

**Matter of Grynberg v BP Exploration Operating Co.
Ltd.**

2014 NY Slip Op 30846(U)

April 2, 2014

Supreme Court, New York County

Docket Number: 116840/2004

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: _____
Justice

PART _____

Index Number : 116840/2004
GRYNBERG, JACK J.
vs.
BP EXPLORATION OPERATING
SEQUENCE NUMBER : 015
RESTORE ACTION TO CALENDAR

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

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

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).

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Dated: 4/2/14

J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
In the Matter of the Arbitration Between:

JACK J. GRYNBERG, ET AL.,
Petitioners,

Index No. 1116840/04

JUDGMENT/ORDER

-against-

BP EXPLORATION OPERATING COMPANY LIMITED
AND STATOIL ASA,

Respondents.

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Affirmations in Opposition to the Cross-Motion.....	<u> </u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u> </u>

Petitioners have brought the present motion to reopen this special proceeding pursuant to CPLR section 7502 (a) (iii); to vacate the decision and award after remand dated November 27, 2013 (the "New Award") issued by the arbitrator Stephen Hochman pursuant to CPLR section 7511 section (b) ; and to remand the signature bonus issue to arbitration before a new arbitrator pursuant to CPLR section 7511 (d). The respondent BP Exploration Operating Company

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Limited (“BP”) has brought a cross-motion to stay petitioners’ motion to vacate the New Award pursuant to CPLR 2201 pending the Court of Appeals’ consideration of BP’s request for leave to appeal the sanctions issue previously decided by the First Department. As will be explained more fully below, the motion is granted in its entirety and the cross-motion is denied.

The relevant background is as follows. There was an arbitration between the parties which arose from the settlement of disputes between them concerning an oil field located off the shores of the Republic of Kazakhstan. As part of the settlement, petitioners were to receive payments in an amount equal to a portion of the net profits from respondents’ interest in the oil fields. The arbitration provisions of the settlement agreements obligated the parties to arbitrate their disputes. When the respondents entered into agreements to sell their interests, they sent a statement to respondents showing their revenue and costs in order to calculate the amount due under the settlement agreements. Petitioners then commenced the arbitration, asserting claims that they were entitled to additional funds pursuant to the settlement agreements.

Following many years of arbitration, the arbitrator issued a final decision and award (the “Original Award”) dismissing all of the Petitioners’ claims for additional money under the settlement agreements. One of the arguments made by petitioners at the arbitration, which the arbitrator rejected, was that signature bonuses which had been paid to the government of Kazakhstan by respondents should not have been deducted as costs in calculating the payout owed to Petitioners because the bonuses were in fact bribes paid to local government officials. The arbitrator rejected this argument concluding that as long as the signature bonuses were paid, the issue of whether the signature payments were or were not bribes was not a relevant issue. The arbitrator also awarded sanctions against Grynberg personally in the amount of three million

dollars because he found that Grynberg had acted in bad faith throughout the course of the proceedings. This court confirmed the Original Award in all respects except for the sanctions imposed on Grynberg. The court vacated the sanctions award on the ground that the award of sanctions exceeded the authority of the arbitrator. On February 21, 2012 the First Department issued a decision in which it affirmed the trial court's decision vacating the sanctions award. The court also reversed the Supreme Court's decision with respect to the signature bonus payments and remanded the issue to the arbitrator for a redetermination. According to the First Department:

The arbitrator's failure to determine the nature of the disputed payment warrants the vacatur of award four. Petitioners claim that this payment constituted a bribe. Respondents assert it was a bona fide cost of doing business. We remand for the arbitrator to determine the nature of the payment. Contrary to the arbitrator's finding, deducting a payment intended to be a bribe to a public official is unenforceable as violative of public policy.

On November 27, 2013, the arbitrator issued the New Award after the issue of the signature bonus was remanded to him pursuant to the decision of the First Department. In the New Award, the arbitrator refused to make the determination required by the First Department—to determine whether the signature bonus payment constituted a bribe. Instead, he wrote a twenty page single spaced decision explaining why he believed the First Department decision remanding the bribery issue to him was wrong and why the respondents should immediately appeal this issue to the Court of Appeals. He states in his decision that "I must respectfully refuse to comply with the First Department's Remand Order to determine the nature of the signature bonus payments. That is because the remand was based on the Court's erroneous holding in reliance on one of New York's two non-statutory grounds for vacating an arbitral award rather than on the

only non-statutory ground for vacating an arbitral award under the FAA, which is manifest disregard of the law, a much stricter standard than either of the New York standards.” He also states that “the parties will have an opportunity to seek leave from the Court of Appeals to review the First Department’s decision after I reconsider the Signature Bonus Claim pursuant to the Remand Order and the Award becomes final.” He concludes his decision as follows: “It is respectfully submitted that the Court of Appeals should grant leave to appeal the First Department Decision and confirm Award 4 (re the Signature Bonus Claim) and award 11 (re the Sanctions Award) so that the arbitration community, including the international arbitration community, will know that our New York courts will support the arbitration process by correctly applying the applicable arbitration law....” On December 27, 2013 respondent BP moved before the New York Court of Appeals for leave to appeal from the First Department’s decision affirming the Supreme Court’s vacatur of the sanctions awarded to respondents. However, even respondents have conceded that the Court of Appeals does not have jurisdiction to hear an appeal of the issue as to whether the determination of the First Department regarding the signature bonus payment should be overturned.

The petitioners have now brought the present motion to vacate the New Award and to remand the arbitration to another arbitrator or arbitration panel. In response, the respondent BP has brought a cross motion to stay the application to vacate pending its application to the Court of Appeals for leave to appeal the sanctions issue decided by the First Department upholding the vacatur of the sanctions awarded by the arbitrator. Surprisingly, the arbitrator has also weighed in on the motion before this court as to whether his award should be vacated and whether this action should be stayed pending respondent’s application for leave to appeal to the Court of

Appeals. The arbitrator has emailed the parties to the arbitration a two page single spaced memo in which he lays out his comments and observations regarding the proceeding that is now before this court. In this memo, he attempts to distinguish the cases relied upon by petitioners in support of this application, explains why he is not biased and expresses his hope that this court will stay the current application pending a determination by the Court of Appeals.

Initially, this court finds that the special proceeding should be reopened and that the New Award of the arbitrator should be vacated. Pursuant to CPLR section 7511 (b)(1)(iii), an award shall be vacated where a party's rights were impaired by an arbitrator who 'exceeded his power.'

An arbitrator "exceeds his power under the meaning of the statute where his award 'violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation' on the arbitrator's power." *Matter of Kowaleski*, 16, N.Y.3d 85, 90 (2010). In the present case, the court finds that the arbitrator exceeded a specifically enumerated limitation on his power when he issued the New Award—he explicitly failed to follow the unambiguous directive of the First Department that he make a determination as to whether the signature bonus payment was a bribe. The remand order from the First Department specifically stated that "we remand for the arbitrator to determine the nature of the [Signature Bonus] payment" and the arbitrator explicitly stated that he refused to comply with the decision of the First Department because it was incorrect.

This exact issue was addressed by the First Department on two separate occasions, where the First Department held that an award of an arbitrator should be vacated where the arbitrator refused to comply with their directive. *See Sands Bros. & Co. v. Generex Pharma*, 298 A.D.2d 307 (1st Dept 2002); *Satwelle v. Waddell & Reed, Inc.*, 21 A.D. 3d 820 (1st Dept 2005). In *Sands*, the First Department found that the arbitration panel failed to comply with a directive of the court

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regarding consideration of a specific paragraph of the parties' agreement. The court held that "[o]ur directive was binding on the panel and the overt failure of the panel to comply therewith constitutes grounds for vacatur of the panel's award." *Sands*, 298 A.D.2d at 307. In *Satwelle*, the First Department had previously remanded a matter to the arbitration panel for reconsideration of an excess punitive damage award. The arbitration panel then issued an award containing an identical exemplary damage award. The First Department found that the subsequent ruling by the arbitration panel should be vacated as it was in contravention of the court's previous decision. According to the court, "arbitral prerogative does not permit a panel to ignore the ruling and obdurately issue an identical determination." *Satwelle*, 21 A.D.3d at 821. The court also upheld the determination of the trial court remanding the arbitration to a new panel. *Id.* At 822. In the present case, as in *Sands* and *Satwelle*, the award of the arbitrator must be vacated as the arbitrator flatly refused to follow the directive of the First Department that he make a determination as to whether the signature bonus payment was a bribe.

The court also finds that this arbitration should be remanded to an arbitration panel pursuant to the terms of the settlement agreement. Initially, it is within a court's discretion whether to remit an arbitration matter to the same or a different arbitrator. *See East Ramapo Cent. School Dist. v. East Ramapo Teachers Assn.*, 108 A.D.2d 717 (2d Dept 1985); *Goldberg v. Nugent*, 85 A.D.3d 459 (1st Dept 2011)(upholding determination remanding matter to a different arbitrator where panel exceeded authority by granting relief on claims not asserted in respondent's statement of claim). *See also* CPLR section 7511(d)("Upon vacating an award, the court may order a rehearing and determination of all or any of the issues either before the same arbitrator or before a new arbitrator....").

In the present case, the court finds that this matter should be remanded to an arbitration panel pursuant to the terms of the settlement agreement based on the positions taken by the arbitrator in this matter. Initially, the arbitrator has explicitly stated in his twenty page single spaced award that he refuses to comply with the directive of the First Department that he make a determination with respect to whether the signature payment bonus was a bribe because he believes the decision is incorrect. He also states that his award is not being addressed solely to the parties, making it very clear that his decision is directed to the Court of Appeals in his attempt to convince them that the First Department was incorrect when it failed to uphold his determination regarding the signature payment bonus. He then goes on to explain in lengthy detail why he believes that there was no legal basis for the decision of the First Department. He states that his ethical duty to the arbitration process "includes a duty to urge the Court of Appeals to correct the First Department decision." He also states that if he had to decide the factual issue of whether the payments made by BP were or were not bribes, it would be inconsistent with his ethical duties to the arbitration process and the New York Courts which is to support the arbitration process. Based on the statements made by the arbitrator in his New Award, the court finds that the arbitrator would not be able to fairly make a determination with respect to the issue remanded to him by the First Department as to do so would violate what he perceives to be his ethical obligations as an arbitrator. This has already been made very clear by his actions in failing to make a determination as to the bribery issue despite the directive of the First Department and the urging of all parties to the arbitration process. Moreover, it appears that the arbitrator has moved beyond the normal role of an arbitrator in the arbitration process by rendering an award which is in effect a brief to the Court of Appeals requesting that they uphold his original award

and overturn the First Department and also by his actions in writing an email to the parties providing his comments and observations about the present proceeding before this court. Based on the foregoing, the court exercises its discretion to remand this matter to an arbitration panel pursuant to the terms of the settlement agreement. The court is very aware that this particular arbitrator has a large amount of knowledge and background with respect to the particular transactions which are the subject of the arbitration but finds that the benefit of this knowledge is outweighed by the other factors previously discussed.

The final issue which this court must address is the cross-motion to stay this proceeding pending the application for leave to appeal to the Court of Appeals. CPLR 2201 provides that a court may grant a stay of a proceeding in a proper case upon such terms as may be just. In the present case, the court declines to exercise its discretion to stay this proceeding pending respondents' application for leave to appeal to the Court of Appeals. Initially, respondents are not even attempting to appeal that aspect of the First Department decision remanding the issue to the arbitrator as to whether the signature payment bonus constitutes a bribe. Respondents are only seeking leave to appeal that aspect of the First Department decision upholding the vacatur of the sanctions award. Respondents have already made the determination that the Court of Appeals does not have the jurisdiction to hear an appeal with respect to the First Department's determination with respect to the signature payment bonus. Moreover, although the respondents argue that the determination of the Court of Appeals on the sanctions issue, if a decision is ever issued, would also determine the bribery issue, that issue is hotly disputed between the parties—i.e. whether the payment of a bribe would violate public policy pursuant to FAA judicial review if the FAA were to apply as opposed to the CPLR. It is beyond the scope of this court to

decide that issue and unnecessary. Until a ruling is made otherwise, the determination of the First Department that the CPLR applies rather than the FAA and that a determination should be made as to whether the signature payment constitutes a bribe is the law of the case and this court will follow that law.

Based on the foregoing, this special proceeding is reopened, the New Award is vacated, the matter is remanded to an arbitration panel as per the procedures laid out in the settlement agreement and the cross-motion for a stay is denied. The parties shall commence negotiations to agree on a panel of three arbitrators. If the parties fail to agree on all three members of the panel within thirty days after this decision is filed, the appointment of the members of the panel shall be made, at the request of a party, by the AAA. The provisions of the settlement agreement are controlling with respect to the process of appointing the arbitration panel. This constitutes the decision, order and judgment of the court.

Dated: 4/2/14

Enter: _____

J.S.C.

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).