



INTERNATIONAL LABOUR STANDARDS AND COMPANIES

Introduction

Increasingly today companies, in their codes of conduct, international framework agreements (IFA) or other policies, are referencing International Labour Organization (ILO) standards – most specifically those related to freedom of association, collective bargaining, child labour, forced labour and discrimination. In some instances such references are augmented by commitments to “give effect” to, or act in compliance with, those standards or the principles enshrined in them. Similarly, references are also commonly made to the principles of the 1998 ILO Declaration on Fundamental Principles and Rights at Work.

In both instances such references often result in questions being asked as to what is the effect of such a reference and what it then obliges a company to do.

The purpose of this paper is to explain how standards are created, their purpose and what it can mean for companies who reference them. It also explores alternative language that may help companies better manage the expectations that may come from the use of international instruments.

ILO international labour standards (ILS)

By the end of June 2007, the ILO had adopted 188 Conventions and 199 Recommendations covering a broad range of issues relating to the world of work. Of these, some 77 Conventions are regarded as up-to-date and, therefore, suitable for promotion by the ILO on a priority basis and for further ratification by member States. Others have been identified as being in need of revision or out of date. Eight amongst the up-to-date Conventions are what are often referred to as “fundamental” or “core” Conventions, upon which particular emphasis is put in promoting ratification¹.

¹ On 25 May 1995, the Director-General of the ILO launched a campaign to promote the fundamental ILO Conventions, i.e.:

- Convention N° 87 (1948) on Freedom of Association and Protection of the Right to Organise
- Convention N° 98 (1949) on the Right to Organise and Collective Bargaining
- Convention N° 29 (1930) on Forced Labour
- Convention N° 105 (1957) on the Abolition of Forced Labour
- Convention N° 100 (1951) on Equal Remuneration
- Convention N° 111 (1958) on Discrimination (Employment and Occupation)
- Convention N° 138 (1973) on Minimum Age, and
- Convention N° 182 (1999) on the Worst Forms of Child Labour,

with a view to their universal ratification. Each year the Director-General submits a report for information to the ILO Governing Body on progress made in the ratification of fundamental Conventions during the previous year and on the future prospects for the ratification of these instruments, based on information communicated by member States.

It is the principles underlying these eight Conventions that can be found in the 1998 ILO Declaration on Fundamental Principles and Rights at Work, described in detail below.

How are ILS created?

International Labour Standards come in two forms: Conventions – instruments which, on ratification, create legal obligations – and Recommendations – not open to ratification, but give guidance as to policy, legislation and practice. Both kinds of instrument are adopted by the International Labour Conference. In some instances standards created consist of both a Convention and a Recommendation; in others it may be a stand-alone Recommendation.

Items for standard-setting are first proposed by the ILO Governing Body, which is the tripartite executive body with representation drawn from governments, workers and employers. Standard-setting usually involves a “double discussion” process over a two-year period at consecutive sessions of the International Labour Conference.

Once a topic is selected by the Governing Body, the Office prepares a report analysing the law and practice in member States with regard to that topic. This is sent, together with a questionnaire, to governments, workers’ and employers’ organisations for comment.. On the basis of replies received, a draft text of a possible instrument is prepared for a first tripartite discussion within a technical committee at the Conference. At the end of that process, the Office prepares a second report for the following year, including a more final text reflecting consensus from the first year’s debate. In this second discussion, a more formal process of amendment – and often voting – is used to come to a final text that is then put to the entire Conference for adoption by vote. In order to be adopted, it must gain a two-thirds majority.

This voting system means that not all standards enjoy unanimous support. There have in fact been a number of occasions where the employers and some governments were unable to support the final text put forward. This was the case in the year 2000 with the adoption of the revised Maternity Protection Convention, where employers believed that the level of benefit was beyond the means of most developing countries and would therefore fail, like its predecessor, to attract widespread ratification. This opposition is then followed up at national level.

All ILO member States are required to submit the text of any adopted standards to their national competent authority (most often parliament). If it is a Convention, then that includes consideration being given to its ratification. Each Convention contains a provision as to how it comes into force. Normally, Conventions come into force twelve months after registration of the second ratification and afterwards for each State twelve months after its ratification. Several maritime and some other Conventions contain different provisions. Until a Convention comes into force, it can have no effect in international law.

If a country ratifies a Convention it becomes, in effect, an international treaty with obligations on the country to ensure that its law is in conformity with the terms of the Convention. **Ratification is a voluntary act. Not all countries ratify all Conventions.**

Conventions and Recommendations are, therefore, drafted for and addressed to ILO member States. They often require a national process of social dialogue to establish how the content of the Convention is to be given force at national level.

Often, the terms of Conventions are not able to be given meaning without that national translation into law. This point is of particular importance to companies. They are unable to make that “translation” directly themselves, especially in instances where they are trying to give effect to Conventions in countries that have not ratified the particular Convention. Companies can easily find themselves acting in breach of national law when they directly try to give the Convention effect.

This issue is further compounded by the fact that some Conventions have “flexibility clauses”. These often allow States either to lay down temporary standards that are lower than those normally prescribed, to exclude certain categories of workers from the application of the Convention, to apply only certain parts of the Convention, or even to build their conformity over time. Again **only States make those decisions, not companies**.

Supervision of Standards

Upon ratifying a Convention, countries are also obliged to conform to the ILO’s reporting requirements. This includes being possibly subject to complaints by the social partners as to their failure to comply with the terms of the Convention. The Committee of Experts on the Application of Conventions and Recommendations (CEACR)² reviews and comments upon the reports submitted by governments along with observations made by employers and workers. The comments of the CEACR on the fulfilment by governments of their standards-related obligations take the form of either observations or direct requests. Observations contain comments on fundamental questions raised by the application of a particular Convention by a government and are reproduced in the annual report of the CEACR. Direct requests usually relate to questions of a more technical nature or of lesser importance, or contain requests for information and are not published in the report. For a company, all of this interpretation and correction is not immediately visible, but needs to be borne in mind if it is trying to give effect to, or act in accordance with, the content of a Convention. In reality, the standard itself is often merely a shell within which a government must act to give it meaning.

Given this reality, it is impossible for a company to try and do the job of government to give effect to a Convention. There is often no “one” way to give effect to a Convention, as can be seen by the different national approaches to issues- e.g. discrimination – in various countries that have ratified the Convention and, despite the differences, are still seen to be in conformity.

ILO Declaration on Fundamental Principles and Rights at Work

Another common reference within company codes of conduct, policies and international framework agreements is to the above Declaration.

Adopted in 1998, the Declaration contains a set of principles and rights that are derived from the ILO Constitution. Therefore, all ILO member States, irrespective of their level of economic development, or indeed whether they have ratified the fundamental ILO

² The Committee of Experts was set up in 1926 to examine the growing number of government reports on ratified Conventions. Today it is composed of 20 jurists appointed by the ILO Governing Body for three-year terms. The experts come from different geographic regions, legal systems and cultures. The Committee’s role is to provide an impartial and technical evaluation of the state of application of international labour standards.

Conventions or not, have the obligation, due to their membership of the ILO, to respect and promote the following set of principles and rights at work:

- Freedom of association and the effective recognition of the right to collective bargaining.
- The elimination of all forms of forced or compulsory labour.
- The effective abolition of child labour.
- The elimination of discrimination in respect of employment and occupation.

These principles and rights are those that underlie the ILO's fundamental Conventions on:

- Freedom of Association and Protection of the Right to Organise (N°87) and Right to Organise and Collective Bargaining (N°98)
- Forced Labour (N°29) and Abolition of Forced Labour (N°105)
- Minimum Age (N°138) and Worst Forms of Child Labour (N°182)
- Equal Remuneration (N°100) and Discrimination (Employment and Occupation) (N°111).

The Declaration and its Follow-Up (described in detail below) are promotional tools – the emphasis being on identifying specific needs in member States and working with the ILO to find solutions, rather than passing judgement and engaging in collective condemnation and sanction.

There are two main measures involved in the Follow-Up of the Declaration:

- One is the Annual Review, composed of reports from those member States that have not ratified one or more of the fundamental ILO Conventions. Governments are to report on how they are promoting each of the four Principles and Rights contained in the Declaration (and not on the technical reasons why they cannot ratify such and such Convention). The Review is discussed by the ILO Governing Body – the aim being to gain a picture of the situation, note where progress could (and should) be made and offer tailor-made assistance.
- The other is the Global Report, which is submitted to the annual International Labour Conference for discussion. This covers, in turn, each of the four categories of fundamental principles and rights for all member States. (The process commenced at the 2000 International Labour Conference, with a discussion on freedom of association). The aim of this report is to provide a dynamic global picture of global and regional trends for each category of the fundamental principles and rights.

The practical outcome of these reports and discussions is that the Office establishes, together with the member State(s) concerned, a plan of action for technical cooperation where necessary.

The Declaration is addressed to ILO member States; governments are responsible for ensuring respect for the principles and rights within their jurisdiction. Nevertheless, employers' and workers' organizations should play an important, active role in the Follow-Up procedures by:

- Participating in the national debates on the domestic response to the Declaration.
- Reviewing and commenting on the Annual Reports submitted by national governments.

- Participating in the tripartite discussions in the Governing Body on the Annual Review and at the annual Conference on the Global Report.

By engaging with national employers' organizations, companies can participate in this Follow-up procedure by feeding in their views.

These four principles are also found within the 10 principles of the Global Compact.

Again these principles are the responsibility of governments, not companies.

However, many codes of conduct and IFAs commit a company to “give effect to” or “adhere to” or “act in accordance with” or “support” these principles (to use but some wording examples). Again, this raises the questions of what exactly does that mean for the company and what is it the company is expected to do to give it effect?

So, what does it mean for companies who include such references to the Declaration or ILO standards in their codes of conduct or IFAs?

The simple answer is: “no one yet knows”.

For a company that includes these references, no case law has emerged as to what it actually means in practice. In many instances it is not in anyone's interest to push a dispute over its meaning to a court, as the documents in question sometimes exclude such recourse or have their own dispute resolution mechanism within it. However, once such principles are made part of an employment contract or agreement (e.g. in the form of an annex or reference), it creates actual rights and obligations for the employer and worker. Disagreement between an employer and his workers can thus arise over compliance with such employment terms and, due to the vagueness of the commitment, as set forth in the annex or reference, can lead to litigation.

For example, respecting freedom of association might lead to an expectation that the company will facilitate unionization of its workers and even those of its suppliers, whereas even well-meaning action in that regard may be seen as undue interference in a context of union rivalry.

Similarly, commitments to non-discrimination where the grounds of unlawful discrimination are not clearly established can lead to claims against companies to give effect to rights unrecognized in the country of operation or expressly illegal. While a code will include a statement of principles concerning business behaviour, this does not necessarily result in the application of those principles in the firm's operations. One only has to think of issues of gender and sexual orientation as but two examples.

Examples can be given in other instances with regard to collective bargaining, child labour etc, etc.

The issue becomes even more complicated when adherence to a company's code or IFA is included in the contractual terms with a supplier. In that instance, the provisions could arguably be said to be more binding on the supplier than the company itself.

- What happens in a situation where a company severs the contract with a supplier over its failure to give effect to the provisions relating to issues like freedom of association

or other ILO Convention referenced and the supplier challenges the ability of the company to cancel the contract?

- Are these obligations expressed with sufficient precision to influence and assess actual behaviour to enable a decision to sever the relationship?
- Similarly, should the issue come before a court or, when arbitration is provided for, in front of a third party for decision?
- Are the criteria and evidence to last enough to support your decision?

Possible ways forward

- Be clear as to what you mean. Good drafting is always preferable to simple language short cuts. This means avoiding references to ILO standards themselves or the Declaration. Set out clearly what commitment a company intends to make and live up to. This should also be specifically addressed when incorporating such terms in supplier contracts. Clarity of language will also help ensure a consistent application of the terms of the code or IFA among multiple operations in multiple countries.
- Treat these texts as legal documents creating potentially enforceable rights and duties and subject them to legal scrutiny before they are signed. Do not commit to what you cannot deliver.
- Qualify the commitment so that it is to be interpreted in accordance with applicable national law. This will help set the expectation on the company within a national legal context, provided you know what that is. However, it still begs the question of what to do if the law is absent or sits in opposition to the intention of the commitment.
- Determine the law applicable for the purposes of any interpretation or in case of litigation. This can help in avoiding the same issue coming up in a multiple of jurisdictions or allowing a complainant to “pick” the jurisdiction likely to give it the answer it seeks. The concept of “conflict of laws” is important in this regard as the IFA, being global in scope, cuts across a variety of legal systems and legal precedent. By identifying a particular jurisdiction, you can try to restrict the interpretation of the IFA to the legal premises of that jurisdiction. However, it is important to bear in mind that a court at the national level, other than that nation specifically mentioned, may give itself jurisdiction notwithstanding the provision of the IFA. In considering a jurisdictional clause, consideration also needs to be given to the speed with which the national court will be able to hear the matter. Judicial delay, as well as the issue of “conflict of laws”, prompts some companies to insert, instead, an alternative disputes resolution (ADR) mechanism to better control the speed with which a dispute can be resolved or consider an alternative dispute resolution procedure.
- Have them looked at by the national employers’ organization, which can help vet the text in terms of national law and practice (it may in fact negate the need for a particular provision at all).

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