

后疫情时代航运业船员权益的法律保障

吴蔚 黄如青*

内容摘要:随着新冠肺炎疫情在全球范围内不断蔓延,航运业的发展遭遇到各种挑战与风险,船员的健康权益和劳动权益也受到了损害。一方面受疫情影响各国防控措施不断升级,客观上影响了船舶靠岸、船员换班,另一方面则是船员劳动权益法律体系与救助制度自身存在漏洞。基于国际海洋法框架下船员权益的保障条款和相关国家责任,国际海事组织、国际劳工组织和世界卫生组织等相关国际组织就疫情影响下的船员工作履约及救助问题作出了指导性建议。后疫情时代的航运业应建立完善的船员权益法律体系的构建,保障船员合法权益,保证船员身心健康,为船员营造一个良好的工作环境和氛围,提高船员社会地位,推动航运业的良性发展与运转。

关键词:新冠肺炎疫情 航运治理 船员救助

当前,尽管新冠肺炎疫情在世界范围内得到了一定控制,但欧美国家的疫情防控情况仍不容乐观,全球范围内疫情还有卷土重来的可能。大规模的疫情爆发和蔓延已经对各行各业产生了严重的影响,航运业作为国际贸易供应链上的关键环节和国际旅游业的重要组成部分,也遭遇了严峻的挑战。航运市场资源紧缩、运输成本剧增、船舶管理难度增加。后疫情时代,航运业治理首要问题是恢复全球的航运业、妥善解决船舶疫情防控和救助感染船员等。

当今全球 90% 的贸易,¹尤其是大宗贸易,依赖海上运输开展。为数众多的海员既是支撑这一行业的坚实基础,也是重大风险来临时最为脆弱的一环。虽然船员工作具有极大风险性,但是我国现行的劳动法并未对船员的劳动特殊性有区

* 吴蔚,法学博士,武汉大学中国边界与海洋研究院讲师、国家领土主权与海洋权益协同创新中心副研究员,电子邮箱:ww330@whu.edu.cn;黄如青,武汉大学中国边界与海洋研究院 2018 级博士研究生,电子邮箱:hrqjay1994@126.com。本文系 2019 年教育部人文社会科学研究青年基金项目“应用浮式平台保障南海维权执法的国际法问题研究”(项目编号:20YJC820049)、2020 年武汉大学自主科研项目“应用浮式平台保障南海维权执法的国际法问题研究”(项目编号:4104/413000045)的阶段性成果。

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1 吴蔚:《救助伤病海员彰显公共卫生命运共同体理念》,载法制网 2020 年 04 月 14 日, http://www.legaldaily.com.cn/commentary/content/2020-04/14/content_8169500.htm。

别体现,² 新冠病毒的全球蔓延, 已对海员的工作生活带来了诸多负面影响,³ 船员的各项劳动权利却未被赋予充分的法律保障。目前, 我国现行法律法规涉及船员权益保障大致分为两大类: 一类是劳动法相关的法律法规, 例如《中华人民共和国劳动法》《中华人民共和国劳动合同法》《中华人民共和国社会保险法》, 另一类是针对船员管理的相关法律法规, 例如《中华人民共和国船员条例》《中华人民共和国海船船员值班规则》《中华人民共和国海船船员适任考试和发证规则》。现有法律在船员管理、行业适任方面的规约较多, 而对船员权益保障的规约却并不明晰, 甚至有所缺失。一旦出现船员权益纠纷, 海事监管部门与劳动行政部门极易因法律规范不明确不予管辖, 导致船员合理诉求难以实现。如船员难以在疫情期间实现正常换班和行使遣返权, 船员劳务履约情况受疫情影响, 导致其劳务报酬求偿权难以得到公平落实、感染新冠肺炎后工伤认定困难等问题。

一、海员生命权、健康权的保障困境

尽管根据《2006年海事劳工公约》规则4.1规定, 船舶应当配备随船医疗人员。但在此次疫情期间, 众多船舶未能提供足够的资源, 以满足船员的随船医疗救治需要。船舶由于途径疫区而出现船员确诊或疑似感染新冠肺炎的事件屡见不鲜, 如旅客和船员3711人中共计感染705人的日本邮轮“钻石公主号”;⁴ 船员在换班或遣返途中感染新冠肺炎的情况也时有发生, 如美国航母“罗斯福号”与法国航母“戴高乐号”上发生的新冠病毒扩散。⁵

这一情况主要系两方面因素引起: 第一, 新冠肺炎系突发传染性疾病, 而按照现有规定, 船上配套的医疗资源和医护水平很难做到有效救治; 第二, 各港口国的疫情防控措施一定程度上也加剧了随船医疗资源的短缺, 导致船舶难以靠岸进行补给。

2 官玮玮:《中国船员劳动权益保障问题及对策研究》,载《产业与科技论坛》2018年第9期,第38页。

3 于洪江、金雷:《我国和国际劳工组织连线磋商疫情期间海员劳动权益问题》,载澎湃新闻网2020年4月5日, https://www.thepaper.cn/newsDetail_forward_6848178。

4 日本横滨母港始发的邮轮“钻石公主号”于2020年2月3日中途返回横滨港,在2月5日检测出确诊病例后,日本政府立刻采取了封船隔离措施,船上旅客和船员3711人中,感染人数共计705人。参见谭洪卫:《从日本钻石公主号邮轮病毒感染事件引发的关于紧急事态应对的若干思考》,载文汇网2020年3月2日, <http://www.whb.cn/zhuzhan/rd/20200302/329862.html>。

5 2020年6月,法国“戴高乐号”航空母舰上共有1081人确诊感染新冠,占了全舰总人数的一半,美军航母“罗斯福号”也相继中招。参见《一千多名船员感染,法国航母成超级感染源,只能用高压水冲洗甲板!》,载快资讯2020年4月20日, https://www.360kuai.com/pc/9d72414820f77070a?cota=3&kuai_so=1&sign=360_57c3bbd1&refer_scene=so_1。

在本次疫情中,多数港口国救济便利提供不足,未能采取有效措施使在港船舶上的海员充分、及时地获得医疗救济。在世界卫生组织宣布将新冠肺炎疫情认定为国际公共卫生紧急事件后,陆续有一百多个国家加强了本国港口针对所有 14 天内靠近或经停、始发于感染国家的船舶的检疫程序,严格把控船上人员的入境数量和健康状况,越南、⁶ 新加坡等沿海国家甚至直接禁止船上人员入境。⁷

这一现象,一方面是港口国出于对本国疫情防控和公共卫生安全的考虑,严格约束外国船舶和人员入境,而在港口管理上普遍依赖“一刀切”政策,即直接拒绝一切外籍船舶和海员入境或通行所引起的;另一方面,也是当下国际法中对于港口国向船只及海员提供便利等相关规定的不一致所引起。例如,依据《国际卫生条例》在第二十八条,⁸ 缔约国不应当出于公共卫生理由阻止船舶上下乘员、装卸货物或储备用品,或添加燃料、水、食品和供应品。而依据《国际海港制度公约》第十六条,港口国可基于国家公共卫生安全的考量拒绝外国船舶进入本国港口,拒绝相关人员过境。

在国际范围内,伤病海员救助机制拘束力缺失也危及船员的生命权和健康权。船员的救助义务在国际法上既不构成强制性规范,相关国际公约也未规定实质性的权利救济机制和国家责任。理论上,大多数的国际条约(非习惯法规则)只对缔约国具有法律拘束力,国际条约法律效果的实现要基于缔约国接受并履行规范。根据《维也纳条约法公约》第五十三条规定,一般国际法强制规范是指“国家之国际社会全体接受并公认为不许损抑且仅有以后具有同等性质之一般国际法规律始得更改之规范”,换言之,国际强行法规范是不能通过国家的双边或多边条约予以排除适用和更改的。另外,国际法委员会曾明确一些国际义务即“普遍性义务”的履行将对整个国际社会产生法律利益,违反此类义务的国家应承担国家责任。⁹ 由此可见,上述关于船员健康权的国际公约条款并不符合强行法规范的构成,对伤病船员的救助义务也很难被认定为对整个国际社会产生法律利益的“普遍性义务”,更遑论国际海事组织、国际劳工组织、世界卫生组织等所颁布的一系列技术性指导文件,就性质而言属于国际法的软法范畴,完全不具有强制拘束力。

二、海员劳动权、薪酬权的保障缺位

6 《越南提高警戒:严格管控中日韩船舶,禁止一切疫区国家人员入境!》,载搜航网 2020 年 2 月 27 日, http://www.sofreight.com/news_42337.html。

7 《紧急预警!禁止和取消,各国港口对曾停靠中国的船舶靠港最新要求!》,载搜狐网 2020 年 2 月 6 日, https://m.sohu.com/a/371018745_99918184/。

8 《国际卫生条例》第 28 条。

9 Report of the International Law Commission on the work of its twenty-eighth session, 3 May - 23 July 1976, Official Records of the General Assembly, Thirty-first session, Supplement No. 10, p. 99.

(一) 海员薪酬待遇和医疗补助落实不到位

受疫情影响,海员的合理劳务报酬求偿难以实现,特别是海员的假期延长或待派延期,¹⁰依据《中华人民共和国船员条例》2020年修订版第二十六条规定,用人单位应当继续发放年假延长的海员年休假期间的工资;依据第二十五条规定,用人单位应正常发放待派海员待派期间的工资且不低于海员用人单位所在地人民政府公布的最低工资。

《2006年海事劳工公约》中并没有限制海员在船时间的明确表述,但标准A2.4规定了海员每工作一个月最低享有2.5日带薪年休假的权利,A2.5.2.2规定了海员从上船服务到可以行使遣返权之间的期限应少于12个月,则可以推定海员在船上服务期限最长为连续11个月左右,具体的服务期限要参考不同国家和地区的相关规定。针对上述延期服务的情况,根据《中华人民共和国劳动法》《中国海员集体协议》2020年修订版和《中华人民共和国船员条例》2020年修订版等法律法规的规定,海员在就业协议约定服务期限外超期服务的,船东应当支付超期补贴,通常额外的超期补贴按照《中华人民共和国劳动法》规定并参照国际惯例高于海员的原薪酬。¹¹但在实施过程中,海员的合理劳务报酬求偿权难以得到保障

伤病海员的“工伤”认定缺乏权威、统一的标准,这也影响到船员的权益。世界各国就海员“工伤”赔偿相关的法律法规有所区别,如英国《1995年商船航运法》(Merchant Shipping Act 1995)并未提及工伤赔偿的责任分配,只在第四十五条规定了船东应承担海员接受医疗救治时的合理费用且不得拖延;我国依据《海员伤病亡处理行业建议标准》采取“1+1”模式,海员工伤赔偿包括依据《工伤保险条例》得到的补偿和船东的一次性伤残或死亡补偿两个部分。由此可见,对于相对弱势的海员一方,工伤赔偿是伤病补偿的重要部分。海员在疫情期间感染新冠能否享有“工伤”待遇目前在行业内并无权威、统一的标准,若海员因履行工作义务而感染新冠受到损失,船东仅依据《2006年海事劳工公约》规定支付医疗相关费用,可能会导致伤病海员得不到公平合理的费用补偿。

感染新冠的情形能否被认定为“工伤”是维护海员合法权益的关键问题,也是维护海员就业协议当事人责任承担的公平合理性的必然要求,但并不意味着只要海员感染新冠就可以享受工伤待遇。在疫情期间部分海员感染新冠是否属于“工

10 如国务院办公厅发布《关于延长2020年春节假期的通知》中将春节假期延长至2月2日,包括海员在内的劳动工作者春假、年假延长,待派海员被迫无法按期履约。参见中国政府网2020年1月27日, http://www.gov.cn/zhengce/content/2020-01/27/content_5472352.htm。

11 付本超、赵斐、王一平:《经略海洋战略实施中船员人身权益保护研究》,载《山东法官培训学院学报》2019年第6期,第131-140页。

伤”¹²并不容易界定。依据我国《工伤保险条例》第十四条、¹³第十五条规定,¹⁴海员如果遇到以下情形推定为工伤是较为合理的:一是海员在履行服务期间因开展防疫相关作业而感染,如在船上进行疫情防控、医学隔离工作时接触疑似和确诊病例,下船采购必要物资或运送物资而感染等;二是海员在履行服务期间依据政府指令协助运输抗疫救援应急物资或完成其他防控任务而不得不前往疫区;若海员在换班或遣返中途感染、正常履行工作义务意外感染则不应认定为工伤。目前,包括我国在内的许多航运业发达的国家都未明确海员是否属于“因履行工作义务感染新冠可享受工伤待遇”的人员,因此海员感染新冠是否属于“工伤”并不能一概而论。现实情况例如“钻石公主号”这类船舶在海上锚泊隔离期间,海员被隔离并接受医学检测和观察,并为旅客提供相应服务,维持隔离秩序;或者按照政府和船公司的指令运输救灾物资,性质属于履行职责的“相关工作人员”;若感染新冠,属于“工伤”,其他情形,例如上下班途中感染新冠,则不属于“工伤”。¹⁵

(二) 海员的换班、遣返权利行使不便

依据《2006 年海事劳工公约》规则 2.5 所规定,在守则所规定的情形和条件下,海员有权利得到遣返且无需承担费用;各成员国应为停靠在其港口或通过其领水或内水的船舶上工作的海员的遣返和船上人员的换班提供便利;经修正的《2003 年修订海员身份证件公约的公约(修订本)》第六条第七款规定,各成员国应尽可能在最短时间内批准持有效海员身份证件及护照的海员登船或遣返的入境请求。2020 年 5 月 6 日,国际海事组织向成员国发布了 12 步解决方案,以协助解决海员换班问题,为成员国妥善处理海员换班和遣返相关工作提供了详细的指导和建议,呼吁各成员国可视本国港口地区疫情防控情况,在保证感染风险不会增加的情况下,适当调整港口防疫措施,积极参与 12 步方案,推进换班路线图落的落实,为海员入境提供最大限度的便利。但是,12 步解决方案在实际操作中依然停留在“纸上谈兵”的层面,落实极为困难。目前仍有许多国家拒绝海员出入境换班和

12 依据人社部《关于因履行工作职责感染新型冠状病毒肺炎的医护及相关工作人员有关保障问题的通知》,海员是否属于“相关人员”并无定论。但在《工伤保险条例》相关规定中,“在抢险救灾等维护国家利益、公共利益活动中受到伤害的”,视同工伤。

13 《工伤保险条例》第 14 条:职工有下列情形之一的,应当认定为工伤:(一)在工作时间和工作场所内,因工作原因受到事故伤害的;(二)工作时间前后在工作场所内,从事与工作有关的预备性或者收尾性工作受到事故伤害的;(五)因工外出期间,由于工作原因受到伤害或者发生事故下落不明的;

14 《工伤保险条例》第 15 条:职工有下列情形之一的,视同工伤:(一)在工作时间和工作岗位,突发疾病死亡或者在 48 小时之内经抢救无效死亡的;(二)在抢险救灾等维护国家利益、公共利益活动中受到伤害的。

15 陈鹏:《新冠肺炎疫情下船员法律权益保障问题研究与对策》,载《中国水运》,2020 年第 5 期,第 9 页。

遣返、上岸接受医疗服务,海员服务合同的执行存在一定困难,出现了大量船东和中介组织侵害海员合法权益的情况。

(三)海员履约与违约的责任认定规则不清

受新冠肺炎疫情影响,海员可能会碰到不能及时登船履行服务合同义务、合同期满或约定服务期满不能遣返以及续约和超期工作等突发情形,存在承担违约责任的可能。对疫情性质的认定会直接影响到海员承担违约责任的程度以及就业协议的效力问题,由于各船旗国针对民事合同纠纷的法律制度不同,则适用依据和解释结果不尽相同。根据《中华人民共和国民法典》第一百八十条规定,“不可抗力”是指“不能预见、不能避免和不能克服的客观情况”,是法定免责条款,对合同当事人具有约束力。因此,如果将“不可抗力”扩大解释为世界范围内的流行疫病,那么海员可以援引不可抗力条款延期履行合同,或者免除部分或全部的违约责任。

2020年2月10日,全国人大常委会法工委发言人指出,受政府疫情防控措施影响导致当事人无法履行合同、实现合同目的的,可援引不可抗力相关法律规定,部分或全部免除责任。随后中国国际贸易促进委员会发布公告,受新型冠状病毒感染的肺炎疫情的影响,导致无法如期履行或不能履行国际贸易合同的企业,可向其申请办理与不可抗力相关的事实性证明。¹⁶参考以往的司法实践,中华人民共和国最高人民法院曾在2003年针对“非典”疫情发布的《关于在防治传染性非典型肺炎期间依法做好人民法院相关审判、执行工作的通知》中认定其为法定的不可抗力情形,¹⁷新冠肺炎疫情相较于“非典”更为严重、影响范围更广,将新冠肺炎疫情认定为不可抗力不仅符合法理基础和司法实践,而且顺应社会需求。由此可以看出,依据我国法律规定,新冠肺炎疫情导致当事人不能履行合同的情形可以被解释为不可抗力事件。但是在英美法系国家,不可抗力免责事由是没有明确法律规定的,仅援引“不可抗力”也不一定能够免责。海员服务合同中只有一部分明确地将流行病、疾病隔离视为“不可抗力”情形,能否免责、减责要结合具体的事实和合同的具体内容及性质作出判断。¹⁸

对于海员就业服务合同中不可抗条款的解释,要综合考虑疫情对合同履行的影响程度和各国适用的合同法规则来判断,盲目援引“不可抗力免责条款”也可能

16 《全国人大常委会法工委:因疫情防控不能履行合同属不可抗力》,载新浪网 2020 年 2 月 10 日, <https://finance.sina.com.cn/china/gncj/2020-02-10/doc-iimxyqvz1797181.shtml>。

17 《最高人民法院关于在防治传染性非典型肺炎期间依法做好人民法院相关审判、执行工作的通知》,法[2003]72号,2003年6月11日发布。

18 张文广:《正确适用不可抗力制度》,载《中国远洋海运》2020年第6期,第72页。

导致海员服务合同当事人风险利益分担有失公平。目前相关国际组织和各成员国并未达成统一的解释标准,对海员履约责任承担的认定问题上众说纷纭,一定程度上也导致了部分海员合同权利因疫情受到损害时难以得到救济。

三、完善船员权益的法律保障及相关机制

(一) 完善航运及船员权益保障的相关法律制度

众所周知,法律规范具有滞后性,包括《国际卫生条例(2005)》在内的相关国际公约、技术指导和包括《中华人民共和国船员条例》《中华人民共和国海船船员职业保障管理规定》在内的各国相关法律法规,在疫情中或多或少暴露了船员权益保障方面的法律漏洞,无法高效地应对突发公共卫生事件为船员带来的损害和风险。同时,相关国际公约、国际组织的指导性规范与各国国内法之间都或多或少存在冲突,国内法与国际法的衔接上存在一定的问题,需要对国际法转化适用和立法调整,也需要落实细化内容细化、加强针对性、明确责任主体等任务,针对大规模突发公共卫生事件下船员的权益保障和权利救济问题,出台更为详实的操作指导。就目前国际法和国内法对船员权益保障规定方面的漏洞而言,诸如《1989年国际救助公约》和《国际海上人命安全公约》等涉及到船员救助问题的国际公约,均未涉及重大公共卫生事件情形下的责任分配和权利救济,《中华人民共和国船员条例》仅规定了对船员劳动权益保障和用人单位监督检查的机构为劳动保障行政部门,却没有进一步细化监督流程和奖惩办法。我国批准加入《2006年海事劳工公约》,但在国内法方面,《中华人民共和国船员条例》并未直接将《2006年海事劳工公约》中涉及船员人身权益保障的相关规定体现在国内立法中。¹⁹在船员权益保障及损害赔偿上,并未与国际条约相适应,也会造成司法实践中的困难,影响船员权益有效保障。

结合国际卫生组织、国际海事组织、国际劳工组织相关公约和条约,我国应结合新发展、新情况,进一步明确重大疫情下相关的国际公约的解释和适用,从程序法和实体法两方面对机构职责、国家责任、船员权益和协调救济机制进行补充和完善,牵头设立专门机构负责船员权益保障协调指导工作,做到统筹国际、国内两个大局;同时呼吁世界各国发扬人道主义精神,积极参与伤病船员救助,响应国际海事组织秘书长 Kitack Lim 呼吁,承认船员的“key workers”身份,给予船员与

19 陈鹏:《浅析〈船员条例〉对国际劳工组织公约国内化的立法实践(上)》,载《中国海事》,2009年第10期。

医务人员同等的待遇,为维护船员合法权益和生命健康安全贡献一份力量。²⁰ 赋予船员们“key workers”的身份,不仅是对船员在抗疫物资运输中所作贡献的认可,更是保障船员合法权益的关键措施,也有利于减少针对船员的歧视和不平等对待。

我国的航运和海事相关法律制度应结合《国际卫生条例》《2006年海事劳工公约》的有关规定,以及我国现有社会保障、医疗卫生和防疫法律制度,从国家总体安全观的高度,对我国在海上交通和港口管控提出建议,修改现行的《中华人民共和国海上交通安全法》和《中华人民共和国港口法》,²¹ 全面修订《中华人民共和国船员条例》,着手研究、制定、执行船员法,在海洋强国战略下,建立与海上交通强国相适应的船员管理与权益保障法律体系,尤其是增加保障船员合法人身权益的相关法律法规,完善船员人身权益损害赔偿法律制度;²² 结合国家卫生防疫、检验检疫以及世界卫生组织、国际海事组织以及国际劳工组织的行业健康防疫标准和卫生指南,完善船上防疫部署、完善船员医疗手册、无线电医疗指南,同时加强船员疫情防控能力和突发公共卫生事件应急的能力,最终提出符合我国航运业发展且切实规范和保障船员合理合法权益的法律法规政策,建立海洋强国不可或缺的船员管理和权益保障的法律体系。

我国不仅要加快船员权益相关法律法规的立改废释,还应在防疫政策和港口、船舶管理制度上为船员作出适当调整。第一,贯彻落实相关国际公约宗旨和条款内容,逐步完善船员劳动权益和健康安全保障方面的法律法规,明确责任主体和法律后果,确保船舶优先权担保下船员工资和社会福利请求权的实现;第二,针对包括新冠肺炎疫情在内的各类重大公共卫生事件,制定具体的技术指南和指导政策,加强船舶检查监督,在行政程序上为船员提供便利,如办理船员适任证书期限酌情延期、进行船员远程培训、调整船员换班遣返过境政策等,同时加强船员健康安全信息通报和交流工作,减少疫情传播扩散的可能性;第三,在疫情期间提供服务的船员承受了比正常时期工作时更高的生命健康风险,超期工作的船员还面临身心疲惫情况下的超负荷作业,国家可以考虑对船员疫情期间所得薪资适度减免个人所得税,提高船员工作的积极性和船舶航行的稳定性;第四,加强海事劳动主管部门、船东协会以及船员工会之间的联系与合作,对船员就业协议中的权

20 2020年6月25日为国际海员日,国际海事组织将2020年的国际海员日主题拟定为“Seafarers are Key Workers”,呼吁公众了解海员在抗击新冠肺炎疫情中作出的牺牲和贡献,认识船员在全球供应链运转中的重要作用。参见《2020年“世界海员日”主题:Key Workers! ... IMO:该任性时要任性!》,载海事服务网6月23日, <https://www.cnss.com.cn/html/cydt/20200623/336559.html>。

21 陈鹏:《新冠病毒肺炎疫情下的船员权益保障问题》,载《中国海事》,2020年第4期,第23页。

22 付本超、赵斐、王一平:《经略海洋战略实施中船员人身权益保护研究》,载《山东法官培训学院学报》,2019年第6期,第139页。

利义务内容进行标准化的调整,²³对重大疫情下延期遣返换班、带薪年假、超期服务以及社会保险缴纳和工资偿付等问题制定明确、统一的标准,在合理范围内为船员争取最大的利益;第五,加快建立高效的船舶监督检查和船员劳动争议解决机制,发挥海事主管部门的专业性,为船员合法权益的救济提供平台;最后,在涉外海事诉讼中准确适用相关国际公约、国际惯例及外国法,充分考虑大陆法与普通法,以及国际惯例中关于不可抗力相关规则的差异性,船东、船员服务合同的制定和履行方面准确适用,与国际法治接轨。²⁴

(二) 完善航运业治理的国际合作机制

无论是从人道主义的角度还是从管辖权的角度,船旗国、港口国、船员国籍国以及船舶公司国籍国等相关国家均有义务保障船员的健康权。在全球性突发公共卫生事件的防控背景下,国家间的责任分配和管辖权冲突问题凸显,因此,建设和完善疫情防控下的国际合作和信息共享机制至关重要。

相关国家应强化与国际海事相关组织之间的合作,建立船舶疫情动态检测与信息交流平台,以便沿海国根据船舶疫情防控情况及时做出政策调整,以为伤病船员接受救助提供便利。加强国家间突发公共事件港口应急协调能力与医疗卫生防疫科研方面的技术合作,为伤病船员的救助工作打好坚实的医疗基础。建立国家间突发公共卫生事件应急合作交流磋商机制,对船员救助、权利救济、管辖权冲突和责任承担等问题达成一致意见,为保障船员尤其外派船员的合法权益提供有力的政治保证。

(三) 切实改善船员的海上工作生活环境

海上工作环境与陆地工作环境的区别很大,船舶航行工作与海上生活对船员的身体、心理素质要求更高,当船员体力不断消耗、心理压力不断增加,加上单调乏味的特殊工作环境和复杂精密的船舶机械操作,以及饮食作息的不规律与不健康,都会使船员的生理、心理疲劳明显加剧,这也是海上事故发生的主要原因之一。²⁵受疫情影响,大部分在船服务的船员不仅要承受感染新冠的风险,还面临过度劳累而合法权益却得不到保障的问题。

一方面,应当加强社会舆论宣传和普法教育,提高船员的维权意识,了解重大

23 李桢:《海事劳工公约要求下的船旗国管理评析》,载《中国海事》2011年第1期,第33页。

24 司玉琢:《妥善处理涉疫情涉外海事纠纷 展现我国司法担当》,载中国法院网2020年6月18日, <https://www.chinacourt.org/article/detail/2020/06/id/5308248.shtml>。

25 王子海:《船员疲劳的原因及对策》,载《中国水运》2009年第1期,第35页。

公共卫生事件影响下可争取的权利与待遇,以及争议解决的途径和主管部门,熟悉流程和步骤;提高船东的法律意识,尊重船员的合法劳动权益,切实提高疫情期间海员的工作待遇和生活质量;提高全社会对航运业的认知程度和对船员社会地位的重视程度,增强社会对船员的尊重。

另一方面,船东应做好船舶防疫工作,定期消毒杀菌,定期评估船员心理健康状况,监测船员身体状况;对待疑似感染船员、确诊或康复船员时,应当公平公正,避免出现歧视;积极为伤病船员提供医疗救助,重视心理呵护,保证船员精神心理健康;²⁶尽可能提高船员工作生活环境的舒适度,降低船员接触传染源的可能性,改善船员饮食质量,提高船员身体素质。²⁷

(四) 提高港口的船员服务水平

传统港口的运营管理模式在全球性重大疫情影响下弊病凸显。疫情爆发初期,许多沿海国为了严格防疫,关闭了部分港口或严格把控船舶停靠和过境、船员上岸的情况。在疫情彻底消除之前,各国的防控手段和措施也不会放松,受大环境影响,大部分港口低效运转的情况在短时间内很难有所改善。

因此,在确保重大公共卫生事件应急水平的前提下,应对标国际标准,改善港口国际经贸竞争力和经济发展质量,提高航运自由程度,规范船舶经营,为船员出入境提供便利,保障船员合法权益,才是未来港口改革和发展的方向。2020年6月1日,中共中央、国务院颁发了《海南自由贸易港建设总体方案》,也为重大公共卫生事件影响下保障船员合法权益提供了宝贵的建设性建议。该方案的制度设计施行更加便利的出入境管理政策,优化出入境边防检查管理,赋予自贸港边检机关一定程度的自由裁量权,在重大疫情出现时对船员出入境的管控也具有一定的自由度,这将为船员的换班和遣返带来极大的便利。加强港口的医疗救助水平,同时加快绿色智能船舶和智慧港口建设,加强港口公共卫生防控救治体系建设,建立传染病和突发公共卫生事件监测预警、应急响应平台和决策指挥系统,提高早期预防、风险研判和及时处置能力,为伤病船员的医疗救助和船舶疫情的防控提供高效的制度保证。

四、结 语

26 《在 COVID-19 的背景下调整公共卫生和社会措施时的注意事项的附件》,载世界卫生组织网站, https://apps.who.int/iris/bitstream/handle/10665/332050/WHO-2019-nCoV-Adjusting_PH_measures-Workplaces-2020.1-chi.pdf。

27 《经济社会文化权利委员会第14号一般性意见》, E/C.12/2000/4, 2020年8月11日, 第15段。

新冠肺炎疫情爆发至今,全球范围仍有大量船员在海上漂泊,面临着超负荷的工作时间与任务。目前,许多国家为了防控疫情,对港口人员往来依旧采取严格的把控措施,船员换班难,归家遥遥无期,伤病船员的救助不够及时,合法劳动权益受到侵害却救济无门。为了缓解大规模公共卫生事件背景下船员工作和维权的困境,推动船员权益保障法律体系的进步和完善刻不容缓。

相关国际公约的缔约国、沿海国和船旗国等国家不仅应严格遵守国际法的相关规定,以保障船员的各项人权与合同权利,更应有意识地建立交流合作机制和信息共享平台:一方面,要在国际法框架内加强船员服务合同的规范化,对突发公共卫生事件有明确的定性,对“不可抗力”情形做出合理的解释与适用,保障船员各项劳动权利的实现,改善船员工作环境和福利待遇;另一方面,在国内法范畴内加快船员相关法律法规的立、改、废、释,建立和完善船员合同纠纷的调解、仲裁和诉讼机制,提高船员权利救济的及时性、公平性和便利性。同时,船东和中介组织也应不断增强契约意识,响应国际劳工组织和相关船员权益保障组织的呼吁,以人为本,认可并感激船员在疫情中做出的牺牲,关注船员身心健康,合理提高船员待遇和地位,积极承担合同责任,为船员营造良好的工作氛围,切实保障船员的各项合法权利。

Legal Protection of Seafarers' Rights and Interests of Shipping Industry in the Post-Pandemic Era

WU Wei HUANG Ruqing*

Abstract: As the COVID-19 pandemic spreads around the world, it poses various challenges and risks to the development of the shipping industry, which has also harmed the health and labor rights of seafarers. As a result of the epidemic, countries continue to upgrade their prevention and control measures, which objectively affects the docking of ships and the shift changes of seafarers; meanwhile, there exist loopholes in the legal system and assistance system of seafarers' labor rights and interests. Based on the provisions on the protection of seafarers' rights and interests under the framework of the international laws of the sea and relevant state responsibilities, international organizations such as the International Maritime Organization (IMO), the International Labour Organization (ILO) and the World Health Organization (WHO) have issued guidance on issues related to seafarer performance and assistance under the impact of the pandemic. For the shipping industry in the post-pandemic era, it is necessary to establish a perfect legal system for seafarers' rights and interests, with a view to protecting their legitimate rights and interests and ensuring their physical and mental health; it is also important to create a good working environment and atmosphere for

* .WU Wei, PhD in Law, Lecturer of Wuhan University China Institute of Boundary and Ocean Studies, Associate Researcher of Collaborative Innovation Center for Territorial Sovereignty and Maritime Rights, E-mail: ww330@whu.edu.cn; HUANG Ruqing, Wuhan University China Institute of Boundary and Ocean Studies, E-mail: hrqjay1994@126.com. This paper is a part of the research achievements of the project sponsored by Foundation for Young Scholars of the Ministry of Education of China in 2019: Research on International Law Issues of the Application of Floating Platforms to Ensure Rights Safeguard and Law Enforcement in the South China Sea (Project No.: 20YJC820049), and 2020 Wuhan University Independent Research Project: Research on International Law Issues of the Application of Floating Platforms to Ensure Rights Safeguard and Law Enforcement in the South China Sea (Project No.: 4104/413000045).

seafarers and enhance their social status, thereby boosting the healthy development and operation of the shipping industry.

Keywords: COVID-19 Pandemic; Shipping governance; Seafarer assistance

While the current COVID-19 pandemic has been controlled to a certain extent worldwide, the situation in Europe and the United States brooks no optimism, leaving the possibility of a resurgence of the pandemic on a global scale. The pandemic outbreak and spread on a large scale has led to a serious impact on various industries. As a key link in the international trade supply chain and an important component of the international tourism industry, the shipping industry has also faced severe challenges, such as the tightening of resources in the shipping market, dramatic rise in transportation costs, and difficulties in ship management. In the post-pandemic era, the top priority in the governance of the shipping industry is to restore the global shipping industry, properly solve such problems as epidemic prevention and control on ships and assist infected seafarers.

90% of today's global trade,¹ especially bulk trade, depends on maritime transport. The large number of seafarers constitutes the solid foundation to support the industry, while also being the most vulnerable link in times of major risk. In spite of the extremely risky nature of seafarers' work, the prevailing Labor Law of China makes no distinction regarding the labor particularity of seafarers.² The global spread of COVID-19 has resulted in many negative effects on seafarers' work and life,³ yet their labor rights have not been given sufficient legal protection. Currently, China's prevailing laws and regulations concerning the protection of seafarers' rights and interests can be broadly divided into two categories: laws and regulations concerning the labor law, such as the Labor Law of the People's Republic of China, the Labor Contract Law of the People's Republic of China, and the Social Insurance Law of the People's Republic of China, as well as laws and regulations concerning seafarer management, such as Regulation of the People's

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- 1 WU Wei, *Assisting Sick and Injured Seafarers Highlights the Concept of a Community with a Shared Future for Public Health*, LegalDaily (Apr. 14, 2020), http://www.legaldaily.com.cn/commentary/content/2020-04/14/content_8169500.htm. (in Chinese)
 - 2 GUAN Weiwei, *On the Protection of Labor Rights and Interests of Chinese Seafarers and the Countermeasures*, Industrial & Science Tribune, Vol. 17:9, p. 38 (2018). (in Chinese)
 - 3 YU Hongjiang & JIN Lei, *China Negotiates via Video Link with the International Labour Organization on the Labor Rights and Interests of Seafarers During the Epidemic*, ThePaper (Apr. 5, 2020), https://www.thepaper.cn/newsDetail_forward_6848178. (in Chinese)

Republic of China on Seamen, On-Duty Rules of Seamen of the People's Republic of China, and Rules of the People's Republic of China for the Competency Examination, Evaluation and Certification of Seafarers Serving in Seagoing Ships. Although there are many stipulations in the existing laws on the management of seafarers and industry competency, those on the protection of seafarers' rights and interests are not clear, or even absent. In case of a dispute over seafarers' rights and interests, it is very likely that the maritime regulatory authorities and labor authorities will refuse to accept such a case due to unclear legal norms, making it difficult for seafarers to realize their reasonable demands. For example, it is difficult for seafarers to change shifts as normal and exercise their right of repatriation during the epidemic; the impact of the epidemic on seafarers' performance of labor service makes it difficult for their labor compensation claims to be treated fairly; and it is difficult to identify the work injury after the seafarer is infected with COVID-19.

I. The Plight of Protection of Seafarers' Rights to Life and Health

It is stipulated in Regulation 4.1 of the Maritime Labour Convention 2006 that ships should be equipped with medical personnel on board. However, many ships failed to provide sufficient resources to meet the medical needs of their seafarers during the outbreak. It is not uncommon for ships to appear confirmed or suspected cases of COVID-19 as a result of passing through epidemic areas, such as the Japanese cruise ship *Diamond Princess*,⁴ which had a total of 705 confirmed cases among the 3,711 passengers and seafarers; it also occurs when a seafarer is infected with COVID-19 during a shift change or repatriation, as was the case with the spread of COVID-19 aboard the US aircraft carrier *Roosevelt* and the French

4 The cruise ship *Diamond Princess* that departed from its home port in Yokohama, Japan, returned back on 3 February 2020. The Japanese government immediately quarantined the ship after a confirmed case of the disease was detected on 5 February 2020, and 705 of the 3711 passengers and seafarers on board were infected. See TAN Hongwei, *Several Thoughts on the Emergency Response from the Infection Incident of the Japanese Diamond Princess Cruise Ship*, WHB (Mar. 2, 2020), <http://www.whb.cn/zhuzhan/rd/20200302/329862.html>. (in Chinese)

aircraft carrier Charles de Gaulle.⁵

There are mainly two causes that contribute to this situation. First, COVID-19 is an emerging infectious disease. Under current regulations, it is difficult to achieve effective treatment with the supporting medical resources and medical level on board. Second, the epidemic prevention and control measures of various port states have also exacerbated to some extent the shortage of onboard medical resources due to the difficulty of docking for resupply.

Most of the port states' relief facilities were inadequate during this pandemic and they failed to take effective measures to enable onboard seafarers in port to receive medical relief in a full and timely manner. After the WHO declared the COVID-19 outbreak a Public Health Emergency of International Concern (PHEIC), more than 100 countries have successively strengthened quarantine procedures at their ports for all ships approaching or passing through and departing from the countries with cases within 14 days, strictly controlling the entry number and health status of people on board. Some coastal countries like Vietnam⁶ and Singapore even directly banned the entry of people on board.⁷

This situation occurs because port states strictly restrict the entry of foreign ships and personnel due to concerns about their epidemic prevention and control and public health and safety, and they generally conduct a single policy towards port management, i.e., directly refusing the entry or passage of all foreign ships and seafarers. In addition, this situation is also the result of the inconsistency in the provisions of current international laws regarding the provision of facilitation by port states to ships and seafarers. It is stipulated in Article 28 of the International Health Regulations that ships shall not be prevented by States Parties for public health reasons from embarking or disembarking,⁸ discharging or loading cargo or

5 In June 2020, a total of 1,081 people on the French aircraft carrier Charles de Gaulle were diagnosed with COVID-19, accounting for half of the total number of people on board, and the US aircraft carrier Roosevelt was also hit. Refer to *Over a Thousand Seafarers Infected, the French Aircraft Carrier Becomes a Super Source of Infection and Has to Wash the Deck with High-pressure Water!*, 360kuaiNetwork (Apr. 20, 2020), https://www.360kuai.com/pc/9d72414820f77070a?cota=3&kuai_so=1&sign=360_57c3bbd1&refer_scene=so_1. (in Chinese)

6 *Vietnam on Heightened Alert: Strictly Control Ships of China, Japan and South Korea, Ban All Entry of People from Infected Countries!*, Sofreight Network (Feb. 27, 2020), http://www.sofreight.com/news_42337.html. (in Chinese)

7 *Emergency Alert! Prohibitions and Cancellations. Latest Requirements of Ports Around the World for Ships that Have Called at China's ports!*, SohuNetwork (Feb. 6, 2020), https://m.sohu.com/a/371018745_99918184/. (in Chinese)

8 Art. 28 of the International Health Regulations.

stores, or providing fuel, water, food and supplies, while according to Article 16 of the Convention and Statute on the International Regime of Maritime Ports, a port state may refuse foreign ships to enter its own port and relevant personnel to transit on the basis of national public health and security considerations.

Internationally, the right to life and health of seafarers is also endangered by the lack of a binding assistance mechanism for sick and injured seafarers. The duty to assist seafarers does not constitute a peremptory norm under the international laws, nor do relevant international conventions provide for substantive right relief mechanisms or state responsibilities. Theoretically, most international treaties (non-customary rules) are only legally binding on the States Parties, therefore, the realization of the legal effect of an international treaty is based on the acceptance and implementation of the norms by States Parties. As stipulated in Article 53 of the Vienna Convention on the Law of Treaties, a peremptory norm of general international laws (*jus cogens*) is “a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international laws having the same character”. In other words, international *jus cogens* cannot be excluded from application and modification through bilateral or multilateral treaties between states. Moreover, the International Law Commission has made it clear that the performance of some international obligations, known as “obligations *erga omnes*”, will give rise to legal benefits for the international community as a whole, and that states that violate such obligations should bear state responsibilities.⁹ In view of this, the provisions of the above-mentioned international conventions on the right to health of seafarers do not conform to the composition of the *jus cogens*, and the duty to assist sick and injured seafarers can hardly be recognized as an “obligation *erga omnes*” bringing legal interests to the international community as a whole, not to mention the series of technical guidance documents issued by the IMO, the ILO and the WHO, which by their nature belong to the soft law category of international laws and are not binding at all.

II. Absence of Protection of Seafarers’ Right of Labor and Remuneration

9 Report of the International Law Commission on the work of its twenty-eighth session, 3 May - 23 July 1976, Official Records of the General Assembly, Thirty-first session, Supplement No. 10, p. 99.

A. Improper Implementation of Seafarers' Remuneration and Medical Benefits

The pandemic has made it difficult for seafarers to obtain reasonable remuneration and compensation for their services, especially in the case of extended holiday and leave or extensions of leave pending dispatch.¹⁰ According to Article 26 of the Regulation of the People's Republic of China on Seamen (2020 Revision), the employer shall continue to pay the seafarer with extended annual leave the wage of the period of annual leave. According to Article 25 of the Regulation of the People's Republic of China on Seamen (2020 Revision), the employer shall normally pay the seafarer pending dispatch at least the minimum wage announced by the people's government of the place where the seafarer's employer is located.

While the Maritime Labour Convention 2006 does not explicitly limit seafarers' time on board the ship, Standard A2.4 provides that seafarers are entitled to a minimum of 2.5-day paid annual leave for each month of work, and A2.5.2.2 provides that the period between seafarers' service on board and exercise of the right of repatriation should be less than 12 months, therefore, it can be presumed that the maximum period of service on board a ship is approximately 11 consecutive months. The specific service period should be subject to the relevant regulations of different countries and regions. Regarding the above-mentioned extended service, pursuant to the provisions of the Labor Law of China, the Collective Bargaining Agreement of Chinese Seafarers (2020 Edition) and the Regulation of the People's Republic of China on Seamen (2020 Revision), where a seafarer serves beyond the service period agreed upon in the employment agreement, the shipowner shall pay an overtime allowance, which is usually higher than the original salary of seafarers in accordance with the provisions of the Labor Law and with reference to international practice.¹¹ However, in the process of implementation, it is difficult to

10 For example, the General Office of the State Council issued *The Notice on the Extension of the Spring Festival Holiday in 2020*, which extended the Spring Festival holiday to 2 February, and the spring break and annual leave of workers, including seafarers, were extended, resulting in the inability of seafarers pending dispatch to perform as scheduled. See China Government Network (Jan. 27, 2020), http://www.gov.cn/zhengce/content/2020-01/27/content_5472352.htm.

11 FU Benchao, ZHAO Fei & WANG Yiping, *On the Protection of Seafarers' Personal Rights and Interests in the Implementation of Maritime Strategy*, Shandong Judges Training Institute Journal, Vol.35:6, p. 131-140 (2019). (in Chinese)

guarantee the seafarers' right of reasonable remuneration for their services.

There is a lack of authoritative and unified standards for determining the "work-related injury" of sick and injured seafarers, which also affects seafarers' rights and interests. Laws and regulations concerning compensation for seafarers' "work-related injury" differ around the world. For example, the Merchant Shipping Act 1995 of the United Kingdom does not mention the assignment of liability for work-related injury compensation, but only provides in Article 45 that shipowners shall bear the reasonable costs of medical treatment for seafarers without delay. China adopts the "1+1" model based on the Recommended Industry Standard for the Treatment of Injuries, Diseases and Deaths of Seafarers, whereby the compensation for work-related injury of seafarers consists of two parts, namely the compensation received under the Regulation on Work-related Injury Insurance and the shipowner's lump-sum compensation for disability or death. This indicates that the work-related injury compensation is also an important part of injury and illness compensation for the relatively disadvantaged seafarers. Currently, there is no authoritative and unified standard in the industry on whether seafarers infected with COVID-19 during the epidemic are entitled to the treatment of "work-related injury". If seafarers are infected with COVID-19 and suffer a loss as a result of the performance of their work obligations, the shipowner's payment of medical-related expenses solely under the Maritime Labour Convention 2006 may result in the sick or injured seafarer not being fairly and reasonably compensated.

Whether or not the infection of COVID-19 can be recognized as a "work-related injury" is not only the key issue to protect the legitimate rights and interests of seafarers, but also the inevitable requirement of maintaining the fairness and rationality of the responsibilities of the parties to the seafarers' employment agreement, which, however, does not mean that seafarers can enjoy the treatment of work-related injury once they are infected with COVID-19. It is not easy to define whether some seafarers infected with COVID-19 during the epidemic

belong to the case of “work-related injury”.¹² According to Articles 14¹³ and 15¹⁴ of Regulation on Work-Related Injury Insurance of China, it is more reasonable for seafarers to presume that a seaman suffers a work-related injury under the following circumstances: First, a seafarer is infected due to epidemic prevention-related work in the course of performing his/her service, such as exposure to suspected and confirmed cases during epidemic prevention and control work on board and medical quarantine, and disembarkation to purchase necessary materials or transport materials. Second, a seafarer who has to go to an infected area as per the government orders to assist in the transportation of emergency supplies for epidemic prevention and rescue or to complete other prevention and control tasks during the performance of his/her service; accidental infection of seafarers during the shift change or repatriation and normal performance of work obligations should not be recognized as a work-related injury. At present, many countries with the well-developed shipping industry, including China, have not made it clear whether seafarers belong to those who “can enjoy work-related injury treatment if they are infected with COVID-19 as a result of fulfilling their work obligations”. Therefore, it cannot be generalized whether seafarers infected with COVID-19 shall be regarded to have suffered from “work-related injury”. In real-life situations, for example, when ships such as the Diamond Princess are quarantined at anchor at sea, seafarers are quarantined and subjected to medical testing and observation, and provide corresponding services to passengers to maintain the quarantine order; or transport disaster relief materials in accordance with the instructions of the

12 According to *The Notice of Issues Concerning the Guarantee of Medical Staff and Other Related Staff Infected with Novel Coronavirus (COVID-19) Pneumonia Due to Performance of Duties* issued by the Ministry of Human Resources and Social Security, it is inconclusive whether seafarers belong to “relevant personnel”. However, in the relevant provisions of the Regulation on Work-Related Injury Insurance, “those who are injured when dealing with an emergency or providing disaster relief or in other activities for maintaining the state benefits or public benefits shall be regarded to have suffered from the work-related injury”.

13 It is stipulated in Article 14 of Regulation on Work-Related Injury Insurance that an employee shall be ascertained to have suffered from work-related injury if: 1. He/she is injured from an accident within the working hours and the working place due to his/her work; 2. he/she is injured from an accident within the working place before or after the working hours for doing preparatory or finishing work related to his/her job; 3. his/her whereabouts are unknown due to his/her injury or accident during his/her trip for performing duties;

14 It is stipulated in Article 15 of Regulation on Work-Related Injury Insurance that an employee shall be regarded to have suffered from the work-related injury if: 1. During the working hours and on the post, he/she dies from a sudden disease or dies within 48 hours due to ineffective rescue; 2. he/she is injured when dealing with an emergency or providing disaster relief or in other activity for maintaining the state benefits or public benefits.

government and shipping companies, the nature of which belongs to the “relevant personnel” who perform their duties; if they are infected with COVID-19, it is a “work-related injury”; while in other situations, such as infected with COVID-19 during commuting to and from work, the case does not belong to “work-related injury”.¹⁵

B. Inconvenience for Seafarers to Change Shifts and Exercise Their Rights of Repatriation

Based on the provisions of Regulation 2.5 of the Maritime Labour Convention 2006, seafarers have the right to repatriate at no cost under the circumstances and conditions provided for in the Convention; member states shall facilitate the repatriation and shift change of seafarers working on the ships that call at their ports or pass through their territorial or internal waters. Article 6, paragraph 7, of the Seafarers’ Identity Documents Convention (revised in 2003) stipulates that the member states shall, in the shortest possible time, approve the entry request for embarkation or repatriation of seafarers with valid seafarers’ identity documents and passports. On 6 May 2020, the IMO issued a 12-step plan to its member states to assist in solving issues related to seafarers’ shift changes, providing detailed guidance and suggestions for member states to properly handle seafarers’ shift change and repatriation. Member states are called upon to appropriately adjust their port epidemic prevention and control measures in the light of the epidemic prevention and control situation in their port areas, while ensuring that the risk of infection will not increase, and to actively participate in the 12-step plan, so as to promote the implementation of the shift roadmap to provide maximum convenience for seafarers to enter the country. In practice, however, this 12-step plan still remains at the level of “empty talk” and is extremely difficult to implement. Currently, there are still many countries that refuse seafarers’ entry-exit shift change, repatriation, and disembarkation for medical services. The enforcement of seafarers’ service contracts is faced with certain difficulties, with a large number of shipowners and intermediary organizations infringing on the legitimate rights and interests of seafarers.

15 CHEN Peng, *On the Protection of Seafarers’ Legal Rights and Interests under COVID-19 and Countermeasures*, China Water Transport, Vol. 26:5, p. 9 (2020). (in Chinese)

C. No Clear Rules for Determining Seafarers' Liability for Pperformance and Breach of Contract

As a result of the COVID-19 pandemic, seafarers may encounter unexpected situations such as not being able to board the ship in time to fulfill their service contract obligations, not being able to repatriate at the end of the contract or the agreed service period, not being able to renew the contract, and work beyond the contractual period, which may result in liability for breach of contract. The determination of the nature of the pandemic will have a direct impact on the extent to which seafarers bear liability for breach of contract and the effectiveness of employment agreements. Since flag states have different legal regimes for civil contract disputes, the basis for application and interpretation will vary. According to Article 180 of the Civil Code of China, “force majeure” means “any objective circumstance that is unforeseeable, unavoidable and insurmountable”. It is a statutory exclusion clause that is binding on the parties to the contract. Therefore, if “force majeure” is interpreted broadly to mean a worldwide pandemic, seafarers may invoke the force majeure clause to postpone the performance of the contract or exempt part or all of the liability for breach of contract.

On 10 February 2020, the spokesman for the Legislative Affairs Commission of the Standing Committee of the National People's Congress pointed out that the parties affected by the government's epidemic prevention and control measures, resulting in their inability to perform the contract and achieve the purpose of the contract, could invoke force majeure-related legal provisions to partially or fully waive their liability. Later on, the China Council for the Promotion of International Trade announced that enterprises that are unable to perform or fail to perform international trade contracts as scheduled as a result of the COVID-19 pandemic can apply to them for factual proof related to force majeure.¹⁶ With reference to previous judicial practice, the Supreme People's Court recognized it as a statutory situation of force majeure¹⁷ in the Notice on Effectively Implementing Relevant

16 Legislative Affairs Commission of the Standing Committee of the National People's Congress, *Failure to Perform the Contract Due to Epidemic Prevention and Control is Force Majeure*, Sina (Feb. 10, 2020), See <https://finance.sina.com.cn/china/gncj/2020-02-10/doc-iimxyqvz1797181.shtml>. (in Chinese)

17 Notice of the Supreme People's Court on Effectively Implementing Relevant Trial and Enforcement Work of the People's Court During the Prevention and Control of SARS. See Bulletin of the Supreme People's Court of the People's Republic of China, Vol. 4 (2003). (in Chinese)

Trial and Enforcement Work of the People's Court During the Prevention and Control of SARS issued in 2003 in response to the SARS epidemic. COVID-19 is more serious and has a wider range of influence than SARS. The recognition of COVID-19 as force majeure not only conforms to the legal basis and judicial practice, but also conforms to the needs of the society. It can be seen that under Chinese law, the inability of the parties to perform the contract due to COVID-19 can be interpreted as an event of force majeure. However, in common law countries, there is no clear legal provision for the exclusion of liability for force majeure, and invoking "force majeure" alone does not necessarily exempt the parties from liability. Only some of the seafarers' service contracts explicitly consider epidemic diseases and disease quarantine as "force majeure". Whether the liability can be exempted or reduced should be judged in combination with the specific facts and the specific content and nature of the contract.¹⁸

As for the interpretation of the force majeure clause in the seafarers' employment service contract, it is necessary to make a judgment by comprehensively considering the impact of the pandemic on the performance of the contract and the applicable contract law rules of various countries. Blindly invoking the "force majeure exclusion clause" may also lead to unfair sharing of risks and interests among the parties to the seafarers' service contract. Currently, no unified interpretative standard has been agreed upon by the relevant international organizations and member states, and views on the responsibility of seafarers for performance are divergent, which to a certain extent makes it difficult for some seafarers to get relief when their contractual rights are damaged by the epidemic.

III. Improvement of the Legal Protection of Seafarers' Rights and Interests and Related Mechanisms

A. Refinement in the Legal Systems Concerning the Shipping Industry and Protection of Seafarers' Rights and Interests

It is well known that legal norms have a delayed nature. Regarding relevant international conventions including the International Health Regulations (2005), technical guidance, and relevant laws and regulations of various countries,

18 ZHANG Wenguang, *Correct Application of Force Majeure System*, Maritime China, Vol. 25:6, p. 72-74 (2020). (in Chinese)

including China's Regulation on Seamen and Regulations on the Administration of Professional Security of Seafarers, there exist more or less legal loopholes of protection of seafarers' rights and interests exposed under the epidemic, making them fail to effectively deal with the damage and risks brought to seafarers by public health emergencies. Meanwhile, there are also certain conflicts between the relevant international conventions, the guiding norms of international organizations and domestic laws and inter-state laws and regulations. Problems existing in the convergence between domestic and international laws require the adaptation of international law and legislative adjustment, as well as the refinement of content, strengthening of pertinence, and clarification of responsibility subjects, and the issuance of more detailed operational guidance on the protection and relief of seafarers' rights and interests in large-scale public health emergencies. As for the loopholes in current international and domestic laws on the protection of seafarers' rights and interests, international conventions such as the International Convention on Maritime Search and Rescue and the International Convention for the Safety of Life at Sea, which deal with the assistance of seafarers, do not involve the distribution of responsibilities and rights relief in case of major public health incidents. China's Regulation on Seamen only provides that the administrative department of labor and social security assumes the responsibility for protecting seafarers' labor rights and interests and supervising and inspecting employers, however, there is no further detailed supervision process and methods of rewards and punishments. China has ratified and entered into force the Maritime Labour Convention 2006. As for domestic law on the protection of seafarers' labor and personal rights and interests, the Regulation of the People's Republic of China on Seamen doesn't directly reflect the relevant provisions on the protection of personal rights and interests of seafarers in the domestic legislation of China.¹⁹ The protection of seafarers' rights and interests and compensation for damages are not in line with international treaties, which may also cause difficulties in judicial practice and affect the effective protection of seafarers' rights and interests.

It is suggested that China should, in combination with the relevant conventions and treaties of the WHO, the IMO and the ILO, further clarify how to apply and interpret the relevant international conventions under a major epidemic in the light

19 CHEN Peng, *Analysis of the Legislation Practice of the Regulation on Seamen on the ILO Conventions in China* (Part I), China Maritime Safety, Vol. 28:10, p. 30-36 (2009). (in Chinese)

of new developments and circumstances, supplement and improve the agency responsibility, state responsibility, seafarers' rights and interests and coordination relief mechanism from two aspects of procedural law and substantive law, and take the lead in setting up a special agency to coordinate and guide the protection of seafarers' rights and interests, so as to coordinate the international and domestic situation. At the same time, we can call on countries worldwide to carry forward the spirit of humanitarianism and actively participate in the assistance of sick and injured seafarers, and respond to the appeal of Kitack Lim, Secretary-General of the IMO, to recognize the status of seafarers as "key workers" and to treat seafarers and medical personnel equally, thus contributing to the protection of seafarers' legitimate rights and interests.²⁰ Endowing seafarers with the status as "key workers" is not only a recognition of their contribution to the transportation of epidemic control materials, but also a key measure to protect their legitimate rights and interests, and helps reduce discrimination and unequal treatment against them.

With regard to China's shipping and maritime legal regimes, the relevant provisions of the International Health Regulations and the Maritime Labour Convention 2006 should be incorporated, in combination with China's existing social security, medical and health and epidemic prevention legal regime, to propose the establishment of China's maritime traffic and port control from the perspective of the overall national security concept, and amend the current Maritime Traffic Safety Law and Port Law.²¹ A comprehensive revision of the Regulation on Seamen should be conducted, and a study on the formulation and implementation of the Seafarer Law should start. Efforts should be made under the strategy of maritime power to establish a legal system for seafarer management and protection of seafarers' rights and interests that fit a maritime power. In particular, it is necessary to add relevant laws to protect the legitimate personal rights and interests of seafarers, and improve the legal regime of compensation for damage

20 25 June 2020 is the Day of the Seafarer. The IMO has designated the theme of the Day of the Seafarer 2020 as "Seafarers are Key Workers", calling on the public to understand the sacrifices and contributions made by seafarers in the fight against the COVID-19 pandemic, and their important role in the operation of the global supply chain. Refer to *Theme of the Day of the Seafarer 2020: Key Workers!... IMO: Be Bold When You Are Bold!*, See CNSS (Jun. 23, 2020), <https://www.cnss.com.cn/html/cydt/20200623/336559.html>.

21 CHEN Peng, *Protection of Seafarers' Rights and Interests Under the COVID-19 Pandemic*, China Maritime Safety, Vol. 26:4, p. 23 (2020). (in Chinese)

to seafarers' personal rights and interests.²² By combining with the national health and epidemic prevention, inspection and quarantine, as well as the industry health and epidemic prevention standards and health guidelines of the WHO, the IMO and the ILO, we should improve the deployment of epidemic prevention on ships, perfect the seafarers' Medical Manual and Radio Medical Guide, and strengthen the seafarers' ability to prevent and control the epidemic and deal with public health emergencies. Eventually, the laws, regulations and policies that are in line with the development of China's shipping industry and effectively standardize and protect the reasonable and legitimate rights and interests of seafarers are proposed, so as to establish an indispensable legal system for the management and protection of seafarers' rights and interests.

More than accelerating the enactment, amendment, repeal and interpretation of laws and regulations related to seafarers' rights and interests, it is also necessary to make appropriate adjustments for seafarers on the epidemic prevention policy and the port and ship management system. First, we should implement the purposes and provisions of the relevant international conventions and clauses, gradually perfect the laws and regulations on the labor rights and interests of seafarers and the protection of health and safety, and specify the subject of responsibility and legal consequences, so as to ensure the realization of the claim for seafarers' wages and social benefits under the guarantee of a maritime lien. Second, we should formulate specific technical guidelines and guiding policies for various major public health incidents, including the COVID-19 pandemic, strengthen ship inspection and supervision, and provide convenience for seafarers in administrative procedures, such as the extension of the time limit for handling seafarer competency certificates, remote training for seafarers, adjustment of transit policies for seafarer shift change and repatriation, etc. Meanwhile, the communication and exchange of the health and safety information of seafarers should be strengthened to reduce the possibility of the spread of the pandemic. Third, seafarers who provide services during the pandemic are exposed to higher life and health risks than during normal work, and those who work overtime are also faced with overload work under the condition of physical and mental exhaustion. The state can consider appropriately reducing or waiving the individual income tax on the salaries of seafarers during the pandemic,

22 FU Benchao, ZHAO Fei & WANG Yiping, *On the Protection of Seafarers' Personal Rights and Interests in the Implementation of Maritime Strategy*, Shandong Judges Training Institute Journal, Vol. 35:6, p. 139 (2019). (in Chinese)

so as to improve their enthusiasm and the stability of ship navigation. Fourth, we should strengthen the contact and cooperation among competent authorities of maritime labor, shipowners' associations and seafarer unions, standardize the contents of rights and obligations in seafarer employment agreements,²³ and set clear and unified standards for delayed repatriation and shift change, paid annual leave, extended service, social insurance payment and wage payment under a major epidemic, so as to strive for the maximum interests within a reasonable scope for seafarers. Fifth, we should accelerate the establishment of an efficient mechanism for ship supervision and inspection and the settlement of labor disputes for seafarers, to give full play to the professionalism of the maritime authorities and provide a platform for the relief of seafarers' legitimate rights and interests. Finally, we should precisely apply relevant international conventions, international practices and foreign laws to foreign-related maritime proceedings, fully taking into account the differences between continental law and common law, as well as the relevant rules of force majeure in international practice, in order to accurately apply the performance and rules of the service contract for shipowners and seafarers, thereby aligning with the international rule of law.²⁴

B. Perfection of the International Cooperation Mechanism for Governance of the Shipping Industry

It is the duty of the relevant states, including the flag ones, the port ones, the states of nationality of seafarers, and those of nationality of the shipping company, to safeguard seafarers' right to health, regardless of whether it is from a humanitarian or a jurisdictional point of view. In the context of global public health emergency prevention and control, issues concerning responsibility distribution and jurisdiction conflict between countries have become highlighted, making it critical to establish and improve mechanisms for international cooperation and information sharing in outbreak prevention and control.

Relevant countries should strengthen cooperation with relevant international maritime organizations to establish a platform for dynamic detection and

23 LI Zhen, *Comments of Flag State Control under the Maritime Labor Convention 2006*. China Maritime Safety, Vol. 66, p. 33 (2011).

24 SI Yuzhuo, *Properly Handling Epidemic-Related Foreign Maritime Disputes and Demonstrating China's Judicial Responsibility*, ChinaCourt (Jun. 18, 2020), <https://www.chinacourt.org/article/detail/2020/06/id/5308248.shtml>. (in Chinese)

information exchange of epidemic situation on ships, so that coastal countries can make timely policy adjustments according to the situation of epidemic prevention and control on ships, thus facilitating the assistance to sick and injured seafarers. Technical cooperation should be strengthened in terms of port emergency response coordination and medical, health and epidemic prevention research between countries, so as to lay a solid medical foundation for the assistance of sick and injured seafarers. An inter-state mechanism for cooperation and consultation on response to public health emergencies should be established, with a consensus reached on such issues as seafarer assistance, rights relief, jurisdiction conflict and responsibility, so as to provide a strong political guarantee for protecting the legitimate rights and interests of seafarers, especially those who are dispatched.

C. Effective Improvement on the Working and Living Environment of Seafarers at Sea

Given the great difference between the working environment on the sea and on the land, the ship navigation work and life at sea require higher physical and psychological quality of seafarers. The physiological and psychological fatigue of seafarers will be aggravated when they are under constant physical strength consumption and increasing psychological pressure, coupled with the monotonous and tedious special working environment and the complicated and precise operation of ship machinery, as well as irregular and unhealthy diet and rest. This is also one of the main causes of maritime accidents.²⁵ As a result of the epidemic, most of the seafarers serving on board are not only exposed to the risk of being infected with COVID-19, but also face the problems of overwork and lack of protection for their legitimate rights and interests.

First, public opinion publicity and law education popularization should be strengthened to raise seafarers' awareness of safeguarding their rights, enabling them to understand the rights and treatment that can be fought for under the influence of major public health incidents and the means and competent authorities for dispute settlement, and to familiarize them with the process and steps; the legal awareness of shipowners should be raised to respect the legitimate labor rights and interests of seafarers, and effectively improve the working treatment and quality

25 WANG Zihai, *The Causes and Countermeasures of Seafarers' Fatigue*, China Water Transport, Vol. 12:1, p. 9 (2009). (in Chinese)

of life of seafarers during the epidemic; it is also necessary to raise the society's awareness and attention to the shipping industry and the social status of seafarers, and enhance the social respect for seafarers.

Second, shipowners should make effective ship epidemic prevention, conduct regular disinfection and sterilization, and evaluate the mental health status of seafarers on a regular basis to monitor their physical condition; seafarers suspected of infection, diagnosed or recovered should be dealt with in a fair and impartial manner to avoid discrimination; medical assistance should be actively provided for sick and injured seafarers, with emphasis laid on psychological care to ensure their mental health;²⁶ efforts should be made to maximize the comfort of the working and living environment of seafarers, reduce the possibility of exposure to the source of infection, and improve the diet quality of seafarers to enhance their physical fitness.²⁷

D. Improvement on the Service Level of Seafarers in Port

The traditional port operation and management model has shown its weaknesses in the face of a major global epidemic. Early in the outbreak of the disease, many coastal countries closed some of their ports or strictly controlled the berthing and transit of ships and the disembarkation of seafarers in order to strictly prevent and control the epidemic. Until the epidemic is completely eradicated, countries will not relax their prevention and control measures, and the inefficient operation of most ports will be difficult to improve in a short period of time due to the general environment.

Therefore, on the premise of ensuring the emergency level of major public health events, it is the future direction of port reform and development to align with international standards, improve the competitiveness of international economy and trade and the quality of economic development of ports, enhance the degree of freedom of shipping, regulate the operation of ships, facilitate the entry and exit of seafarers, and protect the legitimate rights and interests of seafarers. The Master

26 WHO, *Considerations for Adjusting Public Health and Social Measures in the Context of COVID-19*, See WHO (May10, 2020), https://apps.who.int/iris/bitstream/handle/10665/332050/WHO-2019-nCoV-Adjusting_PH_measures-Workplaces-2020.1-chi.pdf.

27 Committee on Economic, Social and Cultural Rights - General Comment No. 14 (E/C.12/2000/4, 11 August 2000), para. 15.

Plan for the Construction of Hainan Free Trade Port, issued by the CPC Central Committee and the State Council on 1 June 2020, also provides valuable and constructive advice for protecting the legitimate rights and interests of seafarers in the event of a major public health incident. The plan is designed to implement more convenient entry-exit management policies, optimize entry-exit border inspection management, grant a certain degree of discretion to the free trade port border inspection organs, and provide a certain degree of freedom to control the entry and exit of seafarers in the event of a major epidemic, which will greatly facilitate seafarers' shift change and repatriation. The plan also strengthens the level of medical assistance in port, accelerates the construction of green intelligent ships and smart ports, strengthens the construction of port public health prevention, control and treatment system, establishes a monitoring and early warning platform for infectious diseases and public health emergencies, emergency response platform and decision-making command system, improves the capabilities of early prevention, risk research and timely disposal, and provides efficient system guarantee for medical assistance for sick and injured seafarers and epidemic prevention and control in ships.

IV. Conclusion

So far since the COVID-19 outbreak, a huge number of seafarers worldwide are still drifting at sea, suffering overloaded working hours and tasks. Many countries still impose strict controls on the movement of people between ports to prevent and control the epidemic, which leads to difficulties in shift changes, long delays in returning home, lack of timely assistance for sick and injured seafarers, and lack of a way to relieve the infringement of legitimate labor rights and interests. In order to alleviate the plight of seafarers' work and rights protection in the context of large-scale public health incidents, it is urgent to push forward the progress and improvement of the legal system of protecting seafarers' rights and interests.

In addition to strictly abiding by the relevant provisions of international law to protect the human and contractual rights of seafarers, states parties to the relevant international conventions, coastal states and flag states should consciously establish exchange and cooperation mechanism and information sharing platform: On the one hand, the standardization of seafarer service contracts should be strengthened under the framework of international law, with a clear definition of public health emergencies and a reasonable interpretation and application of force majeure, so

as to ensure the realization of seafarers' labor rights and improve their working environment and welfare. On the other hand, efforts should be made to speed up the enactment, amendment, repeal and interpretation of laws and regulations concerning seafarers within the scope of domestic law, establish and improve the mediation, arbitration and litigation mechanism of seafarer contract disputes, and enhance the timeliness, fairness and convenience of rights relief for seafarers. In the meantime, shipowners and intermediary organizations should continue to enhance contract awareness and respond to the appeal of the ILO and relevant organizations for the protection of seafarers' rights and interests. They should be people-oriented, recognize and appreciate the sacrifices made by seafarers in the pandemic. They should also pay attention to the physical and mental health of seafarers, reasonably improve the treatment and status of them, actively assume contractual responsibilities, create a good working atmosphere for, and effectively protect the legitimate rights of seafarers.