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MERCHANT SHIPPING (OCCUPATIONAL HEALTH AND SAFETY) REGULATIONS, 2018

*(Subsidiary Legislation to Incorporate the Maritime Labour Convention (Regulation 4.3) into
the Laws of Kenya)*

**A Legislation Drafting Project submitted in partial fulfilment of the
requirements for the award of the Degree of Master of Laws (LL.M.) in
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EXPLANATORY NOTE

Introduction

This legislative drafting project seeks to implement the provisions of the Maritime Labour Convention¹ (MLC) on occupational health and safety as contained in Regulation 4.3 of the Convention.

Part One of this explanatory note discusses the concerns that motivated States, ship owners and seafarers to develop the MLC, its objectives and structure, and the key provisions and obligations imposed by the MLC upon the Parties. Particular focus will be placed on Regulation 4.3 and its importance in promoting seafarers' rights in the maritime sector.

Part Two will assess the need for Kenya to implement Regulation 4.3 of the MLC, and it will identify the gaps in the current legislation that necessitate the formulation of these Regulations. Particular emphasis will be laid upon its obligations not only as a Flag State, but also as a Port State and a maritime labour supplying State, and the benefits it stands to gain from enacting these Regulations.

Part Three will shed more light on the instrument being used for the implementation, that is the subsidiary legislation, and why it is the preferable instrument in this instance. It will also examine the salient features of the Regulations and their scope of coverage.

¹Adopted on 23 February 2006, entered into force 20 August 2013.
<http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/normativeinstrument/wcms_090250.pdf> accessed 30 April 2018.

PART 1

THE MARITIME LABOUR CONVENTION

1.1 Background

For a long time, the International Maritime Organisation (IMO) focussed on regulating how ships were built, how they are maintained, and how they are equipped. This was to enhance the safety of shipping and reduce the number of incidents at sea,² as well as protect the environment from pollution.³ The IMO also put a lot of emphasis on the training of seafarers in order to ensure that a ship's crew is able to operate the sophisticated equipment on board and avoid incidents which can be attributed to lack of proper training.⁴ The three instruments used to enhance safety, environmental protection and training of seafarers, i.e. the International Convention for the Safety of Life at Sea⁵ (SOLAS), the International Convention for the Prevention of Pollution from Ships (MARPOL⁶ and the International Convention on Standards of Training, Certification and Watch keeping for Seafarers⁷ (STCW) have been described as the main pillars of the IMO's regulation of the industry.

However, not much emphasis had been placed on the general welfare of seafarers working on these vessels. Most of the labour related standards had been set by the International Labour Organisation (ILO), and this was done as the problems arose. Additionally, most of the efforts were geared towards setting of minimum wages, regulation of crew agreements and a few other areas. Some areas such as occupational safety and health aboard ships did not get the attention they deserved,

²This was done through the enactment of SOLAS in 1974.

³MARPOL forms the bulk of the law on protection of the marine environment. Recent conventions such as the International Convention on Civil Liability for Bunker Oil Pollution Damage and the International Convention for the Control and Management of Ships' Ballast Water and Sediments supplement MARPOL's efforts in environmental protection.

⁴The STCW sets standards on training of seafarers. Without an STCW certificate issued by a state on the IMO "white list" one cannot work aboard a ship of international navigation.

⁵Adopted on 1 November 1974; Entered into force on 25 May 1980

<[http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-\(SOLAS\)-1974.aspx](http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-(SOLAS)-1974.aspx)> accessed 30 April 2018.

⁶Adopted on 1973 (Convention), 1978 (1978 Protocol), 1997 (Protocol - Annex VI); entered into force: 2 October 1983 (Annexes I and II). <[http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Prevention-of-Pollution-from-Ships-\(MARPOL\).aspx](http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Prevention-of-Pollution-from-Ships-(MARPOL).aspx)> accessed 30 April 2018.

⁷Adopted on 7 July 1978; Entered into force on 28 April 1984,

<[http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-on-Standards-of-Training,-Certification-and-Watchkeeping-for-Seafarers-\(STCW\).aspx](http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-on-Standards-of-Training,-Certification-and-Watchkeeping-for-Seafarers-(STCW).aspx)> accessed 30 April 2018.

despite the fact that the main causes of deaths of seafarers were linked to exposure to dangerous and hazardous substances, exposure to noise and at times radiation, accidents when accessing the ships, among others.

In an attempt to address the above issues, various conventions were enacted under the auspices of the ILO. The conventions addressed the issues as they arose, and each dealt with a specific thematic area, such as safe manning, accidents at work, and many other areas. The ILO regulation of labour standards was therefore fragmented, and was contained in numerous instruments enacted over a long period of time. As at 2001, over 60 instruments had already been enacted to govern the industry.

Due to the large number of these instruments, and considering the major developments in the shipping sector, it was difficult to keep these instruments up to date.⁸ As a result, many of the instruments existing at that time were not reflective of modern practice, and as such, a large number of issues which had become relevant were not covered by these instruments. These issues included among others, the repatriation and abandonment of seafarers. Many of these instruments also contained a lot of technical details that ILO Member States found difficult to understand and implement, and this led to a low ratification rate by the Member States.⁹ Additionally, the provisions contained in these instruments at times overlapped or duplicated existing provisions creating a complex web of obligations that were not easy to implement.¹⁰

These challenges were the main subject of the deliberations leading to the adoption of the MLC. Shipowners noted the need for a set of rules that were not only up to date and relevant, but also widely accepted and enforced, regardless of the flag of the ship, the nationality of the ship's crew, or the port the ship called at.¹¹ Seafarers, on the other hand, hoped that maritime labour standards would be elevated to the same level as safety standards, training standards, and marine pollution prevention laws. They noted that the multiplicity of legal regimes meant that there was no effective

⁸Moira L McConnell, Dominick Devlin and Cleopatra Doumbia-Henry, *The Maritime Labour Convention, 2006: A Legal Primer to an Emerging International Regime* (Martinus Nijhoff 2011) 8.

⁹ILO, Final Report, High Level Tripartite Working Group (Geneva, 17 – 21 December 2001).

¹⁰Ibid.

¹¹Ibid.

protection of seafarers, and that this status quo exposed them to exploitation, discrimination, and social deprivation by their employers, the ship owners. The seafarers also felt that they were disenfranchised when it came to social and welfare protection, since they were often not covered by national legislation on employment, safety and welfare of employees.¹²

Several options to remedy the situation had been floated to the Joint Maritime Commission (JMC),¹³ including revising a number of instruments that had been identified by the Governing Body, consolidating the conventions into a new framework convention and finally, consolidating a number of conventions into a few framework conventions, four or five, that would cover the major subject areas.¹⁴ The JMC was in favour of the second option; that is, the consolidation of the up-to-date conventions into a new framework convention.¹⁵ The proposed framework convention would be divided into several parts containing key principles, and there would be appendices containing more detailed requirements for each part.¹⁶ The Commission noted that the consolidation should be prioritised, and made recommendations on the formation of a High Level Tripartite Working Group on Maritime Labour standards.

In February 2006, the MLC was adopted in Geneva during the ILO Governing Body's Ninety-fourth Session, embracing the recommendations made by the JMC and the High Level Tripartite Working Group.

1.2 Structure of the MLC

The structure of the MLC has been described as being hierarchical in nature.¹⁷ It is divided into Articles, Regulations and a Code. The Articles and Regulations outline the basic obligations that the States should abide by. Part A of the Code contains mandatory provisions, whereas Part B contains the recommendations and guidelines on implementation of the mandatory provisions.¹⁸

¹² Ibid.

¹³ Composed of representatives of state parties, seafarers and ship owners.

¹⁴ ILO, Final Report, High Level Tripartite Working Group (Geneva, 17 – 21 December 2001).

¹⁵ Ibid.

¹⁶ Ibid. See also Moira (n4) 76 on adoption of a format commonly found in IMO conventions.

¹⁷ Moira (n4) 166.

¹⁸ MLC (n1), art VI.

1.3 Key provisions of the MLC

1.3.1 The Articles

The preamble of the MLC reflects the aspirations of the States, the ship owners and the seafarers that in adopting the Convention, seafarers' rights would get special protection, given the global nature of shipping. The Convention seeks to protect seafarers in ships used in international navigation.¹⁹ Although there are no restrictions as to gross tonnage or length of the ship with regard to its applicability, the Convention does not apply to fishing vessels. It further seeks to secure the acceptability of States and various stakeholders in the shipping industry, by consolidating various conventions and standards that promote decent work as embodied in Goal 8 of the Sustainable Development Goals adopted by the United Nations.²⁰

The Convention also recognises that several fundamental rights should be safeguarded, including: freedom of association, including the right to enter into collective bargaining agreements; the abolition of forced labour, child labour, and discrimination in employment; and the elimination of forced or compulsory labour.²¹ It also recognises the seafarer's right to safe and decent working conditions, fair terms of employment, health protection and other forms of social protection.²²

The implementation of the MLC by Member States is to be done through enacting implementing laws, Flag State control, issuance of certificates²³ as evidence of compliance, Port State Control of ships calling in their ports, and enforcement of the laws enacted by Member States. In order for the Convention to be successfully implemented, it was crucial that the key principle of "*firmness on rights, flexibility of methods*"²⁴ be embodied in it.

Firmness on rights means that the key principles have universal application and all the players have a level playing field.²⁵ In doing so, ships flying the flag of a non-Member State do not get

¹⁹ MLC (n1), art II, para. 1 (a).

²⁰ Goal 8 of the Sustainable Development Goals promotes the provision of social protection, eradication of forced and child labour, increased productivity, youth employment, SMEs and skills development. See <<http://www.ilo.org/global/topics/decent-work/lang--en/index.htm>> accessed 18 January 2018.

²¹ MLC (n1), art III.

²² MLC (n1), art IV.

²³ These include the Maritime Labour Certificate and a Declaration of Maritime Labour Compliance.

²⁴ Moira (n4) 167.

²⁵ Ibid.

favourable treatment than the ships flying the flag of a Member State particularly during Port State Control.²⁶ The universal application of the MLC requirements therefore ensures that the rights of seafarers are protected regardless of their nationality or the nationality of the ship they are working in.

On the other hand, there is flexibility in the implementation of the Convention by Member States. The conventions consolidated into the MLC had already been implemented in some of the Member States, and therefore, in implementing the MLC, these States only need to demonstrate that the provisions of their existing laws are substantially equivalent to the standards contained in Title 1 to Title 4 of the MLC.²⁷ However, there is no substantial equivalence in compliance and enforcement measures under Title 5. Flexibility in implementation also means that mandatory requirements are formulated in a rather broad way, and States have the leeway to put in measures of their choice so long as the measures do not fall short of the standards set.²⁸ This can be done by amending existing regulations to fill identified gaps in order to update the body of law to MLC standards. A State can also choose to enact laws on the areas not covered by existing laws in order to ensure compliance.²⁹

States are also required to consult shipowners' and seafarers' organisations when implementing the MLC.³⁰ This is meant to ensure that the laws formulated and other implementing measures have the input of all relevant stakeholders, in line with the practice employed by ILO in its work.

Another feature that sets the MLC apart from other ILO documents is the adoption of a simplified procedure of amendment currently found in IMO treaties.³¹ Amendment of the Articles and Regulations is done through the normal amendment procedures where the explicit consent of State Parties is required.³² Amendment of the Code is however to be done through a simplified procedure

²⁶ MLC, Art V.

²⁷ ILO, Final Report, High Level Tripartite Working Group (Geneva, 17 – 21 December 2001).

²⁸ Ibid.

²⁹ MLC, Art VI.

³⁰ MLC, Art VII.

³¹ This was one of the recommendations made by the ILO's High Level Tripartite Working Group. ILO, Final Report, High Level Tripartite Working Group (Geneva, 17 – 21 December 2001) . See also Moira (n4) 241, and Jennifer Lavelle, *Maritime Labour Convention: International Labour Law Redefined* (Informa Law for Routledge, 2014) 218

³² MLC, Art XIV.

since it does not involve changes to the basic obligations, but only changes to the means of fulfilling those obligations. Once the amendments are prepared, they are circulated to the State Parties, who are then required to make their objections within two years. If at the end of that two-year period, objections from more than 40 percent of the Member States, and which States represent not less than 40 percent of the gross tonnage of the ships of all Member States to the Convention are received, the amendments do not come into force. In the absence of the required number of objections, the amendments are deemed to have entered into force for the States that have not made objections.³³ This mode of acceptance is referred to as tacit acceptance of amendments. This amendment procedure has already been used once in making amendments to the MLC. The amendments were approved by the ILO and circulated to Member States for them to make their objections. The amendments came into force on 18th January 2017.³⁴

1.3.2 Regulations and Code

As earlier discussed, the Regulations and the provisions of Part A of the Code are mandatory.³⁵

The Regulations and Code are divided into 5 main thematic titles, that is:

- Title 1: Minimum requirements for seafarers to work on a ship;
- Title 2: Conditions of employment, including employment agreements, seafarer wages, hours of work and rest, repatriation, and manning levels in ships;
- Title 3: Accommodation, recreation facilities, food and catering;
- Title 4: Health protection, medical care, welfare and social security protection; and
- Title 5: Compliance and enforcement.

Under each title, there are several Regulations. Each Regulation is accompanied by the relevant Standard (Part A of the Code, mandatory in nature) and Guideline (Part B of the Code, not mandatory).

³³ MLC (n1), art XV.

³⁴ International Labour Organisation (12 October 2016) <http://www.ilo.org/global/standards/maritime-labour-convention/news/WCMS_502387/lang--en/index.htm> accessed 20 January 2018.

³⁵ MLC(n1), art VI.

1.4 Occupational Health and Safety requirements under the MLC

Working in the shipping industry is perceived to be relatively dangerous compared to other occupations. This is because the work environment exposes a person to physical, chemical, psychological and social elements which may result in occupational accidents, injuries and diseases.³⁶ However, due to lack of accessible and reliable reports in this field, it is difficult to determine the actual statistics on occupational safety and health in the shipping industry.³⁷ Occupational safety and health is defined as a science of the anticipation, recognition, evaluation and control of hazards arising in, or from, the workplace that could impair the safety, health and well-being of workers.³⁸ Without reliable reports, it is difficult for States and shipowners to anticipate and effectively manage such hazards.

The assessment and management of occupational risks, majorly through the application of preventive and protective measures is the main focus of occupational safety and health programmes.³⁹ Various matters affecting seafarers, such as hours of work and rest, manning levels, food and accommodation, have a bearing on occupational safety and health. All these issues have been comprehensively dealt with by the MLC, with Regulation 4.3 being dedicated to occupational safety and health matters. Standard A4.3 describes the mandatory measures to be adopted by States, whereas Guideline B4.3 gives recommendations as to the implementation of the Standard.

The purpose of the Regulation is “*to ensure that seafarers’ work environment on board ships promotes occupational safety and health*”. The Regulation imposes a number of duties upon States including:

- (a) The duty to ensure that seafarers on ships flying the State’s flag are provided with occupational health protection thus enabling them to live, work and train in a safe and hygienic environment;⁴⁰

³⁶ILO, ‘Guidelines for implementing the occupational safety and health provisions of the Maritime Labour Convention, 2006’ (2014) MEMOSH/2014/6 2.

³⁷ Ibid 2.

³⁸ Ibid 3.

³⁹ Ibid.

⁴⁰ Paragraph 1 of Regulation 4.3.

- (b) The duty to put in place laws or guidelines for management of occupational safety and health on-board ships;
- (c) The duty to consult ship owners' and seafarers' organisations, in addition to consulting the relevant international instruments when drafting laws on occupational safety and health.

Standard A4.3 lists the main areas that should be covered by laws enacted under the Regulation. The laws or other measures adopted should facilitate the adoption of health policies and programmes on ships flying the State's flag, including policies on risk evaluation and training and instruction of seafarers.⁴¹ Such laws should also promote the taking of precautions and preventative measures to prevent occupational accidents, industries resulting from use of equipment and machinery, and also diseases on board ships.⁴² There should also be programmes for prevention of occupational accidents and incidents, which programmes should involve seafarer representatives and other persons involved in their implementation. The use of personal preventive equipment is also covered here.⁴³ The laws or guidelines enacted should also prescribe requirements for inspection, reporting, correcting unsafe conditions, and for investigation and reporting of on-board occupational accidents.⁴⁴

The laws enacted should take account of relevant international instruments, specify the obligations of ship owners and seafarers, specify the duties of the master or other person in charge with occupational safety compliance and specify the authority of safety representatives participating in meetings of a ship's safety committee.⁴⁵ A ship's safety committee is however to be established only if there are five or more seafarers on board the ship.

Other important requirements include the need for adequate reporting of occupational accidents, injuries and diseases, the keeping and publication of records on the same, and the investigation of

⁴¹ Standard A4.3, paragraph 1(a).

⁴² Standard A4.3, paragraph 1(b).

⁴³ Standard A4.3, paragraph 1(c).

⁴⁴ Standard A4.3, paragraph 1(d).

⁴⁵ Standard A4.3, paragraph 2.

occupational accidents.⁴⁶ The Standard also emphasises the need to protect seafarers' personal data.⁴⁷

Finally, competent authorities (in case of Kenya, the Kenya Maritime Authority) will be required to cooperate with ship owners' and seafarers' associations when taking measures that ensure that information on certain hazards on board ships is brought to the attention of seafarers. This can be done through posting of official notices on the same.⁴⁸

Guideline B4.3 gives detailed recommendations on how the Regulation and Standard above should be implemented. It offers specific guidelines on how the law should be formulated as regards occupational accidents, injuries and diseases, exposure to noise and vibration, obligations of shipowners and the corresponding obligations of seafarers, collection of accident statistics, investigation of accidents, training of seafarers on occupational health and safety, safety and health education of young seafarers and international cooperation in the promotion of occupational safety and health protection.⁴⁹

When formulating laws or guidelines on occupational accidents, injuries and diseases, the State should take into account the ILO's Code of Practice on Accident Prevention on Board Ship at Sea and in Port.⁵⁰ The matters to be addressed in the laws or guidelines issued include, among others, the structural features of ships, effects of extremely low or high temperatures, noise, vibrations and other ambient factors, dangerous cargo and ballast, personal protective equipment, effects of fatigue, effects of drug and alcohol dependency and emergency and accident response. The measures taken under this Guideline should be mainly preventive.⁵¹

With regard to exposure to noise, vibration and other ambient factors, the competent authority of a State is expected to co-operate with shipowners' and seafarers' organisations in coming up with measures to address the adverse effects of exposure to those factors. These measures include the

⁴⁶ Standard A4.3, paragraph 5.

⁴⁷ Standard A4.3, paragraph 6.

⁴⁸ Standard A4.3, paragraph 7.

⁴⁹ Guideline B4.3.

⁵⁰ Guideline B4.3.1; This ILO code of practice was issued in 1993, and revised in 1996.

⁵¹ *Ibid* para. 3.

education of seafarers on the adverse effects of such exposure, the provision of approved protective equipment and assessment of risk and reduction of exposure levels.⁵²

The Guideline further provides for reporting and collection of statistics on accidents. This is necessary in facilitating the investigation of accidents, and the analysis and publication of comprehensive data on accidents on board ships. Such information is expected to guide the competent authority when reviewing its laws or guidelines on occupational safety and health. The numbers, nature, causes and effects of occupational accidents, injuries and diseases are to be recorded.⁵³ The competent authority is additionally expected to conduct investigations into the causes and circumstances of all occupational accidents, injuries and diseases that have resulted in either loss of life or serious personal injury. Such investigations should look into the working environment, the age groups of those involved in accidents, and problems arising from human failures, physical stress aboard the ship, and physiological problems that may have been created by the shipboard environment.⁵⁴

The Guideline also recommends the formulation of national protection and prevention programmes by States. Such programmes are to be designed in a manner that allows for the active participation of shipowners and seafarers, or their representatives.⁵⁵ In formulating these programmes, consideration should be given to a number of the listed activities, including the preparation of national guidelines and policies on occupational health management systems, the organisation of prevention training and publicity, and the distribution of literature and information so that it reaches seafarers on board ships.⁵⁶

In order to ensure that occupational programmes and policies on board ships are effectively implemented as required under Standard A4.3, the competent authority is expected to periodically review its training curriculum so as to keep it up to date. Publicity should also be given to such issues and policies, and such publicity should take into account the nationality, language and

⁵² Guideline B4.3.2 and B4.3.3.

⁵³ Guideline B4.3.5.

⁵⁴ Guideline B4.3.6

⁵⁵ Guideline B4.3.7

⁵⁶ Guideline B4.3.8

cultural diversity of seafarers on board the ship. The publicity may be done through displaying of posters, publications in periodicals, educational audio-visual materials, and special campaigns on safe working practices.⁵⁷

Another issue of concern dealt with by the Guideline is the safety and health education of young seafarers. This category of seafarers is to be given special protection, and competent authorities are expected to issue guidelines on special measures geared towards minimizing occupational dangers to young seafarers. Where young seafarers are not recognised by the competent authority as being fully qualified in a pertinent skill, the regulations may specify restrictions as to what activities they may undertake without appropriate supervision and instruction. Such restrictions relate to certain duties that may:

- (a) present a special risk of accident;
- (b) be detrimental to their health or physical development; or
- (c) require a certain degree of maturity, experience or skill.⁵⁸

Competent authorities should take practical measures so as to educate and train young seafarers on not only the prevention of accidents and protection of their health on board ships, but also on other issues affecting their health such as abuse of alcohol and drugs, and HIV/AIDS among other health risk related activities.⁵⁹

The Guideline also encourages co-operation between States, between States and intergovernmental organisations, and between States and other international organisations. This co-operation is aimed at achieving the greatest possible uniformity of actions in promoting occupational health and safety. States are encouraged to enter into bilateral and multilateral arrangements and to exchange information on particular hazards affecting seafarers. They are additionally encouraged to collaborate in the preparation of rules and manuals, and also in the training of seafarers on occupational safety and health practices.⁶⁰

⁵⁷ Guideline B4.3.9.

⁵⁸ Guideline B4.3.10.

⁵⁹ Ibid.

⁶⁰ Guideline B4.3.10.

In conclusion, the MLC, in promoting health and safety protection and accident prevention, sets out broad guidelines on how to implement the obligations imposed, and it is up to Member States to draft national laws that address the issues noted so that they can meet the set standards in the Convention.

The Merchant Shipping (Occupational Safety) Regulations will implement the provisions of Regulation 4.3 on health and safety protection and accident prevention.

PART 2

THE MERCHANT SHIPPING (OCCUPATIONAL HEALTH AND SAFETY) REGULATIONS: NECESSITY FOR FORMULATION AND ADOPTION BY KENYA

Workplaces aboard ships need to be safe enough for people to work on. This is important in promoting decent working conditions.⁶¹ In Kenya, a lot of emphasis has been placed on safety and pollution by ships (both Kenyan and foreign) but little effort has been made to ensure that the ships are safe for the people to work in. Eight years since the Merchant Shipping Act came into operation, no regulations on occupational safety and health have been formulated. This is indicative of how much neglect the workers in this area have suffered. This Part offers an insight into the current regime of occupational safety and health in Kenya and the lacunae in protection of seafarers. It further discusses the benefits that Kenya stands to gain by enacting legislation to implement the occupational health and safety provisions of the MLC.

2.1 The existing legal regime on occupational safety and health and the gaps noted

The law on occupational health and safety is contained in the Occupational Health and Safety Act.⁶² The Act was enacted in 2007 to replace the Factories Act and bring Kenyan law in compliance with ILO standards at the time. No new regulations have been formulated since the Act was enacted, and the Regulations enacted under the repealed Act are deemed to be in force. No regulations are in force for the shipping industry under this Act.

Various deficiencies exist in this regime thus making it inadequate to protect the occupational safety and health rights of seafarers. The Act applies to workplaces, which are defined as ‘any land, premises, location, vessel or thing, at, in, upon, or near which, a worker is, in the course of employment’.⁶³ Premises on the other hand are defined as:

- (a) any vehicle, vessel aircraft or hovercraft;

⁶¹ ILO, Report of the Director-General, “Decent Work” (International Labour Conference, 87th Session, Geneva 1999).

⁶² No. 15 of 2007.

⁶³ Ibid.

- (b) any installation on land including the foreshore and land intermittently covered by water, any offshore installation or any other installation whether floating, or resting on seabed or the subsoil thereof, or resting on other land covered with water or the subsoil thereof; or
- (c) any tent or movable structure.⁶⁴

Although the term ‘vessel’ is not defined under the Act, it can be presumed to include ships. However, although a ship can be considered as a workplace, the provisions of the Act are not suited for the shipping industry. First, it is hard to determine which ships the Act could apply to in terms of size, type, tonnage or nationality. Such provisions are crucial in determining which ships have to undergo mandatory inspection and certification in compliance with the MLC.

Secondly, the Act establishes the office of the Director of Occupational Safety and Health Services whose role is to administer the Act. However, according to the Merchant Shipping Act, the Kenya Maritime Authority is designated to deal with seafarer matters, in addition to all other shipping issues. This authority extends to occupational safety and health as prescribed under section 168 of the Merchant Shipping Act. This creates a potential conflict particularly in terms of inspection and certification of ships. Additionally, the National Council for Occupational Safety and Health established to advise the Minister on various issues of occupational safety and health does not have a member from the shipping and/or transport sector, and as such, the concerns of seafarers are unlikely to be prioritised by the Council.⁶⁵

Importantly, the provisions of the Act are not substantially equivalent to the requirements of the MLC. This is because the application of the Act is general and not specific to shipping, and it therefore does not deal with some circumstances that are peculiar to ships involved in international voyages, such as working in enclosed spaces, fatigue, accommodation on board ships and ballast. The closest this Act comes to setting standards for the occupational safety and health rights in the shipping industry is the Factories (Docks) Rules⁶⁶ which protect only stevedores. In order to avoid

⁶⁴ Ibid sec. 2.

⁶⁵ The Council is established under section 27 of the Occupational Health and Safety Act.

⁶⁶ The regulations are administered under the Occupational Health and Safety Act.

the conflicts described above, and so as to ensure that the law of merchant shipping does not get fragmented, it is recommended that Regulations be enacted under the Merchant Shipping Act.

2.2 Why is it necessary for Kenya to implement Regulation 4.3?

Implementation of Regulation 4.3 of the MLC on health and safety protection and accident prevention is very critical for Kenya. A recent study commissioned by the Kenya Maritime Authority indicated that an average of 50 percent of Kenyan seafarers work on-board Kenyan ships, while the rest work on foreign vessels.⁶⁷ This makes a strong case for the implementation of Regulation 4.3, so as to protect Kenyan seafarers, wherever they work. This is in line with the country's obligations as a Flag State, a Port State, and a labour supplying State. As a Flag State, it needs to ensure that ships flying its flag are safe enough for the crew, whether Kenyan or non-Kenyan, to work in. It can also be noted that a good proportion of Kenyan seafarers work aboard foreign ships, and as such, in exercising Port State Control, it will ensure that ships calling at its ports have put in place at least the minimum safeguards to ensure the safety of workers. As a labour supplying State, it is necessary that Kenyan efforts are complemented by the efforts of other States in implementing the MLC standards so as to ensure that its workers are safe.

By creating an MLC compliant legal regime for protection of safety on board ships, Kenya will get a competitive advantage in attracting and retaining competent and experienced seafarers to work on board its ships. Moreover, Kenya is currently putting a lot of effort and resources in maritime education and training, and if the safety of the workers is not given prominence, then potential trainees may be discouraged from pursuing maritime related jobs if they feel that their safety is threatened.

The need for legislation specific to the shipping industry in Kenya has informed the formulation of the annexed Regulations. The Regulations are to be enacted pursuant to the Merchant Shipping Act, which as reflected in its long title, generally consolidates the law relating to shipping. Section 168 of the Act empowers the Cabinet Secretary (Minister) to enact regulations “*for securing as far as practicable, safe working and safe means of access for masters and seafarers employed in a*

⁶⁷ Kenya Maritime Authority, Baseline Survey of Kenya Seafarers Report (2017) (Unpublished).

Kenyan ship, and on the reporting of injuries sustained by them.” These Regulations will therefore implement the provisions of health and safety protection as contained in the MLC, which Kenya ratified on 31st July 2014, with the Convention entering into force for Kenya on 31st July, 2015⁶⁸ By enacting the Regulations under this Act, the fragmentation of the law will be avoided, as well as any potential conflicts that may have arisen if the Regulations were enacted under the Occupational Health and Safety Act.

Implementation of the MLC has been ongoing, and numerous stakeholder consultations have been done so far. These consultations have resulted in formulation of the Merchant Shipping (Maritime Labour) Regulations which will provide a framework for enforcement of the MLC. The Regulations do not contain substantive requirements on occupational health and safety, as they are expected to be implemented under section 168 of the Merchant Shipping Act discussed above.

⁶⁸ See <http://www.ilo.org/global/standards/maritime-labour-convention/WCMS_251018/lang--en/index.htm> accessed 10 December 2017

PART 3

PROCEDURE FOR THE IMPLEMENTATION OF THE REQUIREMENTS OF REGULATION 4.3 OF THE MLC INTO KENYAN LAWS

Upon the enactment of the Constitution of Kenya, 2010, Kenya changed from being a dualist State to a monist State. Article 2(6) of the Constitution provides that “*Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution*”. The ratification of the MLC was conducted as prescribed under the Treaty Making and Ratification Act, and as such, the MLC has the force of law in Kenya.

It is however necessary to enact implementing legislation since the provisions of the MLC are not self-executing. The Convention, as discussed in Part 1, only contains standards and guidelines for the effective implementation of those standards. It is therefore of paramount importance that these Regulations be enacted.

A subsidiary legislation, to be named “The Merchant Shipping (Occupational Safety and Health) Regulations” will be used to implement Regulation 4.3 of the MLC. The title of the Regulations reflects the name of the parent statute under which the Regulations are to be enacted, and the subject matter of the Regulations (in brackets).

As aforementioned, the Merchant Shipping Act, in its long title is described as an act to, among other things, “*generally consolidate the law relating to shipping*”. Additionally, section 168 of the Act empowers the Cabinet Secretary to make regulations for securing the safe working conditions of sea farers and related matters. Enacting regulations as opposed to a separate statute will therefore prevent fragmentation of the law on merchant shipping.

The draft Regulations annexed hereto are divided into five parts. Part I deals with the preliminary matters, including the short title, commencement of the Regulations, interpretation of certain terms and application of the Regulations, and the objectives of the Regulations.

Part II deals with health protection and accident prevention, and it contains provisions on the obligations of shipowners and seafarers, appointment and duties of safety representatives and safety committees, provision of personal protective equipment, permit-to-work system, safety training, and protection of young seafarers.

Part III deals with investigation and reporting of certain classes of accidents, and maintenance of records on the same.

Part IV deals with inspection of Kenyan vessels and foreign vessels to which these Regulations are applicable, and also contains provisions as to when the vessels may be detained.

Part V creates offences under these Regulations, and the applicable penalties for each.

In drafting these Regulations, drafting techniques of Kenyan regulations have been followed, and other country's legislation, particularly the United Kingdom, has been looked at. Guidelines and notices issued by the Kenya Maritime Authority and the Kenya Ports Authority have been also been referred to, including the Kenya Port Authority's Draft Occupational Safety and Health Management System Policy Statement.

LEGAL NOTICE NO.....

**MERCHANT SHIPPING (OCCUPATIONAL SAFETY AND HEALTH)
REGULATIONS, 2018**

IN EXERCISE of the powers conferred by section 168 of the Merchant Shipping Act, 2009, the Cabinet Secretary for Transport, Infrastructure and Housing makes the following Regulations —

**MERCHANT SHIPPING (OCCUPATIONAL SAFETY AND HEALTH)
REGULATIONS, 2018**

PART I- PRELIMINARY

- | | |
|----------------|--|
| Citation. | 1. These Regulations may be cited as the Merchant Shipping (Occupational Safety and Health) Regulations, 2018. |
| Commencement | 2. These Regulations shall come into force on such date as the Cabinet Secretary shall, by notice in the gazette, appoint. |
| Interpretation | 3. In these Regulations, unless the context otherwise requires- |

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“Act” means the Merchant Shipping Act;

“Authority” means the Kenya Maritime Authority established under the Kenya Maritime Authority Act, 2006 (No. 5 of 2006);

“Director-General” means the Director-General of the Kenya Maritime Authority appointed under the Kenya Maritime Authority Act, 2006 (No. 5 of 2006);

“seafarer” includes every person (except a pilot or apprentice duly contracted or indentured and registered) employed or engaged in any capacity on board a ship.

Application

4. (1) These Regulations shall apply to all Kenyan ships and all other ships engaged on international voyages while they are in Kenyan waters.
- (2) Unless expressly provided otherwise, these Regulations shall not apply to—
- (a) ships of war and troop ships;
 - (b) Government ships operated for non-commercial purposes.
 - (c) cargo ships of less than five hundred tons;
 - (d) ships not propelled by mechanical means;
 - (e) wooden ships of traditional build;
 - (f) pleasure vessels not engaged in trade; and
 - (g) fishing vessels.

Objective of the Regulations.

5. The objective of these Regulations is to promote occupational safety and health on board ships by —
- (a) Promoting health protection and accident prevention;
 - (b) Providing for the protection of young seafarers;
 - (c) Providing for consultation between shipowners and seafarers; and
 - (d) Providing for the investigation and reporting of accidents.

**PART II – HEALTH PROTECTION AND ACCIDENT
PREVENTION**

6. (1) The Director-General shall formulate and regularly review guidelines for the management of seafarer occupational safety and health on board ships.
- (2) The guidelines shall give priority to the following matters:
- (a) structural features of the ship, including means of access and asbestos-related risks;
 - (b) machinery;
 - (c) the effects of the extremely low or high temperature of any surfaces with which seafarers may be in contact;
 - (d) the effects of noise in the workplace and in shipboard accommodation;
 - (e) the effects of vibration in the workplace and in shipboard accommodation;
 - (f) the effects of ambient factors, other than those referred to in subparagraphs (d) and (e), in the workplace and
 - (g) in shipboard accommodation, including tobacco smoke;
 - (h) special safety measures on and below deck;
 - (i) loading and unloading equipment;
 - (j) fire prevention and fire-fighting;
 - (k) anchors, chains and lines;
 - (l) dangerous cargo and ballast;
 - (m) personal protective equipment for seafarers;
 - (n) work in enclosed spaces;
 - (o) physical and mental effects of fatigue;
 - (p) the effects of drug and alcohol dependency;
 - (q) HIV/AIDS protection and prevention; and
 - (r) emergency and accident response.

7. (1) The shipowner shall ensure the health and safety of seafarers and other persons so far as is reasonably practicable, which duty shall be met by the application of the following principles—
- (a) the avoidance of risks, which among other things include the combating of risks at source and the replacement of dangerous practices, substances or equipment by non-dangerous or less dangerous practices, substances or equipment;
 - (b) the evaluation of unavoidable risks and the taking of action to reduce them;
 - (c) adoption of work patterns and procedures which take account of the capacity of the individual, especially in respect of the design of the workplace and the choice of work equipment, with a view in particular to alleviating monotonous work and to reducing any consequent adverse effect on seafarers' health and safety;
 - (d) adaptation of procedures to take account of new technology and other changes in working practices, equipment, the working environment and any other factors which may affect health and safety;
 - (e) adoption of a coherent approach to management of the vessel or undertaking, taking account of health and safety at every level of the organisation;
 - (f) giving collective protective measures priority over individual protective measures; and
 - (g) the provision of appropriate and relevant information and instruction for seafarers.

(2) Without prejudice to the generality of the duties under paragraph (1), the matters to which those duties extend shall include in particular—

- (a) provision and maintenance of plant, machinery and equipment and systems of work that are, so far as is reasonably practicable, safe and without risk to health;
- (b) arrangements for ensuring, so far as is reasonably practicable, safety and absence of risk to health in connection with the use, handling, stowage and transport of articles and substances;
- (c) appropriate arrangements for the effective planning, organisation, control, monitoring and review of preventive and protective measures;
- (d) provision of such information, instruction, training and supervision as is necessary to ensure the health and safety of seafarers and that of other persons aboard ship who may be affected by their acts or omissions;
- (e) maintenance of all places of work in the ship in a condition that is, so far as is reasonably practicable, safe and without risk to health;
- (f) arrangements to ensure, so far as is reasonably practicable, that no person has access to any area of the ship to which it is necessary to restrict access on grounds of health and safety unless the individual concerned has received adequate and appropriate health and safety instruction;
- (g) provision and maintenance of an environment for persons aboard ship that is, so far as is reasonably practicable, safe and without risk to health; and

(h) collaboration with any other persons and bodies to protect, so far as is reasonably practicable, the health and safety of all authorised persons aboard the ship or engaged in loading or unloading activities in relation to that ship.

(3) Compliance with the requirements of applicable international instruments on the acceptable levels of exposure to workplace hazards on board ships and on other matters listed under regulation (6) will be considered as meeting the requirements set out in these regulations in so far as is relevant. .

Shipowner's health and safety policy

8. (1) Subject to paragraph (2), a written statement shall be prepared and, as often as may be appropriate, revised, of the shipowner's general policy with respect to health and safety and the organisation and arrangements for the time being in force for carrying out that policy, and this and any revisions thereto shall be brought to the notice of the seafarers.

(2) The written statement referred to in paragraph (1) shall apply where five or more seafarers are employed in a Kenyan ship.

(3) The written statement shall address the issues listed in regulation 6 (2).

Risk assessment

9. (1) The shipowner shall conduct a suitable and sufficient assessment of risks, including those listed in regulation 6(2), to the health and safety of seafarers arising in the normal course of their activities or duties, for the purpose of identifying—

(a) groups of seafarers at particular risk in the performance of their duties; and

(b) the measures to be taken to comply with the shipowner's duties under these Regulations,

provided that any significant findings of the assessment and any revision of it shall be brought to the notice of seafarers.

(2) The assessment in paragraph (1) shall take account of the physical occupational health effects, including manual handling of loads, noise and vibration, the chemical and biological occupational health effects, the mental occupational health effects, the physical and mental health effects of fatigue, and occupational accidents.

(3) The assessment referred to in paragraph (1) shall extend to the risks to the health and safety of other persons on board ship in so far as they may be affected by the acts and omissions of the shipowner.

(4) The findings of the assessment conducted under paragraph (1) shall be used when formulating:

- (a) health and safety training programmes for seafarers, including young seafarers;
- (b) the ship's emergency and accident response;
- (c) measures to combat the effects of drug and alcohol dependency; and
- (d) HIV/AIDS protection and prevention.

(5) The assessment referred to in paragraphs (1) and (2) shall be reviewed if—

- (a) there is reason to suspect that it is no longer valid; or
- (b) there has been a significant change in the matters to which it relates.

(6) Where a review conducted under paragraph (5) above identifies a need for any changes to procedures or practices, those changes shall be made.

(7) Measures shall be taken, and if necessary protective equipment supplied, to ensure an improvement in the health and safety of seafarers and other persons in respect of those risks identified.

(8) Seafarers shall be informed of the measures taken for their protection.

Health and safety
training

10. (1) In entrusting tasks to seafarers, account shall be taken of their age and capabilities as regards health and safety.

(2) The shipowner shall provide seafarers with adequate and appropriate health and safety training and instruction—

(a) before being assigned to shipboard duties;

(b) on their being exposed to new or increased risks due to—

(i) being transferred or given a change of responsibilities,

(ii) the introduction of new equipment or a change to equipment already in use,

(iii) the introduction of new technology, or

(iv) the introduction of new shipboard practices, a new system of work or a change to a system of work already in use.

(3) The training referred to in paragraph (2) shall—

(a) be repeated periodically where appropriate;

(b) be adapted to take account of any new or changed risks to the health or safety of the seafarers concerned; and

(c) take place during the working hours of the seafarer concerned.

(4) Every person carrying on the activity of a recruitment and placement agency and who recruits seafarers to carry out work aboard a ship to which these Regulations apply shall be provided by the shipowner with information on—

- (a) any special occupational qualifications required by seafarers to carry out their work safely;
- (b) the specific features of the jobs to be filled by those seafarers (in so far as those features are likely to affect their health and safety); and
- (c) any health surveillance required to be provided to seafarers under these or other relevant regulations.

(5) The recruitment and placement agency referred to in paragraph (4) shall ensure that the information so provided is given to the said seafarers.

Permit to work

11. (1) The master shall issue a permit to work to any seafarer likely to be exposed to hazardous work processes or hazardous working environment, including such work processes as the maintenance and repair of boilers, dock work, confined spaces, and the maintenance of machinery and equipment, electrical energy installations, indicating the necessary precautions to be taken.

(2) In this section “**permit to work**” means a written notice, which sets out the work to be done, the hazards involved and the precautions to be taken before the work commences in order to secure the safety and health of the seafarer.

Protection of
persons below
eighteen years

12. (1) The shipowner shall not allow a person below the apparent age of eighteen years to be employed at any workplace or work process, or perform work, which by its nature or the circumstances, in which it is carried out, is likely to harm the person's safety or health.

(2) The following type of work shall be considered as work, which by its nature, is likely to harm a person below 18 years:

- (a) the lifting, moving or carrying of heavy loads or objects;
- (b) entry into boilers, tanks and cofferdams;
- (c) exposure to harmful noise and vibration levels;
- (d) operating hoisting and other power machinery and tools, or acting as signalers to operators of such equipment;
- (e) handling mooring or tow lines or anchoring equipment;
- (f) rigging;
- (g) work aloft or on deck in heavy weather;
- (h) nightwatch duties;
- (i) servicing of electrical equipment;
- (j) exposure to potentially harmful materials, or harmful physical agents such as dangerous or toxic substances and ionizing radiations;
- (k) the cleaning of catering machinery; and
- (l) the handling or taking charge of ships' boats.

Supervision of
apprentices and
indentured learners

13. No person undergoing apprenticeship or indentured learnership shall be allowed to attend to any machinery, equipment, tools, plant or process unless adequate supervision and protection against hazardous work conditions and environment is provided and maintained.

Special responsibility for health and safety and consultation with seafarers

Protective and preventive services

14. (1) The shipowner shall appoint one or more competent persons to provide such protective and preventive services onshore as are necessary to enable him to comply with the requirements of these Regulations.

(2) Where there is no competent person available onshore, the shipowner shall employ an external person who is a competent person.

(3) If he is a competent person, the shipowner may appoint himself to undertake the responsibilities specified in paragraph (1).

(4) The number of persons appointed under paragraph (1) shall be sufficient in number to carry out the requirements of these Regulations, and the appropriate persons shall have the necessary time, resources and means, to carry out their duties.

Appointment of safety officers

15. (1) This regulation and regulations 16 to 20 below shall apply to ships in which more than five seafarers are employed.

(2) In every ship to which this regulation applies, the shipowner shall appoint a competent person as safety officer.

(3) The Director-General may grant exemptions from the provisions in paragraphs (1) and (2) for classes of cases or individual cases on such terms (if any) as he may specify in the exemption and may, subject to giving reasonable notice, alter or cancel any such exemption.

Duties of safety
officers

16. (1) Subject to paragraph (2), it shall be the duty of the safety officer to use his best endeavours to—

(a) improve the standard of safety consciousness among the crew and ensure that the provisions of the Maritime Labour Convention and safety instructions, rules and guidance for the ship relating to health and safety are complied with;

(b) investigate, so far as is reasonably practicable:

(i) every accident involving death, major or serious injury and every dangerous occurrence as defined in these Regulations;

(ii) all potential hazards to health and safety; and

(iii) all reasonable complaints by seafarers about health and safety;

and make recommendations to the master to prevent the recurrence of such an accident or to remove any hazard, provided that the duty to investigate shall not extend to accidents arising from a casualty to the ship;

(c) ensure that health and safety inspections of each accessible part of the ship are carried out at least once every three months and more frequently if there have been substantial changes in the conditions of work;

(d) make representations and, where appropriate, recommendations to the master, about any deficiency in the ship in respect of—

(i) any legislative requirement relating to health and safety,

(ii) any relevant guidelines or notices issued by the Authority, or

(iii) any provision of the Maritime Labour Convention,

and also suggest whether those representations and recommendations should be passed by the master on to the shipowner or other person who has control of the matter;

- (e) maintain a record of every accident involving death, major or serious injury and every dangerous occurrence, and make it available on request to any elected representative, to the master and to any person duly authorised by the Director-General;
- (f) stop any work which he observes in progress and reasonably believes may cause a serious accident, and immediately inform the master who shall decide when work can safely be resumed.

(2) Nothing in this regulation shall require a safety officer to take any action at a time when emergency action to safeguard life or the ship is being taken.

Election of safety representatives and safety committees

17. (1) The shipowner shall make rules for the election and appointment of safety representatives, provided that such elections shall take into account the importance of balanced representation by shipboard departments and functions.

(2) In every election for a safety representative the candidate receiving most votes shall be elected, provided that no safety representative shall be appointed who has less than two years of consecutive sea service since attaining the age of 18, which in the case of a safety representative on board a tanker shall include at least six months of service in such a ship.

(3) The appointment of a safety representative shall terminate—

- (a) on that person ceasing to be employed in the ship; or
- (b) from the date on which that person resigns from that position or on which another duly elected person is elected in his place.

(4) In all ships where a safety representative is elected, the shipowner shall appoint a safety committee which shall include the master as chairman, the safety officer and every safety representative.

(5) The appointment of every person under regulation 15(2) and 17(2), and the appointment of any of those persons into a safety committee shall be recorded in writing.

18. (1) The main duty of the safety representative(s) shall be to represent the crew on matters affecting their safety and health.

(2) To facilitate their duties under paragraph (1) above, safety representative(s) shall:

- (a) have access to all parts of the ship;
- (b) participate in the investigation of accidents and near-accidents;
- (c) have access to all the necessary documentation, including investigation reports, past minutes of safety and health committees, etc.; and
- (d) receive appropriate training.

Powers of safety
committees

19. Safety committees may—

- (a) participate, subject to the concurrence of the safety officer, in any of the investigations or inspections carried out by the safety officer under regulation 16, or after notification to the master or his deputy, undertake similar investigations or inspections themselves, whether or not such investigations or inspections have already been carried out by the safety officer;
- (b) make representations to the shipowner on potential hazards and dangerous occurrences at the workplace which affect, or could affect, seafarers on the ship;
- (c) make representations to the master and the shipowner on general matters affecting the health and safety of seafarers on the ship and,

in particular, on such matters as those on which the shipowner carries out consultation under regulation 20; and

- (d) request the safety officer to carry out any occupational health and safety inspection they consider necessary and to report the findings to them.

20. (1) It shall be the duty of the shipowner and master to facilitate the work of any person appointed under regulations 15(2), 17 (2) and 17(4) in carrying out their health and safety functions, and in particular to—

- (a) provide for use by them a copy of the Maritime Labour Convention (where appropriate), and access to any necessary information, documents and similar material including relevant legislation and Merchant Shipping Notices;
- (b) provide them with relevant information about—
 - (i) the risks and measures for protection identified under regulation 9,
 - (ii) factors known, or suspected, by them to affect the health and safety of the seafarers on board the ship, and
 - (iii) arrangements for fire-fighting, first aid and other emergency procedures;
- (c) ensure that those persons have the necessary resources and means to carry out their functions and duties;
- (d) allow any of those persons such absence from ship duties without loss of pay as may be necessary to enable them to fulfil their functions, or to undertake any necessary training in health and safety matters; and

(e) receive at any reasonable time, representations about health and safety from the safety officer, safety representatives or the safety committee, discuss their representations with them and implement any agreed measures as soon as may be reasonable.

(2) Where no safety officer is appointed under regulation 15(2), the shipowner shall maintain a record of every accident involving death, major or serious injury, and every dangerous occurrence and make it available on request to any seafarer and any person duly authorised by the shipowner.

Consultation with
seafarers

21. (1) The shipowner shall consult seafarers or their elected representatives, in advance and in good time, on all matters relating to their health and safety, and in particular on—

- (a) the arrangements for appointing a competent person under regulation 14 to provide protective and preventive services for the undertaking;
- (b) the findings of the risk assessment;
- (c) arrangements for health and safety training under regulation 9; and
- (d) the introduction of new technology.

(2) The shipowners shall allow seafarers or their elected representatives to make representations on health and safety, and shall implement any agreed measures as soon as may be reasonable and practicable.

(3) The shipowner shall give seafarers or their elected representatives access to any relevant information about—

- (a) health and safety matters from inspection agencies and health and safety authorities; and
- (b) every accident involving death, major or serious injury, and every dangerous occurrence.

(4) Elected representatives shall be given adequate time off work without loss of pay in order to exercise their rights and functions under this regulation, and shall be provided with appropriate training.

(5) Seafarers or their elected representatives shall not be placed at a disadvantage (whether economic or otherwise) because of their activities under this regulation.

General duties of
seafarers

22. (1) Every seafarer aboard a ship to which these Regulations apply shall—

(a) take reasonable care for the health and safety of himself and of any other person aboard ship who may be affected by his acts or omissions; and

(b) as regards any duty or requirement imposed on the shipowner or any other person by these Regulations and the Act or any regulation or rule made thereunder, with regard to health and safety, co-operate with that person so far as is necessary to enable that duty or requirement to be performed or complied with.

(2) No seafarer shall—

(a) use any machinery, equipment, dangerous substance, transport equipment, means of production or safety device provided by the shipowner other than in accordance with any relevant training or instructions which have been received or provided by the shipowner in compliance with these Regulations; or

(b) disconnect, change or remove or otherwise interfere with any safety device provided by the shipowner.

(3) Every seafarer shall immediately inform the shipowner, the safety officer or other competent person appointed under regulation 17(2) —

- (a) of any work situation which he reasonably considers to represent a serious and immediate danger to health and safety; and
- (b) of any matter which he reasonably considers to represent a deficiency in the shipowner's protection arrangements for health and safety.

PART III – INVESTIGATION AND REPORTING OF ACCIDENTS

23. (1) Subject to paragraph (2), for the purposes of these Regulations “accident” means—

(a) a marine casualty, which is an event or sequence of events that has resulted in any of the following and has occurred directly by or in connection with the operation of a ship involving—

- (i) the death of, or serious injury to, a person;
- (ii) the loss of a person from a ship;
- (iii) the loss, presumed loss or abandonment of a ship;
- (iv) material damage to a ship;
- (v) the stranding or disabling of a ship, or the involvement of a ship in a collision;
- (vi) material damage to marine infrastructure external of a ship, that could seriously endanger the safety of the ship, another ship or any individual;
- (vii) pollution, or the potential for such pollution to the environment caused by damage to a ship or ships, or

(b) a serious marine casualty, which is an event or sequence of events that has occurred directly by or in connection with the operation of a ship but which does not qualify as a very serious marine casualty, that involves—

- (i) fire;
- (ii) explosion;
- (iii) collision;
- (iv) grounding;
- (v) contact;
- (vi) heavy weather damage;
- (vii) ice damage, or a suspected hull defect;

resulting in any of the following—

- (aa) the immobilization of the main engines;
- (bb) extensive accommodation damage;
- (cc) severe structural damage including penetration of the hull under water rendering the ship unfit to proceed;
- (dd) pollution;
- (ee) a breakdown that necessitates towage or shore assistance, or

(c) a very serious marine casualty, which is an event or sequence of events that has resulted in any of the following and has occurred directly by or in connection with the operation of a ship involving—

- (i) the total loss of a ship;
- (ii) loss of life;
- (iii) severe pollution, or

a marine incident, which is an event or sequences of events other than those listed in subparagraphs (a) to (c) which has occurred directly in connection with the operation of a ship that endangered, or if not corrected would endanger the safety of a ship, its occupants or any other person or the environment.

(2) An accident does not include a deliberate act or omission with the intention to cause harm to the safety of a ship, an individual or the environment.

Objective of a safety investigation

24. (1) The sole objective of a safety investigation into an accident under these Regulations shall be the prevention of future accidents through the ascertainment of its causes and circumstances.

(2) It shall not be the purpose of such an investigation to determine liability nor, except so far as is necessary to achieve its objective, to apportion blame.

Duty to report accidents and serious injuries

25. (1) When an accident occurs the following persons associated with the ship shall notify the Director-General as soon as is practicable following the accident and by the quickest means available—

(a) the master or, if the master has not survived, the senior most surviving officer; and

(b) the shipowner unless they have ascertained to their satisfaction that the master or senior surviving officer has reported the accident in accordance with sub-paragraph (a).

(2) In addition to any notification made under paragraph (1) in the case of an accident within or adjacent to the limits of any harbour, the harbour authority for that harbour shall notify the Director-General as soon as is practicable and by the quickest means available of any accident of which they are aware.

(3) In addition to making a notification under the preceding paragraphs, the persons specified in paragraphs (1)(a) and (b) and (2) must, so far as is reasonably practicable, ensure that the circumstances of every accident are examined and that a report giving the findings of such examination, stating any measures taken or proposed to be taken to prevent a recurrence, shall be provided to the Director-General as soon as is practicable.

Preliminary
assessments

26. (1) In the case of a marine casualty involving a vessel covered by the Act or these Regulations, the Director-General or an inspector appointed by the Director-General shall carry out a preliminary assessment in order to decide whether or not to undertake a safety investigation.
- (2) When carrying out a preliminary assessment the Director-General must take into account, but need not be limited to:
- (a) the seriousness of the accident;
 - (b) the type of vessel and or cargo involved;
 - (c) the potential for the findings of a safety investigation to lead to the prevention of future accidents.
- (3) Where the Director-General decides not to undertake a safety investigation into a serious marine casualty in relation to a vessel covered by the Act or these Regulations, the reasons for that decision shall be recorded in writing.

Safety investigation

27. (1) The Director-General shall ensure that a safety investigation is carried out in relation to any accident that is a serious marine casualty or a very serious marine casualty as regards a vessel covered by these Regulations.
- (2) The Director-General may decide to undertake a safety investigation in relation to an accident that is a marine casualty having carried out a preliminary assessment in accordance with regulation 26(1) and (2).
- (3) The safety investigation shall include but is not limited to—
- (a) the collection and analysis of evidence;
 - (b) the identification of causal factors, and
 - (c) where appropriate, the making of safety recommendations.

Conduct of investigations 28. The Director-General shall issue guidelines on the conduct of investigations, reopening of closed investigations, preservation of evidence, protection of information obtained in the course of safety investigations, and publication of reports of accidents.

Publications other than reports of safety investigations 29. (1) The Director-General may from time to time publish collective short reports of accidents which have not been the subject of a report published under regulation 28.

(2) The Director-General may submit a report to the Cabinet Secretary on any matter arising from the Cabinet Secretary's analysis of marine accident investigations.

PART IV - INSPECTIONS AND DETENTION

Inspection and detention of a Kenyan Ship 30. An inspector appointed under the Act may inspect a Kenyan ship and if he is satisfied that there has been a failure to comply in relation to that ship with the requirements of these Regulations may detain the ship until the health and safety of all seafarers and other persons aboard ship is secured, but shall not in the exercise of these powers detain or delay the ship unreasonably.

Inspection and detention and other measures in respect of ships registered outside Kenya 31. (1) An inspector appointed under the Act may inspect any ship which is not a Kenyan ship when the ship is in a Kenyan port, and if satisfied that the ship does not conform to the standards required by these Regulations, may—

- (a) send a report to the government of the country in which the ship is registered, and a copy thereof to the Director General of the International Labour Office; and
- (b) where conditions on board are clearly hazardous to health and safety—
 - (i) take such measures as are necessary to rectify those conditions, or
 - (ii) detain the ship,

provided that the measures specified in sub-paragraph (a) and (b) may be taken only when the ship has called at a Kenyan port in the normal course of business for operational reasons.

(2) If either of the measures specified in paragraphs (1)(b) are taken, the inspector shall forthwith notify the nearest maritime, consular or diplomatic representative of the State whose flag the ship is entitled to fly.

(3) In exercise of his power under this regulation, the inspector shall not detain or delay the ship unreasonably.

PART V – OFFENCES AND PENALTIES

Penalties

32. (1) Any contravention of regulation 7 of these Regulations shall be an offence punishable, upon conviction:
- (a) by a fine not exceeding the penalty provided for in section 429 of the Act; or,
 - (b) by imprisonment for a term not exceeding two years; or
 - (c) both.

(2) Any contravention of regulation 8 or 14 shall be guilty of an offence punishable on conviction of a fine not exceeding K.Shs. 100,000.00.

(3) Any contravention of regulation 9, 12 or 13 of these Regulations shall be an offence punishable on conviction by a fine not exceeding K.Shs.200,000.00.

(4) (a) A shipowner who—

(i) fails to appoint a safety officer in accordance with regulation 15(2),

or

(ii) fails to carry out any of the duties specified in regulation 20 and 21,

shall be guilty of an offence punishable, upon conviction, by a fine not exceeding K.shs. 200,000.00.

(b) Any master who fails to carry out any of the duties specified in regulations 11 and 20 shall be guilty of an offence punishable on conviction by a fine not exceeding K.Shs. 50,000.00.

33. (1) A person is guilty of an offence if being a person mentioned in regulation 25(1)(a) or (b), they fail without reasonable cause to report an accident as required by regulation 25.

34. (1) If any person without reasonable cause discloses or permits to be disclosed any information in contravention of these regulations they shall be guilty of an offence and liable on conviction to a fine not exceeding K.Shs.100,000.00.

(2) The penalty in paragraph (1) shall be without prejudice to any other remedy that may be sought for infringement of the right to privacy and confidentiality.

Onus of proving what is reasonably practicable

35. In any proceedings for an offence under any of these Regulations consisting of a failure to comply with a duty or requirement to do something so far as is reasonably practicable, it shall be for the defendant to prove that it was not reasonably practicable to do more than was in fact done to satisfy the duty or requirement.

Dated the....., 2018.

Cabinet Secretary for Transport, Infrastructure and Housing