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

PRESENT: JANE S. SOLOMON Justice

PART 55

Grynberg

- v -

BP Exploration

INDEX NO. 116840/04

MOTION DATE

MOTION SEQ. NO. 009

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 ...	1-3
Answering Affidavits — Exhibits	4-6, 5-11
Replying Affidavits	12-16, 17, 18

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition is decided by the annexed Decision, Order and Judgment

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: 12/8/10

JANE S. SOLOMON 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55
----------X

JACK J. GRYNBERG, GRYNBERG, PRODUCTION CORPORATION (TEXAS), INC., GRYNBERG PRODUCTION CORPORATION (COLORADO), INC., and PRICASPIAN DEVELOPMENT CORPORATION (TEXAS),

Petitioners,

-against-

BP EXPLORATION OPERATING COMPANY LIMITED and STATOIL ASA,

Respondents.
----------X

Index No. 116840/2004
DECISION, ORDER and JUDGMENT

SOLOMON, J.:

Petitioners and Respondents, players in the oil exploration and development industry, have been involved in a decade long arbitration. On February 9, 2010, the arbitrator, Stephen A. Hochman (Hochman) issued his Final Decision and Award ("Award," attached to Bialo Affirmation, Ex. 2). Part of the Award included $3 Million in sanctions against petitioner Jack J. Grynberg (Grynberg).

During the proceedings before Hochman, the parties raised matters before this court. As a result, to treat with the Award, respondents move to reopen this proceeding, and then to confirm the Award. Grynberg cross moves to vacate the Award on the ground that Hochman exceeded the scope of his authority by imposing sanctions. The corporate petitioners separately cross move to vacate two portions of the Award.

The motion to reopen the special proceeding was granted during oral argument on August 17, 2010. The remainder of the motions are decided as follows.

FACTS

The arbitration arose out of the settlement of a 1996 dispute concerning rights to an oil field in the Caspian Sea near the Republic of Kazakhstan. The parties negotiated and entered into two settlement agreements on January 19, 1999 (Settlement A, attached to Bialo Affirmation, Ex. 3 and Settlement B, attached to Bialo Affirmation, Ex. 4). The agreements contained identical arbitration clauses and identified Hochman as the arbitrator, if one was needed (*id.*, at Section 10.04[b][i]). When disputes arose, the arbitration commenced.

The arbitration lasted 10 years. In the course of that decade, Grynberg began four lawsuits, all without success, and, both through his attorneys and while he represented himself, pro se, as an individual claimant, he made numerous applications to Hochman, which were perceived as burdensome, diversionary and delaying. Finally, after my direction that Hochman be left alone for sixty days (Transcript of Oral Argument on Motion Sequence 008 of this index number, dated March 5, 2009, attached to Biallo Affirmation, Ex. 1, 23), on February 9, 2010, he issued his 30 page Award, in which he made 13 separate determinations or sub-awards. The one entitled "11. Re. Respondents' Motion for Sanctions," imposes sanctions against Grynberg in the amount of

$3 million, payable to Respondents (Award, 28). Hochman explained that the sanctions were "based solely on the documents and facts in the record and not on the basis of disputable evidence," and were "deemed just and equitable under the circumstances." He wrote that "[t]he sanctions being awarded in this case are being awarded as sanctions, not as an award of attorneys' fees" (*id.*). In his decision, Hochman relied upon the ruling in *Reliastar Life Ins. Co of New York v. EMC National Life Co.*, 564 F3d 81 [2nd Cir., 2009] that sanctions may be awarded against a party guilty of bad faith conduct in the course of an arbitration under the Federal Arbitration Act (FAA).

DISCUSSION

Under CPLR 7510, a court shall confirm an arbitration award upon the application of a party, made within one year, unless the award is vacated or modified. CPLR 7511 governs vacating or modifying an award and provides, as relevant:

> (b) Grounds for vacating.
> (1) The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds the rights of that party were prejudiced by:
> (i) corruption, fraud or misconduct in procuring the award; or
> (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession.
> (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or

> (iv) failure to follow the procedure of this article . . .

An arbitrator exceeds authority when he violates a strong public policy, is irrational or exceeds a specifically enumerated limitation on his power (*Silverman v. Benmor Coats*, 61 NY2d 299, 308 [1984]). In this matter, the scope of the arbitrator's authority is governed by the arbitration agreement and Rule R-45 of the AAA, as in effect in 1999.

Section 10.04 of both Settlement Agreements provide:

> (a) If the parties . . . are unable to amicably resolve a dispute or differences arising out of, in relation to or in any way connected with this Agreement . . . such matter shall be finally and exclusively referred to and settled by arbitration pursuant to the Commercial Arbitration Rules ("AAA Rules") of the [AAA] as presently in force . . . .
>
> (c) . . . The arbitration shall be regulated by the procedures of the New York Arbitration Act [CPLR Article 75]. . . . The rights and obligations of the parties hereto . . . shall be construed in accordance with the terms and conditions of this Agreement, the Mutual Releases and the substantive law of the State of New York (excluding choice of law rules). The Sole Arbitrator . . . shall have the power to render declaratory judgments and to issue injunctive orders, as well as to award monetary damages.

(Agreements, attached to Biallo Affirmation, Ex. 3, at p. 65, and Ex. 4, at p. 59).

Rule R-45 of the 1999 AAA Rules provides:

> Scope of Award:
> (a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.

> (b) In addition to a final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards. . . .
> (c) In the final award, the arbitrator shall assess the fees, expenses, and compensation provided in Sections R-51, R-52, and R-53. The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate.
> (d) The award of the arbitrator(s) may include: (a) interest at such rate and from such date as the arbitrator(s) may deem appropriate; and (b) an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.

(*Commercial Arbitration Rules [American Arbitration Association]*, 1999 WL 1627984 [1999]).

Rule R-49 governs administrative fees; R-50 governs witness expenses; and R-51 governs the Arbitrator's compensation. Notably, the Rules referred to in R-45 do not address sanctions (*compare*, National Arbitration Forum [NAF] Code Rule 46, which specifically authorizes sanctions).

A. Award for Sanctions

Grynberg argues that the sanctions award must be vacated because Hochman had no authority to award sanctions. He also contends that the sanctions are punitive and New York does not permit arbitrators to award punitive damages; the sanctions are a stand-in for an award of attorneys' fees, prohibited by the Settlement Agreements; the FAA and *Reliastar* are inapplicable to this matter and Hochman's reliance on them was improper; Hochman had no inherent or equitable authority under New York law to

award sanctions, as sanctions can only be awarded by statute in New York; and, if sanctions are allowed, Hochman exceeded the scope of arbitration by awarding them for events that occurred outside of the arbitration.

Respondents counter that the sanctions were rational in that the arbitration fell under the FAA because the Settlement Agreements are contracts evidencing a transaction between foreign nationals; and the arbitration agreement applies New York's arbitration law to procedure and New York's substantive law to the rights and duties of the parties, while the substantive rights of the arbitrator are tacitly governed by the FAA. Finally, Respondents contend that the sanctionable conduct did not take place outside the arbitration because the sanctions were based on Grynberg's actions that were in direct violation of Hochman's orders.

In *ReliaStar*, on which Hochman relied, the Second Circuit was presented with the question of whether sanctions, in the form of attorneys' fees, could be awarded under the Federal Arbitration Act. The Court determined that, in matters governed by the FAA, "[w]here an arbitration clause is broad, arbitrators have the discretion to order such remedies as they deem appropriate" and "[c]onsistent with this principle, we here clarify that a broad arbitration clause . . . confers inherent authority on arbitrators to sanction a party that participates in the arbitration in bad faith . . ." (*ReliaStar*, 564 F3d at 86).

The *Reliastar* arbitration agreement included the following clause:

> Any arbitration instituted pursuant to this Article shall be held in New York, New York . . . and the laws of the State of New York and to the extent applicable, the Federal Arbitration Act shall govern the interpretation and application of this Agreement

(*id.*, at 84).

Similar language invoking the FAA is not included in the arbitration clauses relevant to this action.[1] Therefore, the narrow question before the court is whether the FAA applies to this arbitration agreement.

Where an arbitration agreement expressly invokes state rules, those rules govern the arbitration (*Volt Info. Scis. v. Bd. of Trs.*, 489 US 468 (1989). In *Volt*, the Supreme Court of the United States held:

> [W]hile the FAA . . . pre-empts application of state laws which render arbitration agreements unenforceable, it does not follow, however, that the federal law has preclusive effect in a case where the parties have chosen in their agreement to abide by state rules. To the contrary, because the thrust of the federal law is that arbitration is strictly a matter of contract, the parties to an arbitration agreement should be at liberty to choose the terms under which they will arbitrate. Where . . . parties have chosen in their agreement to abide by the state rules of arbitration, application of the FAA to prevent enforcement of those rules would actually be inimical to the policies underlying state and federal arbitration law, because it would force the parties to arbitrate in a manner contrary to their agreement . . ."

(*id.* [internal quotation marks omitted]).

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[1] Federal courts have the inherent right to sanction (see, *Chambers v. NASCO, Inc.*, 501 US 32, 46-7 [1991]), while New York courts may only sanction under 22 NYCRR 130 and CPLR 8303-a).

Here, Respondents ask the court to ignore the contractually selected and agreed upon procedural and substantive laws of New York in favor of the FAA rules, on the ground that the parties intended the arbitrator to have the authority of one governed by the FAA. Given the explicit language of their agreement, this argument is unpersuasive.

Moreover, *ReliaStar* is inapplicable because it considered "only whether in light of the parties' agreement to arbitrate, the arbitrators were authorized *to sanction bad faith conduct by awarding attorney's and arbitrator's fees*" (*ReliaStar*, 564 F3d at 86 [emphasis added]). In contrast, Hochman was clear that he was not awarding attorneys' fees, and that he was not fee shifting.[2] The sanction award was intended to be punitive.

In New York, a court may impose financial sanctions against a party who engages in "frivolous conduct" under 22 NYCRR 130-1.1. However, the First Department has held that, absent contractual authority to sanction, this rule does not give an arbitrator the basis to award them (*Emery Roth & Sons, P.C., v. M&B Oxford 41, Inc.*, 298 AD2d 320, 321 [1st Dept., 2002] ["We reject the . . . argument that 22 NYCRR part 130 . . . provided the arbitrators with a statutory basis for the award").

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[2] Notably, Hochman had the discretionary power to award costs and attorneys' fees (Award, 24). He affirmatively elected to not use that power and denied both sides' requests for fees (*id.*).

For all of these reasons, the award of a punitive sanction based on frivolous conduct, however egregious, exceeded Hochman's authority. This portion of the Award must be vacated.

B. The Remaining Disputed Awards

The corporate petitioners cross-move to vacate the portions of the Award relating to a "Signature Bonus Issue" within Award 4, and the "Egypt Side Deals Claims" in Award 2. They argue that both awards should be vacated because Hochman refused to hear evidence on the issues and because the Award was incomplete.

"An arbitration award must be upheld when the arbitrator offer[s] even a barely colorable justification for the outcome reached . . . . [A]n arbitrator's award should not be vacated for errors of law and fact committed by the arbitrator and the courts should not assume the role of overseers to mold the award to conform to their sense of justice" (*Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 NY3d 471, 479-80 [2006][emphasis added], cert dismissed 548 U.S. 940 [2006]; *see also, Peckerman v. D&D Associates*, 165 AD2d 289 [1st Dept., 1991]["unless there is no proof whatever to justify the award so as to render it entirely irrational . . . the arbitrator's finding is not subject to judicial oversight"]).

1. Signature Bonuses

The argument here is that Hochman refused to decide an issue put before him by an independent auditor, regarding whether

certain "signature bonuses" actually were bribes. They raise four claims: the Award failed to address the illegal nature of the bonuses; the Award is contrary to public policy because it condones bribery; Hochman relied on an improper burden of proof regarding the alleged bribery (reasonable doubt instead of preponderance of the evidence); and, they were denied an evidentiary hearing on this subject.

An arbitral award may be vacated when the award itself is against public policy *(Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 327 [1999]). However, the court may not revisit the arbitrator's assessment of the evidence, interpretation of the contract or reasoning in fashioning the award (*id.*).

Hochman made the following determination:

> Irrespective of who received those Signature Bonus payments, the independent auditor determined that BP made the payments, and thus he treated them as costs in the calculation of BP's Net Sales Proceeds . . . .
> Claimants request for an evidentiary hearing on the bribery issue was denied because the issue of whether the Signature Bonuses were or were not bribes is not a relevant issue. The relevant issue is whether the independent auditor was wrong to deduct [the Signature Bonuses] in his calculation of BP's Net Sales Proceeds. The auditor cannot decide the issue of whether the Signature Bonus payments violated the U.S. Foreign Corrupt Practices Act, but he can decide whether the payments should be deducted in computing BP's Net Sales Proceeds, and he did decide that issue.

(Award, 19)

Based on his determination that the sole relevant issue was whether BP paid the signature bonuses, he confirmed the auditor's findings without pursuing the avenue of inquiry that

the petitioners wanted. This determination does not violate any public policy concerns. Similarly, Hochman's denial of the evidentiary hearing and his discussion of the proper standard for burden of proof are irrelevant to his reliance on the fact that the payments were made (*see, e.g., Wien & Malkin LLP.*, 6 NY3d at 479).

To the extent that the corporate petitioners seek relief based on misapplication of facts, the motion is denied. Hochman was in the best position to determine the merits of this dispute, and this court will not replace his judgment with its own (*Matter of New York State Correctional Officers & Police Benevolent Assn.*, 94 NY2d at 326 ["A court cannot examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one"]).

Finally, Petitioners' argument that the award was incomplete is unpersuasive. Hochman found their bribery argument irrelevant to whether the bonuses were deductible. He completely decided the issue.

2. Egypt Side Deal

Corporate petitioners argue that the award dealing with the Egypt side deal claims should be vacated because Hochman refused to hear expert testimony that allegedly would have vindicated their position; and because the award gave an irrational construction to the disputed contract. The underlying question here was whether a side deal involving respondents and a

third party for interests in Egypt were part of the issues underlying the Settlement Agreements and the arbitration.

Turning to the first argument, Hochman determined that before the corporate petitioners could introduce expert evidence of the market value of the Egyptian interests, petitioners had to establish that the primary deal and the side deal were economically linked. Based on the copious amount of evidence before him, as explained in the Award, Hochman found no relationship between the two transactions, and found the issue the expert would expound on to be moot (Award, 13-16). This determination is not irrational, and the court cannot substitute its judgment in favor of the arbitrator (*Matter of New York State Correctional Officers & Police Benevolent Assn.*, 94 NY2d at 326).

Regarding the second argument, the corporate petitioners have not established that the award was irrational. They argue that Hochman did not agree with the corporate petitioners' theory of events and that his findings based on the evidence before him were unfavorable to them. The award may not be vacated on this basis.

CONCLUSION

In accordance with the foregoing, it hereby is

ORDERED and ADJUDGED that Respondents' motion to reopen the special proceeding and to affirm the award is granted and the Award is confirmed except as to Award 11 for sanctions against petitioner Grynberg; and it further is

ORDERED and ADJUDGED that the cross motion of petitioner Grynberg is granted and Award 11 for sanctions against him is vacated; and it further is

ORDERED that the cross motion of corporate petitioners is denied.

Dated: Dec. 8, 2010

Enter:

J.S.C.

JANE S. SOLOMON

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).