

# COMMENTS

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## **Seafarer Abandonment and the Maritime Labor Convention: An Examination of Its Effectiveness and Future Solutions**

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### INTRODUCTION

Seafaring is a job that is rife with risk for employees. Not only is seafaring a dangerous job in which employees are at risk for injury and poor working conditions, but seafarers face unique risks such as abandonment by their employer. Specifically, the cargo shipping industry presents a substantial risk of abandonment for seafarers because of how the industry is organized. Cargo ships are often owned in one country and registered in another, ostensibly cutting the link between ship ownership and registration.<sup>1</sup> Moreover, seafarers are often employed by a third-party agency that provides ship owners and managers with seafarers.<sup>2</sup> The connection to multiple countries, or flag states, and the involvement of third-party agencies makes it incredibly difficult to enforce labor standards, such as preventing abandonment, in the cargo shipping industry.<sup>3</sup>

Even when seafarers do not face the tragic circumstance of abandonment, they still face tight restrictions regarding when they can leave the ship. When a seafarer boards a ship to work, they are “trapped” on board until the job is complete.<sup>4</sup> For example, seafarers cannot step foot on land when they reach a foreign port unless they receive permission to do so by the port country’s immigration officers.<sup>5</sup> Moreover, permission from the port country’s immigration authorities is required to use any facilities on land or to use any of the port country’s transport to travel to the seafarers’ home country.<sup>6</sup> More

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<sup>1</sup> Helen Sampson, *‘Beyond the State’: The Limits of International Regulation and the Example of Abandoned Seafarers*, 140 MARINE POL’Y 1, 1 (2022), <https://www.science-direct.com/science/article/pii/S0308597X22000938?via%3Dihub> [<https://perma.cc/2SJU-VSN8>].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 2.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

often than not, immigration authorities deny seafarers' requests to disembark from the ship due to "grounds of nationality or failure to meet bureaucratic requirements (such as applying for visas in person)."<sup>7</sup>

The already challenging working environment for seafarers stuck aboard a cargo ship is exacerbated when their company "abandons" them. The most common form of seafarer abandonment is when a shipping company fails to pay their bills, pay seafarers their salaries, pay port dues, and fails to provide supplies to the seafarers on board.<sup>8</sup> These ships are often detained by port authorities, and seafarers are not allowed to disembark to purchase supplies or to travel home.<sup>9</sup> This means the seafarers are stuck on board without supplies like food, fuel, and medical care because the shipping company has left the seafarers to fend for themselves.<sup>10</sup>

Seafarers are prevented from leaving the boat due not only to port authorities but also to "safe manning."<sup>11</sup> Safe manning is a concept that was ratified by the International Maritime Organization (IMO) "to ensure that a ship is sufficiently, effectively and efficiently manned to provide safety and security [to] the ship . . ."<sup>12</sup> This means that seafarers must stay on board in order to ensure the boat is safe and secure, even if the shipping company has abandoned them.<sup>13</sup> This means seafarers may be stuck on board for months or even years as it can take time to resolve abandonment cases.<sup>14</sup>

Seafarer abandonment has been on the rise since 2017.<sup>15</sup> This is the same year that the 2014 amendments to the Maritime Labor Convention

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Seafarers and Abandonment: The Impact on Wellbeing*, ISWAN: NEWS (July 26, 2021), <https://www.seafarerswelfare.org/news/2021/seafarers-and-abandonment-the-impact-on-wellbeing> [<https://perma.cc/7H4G-8455>].

<sup>12</sup> *Id.* at n.3.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *See Abandonment of Seafarers Set to Reach Record Levels in 2022*, NAUTILUS INT'L (Sept. 29, 2022), <https://www.nautilusint.org/en/news-insight/telegraph/abandonment-of-seafarers-set-to-reach-record-levels-in-2022/> [<https://perma.cc/XFS6-5H29>].

(MLC)<sup>16</sup> went into effect.<sup>17</sup> The 2014 amendments to the MLC sought to increase protections for abandoned seafarers.<sup>18</sup> Between 2012 and 2016, meaning the time before the 2014 amendments went into effect and after the original version of the MLC was ratified,<sup>19</sup> there were between twelve to nineteen abandonment cases reported each year.<sup>20</sup> However, since 2016 cases have spiked. In 2017, the year the MLC amendments on seafarer abandonment went into force, there were fifty-five reported cases of seafarer abandonment.<sup>21</sup> In 2018, there were forty-four reported cases.<sup>22</sup> In 2019, there were forty reported cases.<sup>23</sup> Then, in 2020, cases soared to eighty-five, only seventeen of which were related to COVID-19.<sup>24</sup> Finally in 2021, cases spiked once again to ninety-five cases.<sup>25</sup> Thus, since the 2014 amendments have gone into effect, abandonment cases have been on the rise.

This Comment will examine how the MLC has failed to fully address seafarer abandonment. Part I discusses how the International Labor Organization (ILO) and the International Maritime Organization (IMO) regulate the maritime shipping industry, the dispute resolution process for seafarer abandonment, and the 2014 MLC amendments, which went into force in 2017.<sup>26</sup> Part II addresses the challenges facing the MLC, such as a lack of enforcement, failure to address issues beyond repatriation, issues arising from the manner in which the MLC was ratified, and challenges faced as a result of COVID-19. Part III addresses some future solutions to improve the MLC.

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<sup>16</sup> The Maritime Labor Convention is a source of international law that establishes minimum guidelines and requirements for the working and living conditions of seafarers and serves as the main source of regulation for the global shipping industry. *MLC, 2006: What It Is and What It Does*, INT'L LAB. ORG., <https://www.ilo.org/global/standards/maritime-labour-convention/what-it-does/lang--en/index.htm> [https://perma.cc/59WM-E4EQ].

<sup>17</sup> *Text and Preparatory Reports of the Maritime Labor Convention, 2006*, INT'L LAB. ORG., <https://www.ilo.org/global/standards/maritime-labour-convention/text/lang--en/index.htm> [https://perma.cc/59WM-E4EQ].

<sup>18</sup> *Abandonment of Seafarers Set to Reach Record Levels in 2022*, *supra* note 15.

<sup>19</sup> See *Text and Preparatory Reports of the Maritime Labor Convention, 2006*, *supra* note 17.

<sup>20</sup> *Abandonment of Seafarers Set to Reach Record Levels in 2022*, *supra* note 15.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Text and Preparatory Reports of the Maritime Labor Convention, 2006*, *supra* note 17.

## I

### BACKGROUND:

#### THE REGULATION OF THE INTERNATIONAL SHIPPING INDUSTRY

The basis of the MLC, and the ILO itself, is the United Nations Convention on the Law of the Sea (UNCLOS). UNCLOS is a comprehensive regime of laws for the world's oceans that establishes governing rules for what occurs at sea.<sup>27</sup> These governing rules are an amalgamation of traditional rules as well as new rules to address more recent concerns about conduct at sea.<sup>28</sup> One of the many topics UNCLOS addresses is labor laws and working conditions on sea vessels.<sup>29</sup> Specifically, Article 10 of the original version of UNCLOS states that every state must ensure safety in regard to “the manning of ships” and “labor conditions . . . [for] crews, taking into account the applicable international [labor] instruments.”<sup>30</sup> Therefore, the baseline requirement that states must follow any labor-related laws sets the groundwork for the MLC itself.

Another key to understanding the MLC is the particular language used throughout the convention. The important terms for this Comment that are used in the MLC are “flag state,” “port state,” and “Flags of Convenience.” The United States defines flag state as, “the authority under which a country exercises regulatory control over the commercial vessel which is registered under its flag.”<sup>31</sup> In simpler terms, a flag state is a state<sup>32</sup> under which a company registers its ships.<sup>33</sup> Furthermore, a flag state is the state that regulates the companies and the ships that are registered under it.<sup>34</sup> A port state is a state that allows “Port State Control,” meaning inspections to ensure

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<sup>27</sup> United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS]; see also *United Nations Convention on the Law of the Sea*, INT'L MAR. ORG., <https://www.imo.org/en/OurWork/Legal/Pages/UnitedNationsConventionOnTheLawOfTheSea.aspx> [https://perma.cc/FN26-AVLD].

<sup>28</sup> See UNCLOS, *supra* note 27.

<sup>29</sup> *Id.* art. 10.

<sup>30</sup> *Id.*

<sup>31</sup> Navigation and Navigable Waters, 33 C.F.R. § 156.405 (2023).

<sup>32</sup> Please note the terms “country” and “state” are used interchangeably throughout this Comment. Unless stated otherwise, the term “state” refers to a sovereign state.

<sup>33</sup> *Flag State vs. Port State*, MAR. INST. TECH. & GRADUATE STUD. (Dec. 16, 2021), <https://www.mitags.org/flag-vs-port-state/>.

<sup>34</sup> *Id.*

compliance with international laws, at its ports.<sup>35</sup> These states can inspect any ship, regardless of what flag they fly.<sup>36</sup> More broadly, port states are allowed to exercise discretion over the treatment of ships that are in their ports.<sup>37</sup> Port states can detain ships and impose fines on ships that are out of compliance with that port state's laws, as well as regimes like UNCLOS that the port state has signed on to.<sup>38</sup> Finally, there are Flags of Convenience (FOC). An FOC is a ship that flies a flag other than the flag of the country that owns the ship.<sup>39</sup> Typically, FOC shipowners do not enforce international labor standards on their ships because the countries they are registered under either do not enforce labor standards or do not have stringent labor standards.<sup>40</sup> Thus, whether a ship is an FOC can affect how the MLC is enforced. All these different terms play a role in the MLC and its effectiveness as they all play a role in how the MLC is enforced.

#### ***A. The International Maritime Organization and International Labor Organization***

Seafaring and the maritime shipping industry are heavily regulated by the IMO and the ILO.<sup>41</sup> The IMO is an agency of the United Nations that specializes in improving safety and security on, and preventing pollution from, shipping vessels.<sup>42</sup> The ILO sets labor standards and develops policies to promote good working conditions.<sup>43</sup>

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Desirée LeClercq, *Outsourcing Enforcement*, 62 VA. J. INT'L L. 271, 280 (2022).

<sup>38</sup> *Id.*

<sup>39</sup> *Flags of Convenience*, INT'L TRANSP. WORKERS' FED'N, <https://www.itfglobal.org/en/sector/seafarers/flags-of-convenience> [<https://perma.cc/CA9Y-BM49>]. Certain countries have less stringent requirements for registering ships, which allows for ships to register under flags they do not actually have a link to. Many FOC countries' ship registries are administered by third parties and not the countries themselves. For example, Liberia, a known FOC country, merely requires ships to register on the Liberian registry site and pay a small fee. Jamie Christy, *The Almost Always Forgotten, Yet Essential Part of Our World: An Examination of the Seafarers' Lack of Legal and Economic Protections on Flag of Convenience Ships*, 32 U.S.F. MAR. L.J. 49, 53–54 (2020).

<sup>40</sup> Christy, *supra* note 39, at 51. Flying under an FOC country's flag is appealing to shipowners because these countries often have more relaxed labor standards as well as lower tax rates.

<sup>41</sup> Sampson, *supra* note 1, at 3.

<sup>42</sup> *Frequently Asked Questions*, INT'L MAR. ORG., <https://www.imo.org/en/About/Pages/FAQs.aspx> [<https://perma.cc/HX8P-JE8X>].

<sup>43</sup> *About the ILO*, INT'L LAB. ORG., <https://www.ilo.org/global/about-the-ilo/lang--en/index.htm> [<https://perma.cc/PG8D-BHYZ>].

When it comes to seafarer abandonment, the IMO and the ILO work together to resolve cases.<sup>44</sup> However, in the practice of regulating the maritime shipping industry, the IMO and the ILO play different roles.<sup>45</sup> The IMO is run by the member flag states—meaning the member flag states alone are the ones making decisions for the IMO and only the member states have voting rights.<sup>46</sup> The ILO, on the other hand, is a tripartite organization<sup>47</sup>—meaning an organization “involving three people or organizations.”<sup>48</sup> In the ILO’s case, the three organizations are member states, workers’ organizations, and employers’ organizations.<sup>49</sup> This means that, unlike the IMO where just the member states make the decisions, all three organizations contribute to the decision-making.<sup>50</sup>

Furthermore, the IMO addresses a variety of maritime issues, including seafarer abandonment and other labor issues.<sup>51</sup> In contrast, the ILO focuses solely on labor issues.<sup>52</sup> The ILO has developed a variety of labor standards that establish minimum working conditions for laborers.<sup>53</sup> Although both the IMO and the ILO have distinct processes to adopt standards and norms, both have struggled with inconsistent enforcement of various standards.<sup>54</sup> The inconsistency of enforcement may give rise to the issues now seen with seafarer abandonment.

### ***B. Dispute Resolution for Seafarer Abandonment***

The IMO and ILO work together to address abandonment issues and have agreed on a joint process to resolve seafarer abandonment cases.<sup>55</sup>

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<sup>44</sup> *Seafarer Abandonment*, INT’L MAR. ORG., <https://www.imo.org/en/OurWork/Legal/Pages/Seafarer-abandonment.aspx> [https://perma.cc/T5FM-4ES7].

<sup>45</sup> See Sampson, *supra* note 1, at 3.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Tripartite*, CAMBRIDGE ENG. DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/tripartite> [https://perma.cc/4584-JYCA].

<sup>49</sup> *Tripartite Constituents*, INT’L LAB. ORG., <https://www.ilo.org/global/about-the-ilo/who-we-are/tripartite-constituents/lang--en/index.htm> [https://perma.cc/4584-JYCA].

<sup>50</sup> See *id.*

<sup>51</sup> See *Abandonment of Seafarers Set to Reach Record Levels in 2022*, *supra* note 15.

<sup>52</sup> Sampson, *supra* note 1, at 3.

<sup>53</sup> Desirée LeClercq, *Sea Change: New Rulemaking Procedures at the International Labour Organization*, 22 ILSA J. INT’L & COMP. L. 105, 108 (2015).

<sup>54</sup> Sampson, *supra* note 1, at 3.

<sup>55</sup> See *Seafarer Abandonment*, *supra* note 44.

First, a member state or an accredited organization to the IMO or ILO must inform the ILO about the abandonment case and send any information they have about the case.<sup>56</sup> In regard to member states, the flag state of the abandoned vessel, the port state where the ship is abandoned, or the labor-supplying state (the abandoned seafarer's country of national origin) may report abandonment cases within their jurisdiction.<sup>57</sup> The flag state of the abandoned ship has the primary responsibility to repatriate the seafarers or provide sufficient funds for the seafarers to repatriate.<sup>58</sup> The port state has a secondary responsibility to repatriate abandoned seafarers, while the labor-supplying state has a responsibility to repatriate only if both the flag state and the port state fail to do so.<sup>59</sup> Second, the ILO will send the information—such as IMO number, flag, type of vessel, and company owner—to the IMO for verification.<sup>60</sup> Then, after the information has been verified, the IMO sends it back to the ILO and the information is entered into a restricted database.<sup>61</sup> Relevant parties are then notified and have ten business days to provide further information.<sup>62</sup> After that, the case is released on a public database.<sup>63</sup>

At this point, the dispute can be resolved if the member state or the reporting organization provides clear information that the entire crew has been repatriated and the entirety of the outstanding contractual obligations have been paid to the crew.<sup>64</sup> If crews are not paid, the crew may take their abandonment case to court to fight their employer for the remainder of their wages, but this can be an arduous process.<sup>65</sup> Moreover, this dispute resolution process goes into effect only if the countries involved are parties to the MLC,<sup>66</sup> which will be discussed further in the next Section.

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Seafarers and Abandonment: The Impact on Wellbeing*, *supra* note 11.

<sup>66</sup> *Id.*



### ***C. The Maritime Labor Convention of 2006***

The original version of the Maritime Labor Convention (MLC) was passed in 2006 and went into force in 2013.<sup>67</sup> Just one year later, in 2014, the MLC was amended to incorporate new provisions, including provisions on seafarer abandonment.<sup>68</sup> The original version of the MLC focused mostly on shipping, incorporating many of the preexisting regulations on maritime shipping that the ILO already had.<sup>69</sup> While the original version of the MLC improved on many labor standards, such as providing better communications and contracts to seafarers, it failed to improve working conditions that affect mental well-being, such as living quarters and recreational activities.<sup>70</sup>

In 2014, the ILO passed the MLC amendments regarding seafarer abandonment.<sup>71</sup> The 2014 amendments defined seafarer abandonment as situations in which a shipowner fails to pay the cost of repatriation, has left seafarers without ship maintenance or support, or has in any other way severed their ties with the seafarers, such as failing to pay wages.<sup>72</sup> Under the MLC, shipowners are required to provide restitution to seafarers for necessary accommodations, food, transportation, and medical expenses.<sup>73</sup> The MLC requires that ILO member states have some sort of financial security system, like social security, that abandoned seafarers can access directly if the shipowner fails to pay the seafarers.<sup>74</sup> The financial security system must cover the cost of up to four months of any outstanding wages the shipowner owes from any employment agreement or collective bargaining agreement, all reasonable expenses that have been incurred by the seafarers, and any essential needs of the seafarers, such as food, water,

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<sup>67</sup> *Text and Preparatory Reports of the Maritime Labor Convention, 2006*, *supra* note 17.

<sup>68</sup> *Id.*

<sup>69</sup> Sampson, *supra* note 1, at 3.

<sup>70</sup> Helen Sampson et al., *The Working and Living Conditions of Seafarers on Cargo Ships in the Period 2011-2014*, SEAFARERS INT'L RSCH. CTR. (2018), [https://orca.cardiff.ac.uk/id/eprint/117480/1/Sampson\\_The%20working%20and%20living%20conditions%20of%20seafarers.pdf](https://orca.cardiff.ac.uk/id/eprint/117480/1/Sampson_The%20working%20and%20living%20conditions%20of%20seafarers.pdf) [<https://perma.cc/FH34-467R>].

<sup>71</sup> *Text and Preparatory Reports of the Maritime Labor Convention, 2006*, *supra* note 17.

<sup>72</sup> *Maritime Labour Convention*, A2.5.1, INT'L LAB. ORG. 37 (Dec. 9, 2020), [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/normativeinstrument/wcms\\_763684.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/normativeinstrument/wcms_763684.pdf) [<https://perma.cc/G8DQ-UDCA>].

<sup>73</sup> *Id.* at 37–38.

<sup>74</sup> *Id.* at 37.

clothing, fuel for the ship, and medical care.<sup>75</sup> Moreover, restitution must cover the cost of the seafarers' journeys home, including accommodations and the actual travel itself.<sup>76</sup>

To demonstrate compliance, the MLC requires that ships carry a certificate or documentation of the flag state's financial security system.<sup>77</sup> While the MLC discusses at length the financial requirements of member states, it fails to address the nonmonetary concerns of seafarer abandonment. This leaves a large gap in what seafarers receive when they are abandoned.

## II

### GAPS IN THE MLC AND THEIR IMPLICATIONS

The MLC leaves much to be desired for abandoned seafarers. There are several key issues with the MLC. First, the MLC is challenging to enforce because the enforcement provisions within it lack teeth and because states often fail to regulate each other. Second, the MLC addresses only one aspect of abandonment—repatriation—but there are still gaps in the convention that could be filled. Third, the way the MLC was ratified by the ILO leaves questions about its popularity. Finally, the impact of the COVID-19 pandemic on the MLC is largely unexamined. Ultimately, these points demonstrate that there are substantial gaps in the MLC that need to be filled in order to make the MLC as effective as possible.

#### *A. The MLC Is Challenging to Enforce*

There are three key reasons why the MLC is challenging to enforce, each of which will be addressed individually in this Section. First, the MLC relies on states to self-regulate, which leads to the inconsistent enforcement and incorporation into law of MLC provisions. Moreover, there is varying ratification of the MLC. Second, insurers and third parties fail to fulfill their duties regarding repatriation of seafarers, and the ILO's role in enforcement of the MLC is lacking. Third and finally, FOCs complicate the manner in which the MLC can be enforced. These factors compound, making it immensely difficult to enforce the MLC. This difficulty in enforcement ultimately results in a lack of enforcement altogether.

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

*1. The Problem of Self-Regulation*

The MLC leaves too much room for interpretation when it comes to enforcement. States are expected to self-regulate, which in itself creates problems, but also leads to inconsistent enforcement and implementation into law. These three problems amalgamate to create broad issues in the effectiveness of the MLC. The MLC itself does contain a provision regarding enforcement.<sup>78</sup> In Title V, the MLC lays out the expectations for ratifying states on implementation as well as compliance.<sup>79</sup> Under the mandatory provisions of the MLC, it is up to the ratifying states to incorporate the provisions of the MLC into their own laws.<sup>80</sup> It is also mandatory for ratifying states to ensure that individual ships flying under the state's flag are in compliance with the MLC.<sup>81</sup> This means that it is up to the states themselves to come up with their own regulatory systems for enforcement on ships.<sup>82</sup> The MLC also states it is mandatory that ratifying states "shall prohibit violations . . . and shall, in accordance with international law, establish sanctions or require the adoption of corrective measures."<sup>83</sup> In order to meet this expectation, port states that have ratified the MLC are told they can inspect ships that come into their ports to see if the ships are in compliance with the MLC.<sup>84</sup> Overall, despite stating that there are mandatory consequences to not complying with the MLC, enforcement is left entirely up to the ratifying states.<sup>85</sup>

The way the MLC is supposed to be enforced can be described as "outsourcing."<sup>86</sup> Rather than using internal bodies to enforce the MLC, the ILO outsources enforcement to member states.<sup>87</sup> In maritime law, this system of enforcement is referred to as "Port State Control."<sup>88</sup> Most port states choose to organize into regional groups that standardize vessel inspections for the region while complying with international

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<sup>78</sup> *Id.* at 4.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 5.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 91.

<sup>85</sup> *See id.* at 5.

<sup>86</sup> *See* LeClercq, *supra* note 37, at 271.

<sup>87</sup> *Id.* at 281.

<sup>88</sup> *Id.*

standards like the MLC.<sup>89</sup> Many of these regional organizations will keep track of which flag states are found out of compliance.<sup>90</sup> However, just because port states are given this authority and may keep track of noncompliance does not mean that port states will actually impose penalties on ships and flag states that do not comply.

This system of self-regulation causes problems with enforcement. The shipping industry faces unique challenges in enforcement given the globalized nature of the industry.<sup>91</sup> While the shipping industry is covered by a variety of international regulations, the mobility of ships can make these regulations challenging to enforce.<sup>92</sup> For example, flag states are traditionally expected to enforce regulations, but given that shipping vessels enter into other states' jurisdictions, they are subject to inspection beyond just the inspections of the flag state.<sup>93</sup> However, just because shipping vessels are open to more opportunity for inspections than a domestic company does not necessarily mean that there is more consistent enforcement of regulations. Rather, this could lead to more inconsistent enforcement. For example, while in the domestic context there is one standard of regulation, in the context of international shipping there are varying standards and practices from port to port.<sup>94</sup> In a self-regulatory structure in the domestic context, states must create regulatory schemes and companies need to have some kind of system in place to respond to any complaints of noncompliance.<sup>95</sup> This structure is challenging when it comes to the MLC and the international shipping industry. While the MLC requires states to create financial security systems and inspections of ships,<sup>96</sup> these are all requirements specifically for member countries. The MLC does not specifically address what happens if a shipping company is out of compliance, other than stating that member states must bring the shipping company back into compliance.<sup>97</sup>

While in general states can effectively regulate companies within their borders, regulating seafarer abandonment presents a challenge for states. In the case of seafarer abandonment, even if a state tries to

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 282.

<sup>91</sup> See Sampson, *supra* note 1, at 2.

<sup>92</sup> *Id.* at 2–3.

<sup>93</sup> *Id.* at 3.

<sup>94</sup> *Id.*

<sup>95</sup> See Bridget M. Hutter, *Is Enforced Self-Regulation a Form of Risk Taking?: The Case of Railway Health and Safety*, 29 INT'L J. SOCIO. L. 379, 380–81 (2001).

<sup>96</sup> *Maritime Labour Convention*, *supra* note 72, at 35.

<sup>97</sup> See *id.*

enforce MLC provisions on the shipping company, such as applying pressure to companies to repatriate their workers, oftentimes the company cannot come into compliance due to financial issues. If a shipping company stops paying its workers, it is likely facing financial difficulties that would make it nearly impossible for it to come into compliance. This means that the state itself will be forced to deal with the noncompliance.

Expecting the state to deal with noncompliance with the MLC comes with its own range of issues. Firstly, there is no legal structure in place to ensure ratifying states put the MLC in place. States can choose to simply fail to implement certain provisions of the MLC without consequences. Additionally, given that states are expected to enforce the MLC against each other through sanctions,<sup>98</sup> states can also choose just to not employ any consequences for violating the MLC. Moreover, it is up to port states to decide if a flag state has violated the MLC at all, since the ILO has no adjudicative body.<sup>99</sup> The MLC merely trusts the port states will fulfill their duties and enforce the MLC, but enforcement will not necessarily happen when it is up to the states themselves to decide to enforce and there are no clear consequences for failing to enforce.<sup>100</sup>

While it is expected that states incorporate the MLC into their national law, there is no clear guidance on how a state is to accomplish that.<sup>101</sup> The expectation is that ratifying states “take adequate steps to enshrine the provisions of the MLC into national law.”<sup>102</sup> However, there is some flexibility in what adequately adopting the MLC provisions looks like in practice. The ILO has published some guidance on how states should implement MLC provisions, but these guidelines are not intended to be national law.<sup>103</sup> Rather, they are intended to serve as an aid for states drafting MLC provisions into law.<sup>104</sup> In fact, the intended purpose of the guidance is to be flexible.<sup>105</sup> The flexibility in

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<sup>98</sup> *See id.* at 5.

<sup>99</sup> LeClercq, *supra* note 37, at 293.

<sup>100</sup> *Id.*

<sup>101</sup> *See generally* Sampson, *supra* note 1, at 4.

<sup>102</sup> *Id.*

<sup>103</sup> *See Handbook: Guidance on Implementing the Maritime Labour Convention, 2006*, INT’L LAB. ORG., [https://www.ilo.org/global/standards/maritime-labour-convention/WCMS\\_170389/lang--en/index.htm](https://www.ilo.org/global/standards/maritime-labour-convention/WCMS_170389/lang--en/index.htm) [<https://perma.cc/27TL-7LJR>].

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

how the MLC can be implemented results in a variety of ways the MLC is enshrined into law.

An example of a country that has enshrined the 2014 MLC amendments into law is the United Kingdom. The MLC is enshrined both in statutory law and guidance of the government. Under statutory law, the MLC is enshrined in the Merchant Shipping Act of 1995 (Merchant Shipping Act). The Merchant Shipping Act was enacted prior to the United Kingdom's adoption of the MLC,<sup>106</sup> but its provisions seemingly meet the flexible standard the ILO has for sufficient state compliance. The Merchant Shipping Act outlines the financial security requirements of the MLC throughout several sections. Section 38 establishes that seafarers are entitled to two months wages if their employment is terminated earlier than their employment agreement.<sup>107</sup> Section 73 states that abandoned seafarers from the United Kingdom and seafarers who are not from the United Kingdom but abandoned in the United Kingdom are eligible for repatriation from their original employer.<sup>108</sup> Section 73 also outlines areas in which the Secretary of State can make specific provisions, such as how payments of unpaid wages should be made to seafarers.<sup>109</sup> Furthermore, Section 73 provides that failing to comply could be a punishable offense resulting in a fine.<sup>110</sup> In addition to describing the responsibility of employers under Section 73, Section 76 outlines the financial assistance the United Kingdom can give to employers.<sup>111</sup> Under Section 76, the Secretary of State can give employers financial assistance in order to ensure seafarers get repatriated.<sup>112</sup>

In addition to the vaguer provisions enshrined in the Merchant Shipping Act, the United Kingdom's Maritime and Coastguard Agency

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<sup>106</sup> See Merchant Shipping Act 1995, c. 21 (UK), <https://www.legislation.gov.uk/ukpga/1995/21/resources> [<https://perma.cc/X82S-APTF>]. See also *Ratifications for United Kingdom of Great Britain and Northern Ireland*, INT'L LAB. ORG., [https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200\\_COUNTRY\\_ID:102651](https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102651) [<https://perma.cc/27TL-7LJR>]. The Merchant Shipping Act was passed in 1995, while the 2014 Amendments of the MLC were ratified by the U.K. in 2017.

<sup>107</sup> Merchant Shipping Act § 38.

<sup>108</sup> *Id.* § 73.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* § 76.

<sup>112</sup> *MGN 479 (M) Amendment 1 Maritime Labour Convention 2006, Repatriation of Seafarers*, MAR. & COASTGUARD AGENCY (Oct. 4, 2022), <https://www.gov.uk/government/publications/mgn-479-m-maritime-labour-convention-2006-repatriation-of-seafarers/mgn-479-m-amendment-1-maritime-labour-convention-2006-repatriation-of-seafarers> [<https://perma.cc/RLS8-9Y7V>].

posted more specific guidance in light of the MLC amendments. This guidance provides specific instructions regarding what is required to be provided to seafarers—items like food and clothing—while they are waiting to be repatriated, which mirrors the MLC requirements.<sup>113</sup> It also specifically states the requirement that shipowners have some sort of financial security system in place, such as insurance,<sup>114</sup> a key provision in the MLC. Finally, the guidelines outline that it is the Secretary of State’s responsibility to provide supplies to seafarers while they are waiting to be repatriated if the owner of a United Kingdom ship fails to comply. The guidelines are very similar to the requirements outlined in the MLC, including having no guidance on enforcement or consequences for noncompliance.

The MLC states that the convention applies to all seafarers and all ships regardless of whether the flag state has ratified the MLC.<sup>115</sup> Moreover, flag states are expected to adopt the MLC in such a way that it could be enforced against nonratifying states through inspections when ships come through their ports and penalties for ships that fail to comply.<sup>116</sup> However, it is challenging to get nonratifying states to comply when they do not agree with the provisions in the MLC. Furthermore, given that it is up to the ratifying states themselves to decide how they want to adopt and enforce the MLC, it can result in inconsistent or spotty enforcement since there are no specific guidelines.

The MLC does contain a provision called the “no more favorable treatment clause” that begins to address the issue of the MLC and nonratifying states.<sup>117</sup> The clause says that member states cannot give better treatment to ships flying under flags that have not ratified the MLC than to ships flying under flags of ratifying states.<sup>118</sup> While the “no more favorable treatment clause” certainly does not discourage ratifying states from enforcing the MLC, it once again fails to lay out any actual consequences for not enforcing it. Specifically, when it comes to seafarer abandonment, even if a state does not give a nonratifying ship favorable treatment, that does not result in actual

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Maritime Labour Convention*, *supra* note 72, at 3.

<sup>116</sup> *Id.* at 5.

<sup>117</sup> *See* INT’L LAB. ORG., FREQUENTLY ASKED QUESTIONS (Centenary ed. 2019).

<sup>118</sup> *Id.* at 6.

enforcement because it is still up to the nonratifying states to do something about it.

## 2. *Insurers, Third Parties, and the ILO*

Beyond there being no consequences for states that fail to comply with the MLC, there are also seemingly no consequences for insurers who fail to perform their duties. In many countries, they meet the social security requirement of the MLC by requiring ship owners to get insured through insurance companies called “P&I Clubs.”<sup>119</sup> These insurance policies are intended to repatriate and pay seafarers when shipowners cannot afford to do so themselves.<sup>120</sup> P&I Clubs typically require that shipowners pay them back for any wages that the P&I Club had to repatriate.<sup>121</sup> If a shipowner fails to pay the P&I Club back, the P&I Club may withdraw coverage, which leaves seafarers without any social safety net.<sup>122</sup> The whole point of P&I Clubs is to meet the social security requirement of the MLC, yet it is rendered useless if insurers can pull their coverage of ships at will with no repercussions. Countries themselves are left to deal with the aftermath should a P&I Club decide it no longer wants to provide coverage to a ship. This is exemplified by a Liberian case that the ILO recently dealt with. In that case, the Liberian government was contacted by a shipping company, which confirmed that a vessel flying a Liberian flag had been detained off the coast of India and the crew on board was owed wages.<sup>123</sup> The MLC is enforced in Liberia, and the shipowner used a P&I Club.<sup>124</sup> The Liberian government contacted the P&I Club, but it claimed that it had no responsibility to repatriate or pay wages to the seafarers because it had terminated coverage of the ship prior to the claim of abandonment.<sup>125</sup> Since the insurer refused to repatriate or pay the seafarers, the case had to be referred to an Indian court for resolution.<sup>126</sup>

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<sup>119</sup> Sampson, *supra* note 1, at 3. “P&I” stands for “Protection and Indemnity.”

<sup>120</sup> *See id.* at 3–4.

<sup>121</sup> Eugene Cheng Jiankai, *The Effectiveness of the Maritime Labour Convention’s Financial Security Certificates in Resolving Claims for Unpaid Seafarers’ Wages* 19 (Nat’l Univ. of Sing. Ctr. for Mar. L., Working Paper No. 20/01, 2020), [https://law.nus.edu.sg/wp-content/uploads/2020/05/008\\_2020\\_CML\\_Eugene.pdf](https://law.nus.edu.sg/wp-content/uploads/2020/05/008_2020_CML_Eugene.pdf) [perma.cc/J8TU-527V].

<sup>122</sup> *Id.*

<sup>123</sup> *Evangelia M.*, INT’L LAB. ORG., [https://www.ilo.org/dyn/seafarers/seafarersbrowse.details?p\\_lang=en&p\\_abandonment\\_id=396&p\\_search\\_id=221123034757](https://www.ilo.org/dyn/seafarers/seafarersbrowse.details?p_lang=en&p_abandonment_id=396&p_search_id=221123034757) [https://perma.cc/R5B9-4JCB].

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* The case was referred to an Indian court because India was the port state in this matter.



This case demonstrates many shortcomings with the MLC. It demonstrates that P&I Clubs can pull coverage with seemingly no consequences. Moreover, it demonstrates that even when a state is a signatory to the MLC and fulfills its duties, the MLC can still fail to have any consequences for noncompliance.

Third parties also fail to adequately enforce the MLC. The MLC itself allows for flag states to use third parties to inspect ships.<sup>127</sup> However, these third-party inspectors prove just as ineffective as the ratifying states themselves. For example, one of the main sources for third-party inspectors is the International Transport Forum (ITF).<sup>128</sup> While the ITF conducts many inspections of ships, all it can do is bring the noncompliance to the ILO's attention.<sup>129</sup> Bringing noncompliance to the attention of the ILO is hardly enforcement. Instead, the ITF functions as a whistleblower rather than an enforcer. It does not do anything to actually enforce the MLC because it is still up to the flag state to rectify the issue.

The ILO does not enforce the MLC either. The ILO does not have its own enforcement scheme; it instead relies on a supervisory mechanism.<sup>130</sup> This supervisory mechanism focuses on helping ratifying states implement policies and offer feedback on how provisions can be incorporated better.<sup>131</sup> The problem with this scheme is that it is merely advisory. All the ILO is doing is offering advice, but states do not have to take it. Moreover, there are no consequences from the ILO for inadequately incorporating provisions, so there is insufficient incentive to incorporate anything from the MLC. The lack of consequences from third parties makes enforcing the MLC challenging because there is no larger body assisting countries in enforcement and catching countries out of compliance. Rather, it remains up to the state to conduct enforcement, which gives inconsistent results.

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<sup>127</sup> Sampson, *supra* note 1, at 4.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> See *ILO Supervisory System/Mechanism*, INT'L LAB. ORG., <https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-supervisory-system-mechanism/lang--en/index.htm> [<https://perma.cc/Q3EW-HKR5>].

<sup>131</sup> *Id.*

### 3. *Flags of Convenience*

The final issue that makes enforcing the MLC difficult is FOC ships (FOCs). As previously mentioned, FOCs are ships that are registered under one country and fly under the flag of another country.<sup>132</sup> Under UNCLOS, FOCs cannot claim either nationality, and they can be considered ships without a nationality.<sup>133</sup> A ship without a nationality is considered “stateless.”<sup>134</sup> A stateless vessel is subject to universal jurisdiction, meaning that, rather than being subject to just its flag state’s or port state’s jurisdiction, any state can exercise jurisdiction over the vessel.<sup>135</sup> Under this scheme, it is more difficult for FOCs to dodge labor requirements as they cannot rely on flying under a flag that rarely enforces labor standards. However, given the way the MLC is designed, this presents a distinct issue for enforcement. If the shipowner fails to repatriate the crew, then it is up to the flag state to repatriate the crew.<sup>136</sup> Even so, this becomes challenging to enforce when the identity of the flag state is unclear. It makes it unclear whether the state that should be repatriating is the state that the ship is registered under or the state under which the ship is flying its flag. Typically, FOC states already have a poor track record with following labor requirements,<sup>137</sup> hence shipowners want to fly under that flag. Therefore, FOC states are unlikely to comply with the MLC because it is rare that they comply with labor standards at all. Additionally, it is up to the state the ship is registered under to choose to repatriate the ship, and it is questionable whether they will do that since it is unclear whether the ship is under their flag. Moreover, FOCs make it difficult for port states to know who they should enforce the MLC against, as it is unclear who it should be enforced against and requires states to take responsibility into their own hands.

#### ***B. The Dispute Resolution Process Is Slow and Leaves Seafarers in a Vulnerable Position***

Another reason why the MLC is not as helpful to seafarers as it could be is because the dispute process is slow and seafarers must stay on board the ship while the dispute is being resolved. However, even

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<sup>132</sup> *Flags of Convenience*, *supra* note 39.

<sup>133</sup> UNCLOS, *supra* note 27, art. 94.

<sup>134</sup> See H. Edwin Anderson, III, *The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives*, 21 TUL. MAR. L.J. 139, 141 (1996).

<sup>135</sup> *Id.*

<sup>136</sup> *Maritime Labour Convention*, *supra* note 72, at 36.

<sup>137</sup> Christy, *supra* note 39.

though the dispute process is still time-consuming, the MLC's dispute resolution scheme has sped up the process. Before the MLC amendments went into effect, only 21.4% of abandonment cases were resolved within a year of being reported.<sup>138</sup> After the ratifications of the MLC amendments, 69.2% of abandonment cases were resolved within a year.<sup>139</sup> The increased resolution speed can be attributed in part to the new dispute resolution scheme the MLC created.<sup>140</sup> Specifically, the MLC has clarified who is responsible for repatriating seafarers and has laid out a clear notification structure for flag states and insurers that can help lead to a quick resolution.<sup>141</sup>

However, despite the increase in resolution speed, the process can still be slow for seafarers. First, even if the dispute is resolved within a year, a year is still a long period of time to be stuck on board with limited supplies and no money or medical services. More problems arise when flag states and insurers refuse to take on the financial responsibility to repatriate seafarers. When no one is willing to take on the responsibility of repatriating seafarers, the dispute resolution process can last much longer than a year. For example, in 2017, Elite Marine Services abandoned eight of its vessels, leaving thirty-one crew members stranded.<sup>142</sup> The ships flew under the United Arab Emirates flag, a state that has not ratified the MLC, so it did not have the financial security system in place.<sup>143</sup> The seafarers remained abandoned anywhere from twenty-four to thirty months, with many of them not receiving all their wages until thirty-two months after they were abandoned.<sup>144</sup> This case demonstrates how even under the MLC reforms, the dispute resolution process can still be long, especially if the flag state has not ratified the MLC.

Second, the dispute resolution process can fail, which results in seafarers having to use international courts. Using international courts can be even more challenging than using the MLC dispute resolution process.<sup>145</sup> For example, it is often up to the seafarers themselves to pay for litigation, which is challenging to do when they have not been paid

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<sup>138</sup> Sampson, *supra* note 1, at 4.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 7.

<sup>141</sup> *See id.*

<sup>142</sup> *Seafarers and Abandonment: The Impact on Wellbeing*, *supra* note 11.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> Jiankai, *supra* note 121, at 4.

the wages they are owed.<sup>146</sup> Furthermore, foreign courts can be generally challenging to litigate in because they may decline to litigate the case due to jurisdictional competence issues.<sup>147</sup> This causes the resolution process to go on even longer because the seafarers have to seek out a court that will be willing to hear their case.

Finally, foreign courts may require the physical presence of the seafarer during court proceedings, which may be difficult or impossible.<sup>148</sup> Given these issues, litigating in court has the potential to extend abandonment even longer than a year. While the MLC has improved the time it takes to resolve abandonment cases, seafarers are still stuck for a substantial period of time. That time can become longer when no one repatriates or pays the seafarers, so they are forced to go to court. The dispute resolution process takes too long in practice to be truly helpful to seafarers.

### *C. The Failure to Address the Safe Manning Requirement*

While the focus on repatriation addresses the root cause of abandonment, it fails to address many of the collateral problems that stem from abandonment. One of the major collateral issues is safe manning. The MLC requires that ships always maintain enough seafarers on board to ensure the safety and security of the ship.<sup>149</sup> This principle applies both at sea and in port.<sup>150</sup> In port, the requirements are less stringent, requiring that ships just be well-manned enough to deal with an emergency at port.<sup>151</sup> When seafarers are abandoned, they still must fulfill the minimum manning requirements.<sup>152</sup>

Problems also arise once seafarers can be repatriated and have been paid. Even once seafarers can be repatriated and can technically leave the ship because their wages have been paid, they are still mandated to maintain the sufficient number of seafarers required to keep the ship safe.<sup>153</sup> Specifically, the MLC creates only the obligation that the seafarers be repatriated; it does not establish whose duty it is to bring

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<sup>146</sup> *See id.*

<sup>147</sup> *Id.* *See also* *Bautista v. Star Cruises*, 286 F. Supp. 2d 1352, 1363 (S.D. Fla. 2003) (holding the court should not second-guess Philippine laws, assuming the Philippines was jurisdictionally competent).

<sup>148</sup> *Jiankai*, *supra* note 121, at 4.

<sup>149</sup> *Maritime Labour Convention*, *supra* note 72, at 41.

<sup>150</sup> *See Jiankai*, *supra* note 121, at 16–17.

<sup>151</sup> *Id.* at 17.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

new crew on board or what safe manning looks like after repatriation.<sup>154</sup> This gap in the MLC has led to situations where, even after a party is willing to repatriate the crew, the crew is not allowed to disembark. There have been cases where the whole crew has been allowed to disembark except for the shipmaster. For example, a Panamanian ship's whole crew was repatriated except for the master of the ship because local authorities would not authorize his departure.<sup>155</sup> In more extreme cases, authorities have refused to let entire crews disembark because they did not want the ship to be left unmanned.<sup>156</sup> Typically, the shipping company will not handle getting a new crew on board to deal with safe manning because they are already struggling with financial challenges, so paying a new crew to come on board is not possible.<sup>157</sup> Even if a new crew is secured, it is likely that they will also be abandoned since the root cause of abandonment is the ship owner's inability to pay wages.<sup>158</sup> This leads to a vicious cycle of abandonment, where a crew gets abandoned, repatriated, a new crew comes on, and the cycle continues over and over again because the ship owner cannot afford to pay wages.<sup>159</sup>

The MLC does not prevent this vicious cycle from occurring. The MLC mandates the repatriation of seafarers while also requiring a certain number of crew to remain on board. The MLC fails to reconcile these two requirements. Furthermore, the MLC fails to address whether safe manning requirements should apply to abandoned vessels, and if so, how the safe manning requirements should be applied. This results in the enforcement of the standard safe manning requirement, which disregards the challenges that come with getting a replacement crew and the requirement of the previous crew to disembark. Consequently, the unclear guidance surrounding these two MLC provisions leads to confusion over what should be enforced and whose responsibility it is to meet the seafarers' needs. This hinders the efficacy of the MLC as it may result in seafarers remaining on board even when they have received all their unpaid wages, leading to increased confusion regarding enforcement responsibilities.

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<sup>154</sup> *Id.*

<sup>155</sup> Sampson, *supra* note 1, at 7.

<sup>156</sup> *Id.*

<sup>157</sup> Jiankai, *supra* note 121.

<sup>158</sup> *Id.* at 18.

<sup>159</sup> *Id.*

***D. The Tacit Acceptance Process for Amendments Calls the MLC's Popularity into Question***

The MLC represents a novel change in how ILO legislation is passed. When the ILO was first created, it used the “double discussion” procedure to pass legislation.<sup>160</sup> However, since the MLC was created, the tacit acceptance procedure has been the method by which amendments are passed.<sup>161</sup> Under the double discussion procedure, the Governing Body of the ILO agrees to put an issue on the agenda.<sup>162</sup> Next, the ILO prepares a report of the laws and practices, and member states are given a chance to comment.<sup>163</sup> After member states’ comments, the report is submitted for first discussion.<sup>164</sup> Following the first discussion, a draft instrument is created and member states will have a chance to comment on the draft.<sup>165</sup> Finally, there is a second discussion where the instrument is reviewed and amended as needed.<sup>166</sup>

The MLC altered the way in which instruments were created and amended when it introduced the tacit acceptance procedure.<sup>167</sup> Tacit acceptance altered the amendment procedure in two ways. First, it accelerated the amendment procedure.<sup>168</sup> Like in double discussion, the tripartite groups maintain their final vote of approval, but the amendments are discussed during a special session.<sup>169</sup> Prior to the special session, amendments are proposed by ratifying states and accepted if five other states also approve the amendment.<sup>170</sup> These accepted amendments are then opened for comment and discussed at a special session.<sup>171</sup> This procedure accelerates the process because the amendments that are being discussed have already been accepted by the ILO.<sup>172</sup>

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<sup>160</sup> *How International Labour Standards Are Created*, INT’L LAB. ORG., <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-creation/lang--en/index.htm> [<https://perma.cc/F6PF-HBU7>].

<sup>161</sup> See LeClercq, *supra* note 53, at 105.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> See LeClercq, *supra* note 53.

<sup>168</sup> *Id.* at 123.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 125.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

Second, tacit acceptance itself altered the amendment process.<sup>173</sup> Previously, at least two of the three tripartite groups had to agree to pass an amendment, meaning all member states had to vote in order for an amendment to move forward.<sup>174</sup> Tacit acceptance, on the other hand, assumes that member states accept amendments unless they express otherwise within a specified period of time.<sup>175</sup>

The tacit acceptance process raises questions around the popularity of the MLC. While states are given the opportunity to say that they do not plan on accepting amendments, that does not mean that they will choose to speak out. A state may simply not feel strongly enough about amendments to speak out against them, but also may not support the amendments enough to enforce them. Moreover, presenting the amendments as already adopted discourages states from speaking out against them. There is little opportunity to dispute amendments because they are already presumed to be supported, and there is very little time available for states to comment on them. Thus—given the overall lack of enforcement of the MLC—it could be argued that many states that tacitly accepted the seafarer abandonment amendments did not truly support them. Rather, they did not speak out because it was too difficult to dispute the amendments under this system.

There is some indication that there might be a broad lack of support for the MLC, despite the tacit acceptance of many member states. The MLC consolidates many preexisting maritime standards that have been relatively unpopular among member states.<sup>176</sup>

Since many of these consolidated, preexisting labor provisions were not widely supported by member states, they were watered down and provided mere guidance rather than standards.<sup>177</sup> This limits the effectiveness of the MLC in two ways. First, the watered-down labor provisions offer less assistance to seafarers. Given that the MLC had to be altered to be more palatable for member states, many of the provisions are not as beneficial to seafarers as they could be. The MLC could be far more helpful to seafarers if unpopular provisions did not have to be altered. Second, states are far less likely to enforce and comply with the MLC because its provisions are widely unpopular.

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<sup>173</sup> *Id.* at 123.

<sup>174</sup> *See id.* at 111.

<sup>175</sup> *Id.* at 123.

<sup>176</sup> Sampson, *supra* note 1, at 3.

<sup>177</sup> *Id.*

Even when states ratify the MLC, they often neglect to incorporate or enforce its provisions,<sup>178</sup> indicating that the MLC may not be all that popular. Ultimately, the tacit acceptance procedure may have allowed an unpopular instrument to be approved. This limits the effectiveness of the MLC because no one is going to enforce a convention they do not actually support.

### *E. COVID-19 and the Effect of Force Majeure*

The COVID-19 pandemic could be a major culprit in the rise of seafarer abandonment. Some argue that COVID-19 may play more of a role in the limited effectiveness of the MLC than the MLC itself.<sup>179</sup> Many shipping companies experienced financial difficulties during the pandemic, which made it challenging for them to pay employees.<sup>180</sup> Flag and port states also failed to fulfill their duties by invoking “force majeure” during the pandemic.<sup>181</sup> Force majeure is a provision in the MLC that can go into effect when there is an unforeseen or unavoidable force, beyond the control of the affected state, that makes it materially impossible for the state to fulfill its obligations under the convention.<sup>182</sup> When a state invokes force majeure, it is able to defy its obligations under international law.<sup>183</sup>

While at the start of the pandemic there may have been an argument to invoke force majeure, it quickly became apparent that states were invoking force majeure only to shirk their duties to repatriate seafarers.<sup>184</sup> Moreover, many states kept their ports restricted, which prevented seafarers from disembarking and being replaced by new crews.<sup>185</sup> While COVID-19 made it challenging to aid seafarers, it certainly did not make it impossible. For example, the IMO encouraged states to designate seafarers as key workers so they could be repatriated

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<sup>178</sup> *Id.* at 3, 7.

<sup>179</sup> See *Abandonment of Seafarers Set to Reach Record Levels in 2022*, *supra* note 15.

<sup>180</sup> *Id.*

<sup>181</sup> Mohit Gupta, *Challenges in Implementation of Maritime Labour Convention, 2006 Due to Covid-19 and Plea of Force Majeure*, MODERN DIPLOMACY (June 19, 2020), <https://modern diplomacy.eu/2020/06/19/challenges-in-implementation-of-maritime-labour-convention-2006-due-to-covid-19-and-plea-of-force-majeure/> [<https://perma.cc/V284-6UCX>].

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> Sofia Galani, *Port Closures and Persons at Sea in International Law*, 70 INT’L & COMP. L.Q. 605, 628 (2021).

<sup>185</sup> *Id.*



and exempt from travel restrictions.<sup>186</sup> Moreover, to assist with implementation, the IMO issued guidance on how to facilitate safe crew changes and travel.<sup>187</sup> Although the IMO's guidance provided a clear pathway for states to assist seafarers, only fifty-five states adopted the guidance.<sup>188</sup> While COVID-19 may have played a role in the rise of abandonment, states' unwillingness to adopt any changes to assist seafarers during COVID-19 demonstrated that some states may have been trying to avoid complying with the MLC.

This argument is further bolstered by the concern of the ILO. In a report published in 2022, the ILO expressed concern over the states adopting COVID-19 restrictions that were in direct contention with the MLC.<sup>189</sup> The ILO found that states continued to invoke force majeure despite the default time limit on force majeure being eleven months.<sup>190</sup> The ILO noted that states not only refused to repatriate workers, but labor-supplying states also refused to allow their seafarers back into the country.<sup>191</sup> The ILO also pointed out that, at this point, there are options for states to comply with COVID-19 guidelines while also complying with the MLC, yet the MLC continues to be ignored.<sup>192</sup> The ILO further reinforces that the issue might be with the MLC rather than COVID-19 as it is evident that states are taking advantage of force majeure to avoid compliance with the MLC.

Despite the ILO's clear displeasure with states invoking, and potentially abusing, force majeure, there have been no consequences for port states.<sup>193</sup> There were no financial penalties for port states that were violating their duties under the MLC because the ILO has no mechanisms to enforce its own guidelines and rules, and port states were not enforcing the MLC against each other.<sup>194</sup> All the ILO could do was announce public criticism of the practices of port states, in the hopes of pressuring port states to change their practices, and issue new

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<sup>186</sup> *Id.* at 627.

<sup>187</sup> *Id.* at 628.

<sup>188</sup> *Id.*

<sup>189</sup> INT'L LAB. ORG., COVID-19 AND MARITIME LABOUR ISSUES 1 (2022), [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/meetingdocument/wcms\\_836883.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/meetingdocument/wcms_836883.pdf) [<https://perma.cc/PT4R-44RC>].

<sup>190</sup> *Id.* at 2.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> See LeClercq, *supra* note 37, at 289.

<sup>194</sup> *Id.*

guidance to port states, which is nonbinding.<sup>195</sup> While creating public backlash can certainly be useful, the ILO's actions highlight two of the key issues with the MLC: the lack of enforcement and the lack of consequences. Port states demonstrated that they are unwilling to hold themselves accountable, and the ILO demonstrated that the MLC is toothless, as nothing beyond a public statement of disapproval and issuing new guidance could be done to punish states who were misusing force majeure in order to not repatriate seafarers.

It is undeniable that COVID-19 has played a role in the uptick of abandoned seafarers. However, the fact that there are still unresolved abandonment cases is an issue that lies with member states, not COVID-19. Force majeure appears to be used as an excuse to not comply with an unpopular standard rather than an actual reaction to COVID-19. As the ILO and IMO have pointed out, there are safe ways to repatriate seafarer while still complying with COVID-19 guidelines. It is the fact that states are failing to comply with the MLC or the potential solutions for dealing with COVID-19 and an ineffectiveness of the MLC that is causing a rise in seafarer abandonment, not COVID-19 itself.

### III SOLUTIONS

While there are several ways the MLC could be improved, I will outline four potential options to deal with its lack of effectiveness. First, the status quo could be maintained. Second, the ILO could create an adjudicative body to deal with noncompliance. Third, the MLC could be amended to widen its coverage for abandoned seafarers. Fourth, there could be some incentive offered to encourage enforcement of the MLC. All four options have pros and cons. However, each one offers a potential path forward and an opportunity to improve the lives of abandoned seafarers.

#### *A. Maintain the Status Quo*

The first viable solution is simply doing nothing at all and maintaining the status quo. Sticking with the status quo assumes that abandonment cases will decrease as shipping companies recover from financial losses stemming from COVID-19. Moreover, sticking with the status quo acknowledges that the MLC has improved the amount of time it takes to resolve abandonment cases. This solution assumes that

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<sup>195</sup> *Id.*

as more states implement the MLC, abandonment will solve itself. However, maintaining the status quo fails to recognize that the MLC is not adequately enforced. It will not matter that more states adopt the MLC if there is still a lack of enforcement. Furthermore, this option fails to recognize that despite the improvements the MLC has brought about, the resolution process remains lengthy, and the MLC addresses only the monetary aspect of abandonment. Moreover, the current system fails to acknowledge the challenge FOCs present. Specifically, it fails to allocate the duty to repatriate when a ship is flying an FOC.

However, the status quo is not entirely bad. One could argue that although the system of self-regulation may lead to a lack of enforcement, self-regulation is likely more efficient than requiring every dispute to be resolved through some other method. Moreover, although there may be a lack of enforcement, there are cases being resolved under this system, so clearly the status quo has not been entirely ineffective. Despite the lackluster enforcement of the MLC, it has drastically improved the speed at which abandonment cases are resolved.<sup>196</sup> Perhaps, as more states become signatories to the MLC, and as more amendments go into effect over time, the MLC will become effective enough to avoid intervention.

### ***B. Create an ILO Adjudicative Body to Address Noncompliance***

A second possible solution would be to create an adjudicative body for the ILO.<sup>197</sup> This is extreme as it would result in a complete restructuring of the ILO. If the ILO had an adjudicative body, it could issue binding directives.<sup>198</sup> For example, an ILO adjudicative body could issue directives requiring more frequent inspections of noncompliant flag state vessels or mandate states impose fines should the body find noncompliance.<sup>199</sup> The main benefit of creating an adjudicative body is that it would result in both enforcement and consequences for the MLC. It could be beneficial for the ILO to have an adjudicative body, as this body would be able to better ensure enforcement rather than purely allowing states to enforce the MLC against one another. Additionally, having an adjudicative body means there would be actual penalties for noncompliance. While states may

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<sup>196</sup> Sampson, *supra* note 1, at 7.

<sup>197</sup> LeClercq, *supra* note 37, at 308.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

still fail to comply, having an adjudicative body would at least give the ILO more power to ensure proper enforcement of the MLC.<sup>200</sup> Despite the potential good that could come from the ILO having an adjudicative body, there are drawbacks. One major drawback is that creating an adjudicative body would require a structural change for the ILO, so it may be challenging to get support from member states to make the change, and it may take quite a bit of time to implement that change.

***C. Amend the MLC to Address More than Just Repatriation and Unpaid Wages***

A third possible solution is to amend the MLC to address concerns that come along with seafarer abandonment beyond repatriation and unpaid wages. An example of what could be amended is adding a provision that could reconcile safe manning and expectations under repatriation, such as assigning responsibility to a state to replace a crew. Further, adding amendments to help improve living conditions on ships would be helpful as it would improve the conditions a seafarer has to endure when abandoned. Another possible amendment would be to assign responsibility to someone who would provide legal services to abandoned seafarers, so that they could use international courts to resolve disputes if they wanted to. All these possible amendments would improve conditions for seafarers and make the MLC more useful to seafarers.

***D. Incentivize the Enforcement of the MLC Through Consequences for Noncompliance***

Finally, a fourth possible solution is to incentivize enforcement of the MLC. As the MLC is now written, there are no real consequences for failing to enforce the MLC or for failing to comply with the MLC. The MLC could be amended in a way that incentivizes enforcement, such as including consequences for failure to enforce the MLC and failure to sanction states that do not comply with the MLC. If states know that it is an option to simply decline to enforce the MLC, they will. Consequences for failure to enforce could come from a third party or from the ILO itself. If the MLC is going to be effective in assisting seafarers, it needs to be enforced in full.

One way enforcement could be incentivized is by the ILO issuing stronger guidelines on how port states should conduct inspections and document abandonment noncompliance. As of today, the way

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<sup>200</sup> *See id.*

inspections are conducted and what constitutes compliance varies from state to state.<sup>201</sup> By having a more standardized approach to enforcement, states may be more inclined to enforce the MLC because it will be clear what the expectations are. States also need some kind of incentive to enforce the MLC because there are diplomatic reasons not to enforce the MLC.<sup>202</sup> For example, one of the Port State Control regional groups actively permitted port states to shirk their duties under the MLC by encouraging port states to divert ships with abandoned seafarers to other ports rather than repatriate the seafarers.<sup>203</sup> If port states are being told they do not have to enforce the MLC by third parties, then they likely will not. Therefore, the MLC itself may need to be amended to incentivize enforcement to combat third parties encouraging noncompliance.

Moreover, states may be hesitant to enforce the MLC because they are inclined to stimulate business in their countries, and stringent enforcement of the MLC could discourage flag states from wanting their ships to go to port states.<sup>204</sup> One form of incentive to enforce could be simply including consequences in the MLC for both noncompliance and nonenforcement. Furthermore, given the economic concerns of port states, a potential option would be to amend the MLC to enact a “no more fair treatment” clause that applies to flag states. Similar to the rules for port states, the MLC could be amended to say that flag states cannot choose ports that they believe will be more favorable to them. Until there is some kind of incentive to enforce the MLC, seafarers will continue to suffer from abandonment.

### CONCLUSION

While the MLC is meant to help seafarers in unsafe conditions, lack of enforcement keeps the MLC from being as effective as it could be. The portions addressing seafarer abandonment are intended to make things right for seafarers. While these provisions are a great innovation, they are rendered toothless due to poor enforcement. The way the MLC is designed leaves enforcement entirely up to ratifying states, which has resulted in questionable enforcement. Self-regulation does not render consistent results. Additionally, the MLC fails to address issues with

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<sup>201</sup> Sampson, *supra* note 1, at 3.

<sup>202</sup> LeClercq, *supra* note 37, at 295.

<sup>203</sup> *Id.* at 296.

<sup>204</sup> Sampson, *supra* note 1, at 7–8.

abandonment other than repatriation. For example, the safe-manning requirement prevents seafarers from actually being relieved from their plight. Moreover, there can still be a lengthy wait for abandonment cases to be resolved, leaving seafarers in a terrible position. The tacit acceptance procedure for the MLC calls into question whether the MLC is actually widely supported, especially since the MLC is made up of unpopular provisions. Finally, while COVID-19 may have played a role in abandonment cases, it does not explain all the failings that have come out of the MLC. Ultimately, the lack of enforcement makes it so the MLC fails to assist seafarers in the way it is intended to. Moving forward, the ILO should consider giving third parties the power to enforce the MLC, so it is not solely up to the states themselves to enforce the MLC. Alternatively, the ILO could consider amending the MLC to provide more specific guidelines in the MLC on how to enforce it against noncompliant states. Amending the MLC to improve conditions for seafarers would also make the MLC more effective because it would provide more assistance to seafarers. With the right changes, the MLC could be a powerful tool in fighting seafarer abandonment.