About the *Non-Seafarers Work Clause* and a very one-sided balancing of interests

On the occasion of Vzr. Rotterdam 27 August 2020, ECLI:NL:RBROT:2020:7502.

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This case revolves around the so-called '*Non-Seafarers Work Clause*' which is nothing more or less than an agreement between the International Transport Workers' Federation (ITF [1]) on the employees' side, and the Joint Negotiating Group (JNG) of which the International Maritime Employers Council (IMEC [2]) forms part, on the employers' side. The ITF and the JNG together form '*the International Bargaining Forum*' (IBF). Within the IBF, negotiations take place every two years on the remuneration of seafarers and their working conditions. The results of these negotiations are laid down in an *'IBF Framework Agreement 2019-2022'*, which in turn forms the basis for the industry collective agreements and/or under company collective agreements that local employees' associations have agreed with local workers' organisations. The ITF and the JNG commit themselves to let directly or indirectly affiliated parties implement the terms and conditions of employment applicable to seafarers on board ships in collective labour agreements (collective agreements) and individual maritime labour [3] agreements, and thus to implement the agreements made by the IBF on remuneration and (other) employment conditions.

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[1] ITF is an international trade union federation which, in an international context, promotes, among other things, the interests of its affiliated (local) trade unions for seafarers and dock workers (the *"ITF affiliates"*), such as Nautilus and Ver.di. FNV is a workers' association that represents the interests of workers in a large number of sectors, including the port. FNV Havens is part of FNV and represents, among others, dock workers who work as such for companies in the lashing sector.

[2] IMEC is an international employers' organisation that represents the interests of individual shipowners, ship managers and employers who mainly operate bulk, container and tanker ships or have them manned.

[3] See Sections 7:694-7:738 of the Dutch Civil Code. See J. van Drongelen & A.D.M. van Rijs, *Maritime Labour Convention Part 3. Implementation of the Maritime Labour Convention: the maritime labour agreement, Zutphen* 2011.

Non-Seafarers Work Clause

(1) One of the agreements laid down in the IBF is the so-called Non-Seafarers Work Clause also known as the Dockers Clause'. The Non-Seafarers Work Clause that applied for the period from 2015 up to and including 2017 reads (insofar as relevant): *"Neither ships' crews nor anyone else on board whether in permanent or temporary employment by the Company shall carry out cargo handling and other work traditionally or historically done by dock workers without the prior agreement of the ITF Dockers Union or ITF Unions concerned and provided that the individual seafarers volunteer to carry out such duties, for which they should be adequately compensated. […]. "*
As from 1 January 2020, the Non-Seafarers Work Clause no longer refers to work '*traditionally or historically done by dock workers*' and now reads as follows: *"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. […]"*

(2) With regard to (the crew of) the ship involved in this case, owned by Expert Shipping B.V. in the Netherlands, a *Special Agreement* has been concluded with Nautilus International including the *Non-Seafarers Work Clause*. This *Special Agreement* has also been signed by Marlow Navigation Netherlands B.V., who made the crew of the ship available, as: *"the company/on behalf of the Company who is duly authorised by the owner of the Ship to sign on its behalf*".

(3) The core of the dispute is that the *lashing operations* on the so-called "Marlow ships" are not carried out by *dockworkers* but by *seafarers*, which according to the workers' representatives is contrary to the *Special Agreement*. The Rotterdam Court of Appeal needed to adjudicate this dispute in August 2020.[4]

Reasonableness and fairness

(1) The Owners first and foremost invokes Section 6:248 of the Dutch Civil Code. By virtue of this article, a stipulation applicable between the parties as a result of an agreement does not apply if, under the given circumstances, this would be unacceptable according to standards of reasonableness and fairness. Whether this is the case depends, according to the legal provisions, on numerous circumstances, such as the nature and further content of the agreement in which the stipulation appears, the social position and mutual relationship between the parties, the manner in which the stipulation came about, the extent to which the other party was aware of the purport of the stipulation, and (in the case of exemption clauses) the seriousness of the fault with regard to causing the damage in question, all this in relation to the nature and seriousness of the interests involved in any conduct.[5] The Court in preliminary relief proceedings referred in that respect to the interest put forward by the Shipowner in the light of the changed circumstances in order to protect the crew of ships and to prevent further spread of the *coronavirus.* First of all with a reference to IMO *Circular Letters* which prescribe: *'Measures related to visitors to ships Companies should seek to restrict or limit as far as possible the number of visitors coming on board ship'* and *'Limit, as far as possible, the number of interactions with shipboard personnel by entities in the port to only those critical and essential for the continued operation and supply of the ship.'* and *'Consider temporarily restricting shipboard personnel to the ship while in port (except or until the situation permits*

[4] See Vzr. Rotterdam 27 August 2020, ECLI:NL:RBROT:2020:7502.
[5] See HR 19 May 1967, NJ 1967, 261 (*Saladin/HBU*); HR 20 February 1976, *NJ* 1976, 486 (*Pseudo-bird flu*); HR 25 April 1986, *NJ* 1986, 714 (*Smilde*).

otherwise) unless disembarking as part of a crew change or to receive emergency medical attention not available on board the ship'. Then with a reference to the *Guideline* of the European Commission which prescribes *'Contact between crew and port workers, including pilots, should be reduced to an absolute minimum to protect all persons from risk of transmission of COVID-19'.* And finally to the information from the central government that prescribes: *"Avoid contact with others. Avoid visits by non-crew members on board".*

(2) The Court in preliminary relief proceedings weighed up the interests on the basis of this argumentation of the Shipowner and included the *Non-Seafarers Work Clause* that applied before 1 January 2020 (see *Non-Seafarers Work Clause* under (1)) and on the basis of which the crew itself carried out lashing work on the vessels in question. He concludes that the interests of the shipowner and the crew in the context of (public) health outweigh the interests of the employees' representatives in complying with the *Non-Seafarers Work Clause.* The argument put forward by the employees' representatives that the *Non-Seafarers Work Clause* serves the interests of the crew is dismissed by the Court in preliminary relief proceedings on the grounds that it cannot simply be used as a point of reference when the shipowner's arguments against it are taken into account. The employees' representatives also argued that, in the operation of sea-going vessels, in connection with competition, the tasks assigned to the crew increase in size and severity and that this leads to serious fatigue complaints which lead to accidents. For the interim relief judge, however, what the shipowner puts up against this weighs more heavily, namely that the lashing of containers by the crew is better for the safety of the crew, the ship and the cargo, because the crew has been trained, they have much more experience with it, know the ship like the back of their hand and have an intrinsic motivation to do well, because they have to take the ship out to sea again. Finally, the judge also argues that the *Non-Seafarers Work*

Clause allows lashing by the crew when there are no dock workers available from an ITF-affiliated workers' association.

(3) A few *comments* need to be made here. As far as the coronavirus is concerned, it should be emphasised that this is a matter of *advice, as* the shipowner himself indicates, and not of mandatory regulations. Moreover, to put forward as an argument the *older version* of the *Non-Seafarers Work Clause* (see *Non-Seafarers Work Clause* under (1)) is somewhat miraculous. It is not without a reason that a new *Non-Seafarers Work Clause* has been created with effect from 1 January 2020. A deal is a deal. Moreover, there is a condition attached to the older version, namely 'the absence of dock workers to carry out the work'. This has not been established at all in this case. The reasoning put forward by the Owners that the crew can apparently do these lashing activities better than the dock workers (see under (2)) is also shocking; it is a misunderstanding of their professional competence because they are qualified lashers. It is also contrary to the view laid down in the *Non-Seafarers Work Clause* that the dock workers are capable of performing the lashing tasks adequately because, again, they are qualified lashers. And where is the argument on the part of the employees' representatives being weighed that sufficient measures have been taken by the Rotterdam lashing companies to prevent infection with the virus and that these measures do not deviate from the measures taken in the port of Antwerp, where lashing work is carried out by dockworkers and that, at the time of the circulation of the corona virus, ITF can be asked to temporarily refrain from deploying dock workers? Or is this just not convenient?

Reasonableness and fairness

(1) The Owners also refers to reasonableness and fairness with regard to the establishment of the *Non-Seafarers Work Clause*. The Court in preliminary relief proceedings ruled that it is not inconceivable that the Court in the main proceedings will rule that, given the

establishment of the *Non-Seafarers Work Clause as* outlined by the Owners, it is according to standards of reasonableness and fairness unacceptable to keep the Owners in full compliance with the stipulation. In this judgment the Court in preliminary relief proceedings mainly took into account the circumstance that no discussions were held with shipowners and time charterers involved in the implementation of the *Non-Seafarers Work Clause,* in the sense that compliance with the clause will have a major impact on their business operations in connection with the associated additional costs.

(2) Here, too, a comment need to be made. The Court in preliminary relief proceedings seems to fall back on the *IBF Framework Agreement 2019-2022* in its judgment on the establishment of the *Non-Seafarers Work Clause*. This is not only miraculous, but even incomprehensible. The reasoning of the Owners is completely irrelevant. The Owners are bound by the *Non-Seafarers Work Clause* that is included in the *Special Agreement* to which he himself is a party and to which he is bound (see *Non-Seafarers Work Clause* under (2)).

The CBA-exception

(1) The Owners goes on to argue that the *Non-Seafarers Work Clause* is contrary to Article 101(2) of the Treaty on the Functioning of the European Union [6] (TFEU) and Article 6(2) of the Competition Act, [7] which states that agreements that restrict competition are void. The employees' representatives indicated that the *Non-Seafarers Work Clause* is included in collective agreements and, according to established case law of the Court of Justice of the European Union, collective agreements in principle do not fall within the scope of

[6] See Treaty on the Functioning of the European Union (consolidated version), *OJEU* 26 October 2012, C.326, pp. 47-390.
See Treaty on the Functioning of the European Union, *Treaty Series* 2003, 150.
[7] See Law of 22 May 1997, laying down new rules on economic competition, *Bulletin* of Acts and Decrees 1997, 242.

competition law. In doing so, they invoke the so-called *Albany judgment* of September 1999.[8]

(2) The Court in interim relief proceedings elaborates on this in this judgment. First of all, it states that the Court of Justice of the European Community (now the Court of Justice of the European Union) stated that a certain restriction of competition is inherent to collective agreements between employers' and workers associations. The Court adds that the Treaty establishing the European Economic Community [9] (now: the TFEU) has not only an economic (-competition) but also a social (social policy) component, where the concerted efforts by employers and workers to improve directly employment and working conditions take a central role. This social component comes under too much pressure when the efforts of employers and employees are prohibited by the law. The court in preliminary relief proceedings then continues with a representation from the *Albany judgment of* what has become known as the collective bargaining exception. This collective bargaining exception means that agreements concluded in the context of collective - agreements between the employers' and employees' associations for the improvement of the working conditions of employees are, by reason of their *nature* and *purpose,* deemed *not* to fall within the scope of the (European) *ban on cartels.* By *nature,* collective - bargaining is understood to be the result of collective bargaining between associations of employers and employees. The *aim* is to make a *direct contribution* to improving the working conditions of workers in the sector (*Albany judgment*).

(3) The Court in preliminary relief proceedings found that it follows from that judgment that the collective bargaining exception applies only to contracts for which that is actually justified. That, as far as the *nature requirement* is concerned, the form is important, namely

[8] See ECJ 21 September 1999, C-67/96, *ECR* 1999, p. I-5751 (*Albany*).
See also: ECJ 21 September 1999, C-115/97, *ECR* 1999, p. I-6025 (*Brentjens*); ECJ 21 September 1999, C-219/97, ECR 1999, p. I-6121 (*Floating Docks*).
[9] See Treaty establishing the European Economic Community, *Treaty Series* 1957, 91.

a collective agreement as a result of collective bargaining between employers' and workers' organisations. The court in preliminary relief proceedings did not establish this, but we will do so: it has been complied with. When it comes to the purpose requirement of *directly contributing* to the improvement of one of the terms and conditions of employment of all employees in the industry, the Court in preliminary relief proceedings found that it was not sufficiently clear whether the *Non-Seafarers Work Clause* contributes to the improvement of terms and conditions of employment. Seafarers are denied employment and pay, while the argument that it improves their safety is still insufficiently plausible. If the employees' representatives argue that too many accidents happen if the cargo is lashed by the crew with a reference to an investigation carried out by the Inspectorate for Living Environment and Transport (ILT), then the Owners state that enquiries at ILT on which type of vessels most errors were discovered could not be told because this was not - recorded during the investigation, is sufficient for the Court in preliminary relief proceedings to establish that further investigation is needed into whether lashing by the crew is unsafe, but there is no place for this in interim relief proceedings.

The Court in preliminary relief proceedings held that compliance with the *Non-Seafarers Work Clause* will mean that lashing work traditionally carried out by seafarers will henceforth be carried out by lashing companies ashore. For the time being, this does not seem to benefit all workers in the seafarers' industry, who are covered by the collective labour agreement, but rather workers in another sector, namely dock workers. In the Court's view, this paves the way to conclude (in advance) that the *Non-Seafarers Work Clause* falls within the scope of the (European) *competition law (ban on cartels)*. The Owners and Marlow win.

(4) And, yes, here too we would like to make a few *comments.* The employees' representatives have referred to the established case

law of the Court of Justice of the European Community (now: Court of Justice of the European Union) with regard to the collective bargaining exception, which is more than the *Albany judgment* (see *The collective bargaining exception* under (2)). This judgment, if the nature requirement is at stake, refers to the *direct contribution* to the *improvement* of *working conditions of the workers* employed in the sector. However, in the *Van der Woude judgment of* September 2000[10], the Court of Justice of the European Community stated that, for the applicability of the collective agreement exception, *indirect contributions* to the *improvement* of *working conditions* are also sufficient. De Vos **[11]** observes that the Court opts for a generous approach to the improvement of working conditions. It is sufficient, in fact, that a collective agreement is concluded for the purpose of improving working conditions. According to the *Pavlov judgment of* the Court of Justice of the European Community of September 2000 **[12]**, the only purpose of the collective agreement is to improve working conditions. There is no need for demonstrable implementation. Even more so, in the *Van der Woude judgment,* the Court of Justice of the European Community stated that it is up to the social partners themselves to decide how they will achieve the objective of improving working conditions. This means that there is freedom on the subjects that contribute to the improvement of working conditions and their design.**[13]** Not only does the Court in preliminary relief proceedings completely ignore this, but questions remain unanswered. In the light of the views of the Court of Justice of the European Community, how should we interpret the view that the collective bargaining exception only applies to contracts for which it is actually justified (see *The collective bargaining exception* under (3))? Since when is the improvement of working conditions not a labour condition? **[14]**

[10] See ECJ 21 September 2000, C-222/98, *ECR* 2000, I-7111 (*Van der Woude*).
[11] See M. de Vos, 'The European Collective Labour Agreement', *Social law chronicles* dossier 2002, pp. 19-20.
[12] See ECJ 12 September 2000, C-180/98 and C-184/98, *ECR* I-6451 (Pavlov).
[13] See J. van Drongelen, *Collective labour law part 2 Freedom of association The right to collective bargaining Competition law*, Zutphen 2009, pp. 112-113.
[14] See J. van Drongelen, *Collective labour law part 4 The collective labour agreement and declaring its provisions generally binding*, Zutphen 2012, pp. 55-56.

But quite apart from that. The question is whether or not there is a breach of European competition law and whether or not the CBA-exception applies. Can the Court in preliminary relief proceedings simply rule on this? By this we mean the so-called 'preliminary ruling procedure' in which the Court of Justice of the European Union rules on the interpretation of the TFEU and the regulations or directives issued in that context. Such a decision can be requested by a national court if this is necessary for the delivery of a judgment. The highest national court must ask for such a ruling.[15] Exceptions to this principle are cases where the case is clear or where a judgment has already been given by the Court of Justice of the European Union. This has not been established by the interim relief judge. The subject matter of the dispute before us means that we do not believe that any of these exceptions apply because it is not clear. The Court in preliminary relief proceedings itself stated that 'it cannot be ruled in advance that the *Non-Seafarers Work Clause* falls outside the scope of competition law'. Cannot be ruled in advance? Apart from this, in this case there is a combination of improving the working conditions of workers in one industry and promoting employment opportunities for workers in another industry as a result.

In conclusion

Article 256 of the Code of Civil Procedure prescribes that if the judge in preliminary relief proceedings rules that the case is not suitable to be decided in preliminary relief proceedings, he will refuse the requested injunction. According to settled case law, a case is not suitable to be decided in interim relief proceedings if the judge in preliminary relief proceedings is not able to gain the insight into the case required to give a sound decision, or if the judge in preliminary relief proceedings cannot sufficiently oversee the consequences of a decision to be given by him. Although the Court in preliminary relief proceedings may think that this is not the case in this matter, but the fact that we think very differently cannot surprise anyone after reading this article. He should have refused the

[15] See J. van Drongelen, 'Travelling time or working time?', *Sociale Zaken Actueel* 2010-10, p. 7-8.

preliminary relief proceedings. The verdict of the court is based on a very one-sided balancing of interests. The employees' representatives are considering lodging an appeal or waiting for the judgment in the main proceedings. [16]

To be continued.

[16] Press release 27 August 2020, 'Trade unions continue their struggle to comply with the Non-Seafarers' Work Clause'.