[* 1]
SCANNED ON 7/2/2010

C 7-1-10

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT:

PART 56

Index Number : 600809/2008

FLUXO-CANE OVERSEAS

VS

NEWEDGE USA, LLC

Sequence Number : 003

CONFIRM/REJECT REFEREE REPORT

C

INDEX NO. _____

MOTION DATE 3/15/10

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

RECEIVED
JUL 01 2010
MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 6/29/10

Richard [illegible]
J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

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FLUXO-CANE OVERSEAS LTD. and MANOEL FERNANDO GARCIA

Petitioners,

Index No: 600809/08

-against-

DECISION AND ORDER

NEWEDGE USA, LLC (f/k/a FIMAT USA, LLC),

Respondent.

RICHARD B. LOWE III, J:

Respondent Newedge USA, LLC (f/k/a FIMAT USA, LLC) ("Respondent" or "Newedge") moves, pursuant to CPLR § 7510, to confirm the Arbitration Decision and Award (the "Award") issued on December 23, 2009, in favor of Newedge and against Petitioners Fluxo-Cane Overseas Limited ("Fluxo-Cane") and Manoel Fernando Garcia ("Garcia" and collectively, "Petitioners"), in the ICE Futures US, Inc. ("ICE" or "Exchange") arbitration captioned *In the Matter of Newedge ISA, LLC, Claimant, v. Fluxo-Cane Overseas Limited and Manoel Fernando Garcia, Respondents*. Respondent also moves, pursuant to CPLR § 7514, for a judgment against Petitioners on the Award, with interest; and, pursuant to CPLR § 3211(a)(5), to dismiss with prejudice the complaint in the related *Fluxo-Cane v. Newedge* matter, which was stayed pending completion of the arbitration (*see Fluxo-Cane Overseas Ltd. v Newedge USA, LLC*, Sup Ct, New York County, May 21, 2009 Index No 650030/09, Doc No 18 ["5/21/09 Order"]).

Petitioners cross-move, pursuant to CPLR §§ 2215, 7511(b)(1)(iii), and 7511(b)(2), to vacate the Award, and to lift the stay in the related *Fluxo-Cane v. Newedge* matter, permitting the

complaint in that action to proceed.

BACKGROUND

The background of this matter is discussed in further detail in this Court's June 13, 2008 decision, familiarity with which is presumed (*Fluxo-Cane Overseas Ltd., et al., v Newedge USA, LLC*, Sup Ct, New York County, June 13, 2008 Index No 600809/08 ["6/13/08 Decision and Order"]). Subsequent to the 6/13/08 Decision and Order, Petitioners filed the complaint in the related action. On application by the Respondent, the related action was stayed in favor of the arbitration (*see* 5/21/09 Order, Index No 650030/09, Doc No 18). Thereafter Petitioners participated under protest in the arbitration, which included a motion to the arbitration panel to dismiss the arbitration (*see* Jan 25, 2009 Affirmation of Benjamin Nagin ["1/25/09 Nagin Aff"], Ex A, at 4). That motion was denied (*id.*). The arbitration hearing commenced on December 14, 2009 (*id.*). At the hearing the Petitioners once again moved to dismiss the arbitration proceeding (*id.*). The arbitration panel denied the renewed application (*id.*). Petitioners thereafter left the arbitration proceeding, refusing to participate (*id.*). The hearing continued after the Petitioners left, and ended on December 15, 2009 after the Respondent presented its evidence and witnesses (*id.*). The arbitration panel then issued the Award, dated December 21, 2009, in favor of Newedge and against Fluxo-Cane in the amount of $3,209,472.08, and against Garcia in the amount of $2,924,014.62 (*id.* at 5).

DISCUSSION

CPLR § 7510 states, in relevant part, that the court "shall confirm an award … unless the award is vacated or modified upon a ground specified in section 7511." CPLR § 7511(b)(1) states, in relevant part, that an arbitration award may be vacated if the arbitrator "exceeded his

power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made" (CPLR § 7511[b][1][iii]). Even if the arbitrator, in interpreting the agreement, "misconstrues or disregards its plain meaning or misapplies substantive rules of law," the award may not be vacated (*Silverman v Benmor Coats, Inc.*, 61 NY2d 299, 308 [1984]). "[A]n arbitration award cannot be vacated if there exists any plausible basis for it" (*Matter of Campbell v New York City Tr. Auth.*, 32 AD3d 350, 352 [1st Dept 2006] [citation omitted]). Alternatively, CPLR § 7511(b)(2) provides, in relevant part, that the "award shall be vacated on the application of a party who neither participated in the arbitration nor was served with a notice of intention to arbitrate if the court finds . . . . the rights of that party were prejudiced by one of the grounds specified [section 7511(b)(1)]; or . . . a valid agreement to arbitrate was not made" (CPLR § 7511[b][i]-[ii]). According to CPLR § 7511(e), "upon the denial of a motion to vacate or modify, [the Court] shall confirm the award."

Petitioners argue that under CPLR § 7511(b)(1)(iii) the Award must be vacated because the ICE arbitration panel ("Panel") exceeded its power as Newedge's claims are not "Allowable Claim[s]" under ICE Arbitration Rule 20.01(f). This arguments is premised on their argument that Newedge's claims do not satisfy ICE Arbitration Rule 20.01(a), which defines a "Claim or grievance" as:

> any dispute which arises out of any Transaction . . . executed by or effected through a Member . . . which dispute does not require for adjudication the presence of essential witnesses or third (3rd) parties over whom the Exchange does not have jurisdiction or who are otherwise not available.

(*see* Feb 5, 2010 Affirmation of Andrew Lourie ["2/5/10 Lourie Aff"] Ex 6). Alternatively, and using the same rational, Petitioners argue that under CPLR § 7511(b)(i)-(ii) the Award must be

vacated because there was no agreement to arbitrate.

Petitioners argue that both Christopher Bourges and Tom Kloet are former Newedge officers, who were significantly involved in the underlying transaction, and were essential witnesses in the arbitration. Petitioners allege that not until the eve of the arbitration hearing, in mid-November 2009, did Newedge inform petitioners that both essential witnesses left their positions at Newedge at least a month prior, both were no longer residing in the United States, and both were no longer subject to ICE jurisdiction. By going forward with the arbitration without these essential witnesses, according to the Petitioners, the Panel exceeded its authority under the ICE Rules. On the same set of facts, Petitioners alternatively argue that there was no agreement to arbitrate because the arbitration provision related only to "Allowable Claim[s]", which by definition are those that do not require the presence of essential witnesses who are not subject to ICE jurisdiction.

On December 8, 2009, Petitioners moved the arbitrators to dismiss the arbitration proceedings on the grounds that Bourges was as an essential witness who was unavailable to testify in person at the hearing, and that Exchange rules precluded the arbitrators from proceeding to decide the case in this circumstance (*see* Feb 22, 2010 Affidavit of William Nissen ["2/22/10 Nissen Aff"] Ex 10). On December 11, 2009, the Panel denied that motion, and ruled that Petitioners could obtain and present Bourges' testimony through any of the following means: (1) by telephone; (2) by videoconference; (3) a videotaped deposition via letters rogatory; or (4) in person abroad if Petitioners paid the Panel's expenses to travel (*id.* at Ex 11). The Panel imposed no time limits within which to complete the testimony.

Regardless of the fact that the Panel's order does not lay out in any detail the reasoning

behind the decision to deny the motion, this Court is without guidance to determine whether the order "gave a completely irrational construction to the provisions in dispute and, in effect, made a new contract for the parties" (*Matter of National Cash Register Co. [Wilson]*, 8 NY2d 377, 383 [1960]). The decision clearly turned on whether Bourges was an "essential witness" under Exchange rules, and the scope of the Exchange's jurisdiction. Petitioners provide no case law on the interpretation of the Exchange rules. Considering their expertise in this sophisticated financial industry and their experience as ICE arbitrators, the Panel is in a significantly better position to interpret ICE arbitration rules. While the issue of Kloet's status as an essential witness was not raised in the motion to the Panel, this Court is still without guidance to make that determination.

For similar reasons, controlling case law limits the courts' role to determining if an arbitration provision applies to the parties dispute. If so, the arbitrator is to determine "procedural stipulations that the parties may have laid down to be observed in the conduct of the arbitration proceeding itself -- conditions in arbitration, e.g., limitations of time within which the demand for arbitration must be made, or requirements as to parties on whom or as to the manner in which service of the demand for arbitration shall be made" (*County of Rockland v Primiano Constr. Co.*, 51 NY2d 1, 8 [1980]). Thus "questions as to whether there has been compliance with such procedural regulations and, if not, what the consequences shall be, are for resolution by the arbitrator as incidental to the conduct of the arbitration proceeding" (*id.*; *see also Matter of Town of Greenburgh*, 125 AD2d 315, 316 [2d Dept 1986]).

The issues raised by Petitioners' arguments in the instant matter are particularly similar to the issues presented to the United States Supreme Court in *Howsam v Dean Witter Reynolds,*

Inc., (537 US 79 [2002]). In that case, the Court held that the application of a National Association of Securities Dealers ("NASD") rule imposing a time limit on submission of disputes for arbitration was a matter presumptively for the arbitrator, rather than the court, to decide. In reaching this determination, the Court distinguished between threshold issues of "substantive arbitrability [which] are for a court to decide," and those of issues of "procedural arbitrability," such as "time limits, notice, laches, estoppel, and other conditions precedent [which] are for the arbitrators to decide" (*id.* at 85). The category of substantive arbitrability includes disputes about "whether the parties are bound by a given arbitration clause" (*id.* at 84; *accord Mulvaney Mech., Inc. v Sheet Metal Workers Intl. Assn., Local 38*, 351 F3d 43 [2d Cir 2003]).

As Petitioners concede, this Court has already decided the question of substantive arbitrability in that the parties are subject to a valid agreement to arbitrate the claims raised in Newedge's arbitration demand (*see* 03/15/10 Tr at 11:22-25; *see also* 6/13/08 Decision and Order). That decision has not been appealed and is the law of the case (*see Port Auth. v Office of the Contract Arbitrator*, 254 AD2d 194 [1st Dept 1998]). The issues Petitioners' raise on this motion -- namely whether Bourges and Kloet are "essential witnesses" and whether ICE has jurisdiction over them -- are questions of "procedural arbitrability [which are] for the arbitrator to determine" (*237 Park Investors, LLC v J. Walter Thompson Co.*, 5 AD3d 304, 305 [1st Dept 2004], *citing Howsam*, 537 US at 79). While Petitioners' attempt to frame these two issues as substantive -- just as the respondent in *Howsam* (537 US at 86) -- these issues are more accurately characterized as procedural regulations set up by the Exchange governing the resolution of claims appropriately before an Exchange arbitration panel. Therefore, the

determination of whether Bourges and Kloet are essential witnesses subject to ICE jurisdiction was for the arbitration panel to decide. This issue is not properly before this Court at this time. Thus, the motion to vacate is denied because none of grounds specified in CPLR § 7511(b) apply. According to CPLR § 7511(e), the motion to confirm the Award is granted.

Therefore, judgement will be entered in favor of Newedge in the amounts awarded by the arbitrators (*see* CPLR § 7514) and include interest at a rate of 9% from the date of the Award until the date the judgment is entered, and that interest shall accrue on the judgment at the rate of 9% per annum until the Award is satisfied (*see* CPLR §§ 5002, 5004).

Concerning the complaint filed in the related action (*Fluxo-Cane Overseas Ltd. v Newedge USA, LLC*, Sup Ct, New York County, May 21, 2009 Index No 650030/09), Newedge moves, pursuant to CPLR § 3211(a)(5), to dismiss the complaint with prejudice on the grounds of res judicata. As Petitioners conceded during oral argument in the related action, the same claims were before the arbitrator (*see* 1/25/09 Nagin Aff, Ex N 05/20/09 Tr at 7:18-23). Although Petitioners argue that the "place holder claim" was filed under protest, that claim was decided upon by Panel (*see* 1/25/09 Nagin Aff Ex A at 6 ["This Decision is in full settlement of all claims submitted to arbitration by the parties in this matter."]).

Petitioners only argument opposing dismissal of the complaint in the related action is that the ICE panel lacked jurisdiction over the dispute, and therefore res judicata is inapplicable. Petitioners do not contest that the Award encompassed all of the counterclaims. As the Award is now confirmed, and the same claims raised in the related action were raised in the arbitration, the complaint is dismissed pursuant to the doctrine of res judicata and to CPLR § 3211(a)(5).

The court has considered the parties' remaining arguments and finds them to be unavailing.

CONCLUSION

Accordingly, it is

ORDERED that the motion to confirm the arbitration award is granted and the award rendered in favor of the respondent and against the petitioners is confirmed; and it is further

ADJUDGED that the respondent Newedge USA, LLC (f/k/a FIMAT USA, LLC) do recover from petitioner Fluxo-Cane Overseas Limited the amount of $3,209,472.08, plus interest at the rate of 9% per annum from the date of December 23, 2009, as computed by the Clerk in the amount of $_____, together with costs and disbursements in the amount of $_____ as taxed by the Clerk, for the amount of $_____, and that the respondent have execution therefor; and it is further

ADJUDGED that the respondent Newedge USA, LLC (f/k/a FIMAT USA, LLC) do recover from petitioner Manoel Fernando Garcia the amount of $2,924,014.62, plus interest at the rate of 9% per annum from the date of December 23, 2009, as computed by the Clerk in the amount of $_____, together with costs and disbursements in the amount of $_____ as taxed by the Clerk, for the amount of $_____, and that the respondent have execution therefor; and it is further

ORDERED that the petitioners' motion to vacate the arbitration award is denied; and it is further

ORDERED that the complaint filed in the related action (Index No 650030/2009) is dismissed.

This constitutes the decision and order of the Court.

Dated: June 29, 2010

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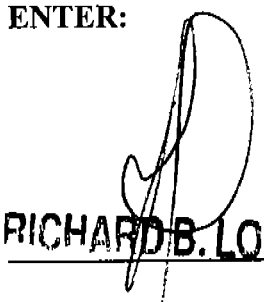

RICHARD B. LOWE III

J.S.C.