

# The Problem of Seafarer Replacement Arising from the COVID-19 Pandemic and Japan's Response: From the Perspective of the 2006 Maritime Labour Convention

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## 1. The COVID-19 Pandemic and the Problem of Seafarer Replacement and Repatriation

Travel restrictions imposed by countries in response to the outbreak of the novel coronavirus have led to a situation in which many seafarers are unable to disembark or are not being repatriated to their home countries. Given that extended voyages increase health risks for seafarers, this situation has become not only an issue in terms of labor agreements relating to shipping but also a health-related human rights and humanitarian issue. According to the International Maritime Organization (IMO), 400,000 seafarers remain on board vessels due to repatriation difficulties, despite having expired contracts, as of December 2020.<sup>1</sup>

The UN Secretary-General has repeatedly raised this problem and urged countries to address it.<sup>2</sup> The UN General Assembly is also urging countries to take action, pointing to requests issued by the specialized agencies of the United Nations including the IMO, International Labour Organization (ILO),<sup>3</sup> as well as to seafarer replacement protocols prepared by seafarers' unions including the International Chamber of Shipping (ICS) and the International Transport Workers' Federation.<sup>4</sup> Nevertheless, according to Kunio Miyashita, who summarized the ICS's position, "many countries have introduced national or regional restrictions that are in violation of international regulations," and "in reality, shipping companies have no option but to comply with those national and regional restrictions"<sup>5</sup>.

To deal with the problem of seafarer replacement and repatriation, the IMO<sup>6</sup> and ILO<sup>7</sup>

<sup>1</sup> IMO Website "Crew changes: A humanitarian, safety and economic crisis"  
<https://www.imo.org/en/MediaCentre/HotTopics/Pages/FAQ-on-crew-changes-and-repatriation-of-seafarers.aspx> (visited on March 12, 2021)

<sup>2</sup> UN Website "Statement attributable to the Spokesman for the Secretary-General on the repatriation of seafarers"  
<https://www.un.org/sg/en/content/sg/statement/2020-06-12/statement-attributable-the-spokesman-for-the-secretary-general-the-repatriation-of-seafarers> (visited on March 12, 2021)

<sup>3</sup> The policies of member states, employers and workers in response to the COVID-19 pandemic are summarized on the ILO website. ILO Website "Country policy responses", <https://www.ilo.org/global/topics/coronavirus/regional-country/country-responses/lang--en/index.htm> (visited on March 28, 2021)

<sup>4</sup> A/RES/75/17, 7 December 2020.

<sup>5</sup> Miyashita, K., "Gaikokaiun-gyo e no eikyo to uizu-korona jidai no taio" (the impact on oceangoing shipping and response to the "with coronavirus" era), White Paper on the Oceans and Ocean Policy in Japan 2021, p. 33.

<sup>6</sup> IMO, Circular Letter No.4204/Add.14/Rev.1, 5 October 2020.

<sup>7</sup> ILO, GB.340/Resolution (Rev.2), 8 December 2020.

have been encouraging governments to recognize seafarers as “key workers”<sup>8</sup> and thereby allow seafarers to disembark from and board ships and travel by air.<sup>9</sup> According to the IMO, many countries have taken measures to replace or repatriate seafarers as a result of these efforts, and 55 countries, including Japan, have designated seafarers as “key workers” as of February 2021.<sup>10</sup> At the same time, however, the IMO has also voiced concern about countries that have not taken such measures and that continue to impose travel restrictions.<sup>11</sup>

In this paper, I will introduce the issue of seafarer replacement and repatriation that arose in 2020 and present standards in the Maritime Labour Convention of 2006,<sup>12</sup> which is the relevant international convention in this case. I will then evaluate actions taken by the Japanese government against the backdrop of the recent COVID-19 pandemic.

## 2. The ILO’s Maritime Labour Convention of 2006 (MLC)

The Maritime Labour Convention (MLC) was adopted by the International Labour Organization (ILO) in 2006 and went into effect in 2013. It is a comprehensive convention that establishes working conditions and standards for employment and working conditions relating to maritime work.<sup>13</sup>

MLC member states must implement and enforce laws, regulations, and other measures

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<sup>8</sup> This refers to a worker who has an essential role in social functions. The phrase “key worker” is mainly used in the United Kingdom; “essential worker” is the preferred term in the United States. The website of Japan’s Ministry of Land, Infrastructure, Transport and Tourism (MLIT) contains a “Message of Gratitude to All Essential Workers” that mentions (as sectors under MLIT’s jurisdiction) transportation, distribution, public works, bus and taxi services, trucking, shipping, and aviation. [https://www.mlit.go.jp/kikikanri/kikikanri\\_tk\\_000018.html](https://www.mlit.go.jp/kikikanri/kikikanri_tk_000018.html) (visited on March 30, 2021)

<sup>9</sup> IMO Website “Coronavirus disease (COVID-19) Pandemic” <https://www.imo.org/en/MediaCentre/HotTopics/Pages/Coronavirus.aspx> (visited on March 28, 2021) A list of statements the IMO has issued to its members is presented on the same webpage. With respect to the ILO, the following website provides a list of meeting minutes and other information concerning the protection of seafarers’ rights under the MLC. <https://www.ilo.org/global/standards/maritime-labour-convention/lang--en/index.htm> (visited on March 28, 2021)

<sup>10</sup> IMO, Circular Letter No.4204/Add.35/Rev.4, 5 February 2021, para 2(5) and Annex. According to this document, 55 of the IMO member states (including Japan) as well as two associate members (Faroe Islands and Hong Kong) consider seafarers to be “key workers.”

<sup>11</sup> *Supra* note 1 (IMO Website).

<sup>12</sup> The Maritime Labour Convention of 2006. Other international laws and regulations that can be considered to have relevance include standards for quarantine and other measures in the International Health Regulations (IHR), which were adopted by the World Health Organization (WHO), and various international human rights conventions that define the rights of individual seafarers. However, in this paper, I will limit my focus to the MLC. I will discuss relationships with other conventions, etc., in another paper.

<sup>13</sup> Koyama, H., “2006-nen no kaijo rodo jyojyaku” (Maritime Labour Convention of 2006) and P&I insurance, *Kaiun*, No. 1070 (2016), pp. 30-31. Fukuta, N., “Gyosei furasshu ILO kaiji rodo togo jyojyaku no doko ni tsuite (Consolidated Maritime Labour Convention)” (administrative flash: developments concerning the ILO Consolidated Maritime Labour Convention), *Hito to Fune*, Vol. 116 (2016), p. 15. Tanaka, K., “ILO kaijo rodo jyojyaku no hakko to kaisei sen’in-ho no gaiyo ni tsuite” (an outline of the ILO’s Maritime Labour Convention’s coming into effect and revised Mariners Act), *Kaiji no Mado*, Vol. 68 (2014), p. 3. The ILO adopted 68 conventions, protocols, and recommendations concerning labor standards between 1920 and its formulation of the MLC. However, problems in responding to social and technological developments as well as in ratification led to the MLC’s formulation in a form that integrates and organizes these various conventions.

in accordance with the MLC when they are flag states, port states, or labor-supplying states (MLC Articles IV and V). Thus, a mechanism is in place whereby the exclusion of substandard ships from non-ratifying states is ensured,<sup>14</sup> as the port state control (PSC) of member states is applied even to countries that have not ratified the MLC. Japan revised its Mariners Act in 2012 to ensure its compliance with the MLC.<sup>15</sup>

Table 1: The Maritime Labour Convention's structure

Mandatory			Voluntary
Article	Regulation	Code (Part A) [Standard A]	Code (Part B) [Guideline B]
General ←			→ Specific

The Maritime Labour Convention consists of three components: the Articles, which set out the general obligations in a total of 16 articles; the Regulations, which flesh out the Articles; and the Code, which concerns implementation. The Code is further divided into Standard A (Part A of the Code) and Guideline B (Part B of the Code) (MLC Article VI). Everything from the MLC's Articles to Standard A are treated as Mandatory (MLC Article II(1)(e)) (see Table 1). The Articles provides, in general form, member states' obligations to implement the convention's provisions and to cooperate with each other (MLC Article I), obligation to ensure that seafarers' rights are realized in the context of the convention (MLC Articles III and IV), and responsibility for implementation by flag states, port states and labor-supplying states<sup>16</sup> (MLC Article V). Implementation methods and implementation standards are established in the next part, "Regulations and Code."

### 2-1. MLC obligations concerning seafarer replacement

The main regulations pertaining to seafarer replacement and repatriation, which are the issues addressed by this paper, are Regulation 2.1 (seafarers' employment agreements), Regulation 2.4 (entitlement to leave), Regulation 2.5 (repatriation), and Regulation 2.7

<sup>14</sup> Usui, K., "Kaijo rodo joyaku no hijun to kokunai-ho-ka" (Ratification of the Maritime Labour Convention and its reflection in Japanese law), *Kaijo Rodo*, Vol. 66 (2014), p. 5.

<sup>15</sup> Tanaka, K., "ILO kaijo rodo joyaku no hakko to kaisei sen'in-ho no gaiyo ni tsuite," (note 11), p. 3. The MLC is considered to be the fourth mainstay of international maritime conventions. It stands alongside three other important IMO conventions: the International Convention for the Safety of Life at Sea (SOLAS), the International Convention for the Prevention of Pollution from Ships (MARPOL), and the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW).

<sup>16</sup> In this paper, I use the term "labor-supplying state" to refer to a country that controls seafarer recruitment and placement (MLC Article V, paragraph 5). It should be noted that this expression "labor-supplying state" is used alongside "flag state" and "port state" in a general observation issued by the Committee of Experts on the Application of Conventions and Recommendations of the International Labour Organization (ILO). This general observation will be discussed in section 4-1.

(manning levels) in Title 2 "Conditions of Employment" of the Regulations and Code.

(1) Seafarers' employment agreements

The purpose provided under Regulation 2.1 (seafarer's employment agreements) is to ensure that seafarers have a fair employment agreement. In the agreement, the flag state is required by laws and regulations to ensure that seafarers sign an employment agreement after being given sufficient information and advice (Standard A2.1 (1) (b) and (d)).

(2) Entitlement to leave

The purpose of Regulation 2.4 (entitlement to leave) is to ensure that seafarers have adequate leave. Paragraph 2 of Regulation 2.4 states that "seafarers shall be granted shore leave to benefit their health and well-being and consistent with the operational requirements of their positions." However, Standard A2.4, which is based on this Regulation, only requires flag states to enact legislation concerning annual leave (Standard A2.4 (1)). There is a non-binding Guideline B on the actual taking of annual leave. However, it is stated that it is preferable that the shipowner decide on the timing of leave in consultation with the seafarers (B2.4.2 Guideline (1)).

(3) Repatriation

The provisions of Regulation 2.5 (repatriation) state that the purpose is to ensure that seafarers are able to return home. The provisions then provide that "[S]eafarers have a right to be repatriated at no cost to themselves... under the conditions specified in the Code" and that "Each Member shall require ships that fly its flag to provide financial security to ensure that seafarers are duly repatriated in accordance with the Code."

In relation to this Regulation 2.5, it is provided that each flag state is obliged to enact legislation to ensure that seafarers on ships that fly its flag have the right to be repatriated upon termination of their employment (Standard A2.5 (1)(a)). The primary responsibility for actual repatriation rests with the shipowner, and a state will take necessary measures if the shipowner fails to repatriate seafarers. Specifically, the flag state of the ship shall be the first to take repatriation measures, followed by the state of nationality of the seafarer or the state from which the seafarer is to be repatriated, which shall take repatriation measures on behalf of the flag state and recover the cost of repatriation from the flag state (Standard A2.5 (5)(a)).

The "financial security to ensure that seafarers are duly repatriated" in the second paragraph of Regulation 2.5 refers to a guarantee of the cost to repatriate a seafarer in the event that the shipowner who is a party in the seafarer's employment agreement and who is primarily responsible for repatriation does not (or cannot) repatriate the seafarer due to

economic failure or illegal activities. An example is insurance coverage for the cost of repatriation provided in accordance with this Article in such cases by a protection and indemnity (P&I) club.<sup>17</sup>

Member states that are other than flag states shall also facilitate the repatriation of seafarers and the replacement of seafarers on ships calling at their ports or passing through their territorial waters or internal waters (Standard A2.5 (7)) and shall not refuse the right of repatriation to seafarers (Standard A2.5 (8)). The non-binding Guideline B2.5.2 provides "Implementation by Members" with regard to this point. The Guideline states that "every possible practical assistance should be given" by a member state if a seafarer becomes stranded in a foreign port, and that notification of the flag state and seafarer's state of nationality by the competent authority of the foreign port should be ensured (Guideline B2.5.2(1)).

As for the period of time leading up to repatriation, the Regulation sets a maximum service period (less than 12 months) (Standard A2.5 (2)(b)) that member states must ensure that it is stipulated in their laws and provisions (Standard A2.5 (2)).

#### (4) Manning levels

Regulation 2.7 states that "each Member shall require that all ships that fly its flag have a sufficient number of seafarers employed on board to ensure that ships are operated safely, efficiently and with due regard to security under all conditions...." When a flag state that is a member state sets manning levels, the competent authority (of that member state) shall take into account international instruments, such as those of the International Maritime Organization (IMO) (Standard A2.7 (1)), and avoid excessive hours of work to ensure sufficient rest and to limit fatigue when making revisions (Standard A2.7 (2)).

In addition, member states are expected to maintain an efficient system for the settlement of complaints or disputes in order to effectively require such manning levels (Guideline B2.7.1).

## 2-2. Summary

The above describes articles, regulations, and standards of the MLC that may have relevance to seafarer replacement. So how does a government's failure to (or inability to) land or repatriate seafarers as a response to the COVID-19 pandemic constitute a violation of the MLC?

Based on Standard A2.5 (5)(a), a flag state is considered to be in violation of this regulation if, when a shipowner fails to make arrangements for repatriation, the state allows

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<sup>17</sup> Koyama, H., "2006-nen no kaijo rodo jyooyaku," (note 11), p. 32.

the fact that seafarers on a ship flying that state's flag are not repatriated (i.e., seafarer abandonment) to continue. In the same situation, if, when the flag state does not take measures, the state from which the seafarer is to be repatriated and the state of nationality of the seafarer do not conduct repatriation, those states would be in violation of Standard A2.5 (5) (a) in the same way as the flag state.

If a seafarer is employed beyond the service period specified in Standard A2.5(2)(b) (maximum duration of less than 12 months) and his or her right to repatriation is violated, measures will be taken in accordance with laws and regulations enacted by the member state. However, neither this standard nor other articles go so far as to require that national laws and regulations provide for penalties for violations.<sup>18</sup> Thus, the effectiveness of this standard concerning the maximum duration of employment depends on the laws and regulations of each member state.

Additionally, port states must also take measures to "facilitate replacement" in order to ensure the right of repatriation (Standard A2.5 (7)). Such measures are expected to include notification of the flag state and the seafarer's state of nationality by the organizations of the port of call (Guideline B2.5.2 (1)). Considering these points, it could be concluded that, even if port states cannot allow seafarers to land within them due to countermeasures against COVID-19, they may also be in violation of the regulation if measures to facilitate replacement, such as notifying and coordinating with concerned states, were not taken.

According to the provisions on manning levels in Regulation 2.7, member states are also expected to maintain systems for handling complaints and disputes. If a member state does not have such a system in place for the manning of seafarers, it could be deemed to be deficient in terms of implementing Regulation 2.7.

It is worth noting with respect to employment agreements concerning the service periods specified in Regulation 2.1 that if an agreement is extended without the consent of the seafarer, that extension may be in violation of the laws and regulations of the member state. However, Regulation 2.1 and Standard A2.1 only require flag states to adopt laws and regulations to ensure compliance (Standard A2.1 (1)), and therefore the handling of violations of a flag state's laws and regulations and the standard's effectiveness depend on the content of those laws and regulations.

### 3. Japan's Response to Seafarer Replacement and Repatriation

On March 28, 2020, Japan's Novel Coronavirus Response Headquarters approved a set of "Basic Policies for Novel Coronavirus Disease Control" (hereinafter referred to as the

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<sup>18</sup> Article V paragraph 6 of the MLC, which governs the implementation of member states' convention obligations, requires that "[each member] establish sanctions or require the adoption of corrective measures," meaning that sanctions are not necessary if corrective measures are taken.



"COVID-19 Basic Policies"). The COVID-19 Basic Policies were subsequently revised when a state of emergency was declared on April 7, 2020.<sup>19</sup> The revised version designated logistics and transportation services (including maritime transportation) as "[a business that,] with a view to maintaining the stability of the society,... provides essential services to maintain corporate activities during the period of a state of emergency."<sup>20</sup>

Under its immigration laws (jurisdiction of the Ministry of Justice), Japan has been denying landing to foreign nationals who have stayed in certain countries or regions within 14 days prior to landing in Japan since February 1, 2020. This is based on the application of Article 5, paragraph 1, item 14 of the Immigration Control and Refugee Recognition Act (hereinafter referred to as the "Immigration Act").<sup>21</sup> However, among those who are denied landing, there are people who are granted special permission to land because they are recognized as having "special exceptional circumstances."

It should be noted with regard to entry into Japan on or after March 19, 2021, that all persons, including Japanese nationals, are required to submit a certificate for a COVID-19 test conducted within 72 hours prior to departure. The same applies to people who are deemed to have special exceptional circumstances.<sup>22</sup>

Regarding the question of who is considered to have "special exceptional circumstances," the Ministry of Justice provides a list of cases that are eligible for special landing permission in a document titled "Regarding denial of landing to prevent the spread of COVID-19 (novel coronavirus)."<sup>23</sup> Although this document does not specify seafarers as having "special exceptional circumstances,"<sup>24</sup> it notes that landing will be allowed for "[persons] who are recognized to be in special exceptional circumstances corresponding to an individual situation such as the need for humanitarian consideration...."

According to reports appearing in trade publications, the Japanese government has been

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<sup>19</sup> Novel Coronavirus Response Headquarters (Japan), "Basic Policies for Novel Coronavirus Disease Control of March 28, 2020 (Revised on April 7, 2020)" [https://www.kantei.go.jp/jp/singi/novel\\_coronavirus/th\\_siryou/kihon\\_h\(4.7\).pdf](https://www.kantei.go.jp/jp/singi/novel_coronavirus/th_siryou/kihon_h(4.7).pdf) (visited on March 25, 2021)

<sup>20</sup> *Ibid.*, p. 25.

<sup>21</sup> Novel Coronavirus Response Headquarters (3rd meeting) material page 10 (decision by the National Security Council and approval by the Cabinet on January 31, 2020), "Chukajinminkyowakoku de kansen ga kakudai-shiteiru shingata koronairusukansensho ni kan-suru seifu no torikumi ni tsuite" (regarding the government's efforts to deal with the novel coronavirus infectious disease that is spreading in the People's Republic of China).

[https://www.kantei.go.jp/jp/singi/novel\\_coronavirus/th\\_siryou/sidai\\_r020131\\_2.pdf](https://www.kantei.go.jp/jp/singi/novel_coronavirus/th_siryou/sidai_r020131_2.pdf) (visited on March 25, 2021).

<sup>22</sup> Ministry of Foreign Affairs of Japan website, "Valid Format of Certificate of Negative Test Result" (March 12, 2021) [https://www.mofa.go.jp/mofaj/ca/fna/page25\\_001994.html](https://www.mofa.go.jp/mofaj/ca/fna/page25_001994.html) (visited on March 25, 2021), Immigration Services Agency of Japan, "Regarding denial of landing to prevent the spread of COVID-19 (novel coronavirus)"

<http://www.moj.go.jp/isa/content/930006078.pdf> (visited on March 18, 2021).

<sup>23</sup> *Ibid.* (Immigration Services Agency of Japan).

<sup>24</sup> *Ibid.* As examples of specific cases where special exceptional circumstances are recognized, the document mentions foreign nationals entering Japan with re-entry permit (2. Regarding special exceptional circumstances (1)), persons having the status of residence of "Instructor" or "Professor" and who need to enter Japan (2. Regarding special exceptional circumstances (2) (d)), persons having the status of "Medical Services" (2. Regarding special exceptional circumstances (2) (e)), and persons affiliated with a receiving company, etc., that can guarantee quarantine measures (2. Regarding special exceptional circumstances (2) (f)).

responding to seafarers on a person-by-person basis and allowing them to enter the country.<sup>25</sup> It can therefore be considered that the government sees seafarers as the “[persons] who are recognized to be in special exceptional circumstances corresponding to an individual situation” mentioned in 2-1.(4) above.<sup>26</sup>

As a COVID-19 countermeasure that may have a connection to the provisions of the MLC, Japan notified the IMO on April 14, 2020, that it will extend the validity of seaman’s seamen’s pocket ledgers, health certificates, and maritime labor certificates that expired on or after February 17, 2020.<sup>27</sup> This step was taken out of consideration of the fact that seafarers will have difficulty completing the courses needed for extension, and it will likely amount to an exemption from the extension procedure.

Additionally, the Ministry of Land, Infrastructure, Transport and Tourism (MLIT) has set up a webpage that details the handling of seafarer-related administrative affairs related to COVID-19.<sup>28</sup> It outlines compensatory holiday benefits and other matters in cases where seafarer replacements cannot take place. MLIT confirms that, when a seafarer's time on board a ship is extended based on a labor-management agreement for the reason that the seafarer cannot be replaced due to COVID-19 and the granting of compensatory holidays is postponed as a result, the shipowner will be exempted from liability under the law, as such a case falls under “reasons not attributable to the shipowner” based on provisions concerning compensatory holidays in the Mariners Act and the Enforcement Regulations of the Mariners Act (Article 60 of the Mariners Act and Article 42, paragraph 4, item 2 of the Enforcement Regulations of the Mariners Act).<sup>29</sup>

<sup>25</sup> The Japan Maritime Daily (April 30, 2020), “For seafarers, there seem to be cases in which entry into Japan is permitted based on individual consultations with quarantine and immigration control authorities,” <https://www.jmd.co.jp/article.php?no=256716> (visited on March 18, 2021); The Japan Maritime Daily (May 29, 2020), “We have been listening to the industry’s views and working with concerned organizations and authorities. So far, there have not been any major problems in terms of foreign seafarers’ entry into Japan,” <https://www.jmd.co.jp/article.php?no=257472> (visited on March 18, 2021); The Japan Maritime Daily (January 12, 2021), “The government has set a policy of continuing to allow foreign seafarers’ entry into Japan as ‘foreign nationals with special circumstances’ even under the state of emergency,” <https://www.jmd.co.jp/article.php?no=263918> (visited on March 18, 2021).

<sup>26</sup> On May 1, 2020, the Immigration Services Agency of Japan issued a press release titled “Shingata koronavirusukansensho ni kan-suru joriku kyohi no sochi ni kakaru ‘tokudan no jijo ga mitomerare joriku o kyoka shita hito’ no uchiwake ni tsuite” (regarding a breakdown of “persons recognized as having special exceptional circumstances and granted special permission to enter Japan” relating to landing denial measures to prevent the spread of COVID-19) that states that almost all of the people who were granted permission to land due to “special exceptional circumstances” are seafarers. [http://www.moj.go.jp/isa/publications/press/nyuukokukanri08\\_00047.html](http://www.moj.go.jp/isa/publications/press/nyuukokukanri08_00047.html) (March 25, 2021). According to the website, the number of foreign nationals who received “landing permission for Crew Members” under Article 16 of the Immigration Act during the period from April 1 to 12, 2020, was 2,730. This number accounts for approximately 80% of the total number of people (3,541) who were granted permission to enter under “special exceptional circumstances.”

<sup>27</sup> Communication from Japan, Circular Letter No.4262, 14 April 2020. <https://wwwcdn.imo.org/localresources/en/MediaCentre/HotTopics/Documents/Circular%20Letter%20No.4262%20Japan.pdf> (visited on March 25, 2021).

<sup>28</sup> Ministry of Land, Infrastructure, Transport and Tourism, “Shingata koronavirusukansensho ni kakaru sen’in kankei jimu no toriatsukai ni tsuite” (regarding the handling of seafarer-related administrative affairs related to COVID-19) [https://www.mlit.go.jp/maritime/maritime\\_tk4\\_000021.html](https://www.mlit.go.jp/maritime/maritime_tk4_000021.html) (visited on March 25, 2021).

<sup>29</sup> *Ibid.* (MLIT).



## 4. Analysis

How can the above responses by Japan be assessed in light of the MLC's provisions? With respect to this point, the ILO's Committee of Experts on the Application of Conventions and Recommendations has presented a general observation on COVID-19 countermeasures and the MLC. I will present the following relevant parts as a guide for consideration before examining each provision and Japan's response to it.

### 4-1. General observation of the ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR)

On December 17, 2020, the ILO's Commission of Experts on the Application of Conventions and Recommendations<sup>30</sup> (hereinafter referred to as "CEACR") presented a general observation on measures to combat the COVID-19 pandemic and the application of the Maritime Labor Convention<sup>31</sup> (hereinafter referred to as "CEACR General Observation 2020").

#### (1) Use of *force majeure* as a defense

To begin, it must be asked whether the provisions of the MLC, which assume normal times, can be applied as is in an emergency situation, such as the recent COVID-19 pandemic.

General Observation 2020 examines the ITF's concern that *force majeure* can be a defense for non-compliance with the MLC in the case of the recent COVID-19 pandemic.

In it, the CEACR stresses that, in the absence of *force majeure* or similar circumstances, ratifying states are equally required to implement the MLC's obligations, stating that "The MLC, 2006, is a comprehensive labour instrument for the maritime industry applicable to all ratifying countries, and not a compilation of labour regulations to be applied selectively, if and to the extent that circumstances so permit." And while admitting that "At the beginning of the pandemic, ratifying States... might have been confronted with genuine situations of

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<sup>30</sup> The ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR) is an independent committee comprised of 20 experts in international law and labor law. It conducts technical analyses and other studies on the application of conventions and individual nations' implementation of them. The results of its studies undergo further examination by the "International Labour Conference's Tripartite Committee on the Application of Conventions and Recommendations" (Conference Committee), which is comprised of representatives of government, labor, and management.

<sup>31</sup> General observation on matters arising from the application of the Maritime Labour Convention, 2006, as amended (MLC, 2006) during the COVID-19 pandemic-Adopted by the Committee of Experts on the Application of Conventions and Recommendations (CEACR) at its 91st session (Nov-Dec. 2020) (hereinafter, "CEACR General Observation 2020"). [https://www.ilo.org/global/standards/WCMS\\_748468/lang--en/index.htm](https://www.ilo.org/global/standards/WCMS_748468/lang--en/index.htm) (visited on March 25, 2021). The observation was presented in response to information provided by the shipping industry—namely, the International Transport Workers' Federation (ITF) and the International Chamber of Shipping (ICS)—indicating that "all ratifying States have failed to comply with major provisions of the Convention during the COVID-19 pandemic, notably regarding cooperation among Members, access to medical care and repatriation of seafarers." *Ibid.* (CEACR General Observation 2020), p. 2.

*force majeure*, which rendered materially impossible the compliance with some of their obligations under the MLC, 2006,” the CEACR points out that “more than ten months have elapsed since then, which constitutes a realistically sufficient time frame allowing for new modalities to be explored and applied, in conformity with international labour standards.” In light of this, the CEACR finds that “the notion of *force majeure* may no longer be invoked from the moment that options are available to comply with the provisions of the MLC, 2006, although more difficult or cumbersome.”<sup>32</sup>

The CEACR expresses the above observation without referring to Article 23 (*force majeure*) of the Responsibility of States for Internationally Wrongful Acts and other norms. This leaves room for a separate examination of whether the CEACR’s reasoning also has significance when considering situations in which the pursuit of responsibility under general international law goes beyond the organizational framework of the ILO. In addition, discussions on the CEACR’s observation by the Conference Committee are anticipated (discussions were not held during fiscal 2020). However, given that the CEACR is a specialized body responsible for conducting legal and technical reviews concerning the implementation of ILO conventions, it can be concluded that ratifying states of the ILO, if not others, are required to take options for compliance—even those that are “more difficult or cumbersome”—if they are available.

## (2) CEACR General Observation 2020 on violations of other articles

After expressing its views on *force majeure*, the CEACR acknowledges with respect to Article I, paragraph 2 of MLC, which establishes that members shall cooperate with each other for the purpose of ensuring implementation based on the MLC, that “numerous governments have undertaken important actions... to identify solutions and generate initiatives to overcome the challenges.” However, it also points out that “hundreds of thousands of seafarers around the world are still on board well beyond the original expiry date of their [seafarers’ employment agreements] and in numerous cases well beyond the default 11 months maximum period of service on board derived from the provisions of the Convention,” “thousands of seafarers have been disembarked but are not allowed to go back to their countries of origin and find themselves stranded in a foreign country,” “seafarers have been denied medical care ashore which has resulted in death of seafarers in several cases,” and “port restrictions are repeatedly introduced with short-term announcements hindering the reasonable planning of the ships’ route.” In light of the above, the CEACR “considers that these elements constitute sufficient basis to conclude that Members, as a whole, have failed to comply with Article I, paragraph 2 of the MLC, 2006”

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<sup>32</sup> *Ibid.* (CEACR General Observation 2020), p. 3.

and thus finds that members are in violation of the MLC.<sup>33</sup>

Likewise, for Article III, which establishes member states' obligation to respect specific seafarers' rights, including the elimination of forced labor, through their laws and regulations, the CEACR states that "implicit in the very inaction of certain Member States of ensuring crew changes or allowing seafarers to go back home... creates conditions... that could amount to forced labour." Although the CEACR does not explicitly declare that violations of Article III are occurring, it calls on member states to take concrete actions, such as applying informed consent, as regards employment agreement extension for seafarers in order to improve the situation.<sup>34</sup>

#### 4-2. Japan's response and the Maritime Labour Convention

So then, how can Japan's response, which was described in section 3 above, be assessed in light of the MLC?

According to an IMO statement, Japan is mentioned one of the countries that considers seafarers to be "key workers." However, no details for this mention are provided.<sup>35</sup>

Looking at terminology that comes close to the term "key workers," the "COVID-19 Basic Policies" of April 7, 2020, states that workers in logistics and transportation services, including seafarers, belong to "with a view to maintaining the stability of the society, [businesses] who provide essential services to maintain corporate activities during the period of a state of emergency." However, this reference is limited to businesses whose business activities are required during the period that emergency measures are implemented in Japan. There is no particular mention of how this relates to seafarers' rights or specific procedures for seafarer replacement and repatriation.

According to a notification from Japan that was released by the IMO, Japan is exempting seafarers from extension procedures for seaman's pocket ledgers and health certificates that expired on or after February 17, 2020.<sup>36</sup> It is difficult to say whether this step alone will expedite seafarers' replacement or repatriation as "key workers." However, if it is considered that some countries, such as the UK, are adopting measures that allow seafarers to enter without presenting a negative test certificate (or without a prior quarantine) if they

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<sup>33</sup> *Ibid* (CEACR General Observation 2020), p. 4.

<sup>34</sup> *Ibid* (CEACR General Observation 2020), p. 5. In addition, the CEACR's General Observation presents a summarized list of regulations to be observed in this case by flag states and port states. The following is a breakdown. Flag states: Regulation 2.1 (2), Standard A1.4 (5), Regulation 2.4, Standard A2.4 (3), Regulation 2.4 (2), Regulation 2.5 and 2.4, Regulation 2.7, Regulation 4.1, Regulation 4.3, and Regulation 4.4. Port states: Regulation 2.4 (2), Standard A2.5.1 (7), and Regulation 4.1). Similarly, it mentions that labor-supplying states must play a role "in cooperating with flag and port States to ensure the respect of seafarers' rights" (p. 7). However, it makes no references to specific articles of the MLC.

<sup>35</sup> *Supra* note 10 (Circular Letter No.4204/Add.35/Rev.4), Annex page1.

<sup>36</sup> Circular Letter No.4262, 14 April 2020.

present their seaman's pocket ledgers,<sup>37</sup> then the step has the advantage of allowing people to enter those countries with a seaman's pocket ledger that was issued in Japan.

When Standard A2.5 (5)(a) and Standard A2.5 (7), which define repatriation measures, are considered, Japan must implement repatriation when it is a fact that the repatriation of seafarers (by a shipowner, etc.) has not been carried out in cases in which Japan is the flag state, the state from which the seafarer is to be repatriated, or the state of nationality of the seafarers. Regarding this point, it has been reported that Japan makes foreign nationals with "special exceptional circumstances" eligible for landing permission and that it has "allowed foreign seafarers to enter Japan since last year as 'foreign nationals with special exceptional circumstances' (regarding landing for crew members)."<sup>38</sup> It is impossible to determine from documents that are currently available whether this is a measure to fulfill Japan's obligation with respect to repatriation. However, at the very least, it can be said that Japan has not imposed any measures that would hinder seafarers' replacement.

Regarding Standard A2.5 (2)(b), which sets the maximum duration of service periods, and Regulation 2.1 and Standards A2.1 (1)(b) and (d), which provide for employment agreements based on the agreement of the seafarer, the primary question is whether Japan has enacted the relevant laws and regulations. Another issue is whether, when an employment agreement extension is presented to a seafarer on a ship that flies Japan's flag, that seafarer is actually given sufficient information and the option of refusal in line with Japan's obligation to implement the MLC (Article I(2), Article III, Article V(7)).

When Japan ratified the MLC, it amended its Mariners Act to establish procedures and other means to ensure that seafarers' working conditions are in conformity with the MLC. At the same time, measures were taken to ensure compliance (such as the Declaration of Maritime Labour Compliance<sup>39</sup>) within implementing regulations related to the Ship Act. It can be concluded, therefore, that Japan has complied with its international obligations concerning the establishment of laws and regulations.<sup>40</sup>

On the other hand, if CEACR General Observation 2020, which no longer recognizes the *force majeure* argument, is taken into account with respect to the MLC implementation obligation relating to Article I(2) and Article III, a problem may exist in terms of confirming a shipowner's exemption from liability if, for example, a compensatory holiday is postponed when seafarer replacement is not possible. Almost a year after the pandemic's outbreak, it

<sup>37</sup> UK, Coronavirus (COVID-19): jobs that qualify for travel exemptions  
<https://www.gov.uk/government/publications/coronavirus-covid-19-travellers-exempt-from-uk-border-rules/coronavirus-covid-19-travellers-exempt-from-uk-border-rules> (visited on March 27, 2021)

<sup>38</sup> *Supra* note 25 (The Japan Maritime Daily [January 12, 2021])

<sup>39</sup> Article 16 of the Regulations concerning the Inspection, etc., of the Working Conditions, etc., of Seafarers

<sup>40</sup> MLIT, "Kaijo rodo joyaku no hijun ni tomonau sen'in-ho kaisei ni tsuite" (regarding amendments to the Mariners Act coinciding with the ratification of the Maritime Labour Convention)  
[https://www.mlit.go.jp/maritime/maritime\\_fr4\\_000017.html](https://www.mlit.go.jp/maritime/maritime_fr4_000017.html) (visited on March 27, 2021).

is inherently undesirable for seafarer replacements to not be made. Rather than exemption from liability, what needs to be stressed are guidelines and policies on how to reduce the number of situations where seafarer replacements cannot be made.

As for Regulation 2.7, considering that onboard complaint procedures<sup>41</sup> were established through the Mariners Act's amendment, it can be said that the procedures expected for compliance with Regulation 2.7 are in place. However, it is unclear whether those procedures are actually functioning in cases relating to seafarers' replacement and repatriation. It is the job of shipowners, not the government, to prepare the procedures for handling complaints on board ships,<sup>42</sup> and status reports on this matter need not be submitted to the Minister of Land, Infrastructure, Transport and Tourism (Article 111 of the Mariners Act). Thus, answering the question of whether these procedures have been effective or not will likely have to wait for future studies to be conducted by concerned shipowners based on the procedures in question.<sup>43</sup>

## 5. Summary and Outlook

In this paper, I organized provisions of the MLC having relevance to the problem of seafarer replacement and repatriation that arose following the outbreak of the COVID-19 pandemic and then examined Japan's response to them. While it can be concluded that Japan has complied with its obligations in enacting laws and regulations and has not implemented policies that would particularly hinder seafarer replacements, further verification and statements by shipowners and others concerned will be needed before the extent to which Japan has actually protected the specific rights of seafarers can be determined.

Looking at Regulation 2.5, which has a significant bearing on seafarer replacement and repatriation, it can be concluded that Japan has complied with certain provisions in order to implement repatriation or "facilitate replacement" as a port state. Its actions here include granting exceptions to landing denial measures to seafarers by recognizing them as having "special exceptional circumstances" and exempting seafarers from renewal procedures for seaman's pocket ledgers and other documents.

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<sup>41</sup> *Ibid.*

<sup>42</sup> MLIT, "[Sanko] Sen'nai kujo shori ni kansuru tejun-sho sakusei rei (word keishiki)" 1. Soron ② ([reference] example for creating a procedure manual for the handling of onboard complaints (word format) 1. general remarks (2)) [https://www.mlit.go.jp/maritime/maritime\\_fr4\\_000017.html](https://www.mlit.go.jp/maritime/maritime_fr4_000017.html) (visited on March 27, 2021).

<sup>43</sup> A document from the Japanese Shipowners' Association on the seafarers' replacement policies of various countries amid the COVID-19 pandemic states that "the ICS is in discussions with the ITF regarding the filing of a formal complaint on non-fulfillment of obligation by MLC member states based on Article 24 of the ILO Charter." If this comes to pass, then more detailed information on individual countries' compliance with the MLC will be presented and discussed through the ILO's complaint procedure. The Japanese Shipowners' Association, "Norikumiin kotai sanko joho (fukumu: kokusaiteki-na ukogi) (word)" (reference information on crew replacements [including: international trends] [Word]) <http://www.jsanet.or.jp/covid-19/index.html> (visited on March 28, 2021).

Japan has fulfilled its obligation as a flag state to enact laws and regulations that pertain to the employment agreements stipulated under Regulation 2.1, the maximum durations of employment under Regulation 2.5, and manning levels under Regulation 2.7. Furthermore, when it is considered that Japan implemented landing measures based on "special exceptional circumstances" and exempted seafarers from having to renew their seaman's pocket ledgers, it becomes difficult to conclude that Japan has taken the attitude characterized above as "the very inaction" that could be viewed as a violation of MLC Article III.

However, the status of implementation and operation of Japan's laws and regulations cannot be determined at the present time. It is anticipated that future examinations conducted through complaint procedures will shed light on whether the rights of seafarers are actually being ensured with respect to employment agreements and manning levels.

The CEACR, a committee of experts of the ILO, has stated that "the notion of *force majeure* may no longer be invoked from the moment that options are available to comply with the provisions of the MLC, 2006." In light of this, the fact that cases in which compensatory holidays cannot be granted because seafarer replacements cannot be made continues to be recognized as a "reason not attributable to the shipowner," as MLIT explicitly states, could be problematic. Here, it would be advisable, through coordination and cooperation with the parties concerned, to gradually shift to a mode of operations that never allows delays in seafarer replacements to occur in the first place.

As was discussed above in section 4, Japan is not considered to have clearly violated its obligations under the MLC at this time. Nonetheless, there is room for a renewed examination in the future—one that would include information that is not yet available—of Japan's obligation to ensure implementation of the MLC as stipulated in Article I(2), Article III and Article V(7). It should be remembered that Japan's status of compliance with Article I(2) etc., of the MLC may become an issue depending on the results of such an examination.

As of the end of March 2021, a number of countries, including the UK and the Philippines, have been implementing measures for seafarer replacement more proactively. Such measures include allowing seafarers to come ashore by presenting their seaman's pocket ledgers or other documentation and setting up priority lanes.<sup>44</sup> The IMO website mentions Japan as a country that categorizes seafarers as "key workers." However, when one looks at domestic procedures, there is no connection between seafarers' status as "key workers"

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<sup>44</sup> Table overview: List of Circular Letters with COVID-19 related notifications received from Member States and Associate Members (updated 19 March 2021)  
<https://wwwcdn.imo.org/localresources/en/MediaCentre/HotTopics/Documents/covid%20overviews%20tables/Notifications%20related%20to%20COVID-19%20received%20from%20member%20states.pdf> (visited on March 27, 2021)



("COVID-19 Basic Policies") and their status for landing and repatriation ("foreign nationals with special exceptional circumstances"). There are no special landing or priority measures that have the appearance of having been established for seafarers in connection with the COVID-19 pandemic.

The importance that various "key workers" have gained recognition in Japan. However, it is reported that, among those "key workers," seafarers have higher industrial accident rates than workers on land.<sup>45</sup> For Japan, a nation that relies on maritime trade for most of its international trade,<sup>46</sup> an essential choice for ensuring stable ship operations will be to formulate policies that protect seafarers' rights in a way that is more rational and predictable for those involved in maritime affairs. The immediate task here is to strive to make information available by aligning and organizing actual system operations and policy documents. This could include, for example, reflecting the above-mentioned status of "key worker" in documents that specify landing and repatriation measures.

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<sup>45</sup> Sen'in saigai shippei hassei jokyo hokoku (sen'in-ho dai 111-jo) shukei-sho (report on seafarer accidents and illnesses (Mariners Act Article 111): tally) <https://www.mlit.go.jp/maritime/content/001393045.pdf> (visited on March 27, 2021), p. 6.

<sup>46</sup> MLIT, Maritime Bureau Annual Report 2020, p. 27. The following issues can also be identified with respect to the protection of seafarers' rights if one takes a long-term perspective. At the present time, only 273 (11.3%) of the 2,411 ships operating in Japan's merchant fleet are Japanese-flagged; the rest are foreign-flagged (p. 28). The addressees of obligations under the MLC include not only flag states but also other countries, such as port states and the labor-supplying states. However, it is flag states that handle most of the important supervisory measures, such as the enactment of laws and regulations, inspections, and issuance of certificates. In the future, it will be necessary to study policies to ensure discipline in seafarer protection with respect to ships involved in Japan's transportation of goods.