

**GFK US MRI, LLC v LHK Partners, Inc.**

2023 NY Slip Op 30969(U)

March 27, 2023

Supreme Court, New York County

Docket Number: Index No. 653399/2022

Judge: Margaret A. Chan

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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GFK US MRI, LLC

INDEX NO. 653399/2022

Petitioner,

MOTION DATE 12/22/2022

- v -

LHK PARTNERS, INC.,

MOTION SEQ. NO. 002

Respondent.

**DECISION + ORDER ON  
MOTION**

-----X  
HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 17, 18, 19, 24, 30, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 65, 67, 68, 69, 106, 107, 108

were read on this motion to/for

VACATE - DECISION/ORDER/JUDGMENT/AWARD

Petitioner GfK US MRI, LLC (GfK) moves for an order vacating an arbitration (the Award) in the amount of \$3,466,138.00 pursuant to CPLR 7511 (b)(1)(iii) and 9 USC § 10. Respondent/cross-petitioner LHK Partners, Inc. (LHK) opposes and cross-petitions the court to confirm the Award pursuant to CPLR 7510 and 9 USC § 9.

### Background

Petitioner GfK is a consumer intelligence platform that provides consulting services based on consumer information (NYSCEF # 1 – petition, ¶ 4). GfK retained respondent LHK, a marketing research company, to collect consumer data for GfK through extensive, in-person interviews (*id.*, ¶ 5). The parties' business relationship was governed by two instruments—a Master Service Agreement (Agreement, NYSCEF # 7) that provided general terms, and each individual Statement of Work (SOW, NYSCEF # 8) that outlined the specific deliverables for pairs of in-person interview “waves” (Waves). The payment to LHK was based on successful completion of the Waves (SOW, § 7.1.2) and a bonus if LHK exceeds the required interview quotas, but also a penalty if it fails to achieve the quotas (*id.*, § 7.1.3).

Each Wave required months of preparatory work before LHK's interviewers went into the field. Also, interviewing and preparing for two Waves often overlapped (NYSCEF # 59, at 3) making it difficult to determine the precise costs of

each Wave. Thus, the parties created a schedule setting forth the monthly cost to be paid by GfK to LHK if GfK terminates the agreement midway (SOW, § 11.4). Further protecting LHK, the Agreement contained a broad *force majeure* clause that relieves LHK – not GfK – of performing should a public emergency or government orders arise that would prevent conducting in-person interviews (Agreement, § 1.6).

On March 13, 2020, in response to the COVID-19 pandemic, the government declared a state of emergency and asked all Americans to “stay at home” (NYSCEF # 4 - Award, ¶ 25). As the pandemic started to affect LHK’s ability to perform, GfK decided to temporarily halt in-person interviews for Wave 82, which was half completed at that time (*id.*, ¶¶ 24-25). And by then, GfK had already paid LHK a portion of the fees for Waves 82 and 83 (*id.*, ¶¶ 22-23). While the parties attempted for months to devise safety protocols for conducting in-person interviews, ultimately the interviews were canceled (*id.*, ¶¶ 26-28).

A dispute arose between the parties over the payments for Waves 82 and 83. On September 23, 2020, LHK submitted the dispute before the American Arbitration Association (AAA) to be decided by a panel of three arbitrators (the Panel). LHK’s arbitration demand sought (1) a declaratory judgment that LHK is not obligated to return any of the Wave 82 payments it received from GfK, and (2) money damages for Waves 82 and 83 pursuant to the schedule in SOW § 11.4 as a result of GfK’s termination of the agreement. GfK opposed the claims and counter-claimed for a refund of the fees it had paid for the incomplete Waves 82 and 83.

The Panel (with one dissent) entered the Award in favor of LHK, finding that GfK cancelled Waves 82 and 83 in March and August 2020, respectively, and awarded monetary damages of \$3,466,138.00 to LHK pursuant to SOW § 11.4 (NYSCEF # 4 – Award). The Panel unanimously rejected GfK’s counterclaims in full, reasoning that the *force majeure* clause and other records had shown that the parties had agreed to shift to GfK the risk of cancelling in-person interviews so that the SOW § 7.1 penalties against LHK for not completing the Waves did not apply (*id.*, ¶¶ 75-80).

On September 16, 2022, GfK commenced this Article 75 proceeding to vacate the Award, arguing that the Panel exceeded its power by invoking the *force majeure* clause *sua sponte*, since LHK never raised this clause and GfK was denied an opportunity to address it in the arbitration. GfK also finds flaw with the Panel’s interpretation of the *force majeure* clause’s notice requirements, which effectively rewrote it to defy the Agreement’s express requirements. Further, GfK contends that the Panel awarded LHK punitive damages which violates the public policy of New York.

In opposition and in support of its cross-petition to confirm the Award, LHK argues that the Award is not irrational or punitive and does not disregard the parties' agreement or public policy.

### Discussion

As the purpose of arbitration is to allow final and binding resolution of the parties' claims without resorting to the courts, "[i]t is a bedrock principle of arbitration law that the scope of judicial review of an arbitration proceeding is extremely limited" (*Frankel v Sardis*, 76 AD3d 136, 139 [1st Dept 2010]). Accordingly, an award will not be vacated "unless it is violative of a strong public policy, or is totally irrational, or exceeds a specifically enumerated limitation on the arbitrator's power" (*id.*). Courts defer to the arbitrator's decision "even if the arbitrator misapplied the substantive law in the area of the contract" (*In re NYC Tr. Auth.*, 6 NY3d 332, 336 [2005]; see also *Silverman v Benmor Coats, Inc.*, 61 NY2d 299, 308 [1984] [the arbitrator "may do justice as he sees it, applying his own sense of law and equity to the facts as he finds them to be and making an award reflecting the spirit rather than the letter of the agreement, even though the award exceeds the remedy requested by the parties"]).

Here, GfK has not met the heavy burden of showing that the Panel exceeded its power by giving "a completely irrational construction to the provisions of the parties' agreement, thereby effectively rewriting it" (*Fishman v Roxanne Mgt.*, 24 AD3d 365, 366 [1st Dept 2005]). Upon reviewing the Award, the court finds that the Panel did not raise the *force majeure* clause as a basis for awarding monetary damages to LHK; rather, the damages were premised on the parties' payment schedule in § 11.4 of the SOW. To assess whether § 11.4 applies, the Panel considered the context of the parties' relationship, in which it found LHK to be vulnerable to events outside the parties' control.<sup>1</sup> In this connection, the Panel found that the one-sided *force majeure* clause—protecting only LHK but not GfK—further evidenced the parties' intent to shift to GfK the risk that in-person interviews might be stopped for any reason (Award, ¶¶ 71-72). Accordingly, the Panel properly found that § 11.4 was reasonable and should apply (*id.*).

The Panel also referred to the *force majeure* clause in the context of determining the applicability of SOW § 7.1, which concerned GfK's counterclaims for a refund. Section 7.1 provides that LHK's payments are based on successful achievement of the required number of interviews and would be subject to penalty extraction against any shortfall. Based on the evidence before it, the Panel found that GfK itself acknowledged that § 7.1 does not apply to stoppage of work caused by exceptional events such as a pandemic and waived any penalties against LHK

<sup>1</sup> For example, the Panel considered facts that petitioner GfK was respondent LHK's only client and revenue stream and that respondent LHK bore a significant risk and costs to prepare for Waves in advance of interviewing (Award, ¶¶ 62-67).

(Award, ¶ 79). The Panel accordingly concluded that the *force majeure* clause relieved LHK of any liability for missing its quotas so that the § 7.1 penalties did not apply (*id.*, ¶¶ 78-81).

The Panel also did not rewrite the *force majeure* clause to defy the Agreement's requirement that, to invoke the *force majeure* clause, LHK must "immediately notify" GfK and "describe in reasonable detail the nature of such event" (Agreement, § 1.6). As the Panel found that the parties were in continual close contact about the pandemic's impact on the interviews (Award, ¶¶ 85-86), the Panel did not exceed its power in concluding that the notice requirement was met (*cf. Bd. of Educ. of N. Babylon Union Free Sch. Dist. v N. Babylon Teachers' Org.*, 104 AD2d 594, 597 [2d Dept 1984] [vacating the award as the arbitrator rewrote the agreement by adding a new provision not negotiated by the parties]).

As discussed above, the Panel did not construe the parties' agreements in a "completely irrational" way since it appropriately considered the *force majeure* clause in interpreting the intent of the parties and applying §§ 11.4 and 7.1 of the SOW. For the same reason, the Award is not vacated under the Federal Arbitration Act on the ground that the Panel exceeded its powers (9 USC § 10[a]).

GfK next argues that vacatur is warranted since the Award is punitive in nature and violates public policy. In particular, GfK argues that § 11.4 of the SOW is a schedule for liquidated damages, and to award damages based on it would amount to imposing an unenforceable penalty.

Under New York law, a contractual provision fixing damages in the event of breach will not be enforceable if the amount liquidated is "plainly or grossly disproportionate to the probable loss" since the provision "calls for a penalty" (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373 [2005], quoting *Truck Rent-A-Ctr. v Puritan Farms 2nd, Inc.*, 41 NY2d 420, 425 [1977]). In this case, the Panel found that the provision is not punitive because "SOW Section 11.4 only pays out a percentage of the Core Costs each month, and the total payments will not exceed the contractual amount for the Wave" (Award, ¶ 74). Also, the Panel found that the parties' § 11.4 payment schedule was appropriate as it was designed "to reasonably track LHK's losses depending on when GfK cancelled or terminated" and "to protect LHK from loss of its sole customer" (*id.*, ¶¶ 74-75). The Panel further noted that "[a]t the time of contracting, LHK's actual losses were not readily calculable because untangling the costs of one wave from another could be impossible or require a forensic accounting" (*id.*, ¶ 74). As such, the Panel properly found that § 11.4 is reasonable and not punitive, and the monetary damages awarded in accordance with the payment schedule in § 11.4 did not violate public policy.

Under CPLR 7510, the court shall confirm an award upon application of a party made within one year after its delivery, unless the award is vacated or

modified upon a ground specified in CPLR 7511. Here, in light of the above, the Award is confirmed since it is not violative of public policy, not irrational, and the Panel did not clearly exceed a specifically enumerated limitation on its power.

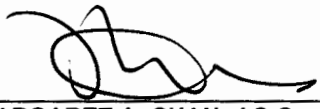
**Conclusion**

Accordingly, it is

ORDERED that petitioner/cross-respondent GfK US MRI, LLC's petition to vacate the arbitration award is denied; and it is further

ORDERED, ADJUDGED, and DECREED, that respondent/cross-petitioner LHK Partners, Inc.'s cross-petition to confirm the arbitration award is granted, and the award rendered in favor of respondent/cross-petitioner and against petitioner/cross-respondent is confirmed; and it is further

ORDERED that the Clerk shall enter judgment in the amount of \$3,466,138.00 pursuant to the AAA Award, together with interest from the date of the Final Award, and costs and disbursements of this proceeding.

<u>3/27/2023</u> DATE	 MARGARET A. CHAN, J.S.C.			
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	<input type="checkbox"/> OTHER
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	<input type="checkbox"/> REFERENCE
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT