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Neutrals

The Arbitration from Hell and How the New York Courts Got It Wrong

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This article follows-up on the author's reporting, which explained why the New York state's Appellate Division, First Department, was wrong in 2012 when it unanimously upheld a New York lower court's vacatur of an arbitrator's sanctions award against Jack J. Grynberg in *Matter of Jack J. Grynberg et al., Respondents, v. BP Exploration Operating Co. Ltd. et al., Appellants*, 92 A.D.3d 547, 938 N.Y.S.2d 439 (2012) (available at http://bit.ly/2x7FXpj).

The earlier work, a *New York Law Journal* article by this author, titled "Step Back in Time: Curtailing Arbitrators' Authority to Award Sanctions," *N.Y.L.J.* 7 (Aug. 6, 2012)(available with a subscription at http://bit.ly/2v4U7Wn), examined the vacatur of the arbitrator's award of sanctions against Grynberg, which is referred to in this article as the "Sanctions Issue."

This article will explain why the First Department was wrong again in 2015 when it unanimously affirmed a lower court's decision in the same case, but on a different issue, referred to in this article as the "Signature Bonus Issue". *Matter of Grynberg v. BP Exploration Operating Co. Ltd.*, 127 A.D.3d 553, 7 N.Y.S.2d 125 (2015).

The Sanctions Issue and the Signature Bonus Issue were only two of the 13 issues that were resolved in arbitrations that Grynberg commenced in 2002 against a subsidiary of BP Plc and Statoil ASA pursuant to the terms of two identical settlement agreements that Grynberg entered into with each of those companies in 1999.

Until recently, the court records in the 2015 New York case were not publicly available because they were filed under seal by the New York courts. But as a result of a Sept. 8, 2016, decision of the U.S. District Court for the District of Columbia (referred to above and throughout the article as the "DC Case"), all of the relevant documents that were filed under seal are now publicly available on Pacer as Exhibits in the DC Case (DC Court Index No. 1:08-cv-00301), fully captioned *Jack J. Grynberg, et al. v. BP P.L.C., et al.*, Civil Action No. 08-301 (JDB), 205 F.Supp.3d 1 (2016).

Thus, the whole story of this case, which Grynberg characterized in his Declaration in the DC Case as "The 13-Year Arbitration from Hell," can now be told.

The key player in this marathon arbitration was, and still is, Jack J. Grynberg, a Denver-based geologist and professional engineer who amassed a multimillion dollar fortune in the oil and gas business. Grynberg, who speaks Russian fluently, developed a relationship with Kazakh President Nursultan Nazarbayev when he hosted him on a U.S. tour.

Grynberg then brokered an agreement

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The author, a Columbia Law School graduate, where he was an editor of the Law Review, and thereafter a law secretary to New York State Court of Appeals Chief Judge Charles D. Breitel when Breitel sat in the Appellate Division, describes himself as a "reformed litigator." Now the principal shareholder of the Solovay Practice in New York, he is the author of books and articles advocating increasing and improved use of alternative dispute resolution practices to replace and avoid the long drawn-out trials in which he used to be involved.

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between the Republic of Kazakhstan and a consortium of seven international oil and gas companies, one of which was BP. Under the agreement, the consortium obtained valuable rights to develop oil and gas reserves in the Kashagan Field in the Caspian Sea area of Kazakhstan.

Pursuant to the agreement with the Kazakh government, BP, as well as the other consortium members, was required to make payments to the Kazakhstan government in the nature of an up-front license fee, referred to as "Signature bonuses," in connection with obtaining those development rights.

In 1993, Grynberg filed suit against BP in New York's Southern District federal court claiming that BP breached a 1990 agreement to pay him a carried interest in the profits it would earn as a consortium member.

That suit was settled in 1996 in a mediation in which Stephen A. Hochman, a well-known and highly regarded New York-based arbitrator/mediator, served as the court-appointed mediator.

The settlement's substantive terms were set forth in a two-page handwritten preliminary settlement agreement, the "PSA." The PSA provided that the parties would embody those substantive terms in a definitive settlement agreement that was to be based on a similar settlement agreement that Grynberg previously entered into with another member of the consortium.

At the request of both parties, Hochman agreed to serve as the sole arbitrator to resolve any and all disputes that may arise under the PSA or the definitive Settlement Agreement pursuant to the following provision in the PSA:

> Any dispute hereunder or as to the terms

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of the definitive settlement agreement shall be resolved in accordance with N.Y. law by binding arbitration in NYC before Stephen A. Hochman in accordance with the commercial arbitration rules of the American Arbitration Association. [2013 New Award, p. 4 [see citation below]; DC Case, Exhibit 7.]

In January 1999, after lengthy negotiations, the parties reached agreement on the terms of a definitive settlement agreement. Because Statoil was the beneficial owner of one-third of BP's one-seventh interest in the consortium—i.e., 14.28%—there were two identical settlement agreements involving Grynberg: one with BP relating to its two-thirds share of its total one-seventh interest in the consortium, and the other with Statoil relating to its one-third interest. Thus, BP owned a 9.52% interest in the consortium, and Statoil owned a 4.76% interest.

The Signature Bonus Issue arose because the settlement agreements provided that Grynberg was entitled to a 15% carried interest in the net profits that each of BP and Statoil earned from being consortium members.

The settlement agreements also provided that BP's and Statoil's net profits were to be determined by an independent auditor. The independent auditor confirmed that the Signature Bonuses were paid via a wire transfer from BP's bank account and thus treated them as an expense in the computation of BP's net profits.

Grynberg, however, argued to the auditor that the Signature Bonus payments should not be treated as costs in calculating his 15% share of BP's net profits—even if those payments represented actual costs that reduced BP's profits—because the wire transfer payments were made to an intermediary and then remitted to Kazakh government officials instead of the Kazakhstan government, thus constituting bribes that violated the U.S. Foreign Corrupt Practices Act.

After the auditor rejected Grynberg's claim, he made the same argument to Arbitrator Hochman, who also rejected it, stating in what was denominated his Final Decision and Award (the "2010 Original Award") that:

> If it were not for those Signature Bonus payments (whether they were legal or illegal), BP, as well as Statoil and the other members of the Consortium, may not have had the opportunity to earn the profits they derived from their participation in the Consortium. Because 15% of BP's profits, as well as 15% of Statoil's profits, inured to the benefit of Claimants (a total of over $40,000,000), Claimants would not have suffered any damages even if the Signature Bonus payments could be proven to have been illegal bribes.
>
> Simply put, 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 them 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. [2010 Original Award, p. 19, DC Case, Exhibit 4.]

No End in Sight

The case: A 1993 suit. A 1996 mediation settlement that included arbitration. An arbitration starting in 1999. Into the courts in 2010.

The result: There is none. The arbitrator defied a court determination, a move that this article strongly backs. Then the arbitration award was overturned. The appealing party took the case to another federal circuit to avoid arbitration and have a court decide the issue.

The future: Will the players live long enough to see an outcome? At press time, no ADR proceedings were scheduled.

TRIAL COURT VACATES

New York state Supreme Court Justice Jane S. Solomon vacated Hochman's sanctions award against Grynberg in her 2010 decision. *Grynberg v. BP Exploration*, N.Y. Sup. Ct. slip opinion 116840-04 (Dec. 8, 2010); DC Case, Exhibit 5.

The ground for vacating the award by the Supreme Court, which is the New York trial-level court and the state's first judicial stop for confirming an arbitration award, was that arbitrators have no power to award sanctions under New York law—which, as indicated in the above-referenced *N.Y. Law Journal* article, ignored the applicable and controlling Federal Arbitration Act.

Justice Solomon, however, confirmed Hochman's award on the Signature Bonus Issue, stating:

> 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. [Citation omitted.]

On Feb. 21, 2012, the New York Appellate Division's First Department overturned Solomon's confirmation of Hochman's award on the Signature Bonus Issue, stating:

> The arbitrator's failure to determine the nature of the disputed payment warrants the vacatur. ... 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 (see *Matter of New York State*

Correctional Officers & Police Benevolent Assn v. State of New York, 94 N.Y.2d 321, 326 (1999); *Matter of Crosstown Operating Corp. [8910 5th Ave. Rest.]*, 191 AD2d 384 (1993); Penal Law art 200).

In the Matter of Jack J. Grynberg, et al., Appellants-Respondents, v. BP Exploration Operating Co. Ltd., et al., Respondents-Appellants, 92 A.D.3d 547, 938, N.Y.S.2d 439 (2012); DC Case, Exhibit 6.

ARBITRATOR'S DILEMMA

The Appellate Division's remand of the Signature Bonus Issue to Arbitrator Hochman, ordering him to decide whether BP's Signature Bonus payment was a bribe, faced him with a dilemma because he believed—correctly—that the decision was wrong.

What some would consider the easy and safe choice for him would have been to follow the instructions of the First Department and hold evidentiary hearings on the bribery issue, even though he and the independent auditor previously determined it to be irrelevant in the context of computing BP's net profits.

But as the arbitrator noted in what was denominated his "Decision and Award after Remand" (the "2013 New Award"), that safe choice would have been inconsistent with his ethical duties as set forth in Canon I.A of the Code of Ethics for Arbitrators in Commercial Disputes (available at http://bit.ly/2vaYXBr), which states:

> An arbitrator has a responsibility not only to the parties but also to the process of arbitration itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved.

Before issuing his 2013 New Award, Arbitrator Hochman sent the parties a draft in which he explained why he believed holding the hearings ordered by the First Department would be inconsistent with his ethical duties.

He noted in that New Award that he had received a list of the numerous non-parties whom Grynberg stated he would subpoena to testify and a list of the extensive documents that he would subpoena from those parties in his attempt to prove his claim that the Signature Bonus payments were bribes.

'In furtherance of my ethical responsibility to the process of arbitration, I must respectfully refuse to comply with the [New York state Appellate Division] First Department's Remand Order to determine the nature of the Signature Bonus payments.'

Hochman also explained that holding such extensive hearings on the bribery issue would result in interminable delay and substantial cost and expense to the parties inconsistent with the goal of arbitration, which is for the arbitrator to decide all issues in accordance with applicable law but in a quicker, less costly, and more efficient process than litigation. Id.

After the parties received Hochman's draft of the 2013 New Award, BP and Statoil proposed a solution to his dilemma that would not be inconsistent with his ethical duties: namely, to summarily dismiss the Signature Bonus bribery claim because it was not plausible under the federal pleading standard announced by the U.S. Supreme Court in *Iqbal v. Ashcroft*, 556 U.S. 662 (2009). D.C. Case, Exhibit 10, p. 5.

They argued that the bribery claim was implausible because the FCPA criminal indictment of the intermediary who allegedly transmitted the Signature Bonus payments to the Kazakh government officials was dismissed.

But Hochman rejected that proposal since an award based on such a summary dismissal could risk being vacated because it would deprive Grynberg of the opportunity to prove his bribery claim, and thus might constitute a refusal to hear evidence pertinent and material to the controversy—a statutory ground for vacatur under Federal Arbitration Act Section 10.

Hochman could have resolved the arbitrator's dilemma by taking the easy way out by complying with the First Department's remand order. He would have been paid his hourly rate to hold extensive evidentiary hearings on the bribery issue, even though it is unlikely that Grynberg would be able to meet his burden of proof that the wire transfers from BP's bank account ultimately went to Kazakh government officials instead of the Kazakhstan government.

But Hochman, in rejecting that easy way out, explained in his 2013 New Award that:

> In furtherance of my ethical responsibility to the process of arbitration, 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.

GRYNBERG'S BELATED BIAS CLAIM

When the New York Appellate Division First Department overturned Justice Solomon's lower court opinion confirming Hochman's decision on the Signature Bonus Issue, Grynberg went back to the lower court and claimed, for the first time, that Hochman should be removed for bias.

Specifically, on March 12, 2012, soon after the appellate court issued its Feb. 21, 2012, decision ordering Hochman to hold evidentiary hearings on the bribery issue that he previously ruled in 2010 was irrelevant, Grynberg made a motion to the lower court to remove Hochman for bias.

Undoubtedly, Grynberg made this belated bias claim because he knew perfectly well that Hochman would, as a matter of principle, rule the same way on the Signature Bonus Issue after the First Department remanded that issue to him in 2012 as he did in his 2010 Original Award.

After his first belated attempt to remove Hochman for bias was denied, the ever-persistent Grynberg made many additional attempts, all of which also were unsuccessful.

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His fifth failed attempt was in a Dec. 11, 2012, appeal to the First Department. That court, however, held that "by failing to make any argument as to the arbitrator's alleged partiality during the confirmation proceeding [in 2010 before Justice Solomon], petitioners waived that challenge."

The First Department appeals court also noted that it found "petitioners' contention that the arbitrator exhibited either actual bias or the appearance of bias [to be] without merit."

Because Arbitrator Stephen Hochman made the same ruling on the Signature Bonus Issue in his 2013 New Award as he did in his 2010 Original Award, Grynberg went back to the lower court, this time before then-Supreme Court Justice Cynthia S. Kern with motions to vacate the 2013 New Award and remove Hochman as the arbitrator because he refused to follow the First Department's remand order to hold hearings on the bribery issue.

Grynberg's application included a motion that Hochman be replaced by a three-person AAA arbitration panel because the Settlement Agreements provided an AAA panel be substituted for Hochman if he is "unable or unwilling to serve." DC Case, Exhibits 2 and 3, §10.04 of both Settlement Agreements.

KERN ON THE SIGNATURE BONUS

On April 2, 2014, Justice Kern—who in June was appointed to the appellate bench by New York Gov. Andrew Cuomo—granted Grynberg's motions to vacate the 2013 New Award, remove Hochman as the decider of the Signature Bonus Issue and substitute a new three-person AAA arbitration panel to decide that issue. *Jack J. Grynberg, et al., v. BP Exploration Operating Co. Ltd. and Statoil, ASA*, N.Y. Sup. Ct. slip opinion 116840-04 (April 2, 2014); D.C. Case, Exhibit 8.

That April 2014 decision related only to the Signature Bonus Issue in the arbitration that was the subject of the 2010 Original Award (referred to below as the "First Arbitration"), which related to the audit that determined BP's net profits.

Because the audit by the independent auditor to determine Statoil's net profits had not been completed when the 2010 Original Award was issued, the parties had agreed that any claims or issues that may arise relating to the Statoil audit would be resolved in a separate arbitration (the "Statoil Arbitration").

Although the Statoil audit involved the same Signature Bonus Issue that the arbitrator decided in the First Arbitration, it also involved several other important issues relating to the computation of Statoil's net profits.

Justice Kern explained that her decision to remove Hochman in the First Arbitration was not based on bias but rather on her conclusion that he exceeded his powers. The Kern opinion stated that "the arbitrator exceeded a specifically enumerated limitation on his powers when he issued the New Award … [and] 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."

Although noting that it is "within a court's discretion whether to remit an arbitration matter to the same or a different arbitrator," Justice Kern based her decision to remit the Signature Bonus Issue to the AAA panel on the fact that Hochman made it clear in his 2013 New Award that, if she remitted the matter to him, he would comply with his ethical obligation to avoid the unnecessary costs, expenses and delay that would ensue if he were to follow the First Department's direction to hold hearings on the bribery issue that he previously ruled was irrelevant.

ARBITRATOR REJECTS RECUSAL REQUEST

Soon after Justice Kern issued her April 2014 decision removing Hochman as the decider of the Signature Bonus Issue in the First Arbitration, Grynberg requested that Hochman recuse himself as the arbitrator in the Statoil Arbitration, although it was well under way and close to a decision. In an April 21, 2014 email response to that request, Hochman gave the following reasons for refusing:

> Although I have not finally ruled on any of the claims asserted in the Statoil Arbitration, I have devoted a substantial amount of time in considering the extensive briefs submitted by the parties and in drafting and sending the parties a tentative award on several of those claims. In your 9-page letter dated July 2, 2013, you summarized the voluminous exchanges of emails, letters and other documents and communications relating to the issues in the Statoil Arbitration, including some new issues that you had properly raised. That letter also pointed out that you had brought to my attention and convinced me that Statoil's $60,253 breach of contract claim was time barred under CPLR § 215, thus requiring Statoil to resort to an equitable estoppel argument in its attempt to collect its claim for arbitration fees against Claimants relating to the First Arbitration. It would be unfair to both parties if I were to shirk my responsibilities by requiring them to start over with a new panel of three arbitrators, especially after so much time and money has already been invested in this Statoil Arbitration. [D.C. Case, Exhibit 9, p. 1-2.]

THE ARBITRATOR FURTHER EXPLAINS . . .

Then, four days later on April 25, 2014, Arbitrator Hochman sent a six-page email memorandum to all parties that, in addition to supplementing the reasons he believed Justice Kern's April 2014 decision was wrong and that his 2013 New Award should be reinstated, explained why it would also be wrong for her to remove him in the Statoil Arbitration. D.C. Case, Exhibit 10.

After reminding the parties that he was not charging arbitration fees for the time he spent in researching and writing the "legal briefs" in his 2013 New Award and his subsequent emails to the parties, Hochman explained what he viewed as his ethical duties to the arbitration process:

'I believe my ethical duty to the arbitration process includes doing whatever I can to enhance the reputation of the New York courts for expertise in commercial matters and for making legally correct decisions on arbitration issues.'

I believe my ethical duty to the arbitration process includes doing whatever I can to enhance the reputation of the New York courts for expertise in commercial matters and for making legally correct decisions on arbitration issues. The email that I sent to all counsel on September 27, 2012 referring to the Solovay Article [*New York Law Journal*, supra] was motivated solely by my duty to the arbitration process and desire to increase the likelihood that the Court of Appeals will correct what I believe was the First Department's erroneous decision relating to the Sanctions Award.

My primary duty as an arbitrator is to correctly decide all claims presented to me, based on the applicable law (which includes the FAA to the extent applicable), and to do so as impartially and objectively as would an ideal judge who always made the right decision. As the Original Award made clear, I decided all of the 13 arbitration claims based solely on the applicable law even though the Arbitration Agreement incorporated the AAA's Rules that empowered me to grant remedies that exceeded the remedies that a court could grant. Because the Settlement Agreements did not provide for attorneys' fees to a prevailing party, I denied Respondents' motions for attorneys' fees (which aggregated approximately $14 million) even though I had the authority to award them pursuant to the AAA Rules.

Although I did not award Respondents $14 million in attorneys' fees, I awarded them a total of $3 million in sanctions against Grynberg individually, who represented himself in the arbitration pro se, because it approximated the attorneys' fees incurred by Respondents in defending against Grynberg's claims that I found were not made in good faith. The fact that my decision on the legal fee issue was helpful to Claimants is as irrelevant as the fact that my advising the parties of the Solovay Article might be helpful to Respondents. As Justice Solomon noted, "Hochman had the discretionary power to award costs and attorneys' fees (Award, 24). He affirmatively elected to not use that power. ..."

The holdings should be reviewed by New York's top court. They signal that New York courts are hostile to arbitration and unwilling to enforce arbitration agreements in accordance with their terms.

Notwithstanding the fact that the AAA Rules incorporated in the Arbitration Agreement gave me the power to grant any remedy or relief that I deemed just and equitable, even if it exceeded the power that the law gives to judges, I did not exercise that power because I believe that most parties who agree to arbitration, including the parties to this arbitration, do not want arbitrators to disregard the law and decide issues based on their own subjective notions of justice and equity rather than on the objective and thus predictable standards of the applicable law that courts are required to follow. When the parties agreed to name me as their sole arbitrator of any and all future disputes, they evidenced their intention to have me make a final and binding decision based on the applicable law—i.e., their intent was to choose arbitration **instead** of litigation, not arbitration **and** litigation.

To increase the likelihood that I will decide all legal issues correctly, my practice is, and has been in this arbitration, to let the parties know which way I am leaning on an issue in order to give the party that I am leaning against an opportunity to convince me that my tentative position is not correct. Thus, before issuing a final award, I send the parties a draft of my proposed award to give them an opportunity to suggest corrections or argue against my tentative decision on any issue. Not only does that minimize the risk that I may make an incorrect ruling, it also saves the parties time and expense by focusing them on the issues that I consider relevant to my goal to make a legally correct decision. Also, in the interest of complying with the intentions and needs of the parties for an efficient arbitral process as well as legally correct decisions, I refuse to permit evidentiary hearings on irrelevant issues or depositions to hear testimony that could more efficiently be heard at a hearing.

In support of his duty to keep the arbitral process efficient, Hochman also explained his reluctance to order depositions in arbitrations after Grynberg, representing himself pro se, made numerous requests to take the depositions of various witnesses. In an email response to one of Grynberg's requests, copied to all parties, Hochman stated that:

> depositions are not appropriate in arbitration except in unusual circumstances (e.g., where a witness may die before a hearing can be scheduled)..., [and] the proper forum to present evidence in arbitration is in an evidentiary hearing at which the arbitrator can keep the questioning focused on the relevant issues in an attempt to keep the arbitration process efficient. Depositions are not only duplicative of the evidence that can be obtained at a hearing, they can lead to costly discovery disputes and lengthy unfocused questioning (and sometimes even witness harassment) that is inconsistent with the goal that arbitration should be more efficient than litigation. [D.C. Case Exhibit 29.]

It is ironic that, but for Hochman's view of his ethical duties to the arbitration process, Grynberg could have been required to pay BP and Statoil a total of $14 million in legal fees instead of only $3 million in sanctions.

Thus, Hochman's decisions, which led to his removal as the arbitrator in that case, might well come under the heading of "No Good Deed Shall Go Unpunished."

STATOIL DECISION

After Hochman refused to recuse himself from the pending Statoil Arbitration, Grynberg moved to (1) reopen Justice Kern's April 2014 proceeding; (2) disqualify Hochman from any further Statoil Arbitration participation; (3) consolidate the Statoil Arbitration with the First Arbitration, and (4) discharge Hochman from participation as an arbitrator in any of the

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parties existing *or future* disputes.

On July 17, 2014, Justice Kern, in the trial court, granted Grynberg's motion to consolidate the pending Statoil Arbitration with the First Arbitration so that the same AAA arbitration panel that would decide the Signature Bonus Issue in that completed arbitration would also decide the same issue in the pending Statoil Arbitration.

Although the Signature Bonus Issue was only one of the many issues in the Statoil Arbitration, Justice Kern noted that it was the most significant dollar issue in that arbitration and that the Settlement Agreements did not contemplate "two separate arbitrations to be conducted before different arbitrators." Thus, there was no provision "which would allow Mr. Hochman to be the arbitrator on some issues but not on others." *Jack J. Grynberg, et al. v. BP Exploration Operating Co. Ltd. and Statoil, ASA*, N.Y. Sup. Ct. slip opinion 116840-04 (July 17, 2014); D.C. Case, Exhibit 11, p.7.

Despite the fact that Grynberg's motion was to remove Hochman as the arbitrator in all *future* as well as existing disputes, Kern granted this motion to discharge Hochman only from participation in the parties' *existing* disputes.

She refused to make any ruling "with respect to any future disputes between the parties which do not yet exist as such a ruling would constitute an advisory opinion which this court is not willing to render." Id.

KERN AFFIRMED

On April 16, 2015, the First Department unanimously affirmed Justice Kern's April 2014 and July 2014 decisions, because the arbitrator failed to follow the "clear directive" of the Court's 2012 order to determine whether the Signature Bonus payments were bribes.

Notwithstanding the fact that the Statoil Arbitration involved several significant issues in addition to the Signature Bonus Issue and was almost completed, the First Department confirmed Justice Kern's consolidation of the Statoil Arbitration with the First Arbitration. The appeals court noted that "Statoil did not meet its burden to show that consolidation would prejudice its substantial rights."

FIRST DEPARTMENT: WRONG AGAIN

Despite the fact that (1) arbitration is a creature of contract; (2) arbitrators have an ethical duty to the process of arbitration as well as to the parties, and (3) the Federal Arbitration Act preempts state arbitration law that permits an arbitrator's award to be vacated on a non-statutory ground other than manifest disregard of the law, the First Department's unanimous confirmation of Justice Kern's decisions on the Signature Bonus Issue assumed that the First Department had the power to do the following:

a) Override the parties' arbitration agreement by limiting the broad powers that the parties gave their chosen arbitrator, including the power to exclude evidence on a factual issue that he determined was irrelevant to the issue in dispute, by ordering him to hold hearings on that irrelevant issue that would have resulted in additional and unnecessary delay and costs to the parties;
b) Vacate the award of the arbitrator based on a non-statutory ground for vacatur that is available only where the dispute has no effect on interstate commerce (such as disputes under a collective bargaining agreement between a New York employer and a New York union); and
c) Remove the parties' chosen arbitrator because he followed the parties' order to decide the dispute in accordance with applicable law instead of following the First Department's order which was based on New York arbitration law, which is inconsistent with and hostile to the FAA's pro-arbitration policy.

BP & STATOIL'S MOVE FOR LEAVE TO APPEAL

On Sept. 1, 2015, the Court of Appeals dismissed—but did not deny—the motions of BP and Statoil for leave to appeal the First Department's unanimous 2015 decision because, under the New York Constitution, the Court of Appeals—the state's highest court—does not have jurisdiction to grant leave to appeal until *all* issues between the parties have been finally decided.

Although it had been finally decided that an AAA panel will be substituted for Hochman as the decider of all existing disputes, the Signature Bonus Issue—whether Grynberg is entitled to additional profit payments from BP and Statoil—will not be decided until the AAA panel decides that issue.

Irrespective of how the AAA panel decides the Signature Bonus Issue, once that issue is finally decided, then, and only then, will the Court of Appeals have jurisdiction to grant a motion by BP and/or Statoil for leave to appeal the First Department's decisions on both the Sanctions Issue and the Signature Bonus Issue, the only clearly existing issues between the parties.

But there are significant dollar amounts at stake in those two issues. As noted above, the arbitrator's award of sanctions against Grynberg in favor of BP and Statoil totaling $3 million was reversed. Also, $4,166,667 is at stake depending on the outcome of the Signature Bonus Issue (which is 15% of the $27,777,778 in Signature Bonus payments made by BP on behalf of itself and Statoil), two-thirds of which ($2,777,778) were treated as expenses of BP, and one-third of which ($1,388,889) as expenses of Statoil.

GRYNBERG'S D.C. FOLLY

In Grynberg's Dec. 29, 2015, motion to the U.S. District Court for the District of Columbia, he argued in his declaration that the D.C. court should decide the Signature Bonus Issue instead of an AAA panel.

Grynberg asserted that the court should decide the case since he is the key fact witness who can prove that the Signature Bonus payments were bribes and, because he was then 84 years old, he might not live long enough to prove his bribery claim in the AAA arbitration.

On Sept. 8, 2016, the D.C. court issued a 22-page decision dismissing Grynberg's motion to reopen that Court's 2008 decision that the Signature Bonus Issue should be decided by the arbitrator. Although Grynberg moved to appeal the D.C. District Court's decision to the D.C. Circuit Court of Appeals, that appeal was dismissed on Jan. 30, 2017, based on a stipulation of all parties.

* * *

When and how will this story end?

It is now more than two years after Gryn-

berg made his motion to the D.C. court. Still, it is not yet known when the proceedings before the AAA arbitration panel will begin or what the outcome will be, assuming it follows Justice Kern's unanimously confirmed order that the AAA panel should decide all existing issues—presently the Sanctions Issue and the Signature Bonus Issue.

We can only guess how long that arbitration will take. And it would not be surprising if the losing party on those significant dollar issues moves to vacate the AAA panel's award in favor of the winner, in which case it may be a long time before both of those issues are finally decided—a condition that must be met before the Court of Appeals will have jurisdiction to grant or deny leave to appeal the unanimous and erroneous 2012 and 2015 decisions of the First Department, Appellate Division.

There is also the possibility that the parties may decide to settle their existing disputes, either prior to or during the AAA arbitration proceeding—in which case the New York Court of Appeals will never get an opportunity to correct the First Department's errors.

Those holdings should be reviewed by New York's top court. They signal that New York courts are hostile to arbitration and unwilling to enforce arbitration agreements in accordance with their terms.

This may be a wakeup call to amend the New York State Constitution to give the Court of Appeals jurisdiction to grant leave to appeal a final decision on any issue that has been finally decided by the appellate court even if there remains issues that have not yet been finally decided.

It is ironic that if the First Department had, in its 2012 decision, unanimously confirmed—instead of having unanimously overturned Justice Solomon's 2010 decision confirming Hochman's decision on the Signature Bonus Issue in his 2010 Original Award that held the bribery issue was irrelevant—the Court of Appeals would have had jurisdiction to grant leave to appeal the First Department's erroneous 2012 unanimous decision confirming Justice Solomon's vacatur of Hochman's sanctions award. (See the author's *New York Law Journal* article cited in this article's second paragraph for a fuller explanation of why the First Department was wrong in 2012 when it unanimously upheld Justice Solomon's lower court vacatur of Hochman's sanctions award against Grynberg.)

Hopefully, Grynberg and all others having an interest in the outcome of this case will live long enough to see how this story ends.