set forth in the convention by putting the place inspection equipment to ensure the convention is respected<sup>68</sup>. The convention also sets out that ship masters must receive a copy of the inspection report<sup>69</sup>. In addition, the convention stipulates in the guidelines that inspectors should be empowered to question the ship master, seafarer or any other person, including the shipowner or the shipowner's representative<sup>70</sup> and inform the shipowner, the operator of the ship

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66) Standard A5.1.3 § 7, c) – Maritime labour certificate and declaration of maritime labour compliance (Title 5. Compliance and Enforcement, MLC, 2006).

67) Guideline B5.1.3 § 3 – Maritime labour certificate and declaration of maritime labour compliance, (Title 5. Compliance and Enforcement, MLC, 2006).

68) Regulation 5.1.4 – Inspection and Enforcement; Standard A5.1.4 § 3 – Inspection and Enforcement (Title 5. Compliance and Enforcement, MLC, 2006).

69) Standard A5.1.4 § 12 – Inspection and Enforcement (Title 5. Compliance and Enforcement, MLC, 2006).

70) Guideline B5.1.4 § 8 a) – Inspection and Enforcement, (Title 5. Inspection and Enforcement, MLC, 2006).

or the master, deficiencies which may affect the health and safety of those on board ship<sup>71</sup>.

Potential and identified violations must also be brought to the attention of Members to ensure the effectiveness of these measures. The convention suggests, in one of the guidelines, to enable ship masters, seafarers or representatives of the seafarers to request an inspection when they consider it necessary. It would provide at least two advantages if it were implemented. Permanent controls are put in place by means of the ship master if they are empowered with the responsibility of determining if a violation was committed or not. Moreover, it legally protects the ship master from any potential recourse that could be filed by the employer<sup>72</sup>. This procedure should not be confused with the provisions set out regarding onboard complaint procedures.

Onboard complaint procedure – The convention states that seafarers can lodge complaints if they feel the convention is not being respected<sup>73</sup>. In fact, the convention sets forth that seafarers can complain directly to the ship master and, where they consider it necessary, to appropriate external authorities<sup>74</sup>. The onboard complaint procedure also recognizes that breaches of rights are often ‘invisible’ and unlikely to be identified during an inspection without a complaint from the seafarer<sup>75</sup>. The ship master has a key role in the onboard complaint procedure<sup>76</sup>. As a seafarer, the ship master will have no other choice but refer to an external authority. Standard A5.1.5 §4 stipulates that seafarers must be provided, in addition to a copy of their employment agreement, a copy of the on-board complaint procedures applicable on the ship. This shall include contact information for the competent authority in the flag State and, where different, in the seafarers’ country of residence, and the name of a person or persons on board the ship who can, on a confidential basis, provide seafarers with impartial advice on their complaint and otherwise assist them in following the complaint procedures available to them on board the ship. It is apparent that this Standard is very ambitious. Regulation 5.1.5 regarding onboard complaint procedures

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71) Guideline B5.1.4 § 8 f) – Inspection and Enforcement (Title 5. Compliance and Enforcement, MLC, 2006).

72) Guideline B5.1.4 § 8 f) – Inspection and Enforcement (Title 5. Compliance and Enforcement, MLC, 2006).

73) Regulation 5.1.5 – Onboard complaint procedures (Title 5. Compliance and Enforcement, MLC, 2006).

74) V. regarding how onboard complaints are processed onshore: M. Marin and A Charbonneau, «La convention du travail maritime 2006: traitement à terre des plaintes déposées par les gens de mer», *Annuaire de Droit Maritime et Océanique*, University of Nantes, t. XXV, p. 173 - J. AC Cartner, «The Ship master and the Maritime Labour Convention 2006», in J. Lavelle, *The Maritime Labour Convention 2006 – International Labour Law Redefined*, Informa Law, Routledge, 2014 p. 67.

75) M. Mc Connel, D. Devlin & Cl. Doumbia-Henry, *The Maritime Labour Convention*, Martinus Nijhoff Publishers, 2011, p. 543.

76) Standard A5.1.5 § 2– Onboard complaint procedures; Guideline B5.1.5 § 1, a) – Onboard complaint procedures (Title 5. Compliance and Enforcement, MLC, 2006).

## VIII. The Ship master and the Maritime Labour Convention

sets up in Paragraph 2 a «whistle blower' provision»<sup>77</sup>. The ship master will have to clear when he is lodging a complaint if he is lodging it as a ship master or as a seafarer<sup>78</sup>.

Port state responsibilities<sup>79</sup> - The convention sets out that foreign vessels calling at a port of a Member state are subject to being inspected for the purpose of reviewing compliance with the requirements of this Convention. This responsibility falls upon Port states. The ship master of the foreign vessel does not have any specific responsibilities. However, the convention does stipulate that the ship master is to be immediately informed of any violations identified during the inspection and the prescribed deadlines for their rectification<sup>80</sup>.

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77) M. Mc Connel, D. Devlin & Cl. Doumbia-Henry, *The Maritime Labour Convention*, Martinus Nijhoff Publishers, 2011, p. 545.

78) V. to illustrate challenges: P. Chaumette, «Le capitaine de navire et son pouvoir de représentation en justice», *Neptunus*, e-magazine, Vol. 11, 2005/3, <http://www.cdmo.univ-nantes.fr/>

79) I. Christodoulou-Varotsi, «Port state control of labour and social conditions: measures which can be taken by port states in keeping with international», *Annuaire de Droit Maritime et Océanique*, University of Nantes, t. XXI. 2003, p. 251.

80) A5.2.1 § 4– Inspections in port (Title 5. Compliance and Enforcement, MLC, 2006).

