

"SARNIA NEWS" CIRCULAR

(Ref: 279 /15/BM)

TO ALL SHIPOWNER CLIENTS TRADING TO FINLAND / SCANDINAVIA / NORTHERN EUROPE

1st September, 2015

Re: VESSELS ENCOUNTERING PROBLEMS WITH THE ITF / Finnish Seamen's Union (FSU)

Clients of Sarnia Marine recently called at Tornio / Finland to conduct discharge operations. Shortly following arrival and commencement of operations, the ITF / FSU boarded the vessel to conduct an inspection, at which time the vessel was deemed as *not covered by any acceptable Collective Bargaining Agreement (CBA)*, despite a P&I insurer approved and Maritime Labour Convention (MLC) compliant seafarers contract of employment being in place. As a result the Master was advised that if he failed to sign the ITF CBA and pay \$150,596-., being the difference between the crew wages presently being paid and that stipulated in the ITF CBA, the vessel would face further action without prior notice. We can advise that shortly after receiving the ITF's demand stevedores ceased discharge operations, which we now understand usually occurs on a Friday afternoon when the courts have closed for maximum impact.

It was only after the intervention of a local lawyer experienced in such matters, that an interim court order was issued after the weekend and served on the FSU, prohibiting their stevedore union members from boycotting discharge operations. It is important to note that in some previous cases the court has requested owners place security, otherwise known as an "*applicant guarantee*", of Euro 50,000 to cover union costs in the event the court does not find in the owners favour.

Clearly the above case highlights blatant extortion tactics being employed by the ITF/FSU who particularly target foreign vessels not only calling at Finnish ports for the first time, but other Scandinavian countries also. Please find attached valuable information received from a local lawyer in Finland who has considerable experience in such cases, which is most informative.

IMPORTANT NOTE: *It has been noted recently that some owners are not observing the trading warranties included within their P&I insurance policies, and as such, are taking a serious risk trading their vessels outside of the trading area agreed with underwriters.*

If a vessel is outside the agreed trading warranty, Underwriters have the right to decline any claims that may arise. *It is therefore imperative that owners check their trading warranty when negotiating a fixture, and if the vessel will be trading outside of the agreed trading area, please inform Sarnia Marine immediately, so we may request your underwriter to provide an extension for the intended voyage.*

Best regards

Loss Prevention Team

Remedies available in case of boycotts and/or other industrial actions

1. Likely scenario

When a foreign vessel, with a valid collective bargain agreement (CBA) in force for the ship's complement calls at a Finnish port, the Finnish Seamen's Union (FSU) might claim the right to negotiate a (new) CBA for the vessel. The FSU usually has no mandate from the crew, but it claims that according to Article 11 (freedom of assembly and association) in the European Convention on Human Rights and in accordance with the Finnish Constitution it has a right to negotiate with owners. The FSU itself has no means to intimidate the vessel but it will ask its fellow unions, such as stevedores/transport workers, to carry out a boycott industrial action by means of refusing loading or unloading the vessel. In practice vessels are not able to load or unload by their own crews either, even if it would be technically possible, since the unions would in that case address actions against some other vital place in the logistic chain. The primary conflict is often disguised as part of the ITF's FOC-campaign. Whereas there does not exist any Finnish CBA between FSU and the (foreign-) owner, neither the primary nor secondary conflict is not in breach of any industrial peace obligation, wherefore remedies, such as actions before the Labor Court for ordering fines would not be available.

2. Unlawful actions

Characteristics for unlawful boycotts and actions are usually the following:

- Boycotts are directed against vessels with entirely lawful CBA:s in force and perhaps even approved by the flag state (in certain jurisdictions there are other acceptable mechanism than CBAs to protect worker's rights).
- Seamen are already paid at least above the ILO and ITF recommendations but the FSU claims that much higher salaries have to be paid.
- The purpose of the actions is ultimately to hinder, prohibit, limit or nullify the rights of EU subjects to exercise their freedom under the the EU legislation, for instance when carrying out cabotage trade within another Member state.
- The purpose of the actions and the methods employed are contrary to bonos mores, fair practices, which means that there is for instance no balance between the purpose of the action and the damages caused.
- Boycotts are targeted against the vessels which are not in regular traffic and call the Finnish ports perhaps for the first time.

3. Legal practice

In the past, Finnish legal practice was not in favour of the owners. The courts considered the boycotts to be justifiable almost without limitations if and when owners tried to lift the boycotts by interim injunctions.¹

The tide began to change in 2004 when the Finnish passenger ferry operator, Viking Line PLC managed to establish jurisdiction in the London High Court against the ITF and the FSU in connection with a re-flagging dispute. In 2007 the European Court of Justice gave a judgment². The ECJ held it to be possible that a boycott or strike could be unlawful if it infringes the employer's interests under EU legislation. The ECJ confirmed that the right to strike may be subject to certain restrictions in accordance with Community law and national law and practices

In 2007 the Swedish Labour Court rendered a landmark precedent in which it concluded among other that a jurisdiction clause inserted in a CBA as a result of a boycott was not valid.³ Moreover the Swedish Labour Court concluded that The Swedish Transport Workers Federation had no authority to negotiate a new CBA for the vessel under boycott, because the valid CBA which fulfilled all requirement and laws of the flag state, was already in force for the crew working onboard the vessel. Only such unions had authority to negotiate on behalf of the crew onboard, which had the right to negotiate on behalf of the crew in accordance with the laws of the flag state.

Ever since the above mentioned rulings the owners have succeeded to obtain interim injunctions from competent Finnish courts and this way to forbid FSU to take and continue apparently unlawful industrial actions.

It can be said that current established legal practice protects the rights of the owners and the crews. The crews rarely want the FSU to interfere with their valid CBAs and employment contracts, on the contrary. The owners are usually granted interim injunctions. The use of interim injunctions has now spread even to purely domestic, non-marine related industrial actions, which are addressed directly against a valid CBA.

4. Interim injunction – the procedures

4.1 Injunction

An injunction is an order by which the court orders a party to do something or prohibits a party from doing something under threat of a

¹ See Supreme Court precedents KKO 1987:85 and KKO 2000:94

² Case C-438/05

³ Swedish Labor Court Decision 2/07

fine. Pursuant to the Judicial Code if a party has a right - for instance a right to choose who will perform certain work - that party can seek an injunction from the court if the party's right is endangered. The applicant must demonstrate that it is probable 1) that the applicant has this right and 2) that the opposing party by deed, action or negligence or in some other manner hinders or undermines the realization of the right of the applicant or materially decreases its value or significance.

The application for an injunction must be submitted in writing. The application will be considered urgently, usually within the same day the application is filed. The handling of the application is summary which means that the applicant only needs to demonstrate the probability of its right and that the right is endangered. Nevertheless, the onus should be rather high according to legal scholars when someone is prohibited to do something by an injunction. Whether the applicant actually has the right and whether the right was endangered will be investigated later when the main issue is before the court.

4.2 Without hearing the opposite party / interim injunction

The application may not be granted without giving the opposing party an opportunity to be heard. However, if the purpose of the injunction may otherwise be compromised, at the request of the applicant the court may give an interim order without affording the opposing party the opportunity to be heard. The application for an injunction without hearing the opposite party appears to be the main rule in practice. If the opposite party obtains notice of the injunction application, the opposite party might try to intervene at the application phase which can undermine the effect of the injunction. Therefore confidentiality and speed should be always emphasized in injunction procedure.

4.3 Enforcing the interim injunction

In order to have effect the interim injunction must be enforced by the execution office. Enforcement takes place by serving the interim injunction upon the opposite party. If the opposite party does not comply with the order the applicant can request that the court levies a fine. A threat of a fine usually encourages the opposite party to obey the order very effectively. In case of FSU the fine from 30.000 euros to 50.000 euros has usually been enough.

Prior to enforcement of the interim injunction the execution office requires the applicant to put a security. The security must consist of a cash deposit or a bank guarantee issued by a European bank. In practice the local execution offices prefer Finnish banks. There is no written rule on the amount of the security. Recently we have managed to bargain the security down from 50.000 euros to 30.000 euros in an injunction case where the FSU was prohibited from boycotting a vessel flying a foreign flag.

The security is held by the execution officer against potential damages the opposite party might suffer if the court finds in the main proceedings afterwards that the interim injunction was groundless. The liability for potential damages is strict. However, in practice a trade union does not suffer financial damage when it is prohibited from instigating industrial actions. In such circumstances, potential damages are limited to legal costs and it is legally unclear whether the applicant security covers the opposing party's legal costs.

One clear disadvantage of the use of an applicant security is that it is in force and custody of the execution office for one year from the date on which the judgment in the main issue becomes full and final, unless the parties agree differently and is therefore money which an applicant cannot use for a potentially long time period.

It can be mentioned that the Appeal Court of Helsinki has recently rendered an important judgment according to which FSU's legal costs are not such damages which it could claim from the applicant's security. In that case the FSU was forbidden to take industrial actions. The judgment is not yet final in the sense that the Supreme Court may grant the FSU a leave to appeal.

The problems for the time being, appear to pertain to technical issues, such as service of the injunction upon the unions. The representatives of the unions are usually not found or reached when an injunction is served upon the union. Before the injunction is served upon a representative of the respective union, the industrial action does not have to be ceased, why it is critical that the bailiff serves the decision of the injunction upon the representative of the relevant union taking the industrial action as soon as possible. When the decision is served upon the union, the union must cease and refrain from all other actions under threat of a penalty payment, i.e. fines.

4.4 **Main issue**

Applying and enforcing an interim injunction is relatively an easy and fast procedure provided that it is well prepared and conducted with utmost speed. The real test of the issue comes in the main proceedings which is a normal trial where the court investigates whether the applicant has the claimed right. The main proceedings must be brought before the court within one month from the date when the interim injunction was granted.

If the interim injunction is successfully granted, the injunction would remain in force during the whole main issue which can take from one to two years in respect of one court proceeding.

However in practice the boycott issues very seldom proceed to the main proceedings. Once the interim injunction is served upon the union the union ceases with the action and the vessel can load or unload and leave the port. After that the applicant can withdraw the injunction order since the applicant has no interest anymore to keep the interest order in force. This means also that the applicant has not to instigate the main proceedings, unless the applicant wants to claim possible damages.

5. Practical issues

In order to success with the injunction procedures we have learned that it helps if the crew can give a statement where it demands that the FSU would not interfere with its employment conditions. Further the arrangement of the applicant security (cash deposition or a bank guarantee from a Finnish bank) can sometimes take time. It would help if the applicant security would be available in advance.

Furthermore it would assist very much if the applicant could in advance explain how the collective bargaining mechanism works in the flag state.

Usually the following kind of documentation is needed:

- 1) ships' details and the list of port state inspections (Equasis extract);
- 2) ship's certificate of registry;
- 3) FSU's threat (presented usually by email);
- 4) any other dispute related correspondence with the FSU;
- 5) correspondence with the ITF, if any;
- 6) crew statement (stating that they have no claims against the employer and FSU has no authority from them);
- 7) ship's sailing schedule;
- 8) employment contracts with the crew;
- 9) collective bargaining agreement (CBA) or collective employment agreement (CEA) or similar arrangement, if applicable in the Flag state;
- 10) if FSU's threat is also based on the unpaid wages, the documentation which proves that wages have been paid and are above the minimum level;
- 11) any other supporting documentation that FSU's claim is groundless.

Please note that we have described above the injunction procedures on a general level. In the event of a particular case we are happy to assist you and we are prepared to evaluate the particular case further.