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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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B. V. BUREAU WIJSMULLER, :

Plaintiff, : 76 Civ. 2494-CSH

-against- : MEMORANDUM AND ORDER

UNITED STATES OF AMERICA as Owner of the warship JULIUS A. FURER, :

Defendant. :

- x

Appearances:

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Of Counsel.

HAIGHT, District Judge:

Plaintiff B. V. Bureau Wijsmuller ("Wijsmuller"), a professional marine salvage company, moves this court for an order, pursuant to Section 1 of Pub. L. No. 91-368, 84 Stat. 692, 9 U.S.C. §206, directing defendant United States of America

to proceed to arbitration of plaintiff's salvage claim in London, in accordance with the terms of a Lloyd's open form salvage agreement ("LOF") signed by the Captain of defendant's warship JULIUS A. FURER prior to rendition by Wijsmuller of the salvage services which form the subject matter of this action.

The Government contends that it is not bound by the LOF or the provisions for arbitration which it contains. Accordingly, the Government contends, the motion to compel arbitration must be denied, and the case go forward in this court pursuant to the provisions of the Public Vessels Act, 46 U.S.C. §781 et. seq., the jurisdictional statute invoked by Wijsmuller.

The court concludes that the United States is not bound by the LOF, and accordingly is not required to participate in arbitration of Wijsmuller's claim for salvage. Accordingly the present motion is denied.

I.

The facts, insofar as they bear upon this motion, may be briefly stated. The JULIUS A. FURER is a warship of the United States Navy. On June 30, 1974 the vessel stranded off the coast of The Netherlands.

Plaintiff Wijsmuller, one of the leading maritime salvage companies in the world, directed four salvage tugs to the assistance of the FURER. Before commencing assistance to the warship, Wijsmuller' representative on the scene obtained the signature of the Captain of the FURER, Commander S. H. Edwards, to the LOF, also known as the

Lloyd's "no cure-no pay" salvage agreement, or the Lloyd's Standard Form of Salvage Agreement. It does not appear from the papers before me that Commander Edwards consulted higher authority before signing the LOF, and I assume for the purpose of this discussion that he did not do so.[1]

The LOF, known throughout the maritime industry and in use by salvors for many years, provides for submission of the salvor's claim for salvage compensation to binding arbitration in London, before an arbitrator appointed by the Committee of Lloyd's.[2] The arbitration agreement (LOF, para. 10) provides that the arbitration will be held in accordance with English law. The LOF also provides for the giving of security by the owner of the salved property (ship or cargo); and further provides (para. that pending completion of security, the salvor has a maritime li on the property salved, which shall not without the consent of th salvor be removed from the place of safety to which the property has been brought until security has been furnished.

The FURER was freed from the strand on July 1, 1974. Wijsmuller filed its complaint in this court, pursuant to the Public Vessels Act, 46 U.S.C. §781, which provides:

> "A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: Provided, That the cause of action arose after the 6th day of April, 1920."

In its complaint, Wijsmuller reserved the right to demand arbitration in accordance with the LOF. By its present motion, Wijsmuller seeks an order directing the United States to proceed to arbitration before Mr. G. R. A. Darling, Q.C., the arbitrator appointed by Lloyd's.

The Government, while conceding that "during the period of the strand, the plaintiff provided some assistance during attempts to float the FURER" (brief, p. 2), has consistently taken the position that it is not bound by the terms of the LOF, and is not required to submit to arbitration before Mr. Darling or anyone else in London. The Government contends that Wijsmuller's salvage compensation must be fixed by this court in accordance with principles of maritime law declared by the federal courts sitting in admiralty.

II.

The Public Vessels Act was one of several statutes passed by Congress in response to its conclusion "that the United States should put aside its sovereign armor in cases where federal employees have tortiously caused personal injury or property damage." American Stevedores v. Porello, 330 U.S. 446, 453 (1947). Of course, the Public Vessels Act is not limited to cases of tort; as noted above, 46 U.S.C. §781 specifically refers to "compensation for towage and salvage services, including contract salvage..."

Absent an express waiver of sovereign immunity, no suit lies against the sovereign. Prior to execution of the Public

Vessels Act and its related statutes, the only means of pressing an affirmative claim against the United States for the acts of one of its vessels was by a special act of Congress.[3] The armor of sovereign immunity has now been put aside by the statutes in question; but it is equally well settled that suits against the United States must conform strictly to the provisions of the enabling statutes.[4]

The initial question, therefore, is whether by enacting the Public Vessels Act, Congress intended to waive the sovereign immunity of the United States in such a manner as to require the Government to submit to arbitration in London, in accordance with contractual terms such as those contained in the LOF. That question must clearly be answered in the negative. While the Public Vessels Act permits suits against the United States for salvage services rendered to one of its public vessels, the venue of such a suit is the United States District Court which is appropriate in the circumstances of the case. 46 U.S.C. §782. Arbitration in London, before an arbitrator appointed by the Committee of Lloyd's or any other body, is entirely inconsistent with the statutory scheme. Equally inconsistent are the LOF's provisions for giving of security, the salvor's lien upon the salved vessel, and his right to detain her. The Public Vessels Act specifically provides that no lien arises against any public vessel of the United States. 46 U.S.C. §788.[5] It is not material, in this regard, that Wijsmuller did not attempt to detain the FURER or assert a lien against her; the express negation of a lien in the Public Vessels

Act gives further evidence of the degree to which the jurisdictional statute upon which Wijsmuller necessarily relies is out of harmony with the salvage agreement upon which it relies in the alternative.

The fact that Commander Edwards, the commanding officer of the FURER, signed the LOF is of no legal consequence. Indeed, it would have made no difference if the Chief of Naval Operations had chanced to be upon the FURER, and had executed the contract himself. That is because only the Congress can remove or tailor the armor of the sovereign's immunity from suit; no officer or representative, regardless of rank, good intentions, or innocent misapprehension of his powers, has the requisite authority. In United States v. Shaw, 309 U.S. 495, 500 (1940), the Supreme Court stated generally that:

> "Without specific statutory consent, no suit may be brought against the United States. No officer by his action can confer jurisdiction. Even when suits are authorized they must be brought only in designated courts."

See also United States v. N. Y. Rayon Co., 329 U.S. 654, 660 (1947); United States v. Village of Little Chute, Wisconsin, 248 F.2d 228, 231 (7th Cir. 1957); American-Foreign Steamship Corp. v. United States, 291 F.2d 598 (2d Cir. 1961), cert. den., 368 U.S. 895 (executive officers of Government held to lack authority to extend two-year period within which actions under Suits in Admiralty Act must be commenced; "The executive arms of the Government, through which the United States does business, have no more

power to extend by contract the limited right granted by Congress than they had to create the original right of suit against the sovereign", 291 F.2d at 607).

Wijsmuller directs the court's attention to a change in the wording of pertinent "OPNAV" instructions addressed by the Office of the Chief of Naval Operations to naval officers. At the time of the salvage services in suit, those instructions provided, in paragraph 7(c):

> "Operational Commanders. When it is apparent that a Navy ship or unit in distress requires a salvage ship or salvage equipment, the operational commander of the ship or unit concerned shall immediately request salvage assistance from the cognizant Service Force Commander and shall take initial steps to insure the preservation of the distressed ship or unit pending arrival of the requested salvage assistance."

In April of 1976, the instructions were amended so as to provide:

> "8. Commercial Salvage Assistance in Remote Areas. Fleet units operating in remote areas may from time to time require salvage assistance that may be available only from foreign commercial sources. Foreign salvors generally operate under the so-called 'Lloyds Open Form (LOF) Contract.' Alternate agreements can be made at the headquarters-home office level. However, lacking specific instructions to the contrary, the on-scene salvor will likely require signature on an LOF by the local commander prior to commencing work. The local commander neither had contracting authority nor is he empowered to commit the U.S. Government to the jurisdiction of foreign courts, or posting of security and provision of a lien, all of which are elements of the LOF. Consequently, when employment of foreign salvors appears probable or imminent, the local commander must advise CNO, JAG, OGC, and COMNAVSEASYSCOM, as well as the appropriate operational chain of command, by the most expeditious means possible, of the complete circumstances. Specific guidance and authorization, if necessary will be provided the local commander while appropriate arrangements are being made with the salvor's home office."

If Wijsmuller is inviting the court to draw the inference, from this change in language, that Commander Edwards had actual authority to bind the United States to the LOF at the time in suit, I decline the invitation. It is true that the 1976 revision states specifically that a local commander lacks authority to bind the United States to the provisions of the LOF. However, in the light of the authority referred to supra, I conclude that the revision does no more than make the implicit explicit. The provision in the earlier instructions, that an operational commander is to "take initial steps to insure the preservation of the distressed ship or unit" pending arrival of salvage assistance requested from higher authority, falls far short of a declaration that operational commanders were authorized to bind the United States to an LOF contract. Furthermore, the authorities make it clear that even if the Office of Chief of Naval Operations had purported to vest operational commanders with such authority, the United States would still not be bound by provisions in a contract which are inconsistent with the limited waiver of sovereign immunity enacted by the Congress.

Wijsmuller also contends that the United States is bound to arbitrate in London under the LOF, as the result of the following provision in the Public Vessels Act, 46 U.S.C. §786:

> "The Attorney General of the United States is authorized to arbitrate, compromise, or settle any claim on which a libel or cross libel would lie under the provisions of this chapter, and for which a libel or cross libel has actually been filed."

This argument is specious. The statute does no more than to confer authority upon the Attorney General to arbitrate claims which would otherwise be justiciable in the district courts. By no stretch of the imagination can such limited authority be expanded so as to include the distinguished arbitrators appointed by the Committee of Lloyd's. Accepting arguendo the doubtful proposition that the Attorney General has the authority to delegate his arbitrator's function to the Lloyd's arbitrator, the record in this case makes it clear that he declines to do so.

III.

But Wijsmuller contends that all the foregoing principles and lines of authority are changed by the adherence of the United States, in 1970, to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as implemented by the Act of July 31, 1970, Pub. L. No. 91-368, 84 Stat. 692, 9 U.S.C. §§201 et. seq.

Several courts, including the Supreme Court, have had occasion to observe that adherence by the United States to the Convention reflects an expression of public policy in favor of resolving international commercial disputes through arbitration. Scherk v. Alberto-Culver Co., 417 U.S. 506, 515-521 (1973); Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L'Industrie du Papier, 508 F.2d 969 (2d Cir. 1974); Antco Shipping Co., Ltd. v. Sidermar S.p.A., 417 F.Supp. 207 (S.D.N.Y. 1976). However, it does not follow that by adhering to the Convention, the United States agreed to do away with limitations upon the waiver of sovereign

immunity contained in other statutes. Certainly, neither the Convention nor the implementing statute contain express provisions to that effect; the argument must therefore be one of necessary implication. But there are formidable obstacles in the path of such an implication.

Thus, Article XIV of the Convention provides:

> "A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention."

This provision recognizes that a "Contracting State" may or may not be bound by the provisions of the Convention, depending upon its expressions of will or intent on the point. Furthermore, adherence of the United States to the Convention was accompanied by the following reservation, among others:

> "The United States of America will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the United States."

Whatever uncertainties may arise when agencies of government engage in commercial transactions, relations arising out of the activities of warships have never been regarded as "commercial" within the context of sovereign immunity.[6]

In addition, the Convention itself recognizes that in certain circumstances the forum court may decline to enforce an agreement providing for arbitration elsewhere. Thus, Article II(3) provides:

> "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." (emphasis added).

While the cases cited supra ~~in this section~~ hold that the "null and void" concept is to be given a narrow construction within the context of arbitration agreements in commercial contracts between private parties, I have no hesitation in holding that the present arbitration agreement, contained in the LOF contract, is "null and void" in respect of the United States because of the sovereign immunity principles discussed previously.

Conclusion

I have considered Wijsmuller's other contentions, and find them to be without merit.

For the foregoing reasons, Wijsmuller's motion for an order directing the United States to proceed to arbitration is denied.

The case will go forward in this court, in accordance with applicable maritime law as declared by the federal courts sitting in admiralty.[7]

It is So Ordered.

Dated: New York, New York
December 21, 1976

CHARLES S. HAIGHT, JR.
U. S. D. J.

Footnotes

1. In any event, consultations by Edwards with higher naval authority prior to execution of the LOF would be of no legal consequence. See discussion under Point III, infra.

2. Lloyd's of London has long been connected with marine insurance. The present day Lloyd's is a society incorporated by an Act of Parliament in 1871. Its members, known as the Underwriting Members of Lloyd's, transact insurance for their own account and risk. The Committee of Lloyd's is the administrative body. In addition to insuring marine risks, Lloyd's renders numerous services to the shipping industry, the processing of salvage claims under the LOF being one of them.

3. See discussion in The Wright, 109 F.2d 699, 700 (2d Cir. 1940).

4. See City of New York v. McAllister Bros., Inc., 278 F.2d 708 (2d Cir. 1960) (suit under Suits in Admiralty Act, 46 U.S.C. §742, dismissed for failure to comply with statutory requirement that service of copy of complaint be made on United States Attorney and Attorney General "forthwith"; plaintiff delayed two months; the Second Circuit observed that "technical requirements for service of process upon the government, when it has waived its sovereign immunity, must be strictly complied with." 278 F.2d at 710.)

5. It is also settled that writs of foreign attachment of the Government's property do not lie under the Suits in Admiralty Act or Public Vessels Act. Chilean Line, Inc. v. Main Ship Repair Corp., 232 F.Supp. 907, 909 (S.D.N.Y. 1964) ("...such consent is to be strictly construed."), aff'd., 344 F.2d 757, 762 (2d Cir. 1965).

6. The Schooner Exchange v. M'Faddon, 7 Cranch. (11 U.S.) 116 (1812); see Robinson on Admiralty (1939) at p. 248.

7. The conclusion reached herein is not intended to disparage Lloyd's salvage arbitrations or the distinguished arbitrator designated by the Committee. This court simply holds that whatever the virtues of arbitration at Lloyd's may be, the United States has declined to partake of them, and cannot be compelled in law to do so.