

MARINE ENVIRONMENT PROTECTION
COMMITTEE
74th session
Agenda item 11

MEPC 74/11/1
8 February 2019
Original: ENGLISH

REPORTS OF OTHER SUB-COMMITTEES

Comments on the outcome of III 5

Draft revised Model Agreement for the authorization of recognized organizations acting on behalf of the Administration

Submitted by Marshall Islands, Russian Federation and IACS

SUMMARY

Executive summary: This document proposes amendments to the draft Model Agreement developed during III 5. This includes editorial and clarification amendments, as well as some more substantial amendments which aim to facilitate the use of such Model Agreement by IACS members and the Administrations with which such Agreements will be sought.

Strategic direction, if applicable: Other work

Output: OW 49

Action to be taken: Paragraph 5

Related documents: III 5/11/1; III 5/WP.4 and III 5/15 (paragraph 11.15 and annex 13)

Background

1 III 5 agreed to the text of the draft revised Model Agreement, together with the associated draft MSC-MEPC.5 circular on *Model Agreement for the authorization of recognized organizations acting on behalf of the Administration*, for submission to MEPC 74 and MSC 101 for approval (III 5/15, paragraph 11.15 and annex 13). Since III 5, the co-sponsors have carefully reviewed this outcome.

Discussion

2 Recalling the terms of reference of the Drafting Group that was established at III 5, i.e. "to finalize, using document III 5/8 (annex 1) as the basis, a draft revised MSC-MEPC.5 circular on *Model agreement for the authorization of recognized organizations acting on behalf*

of the Administration, taking into account document III 5/11/1", the co-sponsors propose amendments to both the draft Model Agreement and the draft MSC-MEPC.5 Circular, on the basis of annex 13 to document III 5/15. These proposed changes are shown in the annex to this document (shown as additions/deletions).

3 In summary, the co-sponsors have concluded that:

- .1 there are some minor editorials needed to ensure consistency of terminology and to close some gaps; and
- .2 there are some terminologies and requirements introduced which exceed the remit of recognized organizations and would, by inclusion in such a Model Agreement, be detrimental to the successful conclusion of such agreements with Administrations.

4 Regarding the proposals provided in the annex to this document, the Committee is invited to note the following comments:

- .1 while it is agreed that this revised Model Agreement should, in future, be used rather than the version provided at the annex to MSC/Circ.710 and MEPC/Circ.307, it is considered that the issuance of this new circular would not affect the validity of "in force" signed agreements that have been concluded based on or referred to MSC/Circ.710 and MEPC/Circ.307 or that have been already updated to refer to the Code for Recognized Organizations (RO Code) (see paragraph 7 of the cover to the draft new MSC-MEPC.5 circular);
- .2 with respect to paragraph 6.5.5 of the draft revised Model Agreement (the annex to annex 13 of III 5/15), it is not considered realistic to inform the flag State of "any failures" as soon as possible. It is therefore proposed to delete paragraph 6.5.5. In this regard, it is noted that pragmatic and practicable provisions to report instances when "a ship did not in all respects remain fit to proceed to sea without danger" or "a situation involving a major deficiency or serious safety-related issue that would normally be considered sufficient to detain a ship from proceeding to sea pending correction", are in paragraphs 6.4 and 6.5.2 of the draft revised Model Agreement;
- .3 regarding the title of section 8.2 of the draft revised Model Agreement on "Rules for administrative proceedings", it is proposed that this section be deleted as there is no corresponding text provided within the RO Code, nor any clear understanding of what this section should include. However, if it is agreed to retain this section, it is suggested to use the text shown in the annex to this document;
- .4 with respect to paragraph 8.8 of the draft revised Model Agreement, it is proposed that there needs to be two options with regard to dispute resolution to take account of the different legal regimes within the countries of Administrations (see two options for the re-numbered paragraph 8.8.1 in the annex to this document); and

- .5 for the sake of fairness, it is considered that paragraph 6.5.2 of the current Model Agreement (MSC/Circ.710-MEPC/Circ.307) be reinstated as a new paragraph 8.8.2 in the draft Revised Model Agreement. Recognized Organizations (ROs) provide statutory services and issue certificates to ships, activities that the flag States would otherwise have to perform themselves. Therefore, it is considered that ROs should be afforded the same protections and defences afforded to flag State employees if they had performed the work themselves.

Action requested of the Committee

- 5 The Committee is invited to consider the comments provided above and the proposed amendments to the draft Model Agreement and its associated draft MSC-MEPC.5 circular as provided in the annex to this document, and take action as appropriate.

ANNEX

ANNEX 13

DRAFT MSC-MEPC.5 CIRCULAR

MODEL AGREEMENT FOR THE AUTHORIZATION OF RECOGNIZED ORGANIZATIONS ACTING ON BEHALF OF THE ADMINISTRATION

1 The Marine Environment Protection Committee, at its [...] and the Maritime Safety Committee, at its [...], approved the *Model Agreement for the authorization of recognized organizations acting on behalf of the Administration* prepared by the Sub-Committee on Implementation of IMO Instruments at its [fifth session (24 to 28 September 2018)], as set out in the annex, ~~in order~~ to assist Administrations when formalizing, in writing, a delegation of authority agreement for the purpose of having statutory certification and services rendered by a recognized organization (RO) on their behalf. It is intended to be used, as deemed necessary by an Administration, for new agreements.

2 The *IMO Instruments Implementation Code* (III Code) (resolution A.1070(28)), in paragraph 18.2, and the *Code for Recognized Organizations* (RO Code) (resolutions MSC.349(92) and MEPC.237(65)), in paragraph 8.2.1 of part 2, prescribe that the Administration should establish the legal basis under which the authorization of statutory certification and services is administered and should regulate such authorization(s) in accordance with the applicable requirements of the international mandatory instruments. This legal basis may be established by ~~to have as its basis~~ a formal written agreement between the Administration and the RO which, ~~as a minimum, may includes~~ the elements set out in appendix 3 of the RO Code, or equivalent legal arrangements, and which may be based on the Model Agreement as set out in this circular.

3 The Model Agreement covers the ~~factors~~ elements included in appendix 3 of the RO Code. The appendix to the Model Agreement is an integral part of the Model Agreement. The Administration should specify the scope and extent of the delegated duties and authorities in ~~an appendix~~ to their agreements with ROs based on the appendix of the Model Agreement.

4 It is recognized that the legal system of the individual Administration as well as additional national requirements may require adaptation of the wording provided in the annex to this circular.

5 The ~~guidance provided by the~~ Model Agreement together with its appendix provides guidance for Administrations and recognized organizations to consider when addressing the elements to be included in ~~is considered to meet the minimum standard for~~ a formal written agreement ~~as set forth in both~~ referenced by the III Code and contained in Appendix 3 of the RO Code. This model agreement, at the discretion of the Administration, may be supplemented by additional matters and/or may be formulated in more detail, taking into account that Part 3 of the RO Code includes non-mandatory guidance. In doing so, it is recognized that since ROs are obligated to adhere to the mandatory provisions of Parts 1 and 2 of the RO Code, agreements do need not to include these mandatory provisions.

6 Member Governments are encouraged to consider ~~invited to use~~ the Model Agreement when ~~concluding a~~ entering into a new formal agreement with organizations acting on their behalf.

7 While this circular supersedes MSC/Circ.710 and MEPC/Circ.307, the validity of in force signed agreements that were concluded based on, or with reference to, MSC/Circ.710 and MEPC/Circ.307 or that have already been updated to refer to the RO Code, do not be affected with the issuance of this circular.

ANNEX

MODEL AGREEMENT

**AGREEMENT GOVERNING THE DELEGATION OF STATUTORY
CERTIFICATION AND SERVICES FOR SHIPS REGISTERED IN [STATE]
between [ADMINISTRATION] and [RECOGNIZED ORGANIZATION]**

1 Application

This Agreement delegates authority and sets forth the conditions for cooperation between [State] hereinafter referred to as "the Administration" and the Recognized Organization hereinafter referred to as "the RO" with respect to the performance of statutory certification and services on behalf of the Administration, as outlined in the *Code for Recognized Organizations* (RO Code) (resolutions MSC.349(92) and MEPC.237(65)).

2 Purpose

2.1 The purpose of this Agreement is to delegate authority to the RO to perform statutory certification and services and to define the scope, terms, conditions and requirements of that delegation.

3 General conditions

3.1 Statutory certification and services comprise the assessment of [State] registered ships and/or ship management companies in order to determine the compliance of such ships/companies with the applicable requirements of the international conventions, codes and national legislation (hereinafter referred to as "applicable instruments") and the issuance of, or in support of the issuance of, relevant certificates and documents as set out in the appendix hereto.

3.2 In so far as the statutory certification and services covered by this Agreement are concerned, the RO agrees to cooperate with port State control Authorities to facilitate the rectification of reported deficiencies or other discrepancies on behalf of the Administration when so requested, and report to the Administration.

3.3 Statutory services rendered and statutory certificates issued by the RO will be accepted as services rendered by or certificates issued by the Administration provided that the RO maintains compliance with the provisions of the RO Code and the national requirements.

4 The execution of functions under authorization

4.1 Functions in accordance with the general authorization:

- .1 the RO is hereby authorized to carry out statutory certification and services on behalf of the Administration with respect to ships, registered in [State], and/or companies responsible for operating such ships, to the extent specified in the appendix to this Agreement and to require repairs to ships in accordance with the applicable instruments;
- .2 surveys shall be carried out in accordance with applicable instruments and where applicable, the *Survey Guidelines under the Harmonized System of Survey and Certification, 2017* (resolution A.1120(30), as may be amended); and

- .3 the RO is ~~and others acting on its behalf are~~ authorized to take relevant control measures in accordance with ~~their~~ its standard procedures or as explicitly advised otherwise by the Administration as is necessary to ensure that matters subject to surveys, audits and inspections correspond substantially with the particulars of the ship's certificates or the requirements of applicable instruments.

4.2 Functions in accordance with special (additional) authorization

Authorizations for services outside the scope of the appendix to this Agreement will be dealt with as mutually agreed on a case-by-case basis.

4.3 Relationship between the Organization's statutory and other related activities

The RO and its staff shall not engage in any activities that may conflict with their independence of judgment and integrity in relation to their statutory certification and services. The RO and its staff responsible for carrying out the statutory certification and services shall not be the designer, manufacturer, supplier, installer, purchaser, owner, user or maintainer of the item subject to the statutory certification and services, nor the authorized representative of any of these parties. The RO shall not be substantially dependent on a single commercial enterprise for its revenue.

5 Legal basis of the functions under authorization

5.1 Acts, regulations and supplementary provisions

This Agreement is made pursuant to the [legal authority] and in compliance with the RO Code and any supplementary provisions made by the Administration.

5.2 Interpretations

While interpretations of the applicable instruments, as well as the determination of equivalents or the acceptance of substitutes to the requirements of the applicable instruments are the prerogative of the Administration, the RO will cooperate in their establishment as necessary.

5.3 Deviations and equivalent solutions

Exemptions and deviations from, and equivalents to, the requirements of the applicable instruments are the prerogative of the Administration and must be approved by the Administration prior to issuance.

In instances where, temporarily, the requirements of an applicable instrument cannot be met under particular circumstances, ~~the RO will specify~~ proposals for such measures or supplementary equipment as may be available to permit the ship to proceed to a suitable port where permanent repairs or rectifications can be effected or replacement equipment fitted ~~are to be acceptable to the RO and agreed by the Administration.~~

6 Reporting to the ~~flag State~~ Administration

6.1 Procedures for reporting in the case of general authorization

The RO shall establish relevant procedures for reporting to the Administration in the case of general authorization, in accordance with the requirements of the RO Code and the additional requirements of the Administration.

6.2 Procedures for reporting in the case of special authorization. The RO shall establish relevant procedures for reporting to the Administration in the case of special authorization, in accordance with the requirements of the RO Code and the additional requirements of the Administration accompanying each special authorization.

6.3 Reporting on classification of ships (assignment of class, changes and withdrawals, as applicable).

6.4 Reporting of cases where a ship did not in all respects remain fit to proceed to sea without danger to the ship or persons on board, or presenting unreasonable threat of harm to the environment.

6.5 Other reporting:

- .1 whenever a request for classification of a ship to which statutory requirements apply, that will be or has been registered in [the register] is received, the RO shall immediately inform the Administration;
- .2 the RO shall notify the flag State Administration immediately upon becoming aware of a situation involving a major deficiency or serious safety-related issue that would normally be considered sufficient to detain a ship from proceeding to sea pending correction;
- .3 the RO shall notify the flag State Administration(s) immediately upon becoming aware of a situation aboard the ship or within a company responsible for operating such ships involving a major non-conformity, as defined in the revised *Guidelines on the implementation of the International Safety Management (ISM) Code by Administrations* (resolution A.1118(30), as may be amended);
- .4 the above notifications shall contain the name of the company or ship, the IMO number, the official number, if applicable, the company identification number and a description of the major non-conformity, deficiency or issue;
- ~~.5 the RO shall inform the flag State, as soon as possible, of any dangerous occurrences, accidents, machinery or structural breakdowns, or failures that they are aware of on a ship;~~
- .65 the RO shall report to the flag State Administration in writing the names and official numbers, if applicable, of any ships removed from the RO's list of classed/certified ships for which the RO has performed statutory certification and services. The report should contain a description of the reason(s) for removal from class, and this should be made within thirty (30) days of the removal becoming effective; and
- .76 in cases of transfer of the certification of the ship from one RO to another, the gaining organization shall, within one month from the issuance of the certificates, advise the Administration and the losing organization of the date of issue of the certificates and confirm the date, place and action taken to satisfy each overdue survey, overdue recommendation and overdue condition of class.

7 Development of rules and/or regulations – Information

7.1 Cooperation in connection with development of rules and/or regulations – liaison meetings

The RO shall allow participation in the development and review of its rules, procedures and/or regulations, specifically in the review process prior to finalization, by representatives of the ~~flag~~ **State Administration**.

7.2 Exchange of rules and/or regulations and information:

- .1 the Administration will provide the RO with all necessary documentation for the purpose of the RO's provision of statutory certification and services; and notify the RO of any additions, deletions or revisions thereto in advance of their effective date and specify whether the ~~flag~~ **State Administration's** standards go beyond convention requirements in any respect;
- .2 the Administration shall be granted access upon request to all plans and documents including reports and records on surveys, audits and inspections on the basis of which certificates are, or have been issued or endorsed by the RO;
- .3 the RO should provide free electronic access to the latest editions of its rules and/or regulations applicable to ships under the scope of authorization in the appendix and listing of ships in its class; and
- .4 the RO and the Administration, recognizing the importance of technical liaison, agree to cooperate towards this end and maintain an effective dialogue.

7.3 Language and form

The RO shall establish, publish and systematically maintain its rules and/or regulations printed and/or in electronic environment, an up-to-date version of which shall be provided in the English language, for the design, construction and certification of ships and their associated essential engineering systems.

8 Other conditions

8.1 Remuneration

Unless agreed otherwise, remuneration for statutory certification and services carried out by the RO on behalf of the Administration will be charged by the RO directly to the party requesting such services.

[8.2 Rules for administrative proceedings]

[The RO shall have a documented process to address appeals related to statutory certification and services in accordance with the requirements of the Administration.]

8.3 Confidentiality

In so far as activities related to this Agreement are concerned, both the RO and the Administration shall be bound by confidentiality provisions to be agreed between them.

8.4 Liability and Financial Responsibility:

- .1 in the context of this Agreement, if a liability is finally and definitively imposed by a court of law on the State of the Administration for loss or damage which is proved in a court of law to have been caused by any willful act, omission or gross negligence of the RO, its officers, employees or others who were acting on behalf of the RO pursuant to this Agreement, the Administration is entitled to seek from the RO compensation up to but not exceeding the amount of financial liability, as agreed bilaterally between the RO and the Administration;
- .2 while acting for the Administration under this Agreement the RO shall be free to create contracts direct with its clients and such contracts may contain the RO's normal contractual conditions for limiting its legal liability; and
- .3 in the context of this Agreement, a professional indemnity or professional liability insurance is to be effected by the RO.

8.5 Entry into force

The agreement commences on [Date].

8.6 Termination

This Agreement may be terminated by either Party by giving the other Party 12 months written notice.

8.7 Breach of agreement

If this Agreement is breached by one of the Parties, the other Party will notify the violating party of its breach in writing to allow the notified party the opportunity to remedy the breach within [...] days, failing which the notifying Party has the right to terminate the Agreement immediately.

8.8 Settlement of disputes

Option 1

8.8.1 The Agreement shall be governed by and construed in accordance with [Agreed State] law. Any dispute arising in connection with this Agreement which cannot be settled by private negotiations between the Parties shall be settled finally by arbitration at an in Agreed location according to Agreed State law, ~~or by the tribunal (courts)~~. The arbitration shall be conducted by a panel of three arbitrators. Each of the parties shall appoint one arbitrator and the two party appointed arbitrators shall appoint the third arbitrator who shall chair the panel. The language used in the proceedings shall be English.

Option 2

8.8.1 The Agreement shall be governed by and construed in accordance with [Agreed State] law. Any dispute arising in connection with this Agreement which cannot be settled by private negotiations between the parties shall be settled finally by the courts at an agreed location according to Agreed State law.

8.8.2 In the performance of statutory certification and services hereunder, the RO, its officers, employees and others acting on its behalf are entitled to all the protection of law and the same defences and/or counter-claims as would be available to the Administration and its own staff, surveyors or employees if the latter had conducted the statutory certification and services in question.

8.9 Use of subcontractors:

- .1 the RO shall perform statutory certification and services by the use of only exclusive surveyors and auditors, being persons solely employed by the RO, duly qualified, trained and authorized to execute all duties and activities incumbent upon their employer, within their level of work responsibility;
- .2 however, if the RO finds in exceptional and duly justified cases that its own exclusive surveyor is not available, the RO shall inform the Administration who may then nominate an exclusive surveyor of another RO;
- .3 in accordance with applicable instruments, the RO may choose to outsource any service that affects conformity to requirements or accepts work of a third party approved by the RO. The RO shall ensure that it fully controls the performance of such services through its quality management system. For the purpose of accountability to the ~~flag State~~ Administration, the work performed by the sub-contracted organization or service supplier constitutes the work of the RO; and
- .4 while still remaining responsible for the certification on behalf of the ~~flag State~~ Administration, the RO may subcontract radio surveys to non-exclusive surveyors in accordance with the RO Code and the national requirements.

8.10 Amendments

Amendments to the Agreement and the appendix will become effective only after consultation and written agreement between the Administration and the RO.

9 Specification of the authorization from the ~~flag State~~ Administration to the organization (refer to the appendix)

10 The ~~flag State~~ Administration's supervision of duties delegated to the organization

The Administration shall be entitled to satisfy itself that the RO is performing its services in compliance with the RO Code and this agreement by establishing, or participating in as applicable, an RO oversight programme for the purpose of supervising the duties delegated to the RO under this Agreement by audits, inspections, supplementary surveys, vertical contract audits or other monitoring activities. The Administration may rely upon the audits carried out by an accredited certification body or equivalent organizations. Should the Administration choose to conduct direct auditing of the RO offices, the frequency and extent of audit is subject to mutual agreement between the Administration and RO. For the purpose of this paragraph:

- .1 the Administration shall have access upon request to the documentation of the quality management system of the RO;
- .2 the Administration shall have access upon request to the internal instructions, circulars and guidelines of the RO;
- .3 the Administration shall have access upon request to the RO's documentation relevant to the [flag State Administration]'s fleet;
- .4 the RO shall fully cooperate with the Administration's inspection and verification work;
- .5 the RO shall keep the appropriate information and statistics appropriately on cases such as, but not limited to, damage and casualties relevant to the [flag State Administration]'s fleet; and
- .6 the RO shall keep the information and statistics of port State control detentions and notified deficiencies allocated to the responsibility of the RO.

APPENDIX

of the

**AGREEMENT GOVERNING THE DELEGATION OF STATUTORY
CERTIFICATION AND SERVICES FOR SHIPS REGISTERED IN [STATE]
between [ADMINISTRATION] and [RECOGNIZED ORGANIZATION]
Dated [date] with effect from [date] covering the:**

APPLICABLE INSTRUMENTS

and

DEGREE OF AUTHORIZATION

1 The RO is hereby authorized as listed below to carry out statutory certification and services and require repairs on behalf of the Administration in accordance with the applicable instruments.

The ~~flag State~~ Administration shall specify the scope of authorization granted to an RO, considering the following:

- .1 ship types and sizes;
- .2 conventions and other instruments, including relevant national legislation;
- .3 approval of drawings;
- .4 approval of materials and equipment;
- .5 surveys, audits, inspections;
- .6 issuance, endorsement and/or renewal of certificates;
- .7 corrective actions;
- .8 withdrawal or cancellation of certificates; and
- .9 reporting requirements.

The following three types of authorizations apply as noted:

- F: Full Authorization to perform plan review, carry out surveys, inspections and audits, and issue and/or revoke necessary interim and full-term certificates.
- P: Partial Authorization to perform plan review, carry out surveys, inspections and audits, and possibly issue interim certificates (Specific guidance to be provided by the Administration and full-term Certificate is to be issued by the Administration).
- L: Limited Authorization to account for other special categories not covered by the above, such as case-by-case authorization or geographical limitations.

2 The listing of Instruments and type of Authorization is as follows:

_____ [To be followed by a listing of the applicable instruments with specific identification of the desired authorization (F/P/L) as applicable.]