SUMMARY

2020/45 Non-Seafarers Work Clause: contributing to better employment conditions or not? (NL)

In a summary proceeding, the Court of Rotterdam has held that it is not clear whether the Non-Seafarers Work Clause, prohibiting lashing work on board of container ships being carried out by the crew, does indeed contribute to better employment and/or working conditions of seafarers. As a result of which the Clause – at this time – cannot be held to be outside the scope of competition law and the claim for compliance with the provision has been rejected. In the media, unions have stated that they will continue to enforce compliance with the Non-Seafarers Work Clause. It remains to be seen whether a court in main proceedings will reach a similar verdict.

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Facts

The International Transport Workers' Federation ('ITF') is an international trade union that,

in an international context, represents the interests of its affiliated (local) trade unions for seafarers and dock workers. The Joint Negotiating Group ('JNG') is an international collective of maritime employers (organizations), including the International Maritime Employers Council ('IMEC'). The majority of shipowners, owners and ship managers operating in European and Canadian waters are affiliated with IMEC. ITF and JNG together form the International Bargaining Forum ('IBF'). Within the IBF, negotiations on the remuneration of seafarers and their terms of employment take place every two years. The results of these negotiations are laid down in an 'IBF Framework Agreement' (which is considered an international collective labour agreement, 'CLA') forming the basis for the local branch and/or corporation CLA's. Since 1 January 2020, a Non-Seafarers Work Clause has been included in this IBF Framework Agreement. The Non-Seafarers Work Clause or 'Dockers Clause', insofar as relevant, is as follows:

4.1 Neither seafarers nor anyone else on board whether in permanent or temporary employment by the Company shall carry out cargo handling services in a port, at a terminal or on board of a vessel, where dock workers, who are members of an ITF affiliated union, are providing the cargo handling services. Where there are not sufficient numbers of qualified dock workers available, the ship's crew may carry out the work provided that there is prior agreement of the ITF Dockers Union or ITF Unions concerned; and provided that the individual seafarers volunteer to carry out such duties; and those seafarers are qualified and adequately compensated for that work. For the purpose of this clause "cargo handling services" may include but is not limited to: loading, unloading, lashing, unlashing, checking and receiving.

The parties affiliated to ITF and JNG committed themselves, with regard to the employment of seafarers on board ships, to implement the terms of the IBF Framework Agreement in local CLA's and individual sea employment agreements.

Marlow is part of an internationally active group that (among other things) focuses on ship management, including the provision of ship crews. Marlow manages more than a thousand (container) ships worldwide and is a member of IMEC. As such, the agreements made at IBF level are applied to the individual sea employment agreements of the crew members made available by Marlow. Expert Shipping B.V. (the 'Shipowner') was the owner of the ship manned by Marlow. The Shipowner was bound by the Non-Seafarers Work Clause because it is part of a 'Special Agreement' concluded between Nautilus (an international trade union) and the Shipowner. For European short sea (transport of goods by sea, where both origin and destination are in or around Europe) and feeder (pre- and on-carriage within Europe, in

connection with an intercontinental route) container ships up to 170 metres are used. The ship manned by Marlow was such a ship up to 170 metres. On these ships, lashing work was carried out in the port of Rotterdam by crew and not by dock workers, as was customary until 1 January 2020.

Judgment

ITF and local trade unions subpoenaed Marlow and the Shipowner to prohibit lashing operations from being carried out by crew members. Five parties (the 'Charterers') active in the European short sea and feeder routes, who were directly affected by the Non-Seafarers Work Clause, joined the proceedings.

Marlow, the Shipowner and the Charterers argued that the Non-Seafarers Work Clause violated Article 101 of the Treaty on European Union and the Treaty on the Functioning of the European Union as well as Article 6 of the Dutch Competition Act, as a result of which the provision would be null and void. Furthermore, the provision was argued also to be null and void, voidable, or unacceptable according to standards of reasonableness and fairness (a Dutch legal concept capable of being able to alter contractual relations), because it was in violation of European competition law, European freedom to provide services, negative trade union freedom, freedom of choice of employment and the (Dutch) standards of reasonableness and fairness.

Ultimately, the Court only ruled on the arguments based on the standards of reasonableness and fairness and whether the provision conflicted with competition law. The other arguments were not substantiated and/or assessed further.

The assertion that the provision would be contrary to reasonableness and fairness is twofold. The first argument was to prevent Covid-19 infections on board. In the interest of the safety and health of the crew, port personnel cannot simply be required to be allowed on board the ship. In accordance with instructions from the United Nations (IMO), the Dutch central government and emergency ordinance of the Rotterdam-Rijnmond Safety Region, the number of 'visitors' on board a ship should be limited wherever possible. The trade unions had stated that in the port of Antwerp the lashing work was carried out by port personnel and the port personnel in Rotterdam had taken adequate measures. The Court ruled that the interests of the Shipowner and the crew in the context of (public) health outweighed the interests of the claimants in currently complying with the Non-Seafarers Work Clause.

A second argument concerned the establishment of the provision. For IMEC, it was clear from

the beginning that the purpose of the Non-Seafarers Work Clause was only to remove work from seafarers – and therefore from shipping companies and (time) charterers, such as the Charterers in this case, who are not represented by the JNG – and to give this to dock workers (and their employers), while only the seafarers were subject to the CLA. Furthermore, seafarers, such as Marlow, who are represented by the JNG, could not carry out the Non-Seafarers Work Clause themselves, but depended on the cooperation of their contracting parties (the shipping companies), who in turn depended on the cooperation of their contracting parties (time charterers such as the Charterers), who would be disadvantaged by this obligation. Prior to agreeing on the Non-Seafarers Work Clause, Marlow (as a member of IMEC's negotiation delegation) explicitly pointed out to ITF that the maritime employers representing IMEC cannot implement (or comply with) this Clause themselves, so that ITF should therefore enter into discussions with the shipping companies and the time charterers to ensure the necessary support. The latter had not happened. The trade unions argued that the Non-Seafarers Work Clause was the result of an intensive and multi-year negotiation process between a large number of social partners. The Clause therefore was part of a balanced and coherent set of rights and obligations, laid down in the IBF Framework Agreement. The Court ruled that it was not inconceivable that the court in main proceedings will rule that, partly in view of the manner of establishment of the Non-Seafarers Work Clause, it is unacceptable, according to the standards of reasonableness and fairness, to hold that the Shipowner and the Charterers fully comply with the Clause. In this judgment the Court took into account that during its establishment no discussions were held with shipowners and time charterers who were involved in the execution of the Non-Seafarers Work Clause.

Furthermore, Marlow, the Shipowner and the Charterers argued that the provision was contrary to Article 101 of the Treaty on European Union and the Treaty on the Functioning of the European Union. The trade unions argued in this respect, with reference to the ECJ's Albany judgment (C-67/96), that a CLA – in this case the IBF Framework Agreement – fell outside the scope of Article 101 of the Treaty on European Union and the Treaty on the Functioning of the European Union, as the CLA resulted from social dialogue and aimed to promote the working and /or employment conditions of employees in the industry. The improvement of working conditions would be that the work on board of a ship is hard work and the lashing work would therefore lead to fatigue and accidents.

The Court considered that it must be examined whether the nature and objective of the Non-Seafarers Work Clause justifies that it falls outside the scope of Article 101 of the Treaty on European Union and the Treaty on the Functioning of the European Union. As far as the

nature requirement is concerned, it must have been concluded in the form of a CLA and be the result of collective bargaining between employers' and employees' organizations. As regards the target requirement, it must contribute directly to the improvement of one of the working conditions of all workers in the sector. At this moment, it was not yet sufficiently clear whether the Non-Seafarers Work Clause contributed to the improvement of the working conditions. Furthermore, seafarers were denied certain employment and pay opportunities (they missed out on bonuses for lashing work), while the argument that it improved their safety had become insufficiently plausible. Compliance with the Non-Seafarers Work Clause will mean that lashing work traditionally carried out by seafarers will henceforth be carried out by dock workers. The Court ruled that at this time this does not seem to benefit all workers within the seafarers' industry, who are covered by the CLA, but rather workers in another sector, i.e. dock workers. The Court held that against this background it cannot be ruled in advance that the Non-Seafarers Work Clause falls outside the scope of competition law, moreover, it is not unlikely that the Clause prevents or restricts competition within the internal market. The claim for compliance was therefore rejected.

Commentary

The key question in the present case is whether the Non-Seafarers Work Clause falls outside the scope of competition law on the basis of the criteria of the Albany judgment. To this end, the nature and purpose of the provision must be considered.

With regard to its nature, it is required that the provision be concluded within the framework of collective bargaining between social partners. In this case, the Court considers that this is the case and this provision is included in a CLA. However, a critical comment can be made in this respect. The Non-Seafarers Work Clause is included in a CLA for seafarers, while it provides employment for dock workers and it is unclear if it provides improvement of the employment circumstances for seafarers. Can it still be argued that the provision is the result of the social dialogue, if the provision is not concluded in favour of the 'group' for whom the social dialogue is conducted? Moreover, as argued by the defendant parties, this provision mainly affects shipowners and charterers using container ships of 170 metres and less, parties that were not represented in the social dialogue. Is the mere fact of 'collective bargaining' the driving criterion, or should it be considered whether the 'affected' branches have been the goal and/or represented party in the social dialogue? If the latter is decisive, it is highly questionable whether for the Non-Seafarers Work Clause – without it being established whether it brings about an improvement in working conditions – it can be argued that it is the result of social dialogue in respect to the Shipowner, the Charterers and the seafarers.

The purpose of the agreement, or provision, should be aimed at improving terms and conditions of employment and/or circumstances. In this case, no substantiation was given why the Non-Seafarers Work Clause would improve the working conditions of seafarers. In fact, the defendants had shown that the crew would get less work and would miss out on benefits which would reduce their income. Whether the working conditions would improve is therefore debatable; this has not been demonstrated in the proceedings. It is important to note that the present case concerned ships of 170 metres and less. On these ships, until 1 January 2020, the lashing work was always done by the crew and it never has been established that this has led to a higher rate of accidents. In addition, the crew is allowed to carry out the lashing activities on the basis of the Non-Seafarers Work Clause if there are no, or insufficient, ITF dock workers present. This actually undermines the argument for improving working conditions and seems to create a monopoly for ITF affiliated dock workers rather than actually protecting the safety of the seafarers.

Lastly, the Charterers put forward the right to free choice of employment as an argument why the provision is contrary to reasonableness and fairness. Reference seems only to be made to Dutch fundamental rights. However, the free choice of employment has a broad European basis (among others in Article 1 of the European Social Charter and Article 15 of the Charter of Fundamental Rights of the European Union). Seafarers are restricted in their employment by an agreement in which they are not involved. The Charterers may not directly benefit from the free choice of employment, but what if seafarers started proceedings for loss of benefits because they are no longer allowed to perform certain work in favour of a third party? Seafarers' safety may be a legitimate reason to restrict the free choice of employment, but this safety, at least the improvement of working conditions, has not been demonstrated in this procedure.

Comment from other jurisdiction

Germany (Othmar K. Traber, Ahlers & Vogel): The decision of the Dutch court on interim relief is also of great interest for Germany. The ITF and the German trade union Verdi have brought proceedings before the Hamburg industrial tribunal – in this case a main action – against various shipowners with the aim of obliging them to refrain from employing seafarers to carry out cargo work in various European ports, contrary to the clause in dispute.

As can also be seen from the Dutch decision and the arguments put forward by the employers' side, the clause is problematic, among other more formal issues, also because shipowners or crew managers do not normally have any influence on port work. This is because contractual relations usually exist only between charterers and ports which have concluded contracts for

the use of the port and the use of the physical and human resources of the terminal. Nevertheless, the shipowners are obliged to observe the sailing times, i.e. to arrive at the ports punctually, to discharge or reload the cargo within the specified time windows and then to leave the port on time again. They are therefore dependent on the correspondingly smooth work of the terminal operator. Therefore, the dispute that has now arisen in Germany has been sparked by the fact that the terminals did not provide sufficient port personnel and that the shipowners threatened to no longer comply with their voyage time and therefore expose themselves to corresponding sanctions by their clients, the charterers. Against this background, however, the shipowners' own seafarers were deployed for short periods of time to assist in such matters as lashing. It should be pointed out that these seamen are trained personnel who often know better how to load the ship on which they are deployed and who have a strong self-interest in correct cargo handling (ship safety). It is therefore at least questionable whether the argument concerning safety at work put forward by the trade unions is indeed correct and constitutes a legitimate objective to restrict the freedom to provide services on the one hand and the free choice of employment on the other.

It should also be borne in mind that in Germany the Federal Labour Court has already decided long ago that the port management companies present in German ports cannot have an exclusive right to provide port services alone. Port work can therefore in principle be carried out by seafaring personnel (BAG, judgment of 6 December 1995, 5 AZR 307/04). This also appears to be confirmed by the ECJ's ruling on the European Commission's action against the Kingdom of Spain concerning the prohibition of cargo handling services by third parties who do not participate in the port operating company and do not wish to post workers there (ECJ, ruling of 11 December 2014, C-576/13).

At least under German law, the extent to which the 'CLA' and the individual collective bargaining agreements for each vessel covered under the ITF 'CLA' scheme ('CBA') referred to here are actually collective agreements under German law may then also play a role. In my view, they are more likely to be agreements under the law of obligations, which cannot be qualified as collective agreements within the meaning of the German Collective Agreement Act (Tarifvertragsgesetz, 'TVG'). However, the question then arises as to the extent to which such an obligation on the part of the shipowner or crew manager under the law of obligations can be considered effective if it does, in fact, interfere with the contractual structure between charterers and terminal operators and ultimately requires obligations to cooperate, but on which the party obliged has no influence. This too is likely to constitute an unfair discrimination against shipowners, which is not only questionable on competition grounds but also constitutes an undue interference with the freedom to provide services in this respect.

Subject: Unions, Miscellaneous

Parties: International Transport Workers' Federation, Nautilus International, Vereinte Dienstleistungsgewerkschaft, Federatie Nederlandse Vakbeweging – v – Marlow Navigation Netherlands B.V., Marlow Navigation Company Ltd., Expert Shipping B.V., BG Freight Line B.V., Samskip B.V., Unifeeder A/S, Eucon Shipping & Transport Ltd., X-press Container Line (UK) Ltd.

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