Doosan Infracore Co., Ltd. v Ingersoll-Rand Co. Ltd.
2011 NY Slip Op 34100(U)
March 15, 2011
Supreme Court, New York County
Docket Number: 652170/2010
Judge: O. Peter Sherwood

[* 1]

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

PRESENT: O. PETER SHERWOOD PART 49
Justice

DOOSAN INFRACORE CO., LTD, *et al.*

Petitioners,

-against-

INGERSOLL-RAND COMPANY LIMITED,

Respondent.

INDEX NO. 652170/2010

MOTION DATE March 1, 2011

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to ____ were read on this motion to vacate or modify award.

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

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, petitioners' motion to vacate or modify the award is decided in accordance with the accompanying decision and order.

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 EFile a "Request for Entry of Judgment", Proposed Judgment, and any supporting documents on the NYSCEF system.

Dated: March 15, 2011

O. PETER SHERWOOD, *J.S.C.*

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

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DOOSAN INFRACORE CO., LTD and DOOSAN ENGINE CO., LTD.,

Petitioners,

Related Matter
Index No.: 652170/2010
Motion Seq. No. 001

-against-

INGERSOLL-RAND COMPANY LIMITED,

Respondent.

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O. PETER SHERWOOD, J.:

This Petition arises out of a stock and asset sale transaction between the parties. In July 2007, Ingersoll-Rand ("Petitioner") and its affiliates entered into an Asset and Stock Purchase Agreement (ASPA) with one or more of Respondent Doosan entities ("Respondents"). The transaction transferred certain assets (the "Business") for an Initial Purchase Price of $4.9 billion, upon closing.

In July 2009, prior to the execution of the ASPA, Petitioner provided Respondents with a Base Net Asset Value (NAV) Statement which represented the "combined financial condition of the Business ." (Neuner Aff., Ex. A, § 1.1 and Schedule 1.1). When the transaction closed on November 30, 2009, Petitioner provided Respondents with a Closing NAV Statement, which indicated that between Dec 31, 2006 and the closing date, NAV, of the Business had increased by over $70 million.

Anticipating such a change, ASPA section 2.6 provided for a post-closing adjustment to the Initial Purchase Price, pursuant to procedures set forth in the ASPA (*see* Neuner Aff., Ex. A, §§ 2.6 [a] - [e]). If the parties could not resolve the dispute with regard to the NAV, the matter would be referred to a mutually acceptable accounting firm (the "CPA Firm"). Under the terms of the ASPA, the CPA Firm's determination was to be "conclusive and binding upon the Sellers and the Buyers. (Id. at § 2.6 [d]).

As of May 22, 2010, unresolved differences remained concerning the Net Asset Value Statement. Therefore, the parties retained BDO Seidman, LLP (not a party to this action) to serve as the CPA Firm under the ASPA. (Neuner Aff., Ex. B).

On August 31, 2010, the CPA Firm rendered a decision, determining "a payment due from Buyers to Sellers of $41,580, 000 plus interest". (Neuner Aff., Ex. C at 4). This amount was subsequently reduced by certain items agreed upon by the parties to $31,831,882.

The initial Petition (Index No. 651603/2010) seeks to confirm the award to Petitioner of $31 million, pursuant to CPLR 7601. By cross-motion, Respondents move to vacate the award, and also to dismiss 28 of the 30 Doosan entity respondents.

The second Petition was subsequently brought by the Doosan entities (Index No. 652170/2010; therein petitioners) seeking to vacate the same award. Ingersoll- Rand (respondent in this related action) move to dismiss that petition as duplicative.

The petitions are hereby joined for disposition of Motion Sequence Numbers 001 in both actions.

Motion to Vacate the Award

Respondents move to vacate the award on grounds that confirmation would not resolve significant open issues in the parties' dispute. Therefore, in the interest of preserving judicial resources, the entire matter, including the Final NAV determination, should be litigated.

Respondents allege Petitioner breached the ASPA by announcing a bonus plan to its employees. The ASPA includes a covenant that Petitioner would not "enter into, amend, adopt, terminate, increase the benefits to or payment under, or supplement any... employment, ... bonus, ... or other agreement or plan, ... or make any change in compensation, severance or termination benefits payable or to become payable to any employees." (Neuner Aff., Ex. A, § 5.1 [b] [iii]). Respondents argue that by announcing the AIM Bonus Plan[1], Petitioner pulled sales from the post-closing period to the pre-closing period, artificially and improperly inflating the NAV. (Transcript at 4). However, in June 2009, when the CPA Firm was retained, Respondents withdrew the AIM Bonus Plan from the CPA Firm's consideration, as it was a breach of covenant claim, and not an accounting issue. (see Neuner Aff., Ex. D at 2-3: "Because covenant issues concern the parties' obligations under the ASPA, and not to an 'accounting related difference' between the parties... Doosan does not present these issues for decisions by the [CPA Firm]").

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[1] The AIM Bonus Plan was announced in October 2007, and allowed employees to "gross up" their bonus payments if they hit applicable performance targets before the transaction with Respondents closed. (Parker Aff., Ex. D).

Under New York law, "there is no need to confirm an award in the typical case where valuation represents only part of a dispute or serves as condition precedent to the exercise of other contractual rights which may also be in dispute." *(Matter of Penn Cent. Corp. [Consolidated Rail Corp.]*, 56 NY2d 120, 130 [1982]). However, when the issues are separate and confirmation of an appraisal award will not result in additional litigation and delay, the award should be confirmed. (see e.g. *Grosz v Serge Sabarsky, Inc.*, 24 AD3d 264, 265 [1st Dept 2005]).

Whatever the merit of Respondents' breach of covenant claim pertaining to the AIM Bonus Plan, the claim is no basis for vacating or modifying an award. *(Commerce & Indus. Ins. Co. v Nester*, 90 NY2d 255, 265 [1997]). Should Respondents succeed in litigation in obtaining damages on the basis of this claim, they will recover those damages then.

Further, Respondents cross-move to vacate the award pursuant to CPLR 7511 (b) (1) on the ground that the CPA Firm exceeded its authority in making the decision concerning the surplus assets of Petitioner's "Plan 50" pension plan. After the transaction closed, Respondents acquired employees who were beneficiaries of this plan and therefore, the pension liabilities attributable to these employees. Pursuant to the ASPA; Petitioner was required to transfer assets to fund these pension liabilities. One of the disputes submitted to the CPA Firm for determination was the valuation of these pension assets and liabilities.

Respondents contend that, as pursuant to Section 2.6(d) of ASPA, the CPA Firm was directed to act as "experts in accounting and not as arbitrators". (Neuner Aff., Ex. A). They argue that in determining the distribution of the pension assets, "the CPA Firm... concluded as a matter of law that [Petitioner's] pro-rata allocation fell within the exception and modifications to the accounting principles applicable under the ASPA." (Respondents' Memorandum in Support of Cross-Motion to Vacate the Award at 19).

The Court disagrees: in allocating pension assets, the CPA Firm did not interpret the ASPA. Instead, the CPA Firm applied the appropriate accounting rules to determine the dispute duly submitted to it by the parties. In resolving the dispute, the CPA Firm found that the "Modified GAAP required consistency with the Base Statement of Net Asset Value, [and] as long as the methodologies applied in the Base Statement of Net Asset Value are not shown to violate GAAP, they must be followed." (Neuner Aff., Ex. C at 50-51). As recognized by New York law,

accountings standards may provide for several "acceptable alternative ways" of treating a particular transaction. *(Westmoreland Coal Co. v Entech, Inc.* 100 NY2d 352, 358 [2003]). Under Section 2.6 (a) of the ASPA, the CPA Firm was required to determine the Net Asset Value "on a combined basis in accordance with Modified GAAP applied on a basis consistently with, and reflecting all categories of adjustments on the Base Statement of Net Asset Value." (Neuner Aff., Ex. A). The CPA Firm decided that "methodology advocated by the [Respondents], although seemingly logical, would require complete abandonment of the methodology employed in preparing the Base Statement of Net Asset Value." (Neuner Aff., Ex. C at 51). These findings reflect application of accounting principles well within the ken of accounting professionals.

The cases cited by Respondents[2] are factually inapposite to the situation in this case. Those courts vacated awards of arbitrators or appraisers who clearly exceeded their authority by awarding relief not contemplated by the parties or resolving issues not submitted for determination. Here, Respondents themselves agreed that this dispute was appropriate for the CPA Firm's determination by submitting it to be decided (unlike the breach-of-covenant issue discussed earlier). In choosing between the two positions presented to it by the parties, the CPA Firm acted as an expert in accounting and decided which accounting method was more appropriate to apply.

The CPA Firm did not exceed its authority under the ASPA and the cross-motion to vacate the award is denied.

Motion to Dismiss Twenty-Eight Respondents From the First Petiotion

Finally, the Respondents move to dismiss all but two respondents, Doosan Infracore Co. Ltd. ("DICL") and Doosan Engine Co., Ltd. ("DECL"). The other twenty-eight respondents contend that they are not parties to the ASPA. Only DICL and DECL executed the ASPA. The other respondents were either established following execution of the ASPA or were subsidiaries of the Petitioner until the transaction closed.

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[2]*Matter of Rochester Police Locust Club, Inc. v City of Rochester*, 25 Misc. 3d 1213A, 2008 NY Slip Op 52695U [Sup Ct 2008]; *Matter of Local 2841 of N.Y. State Law Enforcement Officers Union AFSCME, AFL-CIO, v City of Albany*, 53 AD3d 974 [3d Dept 2008]; *Matter of City of New York v Local 1549 of Dist. Council 37, Am. Fedn. of State, County & Mun. Empls*, 248 AD2d 125 [1st Dept 1998]; *Matter of Board of Mgrs. of 225 E. 57th St. Condominium v Campaniello Real Estate*, 41 AD3d 163 [1st Dept 2009]

With regard to those entities which were allegedly established subsequent to the execution of the ASPA, Respondents rely on the long-standing principle of New York corporate law that a corporation is not bound by contracts entered into on its behalf prior to its existence. 14 NYJur 2d Business Relationships § 97. This reliance is misplaced here. A corporation can avoid liability if it hasn't adopted the agreement, by accepting its benefits. (*see e.g. Reif v Williams Sportswear, Inc.*, 9 NY2d 387, 392 [1961]). All of the respondents received assets of the Petitioner and participated in the CPA Firm's determination process as "the Buyers", the term used in the ASPA to refer to all of the respondents. (Parker Aff., Ex. A). Having accepted the benefits of the ASPA, they are bound by its terms.

With regard to the entities which were subsidiaries of Petitioner prior to the transaction, the express terms of the contract contradict Respondents' position: on the first page of the agreement, DICL and DECL acknowledge that they are entering the contract "on behalf of" all the Asset and Stock Buyers listed in Exhibit A to the ASPA. The list includes all of the respondents named in this action. A contract entered by a parent corporation is binding on the subsidiaries when, as here, there is a provision in the contract that explicitly binds them. (*Daley v Related Cos.*, 198 AD2d 118, 119 [1st Dept 1993]).

For the reasons stated above, Respondents' motion to dismiss all but two of the Respondents is denied.

Accordingly, it is

ADJUDGED that the Petition (Index No. 651603/2010) is granted and the award rendered in favor of Petitioner and against Respondents is confirmed; and it is further

ADJUDGED that petitioner Ingersoll-Rand Company Limited do recover from respondents the amount of $31,831,882, plus interest from November 30, 2007 to the date of payment at the rate provided in Section 2.6(e) of the ASPA, 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 total amount of $_____, and that the petitioner have executed therefor; and it is further

ADJUDGED that the Petition (Index No. 652170/2010) is denied; and it is further

ORDERED that Respondents' cross-motion to dismiss is denied.

DATED: March 15, 2011

ENTER:

O. P. Sherwood

O. PETER SHERWOOD
J.S.C.