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POSSIBILITIES FOR ITF ACTIONS IN ENGLAND AS A RESULT OF NEW

LABOUR DISPUTE LAW

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ABBREVIATIONS

TULRA 74	-	Trade Union Labour Relations Act 1974
Act 80	-	Employment Act 1980
Act 82	-	Employment Act 1982
ITF	-	International Transport Worker's Federation
FoC	-	Flag of Convenience

INTRODUCTION

Changes in English strike law from 1980 and 1982 have also reduced the possibilities for actions by the ITF.

In the following article, only the legal framework for activities of the ITF in England as it is now taking shape is to be discussed, disregarding general questions about the economic practicality of the ITF policy up to now (1) and the future ITF policy (2), which

(1) Comprehensive: "Is ITF right" - Symposium Hongkong Oct, 1981, Lloyd's of London Press Ltd. 1981; Lloyd's Ship Manager, Dec. 1981, pp. 8-13 and Jan. 1982, pp. 6-9; see also S.G. Sturmeijer, The Open Registry Controversy and the Development Issue, Nr. 8 of Buchreihe des Institut f. Seeverkehrswirtschaft, Bremen 1983.

(2) Inside the ITF, Lloyd's Ship Manager, Sept. 1982, pp. 34-35 and Oct. 1982, pp. 36-37.

will no doubt be a topic of discussion at the 34th Congress of this organization in Madrid in October, 1983 (3). An understanding of this framework is not only of interest for those FoC ships sailing into English ports. Many ITF initiatives in other countries originate in the ITF headquarters in London and have in part been influenced by the previous legal situation in England.

I. Legal Situation before THE NAWALA case (4), 1979/80

The NAWALA case, as earlier decisions, determined that the blacking of FoC ships by the employees of a third company, such as a tug-boat crew, was a "trade dispute" according to sec. 29 TULRA 74 (5). The application of sec. 13, 14 TULRA 74 regularly led to legality of the union activities of the ITF and to immunity from liability for damages resulting from the actions.

This was a result of the fact that activities undertaken on the basis of sec. 13 (1) TULRA 74

13.-(1) An Act done by a person in contemplation or furtherance of a trade dispute shall not be actionable in tort on the ground only -

did not result in liability. Therefore one spoke of the "Golden Formula" (6), which set the limits of legal strike activity and - speaking figuratively - acted as a protective umbrella and as a blanket clause granting immunity from liability. The NAWALA case, which confirmed this breadth of protection in labour disputes, prompted the government of Margaret Thatcher to limit the activities of the ITF, among others, by means of the Act 80 and Act 82 (7). The basis for immunity from illegality according to sec. 13 TULRA 74, the so-called "Golden Formula", remained untouched in wording. However, sec. 17 Act 80 set down the conditions under which immunity from liability according to sec. 13 TULRA 74 was possible by, among other things, differentiating between legal and illegal secondary action. Sec. 18 Act 82 redefined the concept "trade dispute".

(3) T. Redding, FoC campaign to be stepped up following ITF Congress?, Lloyd's Ship Manager, May 1983, p. 46.

(4) NAWALA, Lloyd's Law Report 1980 (Vol. 1) p. 1 and LL.L.Rep. 1980 (Vol. 2), p. 317; All England Law Reports (1979) (Vol. 3), p. 614.

(5) Ibid.

(6) Encyclopedia of Labour Relation Law, Vol. 2 (1982/83) side-notes 2-1265; K.D. Ewing, "The Golden Formula", The Industrial Law Journal 1979, pp. 133.

(7) K.D. Ewing, Industrial Action: Another Step in the "Right" Direction, The Industrial Law Journal 1982, p. 209 (further, p. 216).

Nonetheless, the basis remains the TULRA 74. Act 80 and Act 82 contain only a few sections that change the text of TULRA 74 and and for the most part are in force independent of the TULRA 74. This does not aid clarity and understanding of the legal situation and was criticized by Lord Diplock - without mentioning Act 82 - in an ITF case, THE HOEGH APAPA (8), in which he wrote:

"The statutory provisions...are drafted in a manner which... can, in my view, only be characterised as most regrettably lacking in the requisite degree of clarity."

QII. The Legal Situation since Act 80 and Act 82

1) Secondary action

- a) Sec. 17 Act 80 determined that Sec. 13 TULRA 74, i.e. the protection of the "Golden Formula", applies only under the following conditions:

Sec. 17 Employment Act 1980

- 1) Nothing in section 13 of the Act of 1974 shall prevent an act from being actionable in tort on a ground specified in subsection (1) (a) or (b) of that section in any case where (a) the contract concerned is not a contract of employment, and (b) one of the facts relied upon for the purpose of establishing liability is that there has been secondary action which is not action satisfying the requirements of subsection (3), (4) or (5) below.
- 2) For the purposes of this section there is secondary action in relation to a trade dispute when, and only when, a person - (a) induces another to break a contract of employment or interferes or induces another to interfere with its performance, or (b) threatens that a contract of employment under which he or another is employed will be broken or its performance interfered with, or that he will induce another to break a contract of employment or to interfere with its performance, if the employer under the contract of employment is not a party of the trade dispute.
- 3) Secondary action satisfies the requirements of this subsection if - (a) the purpose or principal purpose of the secondary action was directly to prevent or disrupt the supply during the dispute of goods or services between an employer who is a party to the dispute and the employer under the contract of employment to which the secondary action relates; and (b) the secondary action (together with any corresponding action relating to other contracts of employment with the same employer) was likely to achieve that purpose....
- 6) In subsection (3) (a) and (4) (a) above - (a) references to the supply of goods or services between two persons are references to the supply of goods or services by one to the other in pursuance of a contract between them subsisting at the time of the secondary action, and (b) references to directly preventing or disrupting the supply are references to preventing or disrupting it otherwise than by means of preventing or disrupting the supply of goods or services by or to any other person.

Remark: Sec. 14 Act 82 provides further limits to sec. 13 (1) TULRA 74 immunity.

(8) HOEGH APAPA, Merkur Island Shipping Co. v. Laughton and Others, The Weekly Law Report (1983)2, p. 779 (790, side-notes F-G).

- b) Sec. 17 Act 80 consists basically of two parts:
- aa) The first part revokes the protection of sec. 13 TULRA 74 for actions which influence trade contracts by secondary action.
 - bb) The second part confirms the immunity guaranteed by sec. 13 (1) TULRA 74 for certain forms of secondary action.

According to this subdivision, the immunity is lost when the activity affects at least two contractual relationships. This is the case, for example, when a trade contract between two parties and an employment contract with an employer who is not involved in the dispute are affected.

- c) The "secondary action" referred to in sec. 17 Act 80 has been dealt with in two higher court decisions.

THE ANTAMA; Court of Appeal (9) 1982

The ANTAMA was chartered. The charterer's agent ordered harbour services. The ITF was able to prevent the ANTAMA from leaving the harbour by persuading workers in Hull not to operate the lock doors, which was a breach of employment contract between the workers and the harbour authorities. In this way, the shipping agent was prevented from fulfilling his obligations from the charter contract.

In the opinion of the Court, the ITF representatives as defendants could not prove that at the time of the secondary action the contractual relationship required by sec. 17 (6) Act 80 (10) (contract of supply of services) existed between the shipper as plaintiff and the harbour authorities, whose employees were striking the ANTAMA.

THE HOEGH APAPA; House of Lords (11) 1983

The ship, registered in Liberia, was in use on the basis of a subcharter contract. In July, 1982, the ITF caused the lock operators and union members who had an employment contract with a tugboat company to refuse the ship their services, thus preventing it from leaving the harbour of Liverpool. The ITF had been given the complete text of the charter contract before the actions were started. The shipping agent was granted a temporary injunction which was confirmed in two appeals. The charter contract contained an off-hire and cancellation clause in case of boycotts, etc.

The contract was not cancelled. The House of Lords determined that an act actionable in tort according to sec. 13 TULRA 74 did not require that the influencing action had led to a cancellation of the contract (12).

(9) ANTAMA, Marina Shipping Ltd. v. Laughton and Shaw, The Weekly Law Report (1982)2, p. 569.

(10) (critical) Wedderburn, Notes of Cases - Secondary Action and Primary Values, The Modern Law Review 1982, p. 317 (230) with further references.

(11) HOEGH APAPA, op. cit.

(12) HOEGH APAPA, op. cit. pp. 786-787.

The House rejected the opinion of the Court of Appeals (13) that the illegality resulted from sec. 17 (6) Act 80 (also held by the Court of Appeals in the ANTAMA case, see footnote 9) and based the illegality of the actions on the fact that these were not covered by sec. 17 (3) Act 80 (14).

2) Trade dispute

Possibilities for actions by the ITF were further limited by sec. 18 Act 82. This change was also a result of the NAWALA case (15). Sec. 29 TULRA 74 was basically changed as follows:

Sec. 29 TULRA 1974 as amended by Employment Act 1982, Sec. 18

- 1) In this act "trade dispute" means a dispute between workers and their employer which relates wholly or mainly to one or more of the following, that is to say -
 - a) terms and conditions of employment, or the physical conditions in which any workers are required to work;
 - b) engagement or non-engagement, or termination of suspension of employment or the duties of employment, of one or more workers;
 - c) allocation of work or the duties of employment as between workers or groups of workers;
 - d) matters of discipline;
 - e) the membership or non-membership of a trade union on the part of a worker;
 - f) facilities for officials of trade unions; and
 - g) machinery for negotiation or consultation, and other procedures, relating to any of the foregoing matters, including the recognition by employers or employers' associations of the right of a trade union to represent workers in any such negotiation or consultation or in the carrying out of such procedures.
- 3) There is a trade dispute for the purposes of this Act even though it relates to matters occurring outside the United Kingdom, so long as the person or persons whose actions in the United Kingdom are said to be in contemplation or furtherance of a trade dispute relating to matters occurring outside the United Kingdom are likely to be affected in respect of one or more of the matters specified in subsection (1) of this section by the outcome of that dispute.
- 6) In this section -

"employment" includes any relationship whereby one person personally does work or performs services for

(13) Weekly Law Report (1983)2, p. 45.

(14) HOEGH APAPA, op. cit., p. 789, side-note F.

(15) K.D. Ewing, op. cit., p. 216 (with further references), M. J. Sterling, Action for Duress, Seafarers and Industrial Disputes, The Industrial Law Journal 1982, p. 156 (165).

another;

"worker", in relation to a dispute with an employer, means -

a) a worker employed by that employer;....

The term "trade dispute" has now been basically defined by the regulation as follows:

- a) There must be a dispute between employees and their own employer. In many ITF cases, such as the NAWALA, the crew were not in dispute with their employer.
- b) Disputes between employees are not, in contrast to sec. 29 (1) TULRA 1974, old version, trade disputes; the corresponding regulation in sec. 29 (1) TULRA 1974 was taken out (16).
- c) The dispute must wholly or mainly concern the matters listed in sec. 29 (1) TULRA 1974. Until now, a simple relationship to one of the matters of sec. 29 (1) TULRA 1974, old version, was sufficient (17).
- d) The protection for actions whose causes are outside the United Kingdom has been greatly reduced. Sympathy strikes for labour disputes in other countries are not permitted. This is also the case for actions by employees in other countries even when they belong to the same multinational concern (18). Protection under sec. 13 (1) together with sec. 29 (1) (3) TULRA 74, new version, exists only when the striking workers have a direct personal interest in the result of the dispute and the requirements of sec. 29 (1) TULRA 74, new version, are fulfilled.
- e) Only those persons are now considered to be employees who are involved in a dispute with their own employer, sec. 29 (1), (6a) TULRA 74. By expressly stating that a trade dispute can be assumed only in cases of disputes between employees and their own employer, the protection of the "Golden Formula" which had already been restricted by Act 80 - secondary action - has been further limited.

3) Liability for illegal actions

According to TULRA 1974, old version, the protection for natural persons and for trade unions was of different quality. Liability on the basis of tort existed principally for all damages resulting from strikes if an action was not covered by protection of the "Golden Formula" according to sec. 13 (1) TULRA 1974. No further protection existed for natural persons; liability of the trade unions was excluded by special immunity granted by sec. 14 TULRA 74. Sec. 15 Act 82 limits immunity for illegal actions and changes it to a limited liability according to the number of trade union members; a trade union with 5,000 members or fewer is liable for a sum of up to £ 10,000.00; a union with more than 100,000

(16) This regulation was first incorporated into the TULRA in 1971.

(17) NAWALA, op. cit., p. 631, side-note b.

(18) IRS Guide to the Empl.-Act 82, Industrial Relations Review and Report 285/Legal Inf. Bulletin 222, p. 4.

members is liable for a sum of up to £ 250,000.00.

- 4) The changes discussed above can individually or in combination with one another lead to a situation in which actions as carried out by the ITF in the past are no longer considered to be a trade dispute and therefore do not enjoy immunity.

Three typical case possibilities follow:

Example 1: Crew members of a ship are not involved in a dispute with the ship owner. Harbour services are ordered in the shipowner's name.

Employees of a third company cannot legally begin a labour dispute. This is also the case even if the strike by the employees of the third company is carried out because the standard norms are not being upheld on the ship. There is no dispute between the crew and their employer, sec. 29 (6)a TULRA 74, new version. In addition, actions against the ship are an illegal secondary action according to sec. 17 (3) Act 80.

Example 2: Several or all members of the crew of a ship running under a charter are involved in a dispute with their employer over terms and conditions of the employment contract. As long as the temporary charterer is the contracting party for the harbour services, any action taken by employees of the latter are an illegal secondary action, as the contractual relationship between the ship owner and the charterer is affected. The charterer is not involved in a dispute because of an employment contract.

Example 3: As in Example 2, but the ship owner is the contracting party for the harbour services. In this case, secondary actions by the employees of the harbour services are legal as long as the actions of the ship crew concern wholly or mainly one of the matters in sec. 29 (1) TULRA 74, new version, and if the crew has a direct and personal interest in the outcome of the strike, sec. 29 (3) TULRA 74, new version.

The above examples show that ships under FoC which fear becoming involved in a legal strike will sail into English harbours only if the ship is running under a time charter and if the contract insures that only the charterer will order services in his own name (19).

III. Outlook

- 1) It is not the purpose of this article to judge if the latest changes in labour dispute laws have gone too far, as K. D. Ewing suggests (20), or whether a moderate tact has been taken. The desired restriction of ITF actions is only part of a far-reaching legal package. The basic outlines of the area in which the ITF can legally act are, however, clearly recognizable.
- 2) It remains to be seen whether the courts will bring new

(19) M. J. Sterling, op. cit., pp. 166, 168.

(20) K. D. Ewing, op. cit., p. 226

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viewpoints into labour dispute law as was recently done in another ITF case, the UNIVERSE SENTINEL (21). In this case, the House of Lords placed the concept of "economic duress" (22) alongside that of "tort" as used in sec. 13 (1) TULRA 1974 with the logical consequence that an action falling under the concept of "economic duress" would no longer enjoy the protection of the "Golden Formula". The legal arguments of the case UNIVERSE SENTINEL have been thoroughly discussed in literature (23). Due to the far-reaching changes of Act 80 and Act 82, ITF actions against ships under FoC will in future be legal only in very few cases. The doctrine of "economic duress" will remain an isolated decision as far as ITF cases are concerned.

- 3) In conclusion, it can be said that the new laws have cut the ground from under the feet of the ITF for actions in England. This is not a coincidental result of legal initiatives undertaken by the government of Margaret Thatcher to regulate labour dispute law in England, but is rather one of the intended goals. The ITF will no longer - at least, for the moment - be able to carry out its policies against FoC ships in England as it did in the past.

ABBREVIATIONS

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FoC	-	Flag of Convenience

(21) UNIVERSE SENTINEL, Universe Tankships Inc. of Monrovia v. ITF and Others, The Weekly Law Reports (1982)2, p. 803.

(22) Duress consists in any illegal imprisonment, or...other harm, or other means amounting to or tending to coerce the will of another, and actually inducing him to do an act contrary to his free will - Legal Dictionary.

(23) M. J. Sterling, op. cit., p. 156; P. S. Atiyah, Notes: Economic Duress and the "Overborne Will", Law Quarterly Review 1982, p. 197; Wedderburn, Notes of Cases: Economic Duress, The Modern Law Review 1982, p. 556.