

FAIR TREATMENT OF SEAFARERS

Submission by International Federation of Shipmasters' Association (IFSMA)

SUMMARY

Executive summary: Open issues relating to the Guidelines to be drafted in accordance with Draft Resolution IMO/ILO/WGFTS 1/11, paragraph 5. The open issues are listed in order of importance to IFSMA for consideration by the informal Correspondence Group referred to in paragraph 10.17 of IMO/ILO/WGFTS 1/11 - the Report of the First Session of the Joint IMO/ILO *Ad Hoc* Expert Working Group on Fair Treatment of Seafarers (17 to 19 January 2005).

Related documents: LEG 89/9 and LEG 90/7

1./ The conceptual differences made manifest during discussions of the IMO/ILO *Ad Hoc* Expert Working Group on Fair Treatment of Seafarers (to be referred to henceforth as the WG) revealed differing views on substance of the Guidelines (to be drafted) on the Fair Treatment of Seafarers. For identification of the delegations expressing views, opinions and comments reference should be made to the report of the WG: IMO/ILO/WGFTS 1/11.

2./ This document brings to the attention of the Committee issues of importance to IFSMA and considered to be the essential components of the Guidelines to be drafted by the WG on the assumption that the Committee accepts the Report and accedes to the request of the IMO Secretariat as formulated in LEG 90/7.

3./ There was general agreement in the WG that seafarers are a special category of maritime workers who deserve special consideration when in contact with State authorities. In terms of personal freedom, qualities of life and work on board ships are but pale shadows of the past. Modern seamen are vulnerable and exposed to public law sanctions much more than their predecessors were when visiting foreign ports. Their contract of employment, which is a private law documents, affords seafarers no protection against interference with their freedom of movement or even guarantees basic subsistence while so employed.

4./ The Committee is asked to refer to paragraph 2 of LEG 89/9 (IFSMA's submission to the Committee's 89th session) to the effect that "no one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation" - quoting Article 11 of the International Covenant on Civil and Political Rights. The Committee's attention is respectfully directed also to paragraphs 3 and 4 of the above submissions that emphasise the private contractual nature of the seafarer's obligation and the public recognition of the ship master's autonomy in exercising professional judgement in command of a ship.

5./ Neither private nor public obligations on part of the seafarer absolves him/her of personal responsibility in carrying out duties as a competent mariner. Concurrently, States and their agencies have public duties in respect of navigation and other safety issues which have actual or potential impact on the environment and public order within

a State's jurisdiction. In a security conscious world, the legal and administrative tasks of State authorities becomes more onerous that inevitably render visiting seamen's lives in that State more stressful.

6./ Investigations and inquiries are facts of maritime life affecting and involving persons on board ship and on shore. The purpose of the investigation or inquiry is of less relevance to seamen, as rule, than to State authorities, and the Guidelines are the inappropriate forum to categorise them by purpose, aims or objects. Investigations and inquiries may be brief and simple, lengthy and complicated. From the visiting seafarer's point of view the most pertinent consideration is whether a prima facie case exists against him/her that is uncovered during the investigation or inquiry. On the establishment of that prima facie case depends the seafarers' future fate in the State conducting the investigation or inquiry.

7./ The objects of the Guidelines, in our respectful submission, are to inform and guide States to treat seafarers fairly in the context of the obligations and duties of the authorities and agencies of the State before, during and after formal investigation or inquiry is being established within the jurisdiction of the State. Administrative and legal obligations and duties of States may vary when conducting maritime investigations and inquiries. Those obligations and duties have not the same impact, urgency or consequence for seafarers. The State, usually the port or coastal State, where the seafarer is physically present, is most relevant. Obligations and duties of other States, under international or national laws, need not be referred to in the Guidelines in order to preserve the clarity of purpose in the Guidelines.

8./ Greater importance for seafarers is the time required by the authorities and/or agencies of the State conducting the investigation or inquiry to establish the prima facie case against the seafarer, if any, in the course of that investigation or inquiry. In our submission to the Committee's 89th session, LEG 89/9, Annex, Principle 6, the proposal was that " no seafarers shall be detained in the territory of any State beyond seven days from the date of the accident or incident or dispute alleged to have adverse consequences in that State". The seven days' period may be insufficient for the State's purposes, but should not be extended for lengthy periods or be indeterminate.

9./ As a guide to the conduct of State authorities and agencies when undertaking investigation or inquiry involving visiting seamen, we would respectfully refer the Committee to LEG 89/9, Annex, "Body of Principles for the Protection of Seafarers under any form of detention following a marine accident or maritime incident or commercial dispute relating to their ship and/or her cargo." The principles are true reflections of the Resolution of the United Nations General Assembly 43/73 of 9 December 1988. Special relevance to seafarers are to be found in Principles 6, 7, 8 and 9 as submitted by IFSMA in the Annex to LEG 89/9. Principles 6 and 7 refer to accommodation of seafarers during investigation or inquiry and to the allocation of costs for such accommodation and living expenses, respectively. Both issues have been adverted to during discussions in the WG.

10./ The issue of prompt release of a seafarer from detention or other form of restriction on his/her movement within the State conducting the investigation or inquiry, and of the seafarer's ability to leave that State, must be conditional on the findings of facts in the course of the investigation or inquiry. In the event that those facts, or sufficient number of them, are evidence of a prima facie wrongdoing on the part of the seafarer under domestic law, the issues concerning subsequent processes fall to be determined.

11./The Guidelines, in our humble view, must deal, with some particularity and in detail, with the following vital aspects of the subsequent processes referred to above in paragraph 10:

- (a) preservation of evidence in acceptable form in subsequent legal or administrative proceedings involving the seafarer as witness or accused. Forms and values of the evidence required under domestic law vary widely, but some basic and useful proposal in the Guidelines may prompt States to accept sworn depositions, audio and/or video taped statements obtained under legal safeguards and subject to cross examination. Having secured such evidence the presence of the seafarer in the State conducting the investigation or inquiry will no longer be required; and
- (b) ensuring the personal appearance of the seafarer in those subsequent legal or administrative proceedings should such appearance be necessary under domestic law. Appearance may be secured if the seafarer is released into the personal care of the Head of State whose passport the seafarer holds, or where he/she has right to reside, as proposed in Principle 9 of the Annex to LEG 89/9. That Head of State is able to use his/her official capacity and public powers to locate the seafarer at any time in order to ensure the seafarer's attendance in the State making the request for the purpose of progressing the investigation or inquiry to conclusion.
- (c) Involuntary transfer of persons between States have established legal forms and procedures under national and international laws. Utilising those forms and procedures may prove lengthy and complicated when the object is prompt release of seafarer from detention or other forms of restraints in the State conducting a maritime investigation or inquiry. The Guidelines may encourage States to modify existing bilateral or multilateral extradition procedures by requesting States to employ the best practices most appropriate in resolving the contending principles and practices between States, on the one part, and seafarers, on the other part, in the interest of fair treatment of the latter.

Action requested to be taken:

12./ The Legal Committee is invited to take note of the information contained in this document and to make such comments and recommendations as it may deem appropriate with special reference to our request to:

- refer paragraphs 2-12 (both inclusive) to the attention of the informal Correspondence Group for consideration to assist the WG in drafting the Guidelines, and
- to consider advising the WG to include in the Guidelines words and expressions to the effect that seafarers must not be used as human tools to gain or force compliance with private or public obligations on the part of the shipowner, charterer and/or their insurers or on the part of the flag State, and
- to consider establishing the Joint IMO/ILO *Ad Hoc* Expert Working Group on Fair Treatment of Seafarers as a permanent body of the two organisations in order to facilitate continuous and regular procedural arrangements for the collection, collating, evaluating and disseminating of data and information of matters relevant to the Guidelines, in particular the issues referred to in paragraph 11 of this document.

FAIR TREATMENT OF SEAFARERS

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SUMMARY

Executive summary: The terms of reference of the IMO/ILO Joint Working *Ad Hoc Expert* Working Group on the Fair Treatment of Seafarers as formulated at this Committee's 89th session are inadequate for being restricting the fair treatment of seafarers to event of a "maritime accident". Seafarers, in particular shipmasters, face contingencies other than "maritime accidents" in the course of their duties as mariners. The inadequacy the terms of reference was referred to, and discussed, at the meeting of the Joint IMO/ILO *Ad Hoc Expert* Working Group (17-19 January 2005).

Related Documents: LEG 90/7, IMO/ILO/WGFTS 1/11 (paragraphs 7.57 - 7.69) and Annex 3, LEG 89/9 Annex.

- 1./ IFSMA's submission LEG 89/9, Annex, contained our proposal for the "Body of Principles for the Protection of Seafarers under any Form of Detention following a *marine accident or maritime incident or commercial dispute relating to their Ship and/or her Cargo*."
- 2./ The expression *marine accident* is the reference an unforeseen physical event connected to the navigation, manoeuvring or handling of the ship, such as collision, grounding that may, or may not, result in environmental damage to the coastal or port State.
- 3./ The expression *maritime incident* refers to acts or omissions on board ship that result in damage to persons or materials.
- 4./ The expression *commercial dispute relating to their [seafarers'] ship and or her cargo* is reference to the arrest and/or confinement of the master of vessel and/or other seamen belonging to the ship, not an infrequent occurrence, at the instance of a party whose interest is purely commercial. For example, the local ship's agent demands payment for services rendered without success from the owner, or charterer, of the ship. The master of the ship, and other seamen belonging to the ship, are held vicariously liable for the debt, or alleged debt, of another person. Irregularities or mistakes in bills of lading, charter parties or in other documents relating to the cargo also expose the shipmaster and seamen to risks of detention ashore, or to confinement in the ship, until the irregularities or mistakes are rectified. Frequently, the ship's agent's debts will never have been paid nor the irregularities or mistake in the documents corrected, leaving the ship, her master and crew stranded and abandoned by owners of the ship and the employer of the crew.

Action requested of the Legal Committee

5./ The Legal Committee is invited to take note of the information contained in this document and to make such comments and recommendation as it may deem appropriate.

6./ The Committee is also invited to:

- to expand the Joint IMO/ILO *Ad Hoc* Expert Working Group on the Treatment of Seafarers' terms of reference to include contingencies within the public and private law domains encountered by seafarers, in particular shipmasters, in the course of their employment.