

Court rejects preliminary attempt to enforce dockers' clause

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Under the majority of International Transport Federation (ITF) collective bargaining agreements, crew on board short sea and feeder ships are prohibited from lashing or unlashings containers if qualified dock workers that are members of an ITF-affiliated union are available to carry out the lashing instead.

This effort to make lashing a cargo-handling activity rather than a crew activity is set out in the so-called 'dockers' clause', contained in collective agreements covering some 15,000 seagoing vessels worldwide.

Charterers in the short sea shipping and feeder market have challenged the legality of the clause, claiming that it does not enhance safety and is anti-competitive.

However, in August 2020 four trade unions, including the ITF, filed preliminary relief proceedings against two crewing agents and a shipowner to enforce compliance with the clause.

A recent decision by the Rotterdam Court rejected the claimants' request to immediately prohibit lashing by seafarers in advance of the results of main proceedings. In doing so, the court also raised the possibility that the clause could prove to be against the principles of reasonableness and fairness, as well as anti-competitive.

Facts

The dockers' clause, formally known as the non-seafarers' work clause, was amended in February 2018 as part of an agreement between the ITF and the international maritime employers that make up the joint negotiating group.

Under the amendment, crew members on short sea and feeder vessels that historically performed these activities were suddenly prohibited from carrying out lashing and unlashings activity on board ship if an ITF-affiliated dockworker was available. The change was part of a five-year campaign by the ITF to "(re)claim lashing for dockworkers".

On 1 January 2020 the clause came into force for container vessels operating in the Baltic Sea, Canada and Northern and Western Europe excluding the Mediterranean Sea (European sub-regions as defined by the European Union).

Charterers in the short sea shipping and feeder sector have challenged the legality of the clause, arguing that they were not represented when the clause was negotiated and that claims by the unions that crew lashing was unsafe were incorrect.

The shipping lines argue that the practice of crew handling lashing operations should continue as crew are best qualified and positioned to carry out the task: not only do they have the best knowledge of the specific vessel, but they have a natural incentive to carry out the lashing to the highest standards as their own safety depends on it.

While lashing and unlashings duties on deep sea container vessels are already carried out by shore lashers, crew members have traditionally been responsible for the lashing of containers on short sea and feeder ships.

In May 2020 the charterers submitted a formal complaint to the European Commission (EC) claiming an infringement of the EU cartel prohibition.

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In their complaint to the EC, the charterers claim that the ITF is utilising the clause with the aim to foreclose the market for lashing services to please its affiliated dockers, thereby producing severe anti-competitive effects in the short sea and feeder shipping sector in Europe, and even globally.

In August 2020 four trade unions – the ITF, Nautilus, Ver.di and FNV – filed preliminary relief proceedings in the Rotterdam Court to enforce compliance with the clause. The action was brought against crewing agents Marlow Navigation Netherlands BV and Marlow Navigation Company Limited (registered in the Netherlands and Cyprus, respectively) and shipowner Expert Shipping BV in the Netherlands.

Five charterers subsequently made an application to the court to join these proceedings and on 6 August 2020 the judge allowed this group of charterers to intervene in the proceedings on the side of the defendants.

Decision

In its decision, the Rotterdam Court rejected all of the claims made in the preliminary proceedings and refused to compel the three companies to comply with the dockers' clause.

In its judgment, the court stated that it attached more importance to defendants' and charterers' interest in non-compliance with the dockers' clause as compared with the claimants' interest in the performance of said clause.

Prior to 1 January 2020, lashing was carried out by the crew. Due to the current COVID-19 epidemic, the court ruled that compliance with the clause was 'onerous' and that in the short term, the crew's interests to work in a safe and healthy environment outweighed the claimants' interest in compliance with the dockers' clause.

The court also took the principles of reasonableness and fairness into consideration, commenting that:

in view of the circumstances surrounding the conclusion of the Dockers' Clause, it is not unthinkable that the outcome of the proceedings on the merits will be that the Dockers' Clause is unacceptable in view of the principles of reasonableness and fairness.

Further, the court examined whether the dockers' clause is void on the ground of being in contravention of competition law. The court was of the opinion that the dockers' clause may be anti-competitive.

While the Rotterdam Court found that urgency for interim relief as a result of non-compliance existed, the presiding judge ruled that a more extensive judicial review would be necessary to examine the factual and legal questions.

The claimants are now considering whether to instigate an appeal of the preliminary decision or proceed to the pending main proceedings where the court will extensively examine the matter.

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