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Case Note

STRIKES: Strike of crew members supported by ITF held unlawful by Dutch Court applying Philippine law. *The Saudi Independence,* 1984 Schip en Schade ("S&S") 25, 1984 Rechtspraak van de Week (R.v.d.W.) 21 [Hoge Raad det Nederlanden, Netherlands, 1983].

The *Saudi Independence*[1] is a significant decision in the series of disputes arising between shipowners and the International Transport Workers Federation ("ITF") in the campaign of the latter against vessels sailing under "flags of convenience" ("FOC"). On May 18, 1981, 25 Philippine crew members of the Saudi Arabian flag M.V. SAUDI INDEPENDENCE went on strike when the Vessel was ready for loading in the port of Rotterdam. The strike was instigated by the ITF after the crew had asked for the intervention of the local ITF inspector because of complaints about the quality of the food supplied on board. The crew's demands, however, were extended to having the owner sign the ITF Collective Agreement.

In summary proceedings the owner asked the District Court of Rotterdam to grant an injunction to the effect that the seamen should terminate their strike and resume their work, and that the ITF should refrain from giving support to the strikers. The District Court ruled in favor of the owner. The vessel then sailed, and the ITF and the crew members appealed, first to the Appellate Court, and after its affirmance of the District Court's decision, to the Court of Cassation. The Court of Cassation dismissed the appeal, thereby ruling in favor of the owner.

[1] 1984 Schip en Schade ("S&S") 25, 1984 Rechtspraak van de Week (R.v.d.W.) 21 [Hoge Raad det Nederlanden, Neth., 1983]. An action in summary proceedings such as this is in the first instance brought before the President of an "arrondissementsrechtbank" (district court), in this case the District Court of Rotterdam. The district court's judgment may be appealed to a "Gerechtshof" (appellate court), in this case the Appellate Court of The Hague, which reviews the matter in full. A party may appeal from an unfavorable judgment to the Hoge Raad der Nederlanden (Court of Cassation, the top of the pyramid of the Dutch Court system), which will only look into matters of law. The Court of Cassation will either confirm the lower court's decision or refer the case, with instructions, to the same or another appellate court (or, in some cases, enter a judgment itself).

The most difficult issue presented was which law should be applied in deciding whether the strike was valid.[2] The Philippine seamen had signed on under individual contracts of employment which contained, *inter alia,* the following conditions:

> 18. It is fully understood and agreed by the second party that officers and crew who are signatory under this contract shall not in any matter voluntarily or otherwise enter into any bargaining or affiliation with any organization such as ITF and or I.L.O. . . .
> 19. This agreement shall be construed, interpreted and governed in accordance with the laws of the Republic of the Philippines and the applicable regulations of the National Seamen's Board of the Philippines and other applicable labor laws.

The Court stated that application of at least four legal systems should be considered: Dutch law as the *lex fori;* Philippine law as the law governing the employment contract; Greek law, the employer of the crew being Greek; and Saudi Arabian as the law of the flag of the vessel. None of the parties argued for the application of Greek or Saudi law. The seamen and ITF argued that Dutch law was applicable; the owners contended that Philippine law governed. The Appellate Court rejected the lex fori theory, since in its opinion this would entail unfavorable consequences. According to the Court:

> Bearing in mind that a vessel sails from harbor to harbor, this would result in 'forum shopping', which means that the ITF could start strikes only at such places where it knows the law to be on its side, which system adds an improper element to the judicial contest, a system which rejects itself.

The Court was of the opinion that in a case of a labor dispute on board a foreign flag vessel, as a general rule, the law of the flag of the vessel should be applied. However, in view of Art. 19 of the individual employment contracts signed by the crew, the Court held that the parties had agreed to the applicability of Philippine law. The Court considered such a choice of law valid, and held that:

> In all cases when parties have chosen for a certain system of law to apply to the employment contract and in doing so thus choosing for the labor law of said system of law, it furthermore presents itself that said choice includes the law on strikes of said system of law: there is a close connection between labor law and law on strikes.

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[2] The discussion herein, unless otherwise indicated, will deal with the Appellate Court's opinion, as its opinion was more elaborate, though, in essence, not different from the District Court's decision.

The Court referred to Arts. 3, 6 and 10 of the EEC Convention on the Law Applicable to Contractual Obligations,[3] which recognizes the choice of law criterion and that the law thus applicable governs, among other things, "the consequences of breach", which should include strikes. Upon the above considerations it was decided that Philippine law should be applied.

Art. 264 of the Labor Code of the Philippines contains the following:

> (a) It is the policy of the States to encourage free trade unionism and free collective bargaining, within the framework of compulsory and voluntary arbitration. Therefore, all forms of strikes, picketings and lockouts are hereby strictly prohibited in vital industries such as public utilities, including transportation . . .
> (b) Any legitimate labor union may strike, . . . in which case the union . . . shall file a notice with the Bureau of Labor Relations at least thirty (30) days before the intended strike or lockout. . . .

The Court ruled that even assuming that the strike at issue did not come within the strict prohibition regarding "vital industries" (Art. 264(a)), appellants had "not at all complied with the stipulation for strikes in non-vital industries" (Art. 264(b)). On grounds that the ITF was not a legitimate labor union, the strike was called only two months before the expiration of the contract and no notice had been given, the strike was declared unlawful under the Philippine law.

The Court further considered the question whether the ITF should be treated differently from the crew, i.e., whether the rights of the ITF, as opposed to those of the crew, should be judged under Dutch law. The Court did not make an explicit choice of law, but merely stated that Dutch law provides that it is unlawful to provoke or stimulate unpermitted strikes and since the ITF had provoked or stimulated the strike, it had committed a violation of the law. The Court stated that it was quite immaterial that the unlawfulness of the subject strike was to be judged according to Philippine law."[4]

The crewmembers' argument that the strike was lawful, because the wages were below the ILO level, was dismissed, since wages at

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[3] This convention is not yet in force.

[4] The Court considered that the ITF, operative on an international level, in trying to improve conditions for the crew members on foreign flag vessels, will in general have to take into account "the strike law of the systems of foreign law in which the ITF penetrates." A. Korthals Altes, *Seaman's Strikes and Supporting Boycotts: Recent Case Developments Abroad* 120, is of the opinion the court used implicitly a method known in international private law as "accessory attachment" (akzessoire Anknuepfung), a term coined by a German lawyer, Jan Krophollen, in *Ein Anknuepfungssystem fuer das Deliktsstatut* 601 (1969).

the time of contracting were in accordance with the ILO level. Dutch law prevents the application of a foreign law if its results are contrary to the "Dutch Public Order". It was decided, however, that the result was not contrary to the Public Order since contracts for a period of only one year were involved, which were due to expire in only two months, and the strike was called without prior notice. In addition, the strikers originally complained only about the food; their complaints about the wages were made only after contact with the ITF.

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