

The Legal Rights of Seafarers to Health Protection Measures during the COVID-19 Pandemic

Abstract

This article explores the legal rights of seafarers to adequate health protection measures during the COVID-19 pandemic. In doing so, it compares the private law rights of seafarers to those under the international regulatory framework and evaluates any redress options that might be available to them. It aims to recommend how the law might be used most effectively to secure seafarers with the health protection measures they need as the pandemic progresses with a focus on English private law principles as they apply to the maritime labour context.

Introduction

In the past ten to fifteen years, there have been some significant steps in so far as the employment rights of seafarers are concerned, with the Maritime Labour Convention (MLC), 2006, being the most important development in this regard. However, the outbreak of the COVID-19 pandemic in late 2019 came to underscore once again the vulnerable position of seafarers. This pandemic forced seafarers to face one of the biggest challenges in their profession, with more than 300,000 seafarers being unable to exercise their unequivocal right to get relieved from their ship once their employment agreements expire.¹

As lockdown measures are slowly being lifted in various countries, the world is now ready to get back to normality, or at least the new 'normality' that the pandemic prescribes. However, the position of seafarers remains precarious. Only recently, the International Chamber of Shipping (ICS) has warned the industry against the detrimental effect that a failure to comply with health protection measures could have not only on seafarers, but also on the general

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¹ ITF, '300,000 Seafarers Trapped at Sea' (16 July 2020), available at <https://www.itfseafarers.org/en/news/300000-seafarers-trapped-sea-mounting-crew-change-crisis-demands-faster-action-governments> accessed 30 July 2020.

public.² The warning came in response to a series of allegations that the results of some tests for the presence of COVID-19 among seafarers rostering for crew changes had been tampered.³

The aim of this article, whose primary focus is on English law,⁴ is, thus, to examine the legal rights of seafarers to adequate health protection measures during the COVID-19 pandemic, with a view to recommending approaches as to how the law might be used most effectively to ensure that seafarers are provided with the health protection they need as the pandemic progresses. To this end, it compares the private law rights of seafarers to those under the international regulatory framework and evaluates any redress options that might be available to seafarers. It argues that private law claims might not be the best course of action through which the fundamental employment right of seafarers to health protection can be vindicated and that, in practice, the compliance and enforcement systems under the MLC, 2006, might offer a preferable remedial alternative, if what is sought after is to provide those seafarers in need with adequate health protection measures during the current crisis.

Most certainly, such an argument is true for seafarers from the ninety-seven member states that have ratified the MLC, 2006.⁵ However, those remedies might not always be available to seafarers from countries that have not ratified the MLC, 2006, or working on ships that are flagged to non-ratifying countries, or who have to go in the course of their work to port states that have not ratified the Convention. In such circumstances, it is argued that seafarers might be able to benefit from the underlying principle of ‘no more favourable treatment’ for ships of non-ratifying countries as this is adopted under Article V, paragraph 7 of the MLC, 2006. According to this principle, ships of all countries (irrespective of ratification) will be subject

² ICS, ‘Negligence of Small Minority Risks Setbacks to Crew Change Progress’ (23 July 2020), available at <<https://www.ics-shipping.org/news/press-releases/2020/07/23/negligence-of-small-minority-risks-setbacks-to-crew-change-progress>> accessed 26 July 2020.

³ ICS, ‘Negligence of Small Minority Risks Setbacks to Crew Change Progress’ (23 July 2020), available at <<https://www.ics-shipping.org/news/press-releases/2020/07/23/negligence-of-small-minority-risks-setbacks-to-crew-change-progress>> accessed 26 July 2020.

⁴ It may be worth noting here that, while the focus of the analysis lies on English law, the provisions of which primarily apply to seafarers working on board UK flagged ships anywhere in the world, some of the legal principles it considers promulgate under European (like the Council Directive 89/391/EC on the Introduction of Measures to Encourage Improvements in Health and Safety at Work and the Council Directive 89/656/EEC on the Minimum Health and Safety Requirements for the Use by Employees of PPE in the Workplace) and international legislation (like the MLC, 2006), and that makes part of the analysis of this article generally equally applicable to seafarers working on board ships that fly the flag of other States.

⁵ A full list of the ratifying member states is available at <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312331> accessed 14 September 2020.

to inspection in any country that has ratified the MLC, 2006, and to possible detention if they do not meet the minimum standards of this Convention.⁶

This article begins by setting the scene. In doing so, it explains why providing seafarers with health protection measures (including any necessary personal protective equipment (PPE)) is important and then presents how the situation regarding the protection of the health of seafarers has developed since COVID-19 first broke out. It continues by exploring what English private law says about the rights of seafarers to health protection and what redress options English private law provides to secure seafarers with the health protection measures (including the PPE) they need during the pandemic. Finally, it considers what the MLC, 2006, says about the right of seafarers to health protection and whether the Convention can provide seafarers with remedial alternatives in COVID-19 related cases.

Why is it important to provide seafarers with health protection measures (including any necessary PPE) during the pandemic?

It is true that the ICS and the International Transport Workers' Federation (ITF) advocated for the provision of health protection measures to seafarers from the outset of the pandemic. Unfortunately, however, access to PPE was being denied and priority was being given to other frontline workers, such as healthcare workers bus drivers, retail assistants and cabin crew. It is presumed that two reasons lie behind this. First, the difficulties surrounding repatriation and crew changes have been a priority issue during this time of crisis, and that overshadowed any other issues relating to seafarers. Secondly, there was a misconception that seafarers were safer on board. That is because they live and work in an isolated environment where, in theory, the risk of contracting COVID-19 is limited, assuming that all crew members are healthy.

In reality, however, seafarers continued to come into close contact with port workers, pilots and other shore-based personnel as they boarded the ship to guide her in and out of ports, load and unload cargo, provide necessary supplies, or conduct essential repairs. That was inevitable if carriage of vital goods, such as food and medical supplies, was to continue without any significant disruptions during the first phase of the pandemic. Furthermore, as 'lockdown' measures are currently being lifted in many countries around the world, seafarers' interactions

⁶ MLC, 2006, Article V, paragraph 7.

with people outside the ship are also bound to become more often. This, taken in conjunction with the wide spread of COVID-19 in the community (according to the World Health Organisation (WHO), more than 200 countries are now affected by the pandemic⁷), arguably increases the risk of seafarers getting infected on board ships.

What is more important in this respect, however, is how disproportionate the rate of transmission of COVID-19 between the members of a ship's crew is. In a recent case, for example, 16 out of 21 seafarers aboard a ship have tested positive after they had come into close contact with the ship's master who fell ill with COVID-19.⁸ While the reasons for such disproportionate transmission rate need to be tested, it is expected that they relate to the working and living conditions of seafarers on board ships. Indeed, the WHO indicates physical distance as the most effective precautionary measure in the fight against COVID-19.⁹ Understandably, however, social distancing is not always viable on board ships, and that highlights the need for additional health protection measures to ensure seafarers are provided with safety standards as comparable as possible to those put in place ashore.

As a final remark, it seems appropriate to add a few words about the problems faced by seafarers when they are in need of immediate medical care during this pandemic. Port States have often denied seafarers permission to go ashore to receive necessary medical care, even though they presented medical issues that were urgent but not related to COVID-19, in an attempt to contain the spread of the virus in their territory.¹⁰ For example, a 45-year old Russian seafarer who was suffering a stroke was refused permission to enter a foreign port to receive medical treatment.¹¹ It was not until the intervention from two UN agencies, that the medical evacuation was finally authorised.¹²

⁷ WHO, 'Numbers at Glance' (WHO, 10 July 2020), available at <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019>> accessed 10 July 2020.

⁸ Emma Boyde, 'Russian Ship Outbreak Adds to Concerns in South Korea' (Financial Times, 23 June 2020), available at <<https://www.ft.com/content/66453542-05e9-3d1e-a51a-71afd0de485b>> accessed 30 June 2020.

⁹ WHO, 'Coronavirus disease (COVID-19) Advice for the Public' (4 June 2020), available at <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public>> accessed 10 July 2020.

¹⁰ IMO, 'Crew Changes and Repatriation of Seafarers – A Key Issue Explained' (16 June 2020), available at <<http://www.imo.org/en/MediaCentre/HotTopics/Pages/FAQ-on-crew-changes-and-repatriation-of-seafarers.aspx>> accessed 30 June 2020.

¹¹ IMO, 'Supporting Seafarers on the Frontline of COVID-19' (April 2020), available at <<http://www.imo.org/en/MediaCentre/HotTopics/pages/support-for-seafarers-during-covid-19.aspx>> accessed 30 June 2020.

¹² IMO, 'Supporting Seafarers on the Frontline of COVID-19' (April 2020), available at <<http://www.imo.org/en/MediaCentre/HotTopics/pages/support-for-seafarers-during-covid-19.aspx>> accessed 30 June 2020.

Examples like this clearly contravene the WHO International Health Regulations (IHR), 2005, as amended, Article 28 of which states that a ship shall not be prevented for public health reasons from calling at any point of entry nor from exercising free pratique.¹³ Furthermore, those instances spark fears as to whether seafarers who may become ill from COVID-19 while on a voyage will receive the immediate medical care they need. Finally, cases where seafarers are denied access to prompt and adequate medical care whilst working on board a ship evidence how vulnerable seafarers are during the pandemic and how necessary preventive measures are during this time of crisis.

An overview of existing guidelines and key information on health protection measures, including the use of PPE by seafarers during the COVID-19 pandemic, will follow.

What is the situation regarding health protection measures, including the use of PPE by seafarers during the pandemic?

Despite the fact that public concerns with regard to the challenges faced by seafarers during this time of crisis have been minimal, those challenges were in the epicentre of the work done by the ITF and the ICS who were instrumental in raising concerns about health protection measures for seafarers. In the early days of the pandemic, for example, the ITF and the ICS jointly called all governments and transport companies to implement all measures available to them to limit the risk of transmission of the new coronavirus to transport workers globally.¹⁴ In response to such calls, various guidelines and recommendations have been issued. The IMO, in particular, has issued a series of Circular Letters promoting safety issues relevant to seafarers in this context.¹⁵

To begin with, the International Maritime Health Association's (IMHA's) advice for shipping companies on measures to reduce the risk of infection from COVID-19 was issued on 26

¹³ It may be worth noting here that, under Article 42 of the WHO IHR, 2005, as amended, State parties are given the power to 'implement health measures, in accordance with their relevant national law and obligations under international law, in response to specific public health risks or public health emergencies of international concern which are otherwise prohibited under Article 28'. However, it is further explained in the same Article that 'such measures shall not be more restrictive of international traffic and not more invasive or intrusive to persons than reasonably available alternatives that would achieve the appropriate level of health protection'.

¹⁴ ITF, 'Coronavirus Update' (31 January 2020), available at <<https://www.seafarers.org/itf-coronavirus-update/>> accessed 20 July 2020.

¹⁵ For a full list, see IMO, 'Advice for IMO Member States, Seafarers and Shipping' (1 July 2020), available at <<http://www.imo.org/en/MediaCentre/HotTopics/Pages/Coronavirus.aspx>> accessed 20 July 2020.

January 2020.¹⁶ It suggests an approach that minimises the chances of seafarers contracting and spreading the new coronavirus on board ships. The approach includes a combination of measures revolving around physical distancing, hand hygiene, respiratory etiquette, symptom screening, cleaning and disinfection, masks and face coverings, testing, contact tracing, self-monitoring or quarantine, and access to medical facilities on shore. The advice also urges shipping companies to provide the members of a ship's crew with PPE (i.e. masks, goggles, face shields etc), maintaining that at least 5 pieces per person should be available on board.

This initial advice was followed by the ICS guidance for ship operators for the protection of the health of seafarers, which recommends the adoption of preventive measures, in order to limit and slow down widespread transmission of COVID-19 on board ships.¹⁷ It may be worth noting here that this ICS guidance is constantly under revision to take into account more factors as more information about COVID-19 becomes available and will continue to be updated during the course of the pandemic as required. According to its latest version, shipping companies should develop plans and procedures to address the risks associated with the pandemic to the health of seafarers and the safety of their ship operations and that shipboard measures to respond to the aforesaid risks may cover, amongst other things, measures to protect health and prevent infection, including monitoring and screening, PPE, testing and assessment, shipboard self-distancing, and cleaning and disinfection.¹⁸ With regard to embarkation and disembarkation during the pandemic, the guidance urges ship operators to require seafarers to complete a period of shipboard self-distancing, in order to monitor their health and to manage the risk that they may be asymptomatic carriers of the virus.¹⁹ Where maintaining physical distance is not a viable option, the ICS guidance recommends that ship operators should require seafarers to wear adequate PPE, such as face coverings.²⁰

¹⁶ IMHA, 'Reducing the Risk of Infection from 2019 new Coronavirus (2019-nCoV) – Information to Shipping Companies' (26 January 2020), available at <<https://www.imha.net/sites/default/files/2020-01/20200126%20CORONA%20advice%20shipping%20comp.pdf>> accessed 20 July 2020.

¹⁷ ICS, 'Guidance for Ship Operators for the Protection of the Health of Seafarers' (29 May 2020), in page 5, available at <<https://www.ics-shipping.org/docs/default-source/resources/covid-19-guidance-for-ship-operators-for-the-protection-of-the-health-of-seafarers-v2.pdf?sfvrsn=4>> accessed 20 July 2020.

¹⁸ ICS, 'Guidance for Ship Operators for the Protection of the Health of Seafarers' (29 May 2020), in page 7, available at <<https://www.ics-shipping.org/docs/default-source/resources/covid-19-guidance-for-ship-operators-for-the-protection-of-the-health-of-seafarers-v2.pdf?sfvrsn=4>> accessed 20 July 2020.

¹⁹ ICS, 'Guidance for Ship Operators for the Protection of the Health of Seafarers' (29 May 2020), in page 11, available at <<https://www.ics-shipping.org/docs/default-source/resources/covid-19-guidance-for-ship-operators-for-the-protection-of-the-health-of-seafarers-v2.pdf?sfvrsn=4>> accessed 20 July 2020.

²⁰ ICS, 'Guidance for Ship Operators for the Protection of the Health of Seafarers' (29 May 2020), in page 11, available at <<https://www.ics-shipping.org/docs/default-source/resources/covid-19-guidance-for-ship-operators-for-the-protection-of-the-health-of-seafarers-v2.pdf?sfvrsn=4>> accessed 20 July 2020.

On 27 March 2020, the IMO issued a preliminary list of recommendations for governments and relevant national authorities on the facilitation of crew changes and repatriations during the COVID-19 pandemic.²¹ In this context, the IMO recommended a list of measures to ensure health protection in ports.²² Crucially, the recommendations urge governments and relevant national authorities to request ships to report any cases of seafarers suffering COVID-19 related symptoms on board, to advise ships to regularly monitor the health of seafarers, to consider temporarily restricting seafarers to the ship while in port unless disembarking as part of a crew change or to receive emergency medical care and to limit, as far as possible, the number of interactions with shore-based personnel.²³ On the same line, the European Commission guidelines on the protection of health, repatriation and travel arrangements for seafarers, passengers and other persons on board ships recommend that contact between seafarers and shore-based personnel should be reduced to protect all persons from the risk of transmission of COVID-19 and that PPE should be worn for any necessary interactions.²⁴

More recently, the IMO distributed WHO information and guidance on the safe and effective use of PPE to support decisions on the use of PPE to minimise the risks of COVID-19 infection for seafarers.²⁵ What is particularly interesting in this respect, however, is that the WHO has updated its guidance to advise that governments should encourage the use of PPE (such as masks, face shields etc) in specific situations and settings as part of a comprehensive approach to suppress the transmission of the new corona virus.²⁶ Examples of where the general public should be encouraged to use medical and non-medical masks in areas with known or suspected community transmission include, amongst other things, settings where physical distancing cannot be achieved.²⁷ More specifically, the WHO recognises that those working in close

²¹ IMO, Circular Letter No 4204/Add 6, 27 March 2020.

²² IMO, Circular Letter No 4204/Add 6, 27 March 2020, in page 3.

²³ IMO, Circular Letter No 4204/Add 6, 27 March 2020, in page 3.

²⁴ European Commission, 'Guidelines on the Protection of Health, Repatriation and Travel Arrangements for Seafarers, Passengers and Other Persons on board Ships' (European Commission, 8 April 2020), in paragraphs 35 to 41, available at <https://ec.europa.eu/info/sites/info/files/guidelines-protection-health-repatriation-seafarers-passengers_0.pdf> accessed 10 July 2020.

²⁵ IMO, Circular Letter No 4204/Add 15, 6 May 2020, in paragraph 1.

²⁶ WHO, 'Advice on the Use of Masks in the context of COVID-19 – Interim Guidance' (5 June 2020), in pages 6 to 8, available at <[https://www.who.int/publications/i/item/advice-on-the-use-of-masks-in-the-community-during-home-care-and-in-healthcare-settings-in-the-context-of-the-novel-coronavirus-\(2019-ncov\)-outbreak](https://www.who.int/publications/i/item/advice-on-the-use-of-masks-in-the-community-during-home-care-and-in-healthcare-settings-in-the-context-of-the-novel-coronavirus-(2019-ncov)-outbreak)> accessed 20 July 2020.

²⁷ WHO, 'Advice on the Use of Masks in the context of COVID-19 – Interim Guidance' (5 June 2020), in pages 6 to 8, available at <[https://www.who.int/publications/i/item/advice-on-the-use-of-masks-in-the-community-during-home-care-and-in-healthcare-settings-in-the-context-of-the-novel-coronavirus-\(2019-ncov\)-outbreak](https://www.who.int/publications/i/item/advice-on-the-use-of-masks-in-the-community-during-home-care-and-in-healthcare-settings-in-the-context-of-the-novel-coronavirus-(2019-ncov)-outbreak)> accessed 20 July 2020.

contact or potential close contact with others should be encouraged to use non-medical masks to prevent the spread of the virus.²⁸

Finally, the IMO has engaged in substantial consultative work with global industry associations to address another key issue when it comes to concerns relating to the protection of the health of seafarers during the pandemic, namely that of shipboard interactions between ship and shore-based personnel. The COVID-19 related guidelines for ensuring a safe shipboard interface between ship and shore-based personnel, which were issued on 6 May 2020, propose practical, risk-based measures to reduce the risk of transmission during ship/shore interface in port calls.²⁹ Depending on the circumstances of each particular case, appropriate control measures may include conducting work normally carried out onboard remotely, minimising the number of persons attending on board, using outer walkways rather than accessing through the crew accommodation, limiting time on board to the absolute minimum necessary to perform duties onboard, cleaning and disinfecting, maintaining social distancing, providing sanitising stations at appropriate locations, or wearing face masks, to name but a few.³⁰

In response to the most recent guidance by the IMO and taken into account new information available about COVID-19, the ICS, working together with the IMHA and INTERTANKO, developed additional protocols to mitigate the risks of cases on board ships. These protocols were made available on 26 August 2020.³¹ They revolve around two tools to help ship operators manage cases on board.³² Recognising that COVID-19 cannot be satisfactorily excluded, the first tool identifies a process to follow when managing a larger number of potential cases of the new corona virus on board.³³ Critical in this process is the isolation of the suspected cases.³⁴

²⁸ WHO, 'Advice on the Use of Masks in the context of COVID-19 – Interim Guidance' (5 June 2020), in pages 6 to 8, available at <[https://www.who.int/publications/i/item/advice-on-the-use-of-masks-in-the-community-during-home-care-and-in-healthcare-settings-in-the-context-of-the-novel-coronavirus-\(2019-ncov\)-outbreak](https://www.who.int/publications/i/item/advice-on-the-use-of-masks-in-the-community-during-home-care-and-in-healthcare-settings-in-the-context-of-the-novel-coronavirus-(2019-ncov)-outbreak)> accessed 20 July 2020.

²⁹ IMO, Circular Letter No 4204/Add 17, 6 May 2020, in paragraph 5.

³⁰ IMO, Circular Letter No 4204/Add 17, 6 May 2020, in paragraph 16.

³¹ ICS, 'Coronavirus (COVID-19) – Protocols to Mitigate the Risks of Cases on board Ships' (26 August 2020), available at <<https://www.ics-shipping.org/docs/default-source/resources/covid19-protocols-to-mitigate-the-risks-of-cases-on-board.pdf?sfvrsn=4>> accessed 14 September 2020.

³² ICS, 'Coronavirus (COVID-19) – Protocols to Mitigate the Risks of Cases on board Ships' (26 August 2020), in page 3, available at <<https://www.ics-shipping.org/docs/default-source/resources/covid19-protocols-to-mitigate-the-risks-of-cases-on-board.pdf?sfvrsn=4>> accessed 14 September 2020.

³³ ICS, 'Coronavirus (COVID-19) – Protocols to Mitigate the Risks of Cases on board Ships' (26 August 2020), in page 3, available at <<https://www.ics-shipping.org/docs/default-source/resources/covid19-protocols-to-mitigate-the-risks-of-cases-on-board.pdf?sfvrsn=4>> accessed 14 September 2020.

³⁴ ICS, 'Coronavirus (COVID-19) – Protocols to Mitigate the Risks of Cases on board Ships' (26 August 2020), in page 5, available at <<https://www.ics-shipping.org/docs/default-source/resources/covid19-protocols-to-mitigate-the-risks-of-cases-on-board.pdf?sfvrsn=4>> accessed 14 September 2020.

The second tool highlights the importance of conducting polymerase chain reaction (PCR) tests to seafarers prior to boarding and also if COVID-19 is identified on board a ship.³⁵

Indeed, the IMHA recommends a matrix of quarantine and testing requirements for seafarers before joining a ship.³⁶ This includes a testing requirement in the seafarers' home country before they travel to the port of joining.³⁷ Upon arrival in the port where they are to join a ship, a second testing is prescribed, accompanied with a requirement for a two-weeks quarantine in suitable accommodation arranged and paid for by the shipping company.³⁸ Once the two-week quarantine is over, a third testing is advised, so that seafarers can join a ship safely.³⁹ If this is not possible, the IMHA suggests that seafarers should follow shipboard self-distancing for the first fourteen days on board or until a negative test result is available.⁴⁰ Irrespective of which policy is followed, the IMHA underlines that if any of the tests are positive or if seafarers develop any symptoms associated with the new corona virus, the affected seafarers should receive appropriate treatment and must not join the ship until they recover and are considered free of COVID-19 and non-infective to the rest of the crew.⁴¹

The IMO, the ILO and the WHO, in cooperation with international seafarers' and shipowners' organisations, therefore, appear to have been working together to ensure seafarers remain protected from COVID-19 while living and working on board ships. However, it is yet to be seen to what extent these recommendations will be followed in individual cases, since their implementation and enforcement are discretionary. Against this backdrop, this article will

³⁵ ICS, 'Coronavirus (COVID-19) – Protocols to Mitigate the Risks of Cases on board Ships' (26 August 2020), in page 6, available at < <https://www.ics-shipping.org/docs/default-source/resources/covid19-protocols-to-mitigate-the-risks-of-cases-on-board.pdf?sfvrsn=4>> accessed 14 September 2020.

³⁶ IMHA, 'Getting Health Seafarers to a Ship: Mitigating the Risk with Quarantine and Testing' (1 August 2020), in page 2, available at < <https://www.ics-shipping.org/docs/default-source/resources/getting-healthy-seafarers-to-a-shipD60DA4DEA5BD.pdf?sfvrsn=2>> accessed 14 September 2020.

³⁷ IMHA, 'Getting Health Seafarers to a Ship: Mitigating the Risk with Quarantine and Testing' (1 August 2020), in page 2, available at < <https://www.ics-shipping.org/docs/default-source/resources/getting-healthy-seafarers-to-a-shipD60DA4DEA5BD.pdf?sfvrsn=2>> accessed 14 September 2020.

³⁸ IMHA, 'Getting Health Seafarers to a Ship: Mitigating the Risk with Quarantine and Testing' (1 August 2020), in page 2, available at < <https://www.ics-shipping.org/docs/default-source/resources/getting-healthy-seafarers-to-a-shipD60DA4DEA5BD.pdf?sfvrsn=2>> accessed 14 September 2020.

³⁹ IMHA, 'Getting Health Seafarers to a Ship: Mitigating the Risk with Quarantine and Testing' (1 August 2020), in page 2, available at < <https://www.ics-shipping.org/docs/default-source/resources/getting-healthy-seafarers-to-a-shipD60DA4DEA5BD.pdf?sfvrsn=2>> accessed 14 September 2020.

⁴⁰ IMHA, 'Getting Health Seafarers to a Ship: Mitigating the Risk with Quarantine and Testing' (1 August 2020), in page 3, available at < <https://www.ics-shipping.org/docs/default-source/resources/getting-healthy-seafarers-to-a-shipD60DA4DEA5BD.pdf?sfvrsn=2>> accessed 14 September 2020.

⁴¹ IMHA, 'Getting Health Seafarers to a Ship: Mitigating the Risk with Quarantine and Testing' (1 August 2020), in page 3, available at < <https://www.ics-shipping.org/docs/default-source/resources/getting-healthy-seafarers-to-a-shipD60DA4DEA5BD.pdf?sfvrsn=2>> accessed 14 September 2020.

continue by considering what English private law says about the rights of seafarers to health protection and evaluating the redress options English private law provides to secure seafarers with the health protection measures (including the PPE) they need during the pandemic.

What does English private law say about the rights of seafarers to health protection?

The most obvious starting point in English private law is that all seafarers working on board UK flagged ships have a right to a safe place of work and safe work processes under the Merchant Shipping and Fishing Vessels (Health and Safety at Work) Regulations 1997, Regulation 5 (1) of which states that the maritime employer (i.e. the shipowner, the bareboat charterer etc) shall ensure the health and safety of seafarers so far as is reasonably practicable.⁴² Sub-paragraphs (a) and (b) of the same Regulation further explain that the aforesaid duty shall be met, amongst other things, by the avoidance of risks, which include the replacement of dangerous practices by non-dangerous or less dangerous practices, and the evaluation of unavoidable risks and the taking of action to reduce them. In the context of the COVID-19 pandemic, this may prescribe a need to follow on board ships the recommended protocols with regard to the protection of the health of seafarers from risks associated with the new corona virus.⁴³ Indeed, Regulation 5 (2) (g) of the 1997 Regulations explains that the matters to which those duties extend include the provision and maintenance of an environment for seafarers on board ships that is, so far as is reasonably practicable, safe and without risk to health.

In addition to this general right, all seafarers working on board British ships have a more specific right to suitable PPE under the Merchant Shipping and Fishing Vessels (PPE) Regulations 1999.⁴⁴ In particular, Regulation 5 provides that the use of PPE is required when risks cannot be avoided or reduced to an acceptable level by other ways. Such ways may include any systems of work that are safe and without risk to health, any collective protection or any other ways which are in use equally or more effective.⁴⁵ Arguably, the case of COVID-

⁴² Of course, Regulation 5 (1) of the Merchant Shipping and Fishing Vessels (Health and Safety at Work) Regulations 1997 does not apply to ships registered outside the UK. However, Regulation 28 extends any rights to inspection and detention to non-UK ships when the ships are in a UK port, and when conditions on board are clearly hazardous to health and safety.

⁴³ See, for example, ICS, 'Guidance for Ship Operators for the Protection of the Health of Seafarers' (29 May 2020), in page 11, available at <<https://www.ics-shipping.org/docs/default-source/resources/covid-19-guidance-for-ship-operators-for-the-protection-of-the-health-of-seafarers-v2.pdf?sfvrsn=4>> accessed 20 July 2020.

⁴⁴ While the Merchant Shipping and Fishing Vessels (PPE) Regulations 1999 apply to all UK ships (Regulation 3 (1)), ships which are not UK ships when in UK waters are subject to Regulations 15 to 17 covering inspection and detention, particularly when conditions on board are clearly hazardous to health and safety.

⁴⁵ Merchant Shipping and Fishing Vessels (PPE) Regulations 1999, Regulation 5.

19 falls within the scope of this Regulation, especially where physical distancing cannot be achieved, and the use of PPE (i.e. face masks) becomes a viable option, through which the chances of contracting and spreading COVID-19 on board ships can be limited. In such circumstances, every maritime employer shall ensure that seafarers are provided with necessary PPE and that such PPE is suitable.⁴⁶ According to Regulation 6 (2) of the 1999 Regulations, PPE shall not be considered suitable unless it is appropriate for the risks to which the seafarer is exposed, to the task which he/she is performing and to the existing conditions at the work place, without itself leading to any increased risk, it correctly fits the seafarer, it takes into account ergonomic requirements and the seafarer's state of health and it is compatible with any other equipment the seafarer has to use at the same time.

Of course, it is recognised that the 1997 and the 1999 Regulations implement the European Union (EU) Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the health and safety of workers at work and the EU Council Directive 89/656/EEC on the minimum health and safety requirements for the use by employees of PPE in the workplace respectively. However, they can still be relied upon during the transition period of the UK's exit from the EU. That is because all domestic legislation promulgated under EU law, including all domestic statutory instruments emanating from EU Directives, continue to have effect in domestic law during this transition period, under the terms of the EU (Withdrawal Agreements) Act 2020. Furthermore, the 1997 and the 1999 Regulations align with the UK's international obligations with regard to health and safety and the use of PPE under the MLC, 2006, as those obligations are prescribed in Regulation 4.3, paragraph 3 of which states that each Member shall adopt laws and regulations addressing issues in relation to and setting standards for occupational safety and health protection,⁴⁷ and that is likely to secure their application even after the end of the transition period.

What is more important in this respect, however, is to note that both the 1997 and the 1999 Regulations remain actionable themselves in tort, and so seafarers can rely on them directly to bring a legal challenge. Unlike shore-based employees, whose only option pursuant to recent amendments made to the Health and Safety at Work Act 1974 by Section 69 of the Enterprise

⁴⁶ Merchant Shipping and Fishing Vessels (PPE) Regulations 1999, Regulation 6 (1).

⁴⁷ MCA, 'MLC 2006 Titles 1 to 5: Regulations, Guidance and Information' (7 June 2018), available at <<https://www.gov.uk/guidance/mlc-2006-titles-1-to-5-regulations-guidance-and-information>> accessed 24 July 2020.

and Regulatory Reform Act 2013 is to bring a claim in negligence when injury or death occurs in the course of their employment, seafarers can still take advantage of strict liability provisions, like the ones under the 1997 and the 1999 Regulations. Indeed, the scope of the 2013 Amendments is limited to any regulations made under the Health and Safety at Work Act 1974, leaving unaffected any merchant shipping regulations, including the 1997 and the 1999 Regulations, which are made under Sections 85 and 86 of the Merchant Shipping Act 1995. But, even if seafarers were not able to rely directly on the 1997 and the 1999 Regulations to pursue a legal challenge in the event of being exposed to or getting infected with COVID-19 whilst in the employment of the shipowner, a claim under the tort of negligence will be available to them. All shipowners owe seafarers the same non-delegable common law duty of care as any shore-based employer.⁴⁸ In other words, an obligation rests on shipowners to provide seafarers with a reasonably safe workplace, system of work and competent crew.⁴⁹

Most certainly, proving a claim in negligence is much harder than establishing liability under the 1997 and the 1999 Regulations.⁵⁰ Liability under the 1997 and the 1999 Regulations is strict, subject only to the defence of lack of reasonable practicability, and it is for the defendant (i.e. the shipowner) to prove that it was not reasonably practicable to do more than was in fact done to satisfy the duty or requirement.⁵¹ The test for negligence, on the other hand, is much harder to satisfy, since it requires claimants (i.e. seafarers) to prove that the defendant failed to take steps which a reasonable person would have taken, or did take steps which a person taking reasonable precautions would not have taken.⁵² The core question is, therefore, to ascertain what steps reasonable shipowners can or cannot be expected to take to provide seafarers with a safe workplace, a safe system of work and competent crew in particular circumstances.

In order to address this question, a court will take into account the probability of the damage occurring, the likely gravity of the damage, were it occur, the cost to implement precautionary measures, and the social value of the activity.⁵³ In particular in the context of the COVID-19 pandemic, key issues are likely to be the probability of seafarers contracting the virus on board

⁴⁸ *Saul v Saint Andrews Steam Fishing Co (The St Chad)* [1965] 2 Lloyd's Rep 1 (CA) 7 per Lord Harman.

⁴⁹ *Wilson & Clyde Coal Company Ltd v English* [1938] AC 57 (HL) 65 per Lord Thankerton, 75 per Lord Macmillan, 78 per Lord Wright, 87 per Lord Maughan.

⁵⁰ *Cairns v Northern Lighthouse Board* [2013] CSOH 22, [43] per Lord Drummond Young.

⁵¹ Merchant Shipping and Fishing Vessels (Health and Safety at Work) Regulations 1997, Regulation 26; Merchant Shipping and Fishing Vessels (PPE) Regulations 1999, Regulation 13.

⁵² *Blyth v Birmingham Waterworks Co* 156 ER 1047; (1865) 11 Exch 781 (CA).

⁵³ *Bolton v Stone* [1951] AC 850 (HL).

ships if suitable health protection measures were not taken and the availability of such health protection measures. Furthermore, the state of knowledge and information available to shipowners about precautionary measures against risks associated with the new corona virus will be factored in, especially since shipowners should take positive thought for the safety of their crewmembers in the light of what they already know or ought to have known, and keep reasonably abreast of developing knowledge.⁵⁴ Finally, the provisions of the 1997 and the 1999 Regulations and the guidance produced by the IMO, the ILO and the WHO, in cooperation with international seafarers' and shipowners' organisations, are likely to inform the content of the shipowner's obligation to provide a reasonably safe workplace and system of work.⁵⁵

Apart from the obvious difficulties in establishing negligence on the part of the shipowner (although it is likely for negligence to be found in cases where shipowners do not provide seafarers with any form of health protection measures (i.e. social distancing processes, enhanced cleaning and disinfection procedures, hand sanitisers and face masks where appropriate)), there are further limits to what a common law negligence claim can achieve in COVID-19 related cases. First, there must be a *de minimis* threshold of damage.⁵⁶ This could be a troublesome requirement, as asymptomatic COVID-19 is very common. It seems, thus, necessary to draw a distinction between symptomatic and asymptomatic COVID-19, in order to determine whether getting infected with COVID-19 could be a compensable damage.

Take, for example, someone who contracts COVID-19, and, as a result, falls ill. In such circumstances, establishing the minimum threshold of damage required for a claim in negligence will be much more straightforward. That is because COVID-19, when symptomatic, can have an adverse effect on bodily functions. Damages for any pain, suffering, anxiety caused by the diagnosis plus financial damages for cost of care, loss of earnings will in principle be recoverable. Where, on the other hand, someone gets infected with COVID-19, but suffers no symptoms whatsoever, a question arises as to whether mere infection should constitute compensable damage. In answering this question, pleural plaques litigation may be instructive. That is because there are some analogies between pleural plaques and COVID-19 cases. Like

⁵⁴ *Bussey v 00654701 Ltd (formerly Anglia Heating Ltd)* [2018] EWCA Civ 243, [29] to [40] per Lord Justice Jackson. See also *Thompson v Smiths Ship Repairers (North Shields) Ltd* [1948] QB 405 (QB) 415 to 416 per Mr Justice Mustill.

⁵⁵ *Kennedy v Cordia (Services) LLP (Scotland)* [2016] UKSC 6, [110] to [111].

⁵⁶ *Reilly v Merseyside HA* (1994) 23 BMLR 26 (CA).

the plaques, COVID-19 can be symptomless, does not always give rise to a disease, but it can lead to more serious health conditions (i.e. pneumonia and lung failure).

Indeed, the House of Lords in *Johnston v NEI International Combustion Ltd* held that the pleural plaques did not meet the *de minimis* threshold of damage requirement.⁵⁷ In support of this conclusion the House of Lords gave four reasons, which could be equally applicable to COVID-19 cases. First, it was held that the asbestos fibre penetration, the risk that the asbestos fibre could give rise to disease and the anxiety generated about this risk did not amount to injury.⁵⁸ Furthermore, it was explained that no claim can be made for the chance of contracting a future disease, unless the chance is founded upon some physical injury, and, in pleural plaques cases, there is no such physical injury.⁵⁹ Both reasons could be equally true with regard to COVID-19 cases, especially where the only ‘damage’ suffered is the infection and the risk that the infection could give rise to symptoms, including any anxiety in relation to this risk.

According to the House of Lords, the pleural plaques did not increase susceptibility to other asbestos-related diseases, or shorten life expectancy, so those heads of damage were also not available.⁶⁰ While research with regard to COVID-19 is still ongoing, at least at the moment, there is not enough evidence suggesting any long-term effects of COVID-19 to those infected. Finally, the House of Lords held that policy reasons dictate against holding pleural plaques to be actionable damage.⁶¹ In particular, it was explained that finding that pleural plaques themselves were ‘damage’ would encourage litigation by employees against employers and that the costs of such litigation will far exceed the damage recovered.⁶² Those policy considerations are not less true when it comes to COVID-19 cases. In particular in the context of the COVID-19 pandemic, holding that mere infection is damage could lead to a floodgate of claims, given how widespread the transmission of COVID-19 is in the community.

It might be well arguable that those seafarers who contract COVID-19, but suffer no symptoms whatsoever, may be able to surpass the minimum threshold of damage requirement, if they bring their claim in contract, instead of tort. That possibility was discussed in *obiter* by Lord

⁵⁷ *Johnston v NEI International Combustion Ltd* [2007] UKHL 39.

⁵⁸ *Johnston v NEI International Combustion Ltd* [2007] UKHL 39, [42] per Lord Hope of Craighead and [73] per Lord Scott of Foscote.

⁵⁹ *Johnston v NEI International Combustion Ltd* [2007] UKHL 39, [12] to [22] per Lord Hoffman.

⁶⁰ *Johnston v NEI International Combustion Ltd* [2007] UKHL 39, [11] per Lord Hoffman.

⁶¹ *Johnston v NEI International Combustion Ltd* [2007] UKHL 39, [34] per Lord Hoffman.

⁶² *Johnston v NEI International Combustion Ltd* [2007] UKHL 39, [34] per Lord Hoffman.

Scot of Fosco in *Johnston v NEI International Combustion Ltd* where it was highlighted that, while damage is the gist of a negligence claim, damage does not have to be proven in order to establish a cause of action for breach of contract.⁶³ Accordingly, in the case of asymptomatic COVID-19, seafarers might be able to claim an award of contractual damages against the shipowner for subjecting them to the risk of contracting COVID-19. Under Section 42 of the Merchant Shipping Act (MSA), 1995, every shipowner owes seafarers an implied by law contractual duty to provide a seaworthy ship for the voyage at the time when the voyage commences and to keep the ship in a seaworthy condition during the voyage. Such contractual duty is commensurate with the tortious duty of care, meaning that it requires shipowners to provide a safe place of work, a safe system of work and competent crew.⁶⁴ If it is, therefore, accepted that the tortious duty of care was broken by the shipowner's failure to take suitable measures to protect the health of seafarers from risks associated with the new corona virus in the course of their employment, it would follow that the shipowner was in breach also of his/her contractual duty, leaving, in principle, a door open for a contractual claim.

Secondly, causation is likely to prove problematic. In a typical tort case, it is necessary to prove on the balance of probabilities that a breach of duty caused an injury and that the injury would not have happened but for that breach.⁶⁵ If the injury would have happened anyway, because of another tortious or non-tortious reason, the breach did not cause the injury.⁶⁶ In the COVID-19 context, however, that would be hard to establish, as it is impossible to know exactly how and when an infection occurs. In order to address these difficulties, the courts have developed exceptional theories to establish causation. It is submitted that the doctrine of material contribution (the principal exceptional theory of causation) should apply in COVID-19 cases. So far, the doctrine of material contribution has been used to prove causation in workplace disease claims, particularly in cases where employees have developed lung disease because of exposure to asbestos in the course of their employment.⁶⁷ According to this doctrine, causation will be established where it is possible to prove that the breach contributed cumulatively to the seafarer's illness or that the breach increased the likelihood of the seafarer being infected and

⁶³ *Johnston v NEI International Combustion Ltd* [2007] UKHL 39, [74].

⁶⁴ K X Li and other, 'International Maritime Conventions: Seafarers' Safety and Human Rights' (2002) 33 (3) *Journal of Maritime Law and Commerce* 381, 388.

⁶⁵ *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428 (QB).

⁶⁶ *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428 (QB).

⁶⁷ See, for example, *McGhee v National Coal Board* [1973] 1 WLR 1 (HL); *Fairchild v Glenhove Funeral Services Ltd* [2003] 1 AC 32 (HL); *Barker v Corus UK Ltd* [2006] 2 AC 572 (HL); *Garner v Salford County Council* [2013] EWHC 1573 (QB).

falling ill with COVID-19. What is worth noting in this respect, however, is that the doctrine of material contribution operates under some strict conditions. Hence, its potential application to COVID-19 cases needs to be treated with caution.

Put in simple terms, for the doctrine of material contribution to establish causation, the following requirements must be fulfilled cumulatively. To begin with, there must be only one agent that could have caused the claimant's damage. In COVID-19 cases, the virus itself should be the relevant agent. The claimant must be exposed to that agent both tortiously (as where the shipowner does not take any measures for the protection of the health of seafarers during interactions with shore-based personnel or where the shipowner does not adopt the relevant protocols for safe crew changes) and innocently (for example, where seafarers contract the new corona virus before joining the ship). Furthermore, the defendant must fail to take precautions against the risk of the agent causing the claimant damage. In the context of COVID-19, establishing the shipowner's failure to adopt suitable health protection measures (i.e. physical distancing measures, disinfectants, and PPE) would be sufficient. Accordingly, the defendant's breach must precede the claimant suffering the damage which that agent causes. If, for example, a seafarer suffered COVID-19 related symptoms before boarding a vessel, this requirement would not be fulfilled, and so causation would fail. Finally, the claimant must not be able to prove, on the balance of probabilities, that his/her damage was caused by the particular exposure to the agent which the defendant's breach brought about, and the claimant's failure to prove that must be because of the current limits of science. That is the case in the context of COVID-19, as it is impossible to determine when and how infection takes place.

Finally, the most important limit to what a common law negligence claim can achieve in COVID-19 related cases emerges from the available redress options. In principle, the aim of a claim in negligence is to provide for compensation. Understandably, this is likely to be of little or no value to seafarers who work and live onboard unsafe ships during this pandemic. What is more important in this context is that shipowners act proactively by taking the necessary precautions to safeguard the health and safety of seafarers. To achieve this, the preferable remedies would be an injunction or a mandatory order. However, those remedies are not generally available in negligence claims.⁶⁸ It is, thus, necessary to consider what the MLC,

⁶⁸ *Miller v Jackson* [1977] QB 966 (CA) 980 per Lord Denning.

2006, says about the right of seafarers to health protection and whether the Convention can provide seafarers with remedial alternatives in COVID-19 related cases.

Can the Maritime Labour Convention (MLC), 2006, offer an alternative remedy to seafarers?

The Maritime Labour Convention (MLC), 2006, concentrates in a comprehensive manner the rights of seafarers in relation to labour standards, which set out the minimum requirements for decent working and living conditions for more than one million seafarers worldwide. In addition, the MLC, 2006, creates, through Title 5, clear mechanisms to ensure that rights and principles under the Convention are properly complied with and enforced. It is submitted that seafarers can take advantage of these compliance and enforcement systems to seek the immediate relief they need in cases where their health and safety is jeopardised due to inappropriate work processes and the lack of adequate health protection measures (such as masks, gloves, goggles, face shields, or disinfectants) during the COVID-19 pandemic.

Under Article IV of the MLC, 2006, every seafarer has the right to a safe and secure workplace that complies with safety standards, to decent working and living conditions on board ship and to health protection, medical care, welfare measures and other forms of social protection.⁶⁹ What is more, Title 4 of the Convention contains a group of provisions relating to health protection, medical care, welfare and social security. Regulation 4.1, in particular, states that seafarers shall be provided with adequate measures for the protection of their health and that they shall have access to prompt and adequate medical care whilst working on board.⁷⁰ According to paragraph 4 of Regulation 4.1, the standards for measures aimed at providing seafarers with the health protection and the medical care they need shall be as comparable as possible to that which is generally provided to shore-based employees.⁷¹ This is further elaborated in Standard A4.1, paragraph 1 of which explains that those measures shall not be limited to treatment of sick or injured seafarers but shall also include preventive measures.⁷²

At the beginning of April 2020, and in response to numerous inquiries by governments and seafarers' and shipowners' organisations on how to address the complexities of the current

⁶⁹ MLC, 2006, Article IV, in paragraphs 1, 3 and 4.

⁷⁰ MLC, 2006, Regulation 4.1, in paragraph 1.

⁷¹ MLC, 2006, Regulation 4.1, in paragraph 4.

⁷² MLC, 2006, Standard A4.1, in paragraph 1.

crisis in light of the provisions of the MLC, 2006, the International Labour Organisation (ILO) drafted an information note through which it shed light on the application of the provisions of the MLC, 2006, during the COVID-19 pandemic.⁷³ The information note is currently in its second revision. With regard to health protection and medical care, ILO made clear that the rights of seafarers must be respected.⁷⁴ In particular, ILO explained that flag States must ensure that all seafarers on ships that fly their flag are provided with adequate measures for the protection of their health, including the provision of alcohol-based disinfectants and personal protective equipment (such as masks, gloves etc), and that they receive prompt and adequate medical care onboard and ashore when necessary.⁷⁵

Where seafarers are concerned about their possible exposure to COVID-19 and the availability on board of health protection measures, they can raise their concerns in the form of a complaint requesting an inspection from the flag State. Pursuant to Standard A5.1.4 of the MLC, 2006, flag States must take necessary steps to investigate any complaints received that ships that fly their flag do not conform to the requirements of the Convention, as long as they are not manifestly unfounded.⁷⁶ In the context of the COVID-19 pandemic, two issues might arise. First, seafarers might be reluctant to submit such complaints out of fear of losing future employment opportunities. The Convention itself makes an attempt to address this fear by ensuring the sources of any grievance or complaint are treated as confidential.⁷⁷ However, it cannot be overlooked that, in practice, such anonymity cannot be easily achieved.

In such circumstances, seafarers might be able to ensure their anonymity if NGOs or Unions file a complaint on their behalf. That is provided under the Convention, Guideline B5.1.4 of which explains that such complaints may be submitted by seafarers themselves or by representatives of seafarers (i.e. a professional body, an association, a trade union or any person interested in the safety of the ship, including an interest in safety or health hazards to seafarers

⁷³ ILO, 'Information Note on Maritime Labour Issues and Coronavirus (COVID-19) – Revised Version 2.0' (10 July 2020), available at <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/genericdocument/wcms_741024.pdf> accessed 27 July 2020.

⁷⁴ ILO, 'Information Note on Maritime Labour Issues and Coronavirus (COVID-19) – Revised Version 2.0' (10 July 2020), in paragraphs 8 to 12, available at <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/genericdocument/wcms_741024.pdf> accessed 27 July 2020.

⁷⁵ ILO, 'Information Note on Maritime Labour Issues and Coronavirus (COVID-19) – Revised Version 2.0' (10 July 2020), in paragraphs 8 to 12, available at <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/genericdocument/wcms_741024.pdf> accessed 27 July 2020.

⁷⁶ MLC, 2006, Standard A5.1.4, in paragraph 5.

⁷⁷ MLC, 2006, Standard A5.1.4, in paragraph 10.

on board).⁷⁸ In particular in the context of the COVID-19 pandemic, seafarers can also address their concerns to the Seafarer Crisis Action Team (SCAT), a dedicated team which has been established by the International Maritime Organisation (IMO).⁷⁹ Through this team, the IMO works alongside the ILO and other organisations like the ITF and the ICS to ensure that seafarers and their relatives can raise their concerns freely and that individual cases are resolved promptly.⁸⁰ Arguably, that could be another outlet for those seafarers who are concerned about the working and living conditions on ships, but are afraid to raise such concerns.

The second issue revolves around how such inspections could be conducted safely during the pandemic. When a complaint is received, flag State inspectors shall be issued with clear guidance as to the tasks to be performed and provided with proper credentials to board the relevant ship, in order to carry out any necessary examinations, tests or inquiries to satisfy themselves that the requirements of the MLC, 2006, are being strictly observed.⁸¹ Most certainly, during the COVID-19 pandemic, boarding a ship for inspection might be more difficult than usual due to containment measures. However, it is highly unlikely that such difficulties will be enough to prevent any inspections required under Regulation 5.1.4 of the Convention from taking place. The ILO recognised that the intermediate and renewal inspections required under Regulation 5.1.3 of the Convention may be delayed when the extraordinary circumstances of this pandemic lead to situations of force majeure.⁸² In such circumstances, measures, such as the extension of the validity of certificates and the issuance of interim certificates may be adopted by governments, when and as strictly necessary.⁸³

While such exceptional measures might be appropriate for regular inspections, it is submitted that they should not be extended to cases where an inspection needs to be conducted in response to a complaint alleging a breach of the requirements of the MLC, 2006. The specific purpose

⁷⁸ MLC, 2006, Guideline B5.1.4, in paragraph 3.

⁷⁹ IMO, 'Supporting Seafarers on the Frontline of COVID-19' (1 April 2020), available at <<http://www.imo.org/en/MediaCentre/HotTopics/pages/support-for-seafarers-during-covid-19.aspx>> accessed 30 June 2020.

⁸⁰ IMO, 'Supporting Seafarers on the Frontline of COVID-19' (1 April 2020), available at <<http://www.imo.org/en/MediaCentre/HotTopics/pages/support-for-seafarers-during-covid-19.aspx>> accessed 30 June 2020.

⁸¹ MLC, 2006, Standard A5.1.4, in paragraph 7(a) and (b).

⁸² ILO, 'Information Note on Maritime Labour Issues and Coronavirus (COVID-19) – Revised Version 2.0' (10 July 2020), in paragraphs 39 to 43, available at <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/genericdocument/wcms_741024.pdf> accessed 27 July 2020.

⁸³ ILO, 'Information Note on Maritime Labour Issues and Coronavirus (COVID-19) – Revised Version 2.0' (10 July 2020), in paragraphs 39 to 43, available at <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/genericdocument/wcms_741024.pdf> accessed 27 July 2020.

of inspections required under Regulation 5.1.4 of the Convention is to secure seafarers with decent working and living conditions on ship, especially when there are violations of fundamental rights of seafarers (like the right to health protection), or when there are risks to the health, safety or security of seafarers.⁸⁴ Accordingly, any suspension, delay or prohibition of such inspections during the COVID-19 pandemic would defeat their purpose in a time that is needed the most. This, taken in conjunction with the fact that, in the context of the MLC, 2006, the test for force majeure is that of absolute and material impossibility,⁸⁵ suggests that flag States should make every attempt to comply with their obligations under the Convention and that non-compliance will not be justified in cases where compliance is simply more difficult than usual, as where social distancing measures and personal protective equipment (such as, masks, gloves, and face shields) have to be taken during the course of inspections.

If an inspection reveals a breach of the requirements of the MLC, 2006, flag State inspectors shall require that any deficiencies are remedied.⁸⁶ During the COVID-19 pandemic, for example, flag State inspectors may require shipowners to make personal protective equipment (such as masks) available on the ground to those seafarers in need. Additionally, flag State inspectors can go as far as to prohibit a ship from leaving port until necessary actions are taken, but only where it is established that a significant risk to seafarers' safety, health or security exists.⁸⁷ While all reasonable efforts shall be made to avoid a ship being unreasonably detained or delayed,⁸⁸ such extraordinary measures might be inevitable in COVID-19 related cases, if flag States wish to stop any ongoing violations of the rights of seafarers to a safe and secure workplace, to health protection and to decent working and living condition on their tracks.

Alternatively, seafarers may take advantage of port State inspection procedures, although their scope is much more limited. In general, inspections in port are reduced to a review of the maritime labour certificate and the declaration of maritime labour compliance required under Regulation 5.1.3 of the MLC, 2016, unless some exceptional circumstances apply.⁸⁹ Indeed, there are four explicit grounds upon which port States are authorised to carry out more detailed

⁸⁴ MLC, 2006, Standard A5.1.4.

⁸⁵ ILO, 'Information Note on Maritime Labour Issues and Coronavirus (COVID-19) – Revised Version 2.0' (10 July 2020), in paragraph 40, available at <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/genericdocument/wcms_741024.pdf> accessed 27 July 2020.

⁸⁶ MLC, 2006, Standard A5.1.4, in paragraph 7(c).

⁸⁷ MLC, 2006, Standard A5.1.4, in paragraph 7(c).

⁸⁸ MLC, 2006, Standard A5.1.4, in paragraph 15.

⁸⁹ MLC, 2006, Regulation 5.2.1, in paragraph 2.

inspections to ascertain the working and living conditions on board ships,⁹⁰ and, in practice, at least two of those grounds can prove useful in COVID-19 related cases. More specifically, such detailed inspections can be conducted by port States, amongst other things, where there are clear grounds for believing that the working and living conditions on the ship do not conform to the requirements of the MLC, 2006,⁹¹ and where there is a complaint alleging that specific working and living conditions on the ship are defective.⁹²

In the former case, port States must investigate the extent to which the working and living conditions on the ship represent a clear hazard to the safety, health or security of seafarers or the extent to which any discrepancies constitute a serious breach of the requirements of the MLC, 2006.⁹³ In the context of the COVID-19 pandemic, a ‘clear hazard’ to the health of seafarers may be established where it is evident that seafarers have no access to health protection measures, including suitable PPE. Likewise, a failure to provide seafarers with proper health protection measures during this time of crisis may constitute a ‘serious breach’ of Regulation 4.1 of the Convention. As explained in Guideline B5.2.1 of the MLC, 2006, the ‘seriousness’ of the breach shall be determined in light of the nature of the deficiency concerned, especially when fundamental rights and principles or seafarers’ employment and social rights under Articles III and IV, like the right of seafarers to health protection, are violated.⁹⁴ Where, on the other hand, a complaint has been submitted, port State inspections shall be limited to matters within the scope of the complaint.⁹⁵ In such circumstances, it is, thus, essential that seafarers, who worry that the measures taken by shipowners for the protection of their health are inadequate and that the lack of PPE will expose the members of a ship’s crew to considerable risks of COVID-19 infection, make a marked reference of such concerns in their complaint.

In parallel with flag State inspection procedures, where it is verified that the working and living conditions on the ship do not conform to the requirements of the MLC, 2006, as where no measures have been taken to protect the health of seafarers from the new corona virus, port State inspectors must bring any non-conformities to the attention of the master and require their

⁹⁰ MLC, 2006, Standard A5.2.1, in paragraph 1.

⁹¹ MLC, 2006, Standard A5.2.1, in paragraph 1(b).

⁹² MLC, 2006, Standard A5.2.1, in paragraph 1(d).

⁹³ MLC, 2006, Standard A5.2.1, in paragraph 1.

⁹⁴ MLC, 2006, Guideline B5.2.1, in paragraph 2.

⁹⁵ MLC, 2006, Standard A5.2.1, in paragraph 3.

rectification.⁹⁶ In addition, port State inspectors may notify a representative of the flag State, or provide the competent authorities of the next port of call with the relevant information.⁹⁷ Finally, where the non-conformities place a clear danger to the safety, health or security of seafarers (as seen earlier, a failure to provide adequate health protection measures, including suitable PPE for seafarers in the current crisis may violate the right of seafarers to health protection pursuant to Article IV of the MLC, 2006), or if they constitute a serious or repeated breach of the requirements of the Convention (that may be especially important in a scenario where a shipowner has failed to comply with a previous advice to provide seafarers with health protection measures), port State inspectors have the power to prevent the ship from sailing until the working and living conditions on board have been rectified, or until the port State inspectors have accepted a plan of action for their rectification which will be implemented in an expeditious manner. The latter can ensure that an ongoing breach of the shipowner's duty to provide seafarers with a safe workplace and system of work is quickly addressed.

Conclusion

At a time where all countries are encouraged to give priority to the effective protection of the health and safety of seafarers and ensure they have access to medical care in all circumstances in line with other key workers, there are more and more concerns raised with regard to inappropriate work processes that put in danger the health of thousands of seafarers living and working on board ships. The present article has concentrated the legal rights of seafarers to health protection measures during the pandemic and has evaluated any redress options available to them. While tort claims might be an option for those seafarers falling ill with COVID-19, they are highly unlikely to be of any help to almost one million seafarers working and living on board ships during this time of crisis. To secure decent working and living conditions on board ships and to safeguard seafarers' health, the compliance and enforcement systems of the MLC, 2006, might offer a preferable remedial alternative. And, on a positive note, COVID-19 may provide a window of opportunity to make those compliance and enforcement mechanisms more effective.

⁹⁶ MLC, 2006, Standard A5.2.1, in paragraph 4

⁹⁷ MLC, 2006, Standard A5.2.1, in paragraph 4