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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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KONKAR INDOMITABLE CORPORATION,

Petitioner,

-against-

FRITZEN SCHIFFSAGENTUR UND BEREEDERUNGS-GMBH,

Respondent.

- -x

80 Civ. 3230

MEMORANDUM DECISION

U.S.D.C. S.D.N.Y. MAY 4 1981

GAGLIARDI, D.J.

This is a petition to confirm an arbitration award pursuant to 9 U.S.C. §9. On March 17, 1972, in Hamburg, Germany, petitioner Konkar Indomitable Corporation ("Konkar"), the Liberian owner of the vessel M.V. Konkar Indomitable, flying under a Greek flag, and respondent Fritzen Schiffsagentur und Bereederungs - GMBH ("Fritzen"), the German charterer, entered into a time charter party for a period of approximately eight years. Clause seventeen of the charter party provides that any disputes arising between the parties shall be "referred to three persons at New York."

A dispute arose concerning interpretation of clause fifty-nine of the charter party, which provides that hire payments to Konkar were to be made at specified rates of exchange between United States Dollars and German Deutschemarks.[1] Fritzen made payments in accordance with clause fifty-nine until November 15, 1977, when it informed Konkar that it would

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thereafter remit payments "dollar for dollar" instead of at the Deutschemark exchange rate provided for by clause fifty-nine, contending that the designated exchange rate violated the "Gold Clause," 31 U.S.C. §463 (1976)(amended 1977). 31 U.S.C. §463 provides in pertinent part:

> (a) Every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy. . . .

The parties agreed to submit to arbitration the issue arising from Konkar's expectation that payment was to be made in accordance with clause fifty-nine and Fritzen's contention that the obligation under clause fifty-nine was invalid and unenforceable under 31 U.S.C. §463.

The panel, after four days of hearings in New York, rendered a unanimous interim award in favor of Konkar,[2] holding that the charter party was not an "American Contract" and that the Gold Clause was therefore inapplicable to the agreement and its hire payment provisions.

For the reasons which follow the petition is granted.

Discussion

This court's role in reviewing an arbitration award is limited to consideration of those grounds set forth in 9 U.S.C. §10, see Local 771, I.A.T.S.E., AFL-CIO v. RKO General, Inc., 546 F.2d 1107 (2d Cir. 1977); Saxis Steamship Co. v. Multifacs Int'l Traders, Inc., 375 F.2d 577 (2d Cir. 1967), or

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to the non-statutory ground of "manifest disregard" of the law. See Wilko v. Swan, 346 U.S. 427, 436-37 (1953); Drayer v. Krasner, 572 F.2d 348, 352 (2d Cir.), cert. denied, 436 U.S. 948 (1978). In limited situations, when the provisions of the United States Convention on the Recognition and Enforcement of Foreign Arbitration Awards, 9 U.S.C. §201-208, are invoked, a court may deny enforcement on the grounds that enforcement would be contrary to this country's pulic policy. See 9 U.S.C. §201, Article V; Transmarine Seaways Corp. v. Marc Rich & Co., A.G., 480 F. Supp. 352, 357 (S.D.N.Y. 1979). Since Fritzen's claims are directed to the latter ground, the court will address only those arguments.

It is well settled in this Circuit that arbitrators need not explain the reasons for their award. See Sobel v. Hertz, Warner & Co., 469 F.2d 1211, 1214 (2d Cir. 1972). In fact, "if a ground for the arbitrator's decision can be inferred from the facts of the case, the award should be affirmed." Id. at 1216. It is apparent here that the panel concluded that there were insufficient contacts with the United States to invoke this country's law. In considering whether the award was in manifest disregard of the law, the issue before this court is not whether the panel was merely in error in holding that the agreement was not governed by United States law, but rather whether, in reaching that result, the panel disregarded the applicable standards for determining which law should govern this contract dispute. See Saxis S.S. Co. v. Multifacs Int'l. Traders, Inc., supra, 375 F.2d 577.

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Although the selection of a forum for arbitration may sometimes be considered an implicit indication of the parties' choice of law for governing contract disputes, see Splosna Plovba of Piran v. Agrelak Steamship Corp., 381 F. Supp. 1368, 1370 (S.D.N.Y. 1974); cf. Scherk v. Alberto-Culver Co., 417 U.S. 506, 519, n.13 (1974) (dictum), selection of an arbitration forum may also be viewed as but one factor in determining a contract's "center of gravity" for choice of law purposes. See Fricke v. Isbrandtsen Co., 151 F. Supp. 465, 477 (S.D.N.Y. 1950). Even when the parties have explicitly provided that the law of a particular jurisdiction will govern any dispute, such a stipulation is not necessarily binding on the body resolving disputes. Id. at 467. It is, moreover, appropriate to disregard the parties' choice if the chosen law would render any portion of the contract invalid. See Restatement (Second) of Conflict of Laws §187, Comment e (1971).

Had the panel applied either United States or New York law, although there was no mandate for it to do so, it would have adopted a "center of gravity" analysis under applicable choice of law principles. See Index Fund, Inc. v. Insurance Co. of North America, 580 F.2d 1158, 1162 (2d Cir. 1978), cert. denied, 440 U.S. 912 (1979); Uniroyal, Inc. v. Heller, 65 F.R.D. 83, 90 (S.D.N.Y. 1974); Fricke v. Isbrandtsen Co., supra, 151 F. Supp. at 467; Auten v. Auten, 308 N.Y. 155, 160-61 (1954). The charter party was executed in Germany between German and Liberian parties for the [illegible]

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of a Greek vessel. It cannot be said, therefore, that the panel was in "manifest disregard" of the law in holding that neither New York nor the United States was so clearly the center of gravity as to require application of United States law.[3]

Fritzen cannot prevail in meeting its stringent burden by the citation of two inapposite cases. In Compania de Inversiones Internacionales v. Industrial Mortgage Bank of Finland, 269 N.Y. 22 (1935), the New York Court found not only that the parties intended New York or United States law to apply, but that the plaintiff had chosen to enforce an obligation by resort to this country's courts. Under those circumstances, both absent in the instant case, the court considered the parties bound by United States law. In Bethlehem Co. v. Zurich General Accident & Liability Ins. Co., 307 U.S. 265 (1939), the Supreme Court likewise applied United States law when suit was instituted in a New York court to enforce an ostensibly international contractual obligation. The parties in the instant action resorted to arbitration in the first instance, not to the judicial system. An agreement to arbitrate should not, absent a clear intention that United States law apply to the arbitration, automatically subject foreign parties to this country's law in the same manner as institution of suit.

Also unavailing is Fritzen's argument that this court should deny enforcement of the award on public policy grounds pursuant to Article V(2)(b) of the Convention on the

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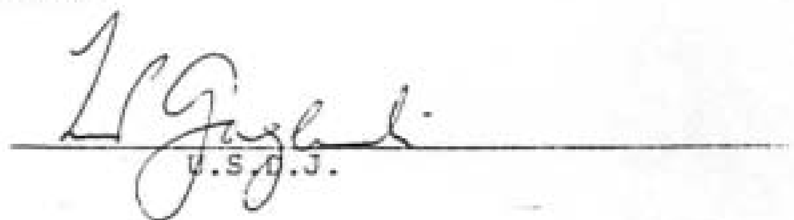
Recognition and Enforcement of Foreign Arbitration awards ("the Convention").[4] The Second Circuit in Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier (RAKTA), 508 F.2d 969 (1974), rejected the public policy defense, declaring that arbitral awards should be denied confirmation only when the asserted public policy "would violate the forum state's most basic notions of morality and justice." Id. at 974. To do otherwise would "undermine the Convention's utility . . . and enshrine the vagaries of international politics under the rubric 'public policy.'" Id. In light of the fact that Congress has legislated to limit the applicability of the "Gold Clause" to obligations predating October 28, 1977, Act of October 28, 1977, Pub. L. 95-147, 91 Stat. 1229 (codified at 31 U.S.C. §463 (Supp. 1979)), it is clear that the "Gold Clause" cannot be deemed one of the United States' "most basic notions of morality and justice."

Accordingly, the Court grants Konkar's motion to confirm the arbitration award. Fritzen's cross-motion to vacate the arbitration award is denied.

So Ordered.



U.S.D.J.

Dated: New York, New York
April 30, 1981.

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Footnotes

1. Clause fifty-nine provides:

Hire/Hire Payment

Rates payable in German Marks:

US$ 1.96 at rate of exchange of 3.2225 or DM 6.3161 for first three years,
US$ 2.16 at rate of exchange of 3.2225 or DM 6.9606 for second three (3) years,
US$ 2.31 at rate of exchange of 3.2225 or DM 7.4440 for last two (2) years,
all per longton deadweight all told per month.

Charterers may, at their option, pay said hire, offices and crew overtime, and for meals and supercargo charges, if any, in United States Dollars (US$) in an amount equal to the amount of United States Dollars (US$) required to purchase the original German Mark (DM) amount, using the spot exchange rate as quoted by the First National City Bank, London, as at 11:00 o'clock, two (2) days before the hire and instalment is due, or at the rate of exchange as quoted on the nearest preceding normal banking day before the hire and instalment is due.

Hire to be paid to: Konkar Indomitable Corporation, account number 04 227 421 with the First National City Bank, 2 Broadway, New York, N.Y., 10004.

Hire to be paid on eventually ascertained final summer deadweight or that on 44 feet 10 inches draft, whichever is less.

2. In its interim award the panel decided only the issue of Fritzen's liability pursuant to clause fifty-nine, reserving the question of the amount due to Konkar for a later submission in the event the parties could not reach agreement. In its final award, also confirmed here, the dollar amount of liability was determined.

3. Admiralty choice of law provides for lex loci contracts, application of the law of the place of the contract's execution. See S.C. Loveland, Inc. v. East West Towing, Inc., 608 F.2d 160, 164 (5th Cir. 1979), cert. denied sub. nom. St. Paul Mercury Ins. Co. v. East West Towing, Inc., 446 U.S. 918 (1980). Thus, since the charter party was executed in Germany, it is clear that maritime choice of law would yield the same result.

4. 9 U.S.C. §201 Article V, provides in relevant part:

"2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

* * *

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Since the panel determined that the contract was not an American one, the Convention covers this award as one "not considered as a domestic award . . . in the state where the recognition and enforcement are sought." Convention, Article I(1).

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