

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CA 0182

MACK ENERGY CO., ET AL

VERSUS

EXPERT OIL AND GAS, L.L.C.

DATE OF JUDGMENT: JAN 17 2014

HIGGINBOTHAM, J DISSENTS & ASSIGNS REASONS

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 2012-12872, DIV. I, PARISH OF ST. TAMMANY
STATE OF LOUISIANA

HONORABLE REGINALD T. BADEAUX, JUDGE

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BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.

Disposition: AFFIRMED.

KUHN, J.

Defendant-appellant, ExPert Oil & Gas, LLC (EOG), appeals the trial court's judgment, confirming the reasoned award of an arbitrator; rendering judgment in conformity with that award; and ordering EOG to credit the joint account in favor of petitioners-appellees, Mack Energy Co., Knight Resources, LLC, Big Sky Operating Companies, Inc., and Duplantis Resources, LLC (collectively Mack). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Mack consists of the non-operator ownership interests in certain wells in the Lake Salvador Field located in Jefferson and St. Charles parishes. In 2007, Mack entered into a Participation Agreement and an Operating Agreement with EOG whereby the parties agreed EOG would serve as "operator" in the development of oil, gas, and mineral leases in the Lake Salvador Field. The Operating Agreement included a specified accounting procedure for joint operations, identified as COPAS,¹ which among other things allowed Mack to annually initiate an audit of the joint account that EOG maintains for the parties. After the issuance of a report of an audit conducted in 2010, neither Mack nor EOG agreed with the results. In accordance with a contractual stipulation in the Participation Agreement, the parties submitted the dispute to a mediator; and then, because the mediator was unable to satisfactorily resolve the matter, the parties submitted the dispute to arbitration.

An eight-day arbitration hearing was conducted, after which the arbitrator rendered a reasoned award ordering EOG to credit the joint account in the amount of \$1,596,269.15. Mack timely petitioned the trial court to confirm the arbitration award. EOG answered the petition and filed a motion to vacate the award. After a hearing, the trial court issued a judgment, confirming the reasoned award and ordering EOG to credit the joint account in the amount determined by the arbitrator.

¹ The arbitrator's reasoned award established that Council of Petroleum Accountants Societies, Inc. (COPAS) is an organization that has produced and copyrighted protocols and procedures that are used as general guidance in expenditure audits.

Subsequent to the trial court's denial of its motion for new trial, EOG filed this appeal.

DISCUSSION

Arbitration is a mode of resolving differences through the investigation and determination by one or more individuals appointed for that purpose. The object of arbitration is the speedy disposition of differences through informal procedures without resort to court action. *Firmin v. Garber*, 353 So.2d 975, 977 (La. 1977). Arbitration awards are presumed to be valid and must be affirmed unless grounds for vacating, modifying, or correcting the award are established by the party attacking the award. *Nat'l Tea Co. v. Richmond*, 548 So.2d 930, 933 (La. 1989).² Errors of fact or law do not invalidate a fair and honest arbitration award. *Id.*, 548 So.2d at 932. The exclusive grounds for vacating an arbitration award in Louisiana are set forth in La. R.S. 9:4210, which provides in pertinent part:

In any of the following cases the court in and for the parish wherein the award was made shall issue an order vacating the award upon the application of any party to the arbitration.

A. Where the award was procured by corruption, fraud, or undue means.

B. Where there was evident partiality or corruption on the part of the arbitrators or any of them.

C. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced.

D. Where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

It is well settled that a trial court ordinarily does not sit in an appellate capacity when reviewing an arbitration award, but confines its determination to whether there exists one or more of the specific grounds provided by statute to vacate. *MMR-*

² The parties have raised no issues regarding a modification or correction of the arbitration award pursuant to La. R.S. 9:4211.

Radon Constructors, Inc. v. Continental Ins. Co., 97-0159 (La. App. 1st Cir. 3/3/98), 714 So.2d 1, 5, writ denied, 98-1485 (La. 9/4/98), 721 So.2d 915. The appellate court's function is to determine if the arbitration proceedings have been fundamentally fair. *Pennington v. Cuna Brokerage Sec., Inc.*, 2008-0589 (La. App. 1st Cir. 10/1/08), 5 So.3d 172, 176, writ denied, 2008-2600 (La. 1/9/09), 998 So.2d 723.

EOG asserts the trial court erred in confirming the reasoned award because the arbitrator exceeded his powers in violation of La. R.S. 9:4210D. Pointing to the Procedural Agreement the parties entered into at the commencement of the arbitration as the articulation of the scope of the arbitrator's powers, EOG initially maintains that pursuant to Mack's request, the arbitrator ordered the production of evidence after the deadlines the parties established to submit exhibits and cut off discovery.

At the hearing before the trial court, in support of their respective positions, the parties submitted excerpts from the transcript of the arbitration hearing into the record. Those excerpts demonstrate that during Mack's examination of Michael Ledet -- whom it is undisputed is EOG's CFO and the final witness Mack was examining in the presentation of its case -- the issue of documentation for services provided by EOG's affiliated company, ExPert E & P Consultants (Consultants), arose. Ledet testified that he was also the CFO for Consultants and that the offices for the two companies were located in the same building. Ledet admitted in his testimony that he had refused to provide documentation for charges by Consultants to EOG (the Consultants records) when requested by the auditor who rendered the 2010 audit report, noting that because Consultants was not a party to the agreements between Mack and EOG, there was a need for confidentiality of those records. Ledet further admitted that he had never produced the Consultants records in connection

with the 2010 audit. Mack then requested the production of the Consultants records over the vehement objection of EOG.

Despite EOG's attempt to characterize the request for the Consultants records as having been made by Mack, our review of all the excerpts admitted into evidence shows that it was the arbitrator to whom the records were delivered and ultimately at his insistence. Thus, there is no merit in EOG's assertion that the arbitrator exceeded his powers as delineated in the Procedural Agreement by permitting Mack's request to produce evidence after the agreed upon deadlines.

EOG next challenges the arbitrator's reliance on the Consultants records in rendering an award. Again pointing to the provisions of the Procedural Agreement, EOG asserts the arbitrator's failure to admit the Consultants records as an exhibit at the hearing warrants a reversal of the trial court's confirmation of the reasoned award.

Section XI of the Procedural Agreement states in relevant part:

The conduct of the hearing shall be informal. Evidence may be presented in written or oral form as the Arbitrator may determine is appropriate. The Arbitrator is not required to apply the rules of evidence used in judicial proceedings.... The Arbitrator shall also determine the *admissibility, relevance, materiality and weight* of the evidence offered at the hearing. (Emphasis added.)

Additionally, Subsection XIII states, "The Arbitrator may base his decision on any evidence admitted in the record including that offered by stipulation of the parties." We note that the parties used the word "may," indicative of a discretionary nature. See La. C.C. art. 2047 (words of a contract must be given their generally prevailing meaning) and La. R.S. 1:3 (as used in statutes the word "shall" is mandatory and the word "may" is permissive); see also *Black's Law Dictionary* 979 (6th ed. 1990) (noting jurisprudence defining "may" as "usually ... employed to imply permissive, optional, or discretionary, and not mandatory action or conduct").

It is clear that in accordance with the powers delineated to him under Subsection XI of the Procedural Agreement, the arbitrator determined the Consultants records were admissible, relevant, and material; and then that he weighed them heavily in rendering his award. The excerpts admitted into the record show that the arbitrator fashioned a remedy whereby the confidentiality EOG requested was maintained: Mack was not permitted to see the Consultants records but was only notified that they had been delivered. Neither party was permitted to offer witnesses in conjunction with the production of the Consultants records, which were viewed only by the arbitrator. Although the Consultants records were not formally admitted into the record as an exhibit, under Subsection XI, they constituted "evidence offered at the arbitration hearing" by EOG as directed to do so by the arbitrator.

Reading the provisions of Subsections XI and XIII, as we must, see La. C.C. art. 2050 (providing that each provision in a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole), we conclude that the arbitrator did not exceed his powers by relying on the Consultants records that he ordered EOG to submit to him. It was EOG, not Mack, who provided the Consultants records to the arbitrator. Thus, EOG was aware of the contents of the documents given to the arbitrator.

Mindful that on review this court is charged with the task of determining whether the arbitration was fundamentally fair, we are not required to ferret through the evidence. Our duty, in this instance, is merely to ensure that the arbitrator did not exceed his powers. Finding that the arbitrator acted within the scope of his powers as delineated in the Procedural Agreement, and that there was no prejudice to EOG since it had actual knowledge of the contents of the Consultants records, which were not formally admitted as an exhibit by the arbitrator in an obvious attempt to

maintain the confidentiality EOG requested, the trial court correctly rejected EOG's assertion that the arbitrator exceeded his powers on this basis.

Additionally, we note that La. R.S. 9:4206C(1) provides:

The parties to the arbitration may offer evidence that is relevant and material to the dispute and *shall produce evidence as the arbitrator may deem necessary* to an understanding and determination of the dispute. (Emphasis added.)

Thus, whether we construe the Procedural Agreement as affording the arbitrator the power to order EOG to provide him with the Consultants records, or we apply Louisiana statutory law, EOG has failed to show the arbitrator exceeded his powers on this basis.

In its final challenge of the trial court's confirmation of the reasoned award, EOG asserts that the arbitrator exceeded his powers by rendering an award almost double the amount at issue at the conclusion of the 2010 audit. Noting that prior to arbitration, the parties had worked through the audit process and mediation to resolve numerous issues arising from Mack's challenge of particular charges EOG had made to the joint account -- which issues the parties referred to as "exceptions" -- and that at the commencement of the arbitration proceedings the parties had resolved additional exceptions, EOG maintains that the only amount in dispute when the arbitration hearing began was \$809,394.14. EOG urges that the arbitrator's reasoned award of \$1,596,269.15, which was confirmed by the trial court, was more than the arbitrator was authorized to award.

The "Arbitration Claim" the parties submitted set forth the parameters before the arbitrator, stating in pertinent part:

The only disputes to be arbitrated in this arbitration are (i) a resolution of exceptions raised in an audit of the Joint Account and (ii) the payment of credits to the Joint Account based on evidence to be submitted in the arbitration.

Because the item of charges EOG made based on the Consultants records was among the exceptions raised in the 2010 audit, and the payment of credits based on the

Consultants records was submitted to the arbitrator during the arbitration proceedings, i.e., it was “evidence submitted in the arbitration,” the amount of quantum based on the Consultant records was within the scope of arbitration claim as set forth by the parties.

Additionally, the Procedural Agreement states, “The issues to be decided by the Arbitrator shall be those issues formally submitted to the Arbitrator in accordance with the provisions of the Contract....” The agreement identifies “the Contract” as the Participation Agreement and the Operating Agreement in which the parties agreed to the development of oil, gas, and mineral leases in the Lake Salvador Field. Nothing in those agreements expressly sets forth the scope of the arbitration. Indeed, the only provisions applicable to the dispute before the arbitrator are contained in Article VII of the Operating Agreement, entitled “Expenditures and Liability of Parties.” Paragraph C states in part:

Except as herein otherwise specifically provided, [EOG] shall promptly pay and discharge expenses incurred in the development and operation of the Contract Area pursuant to this agreement and shall charge each of the parties hereto with their respective proportionate shares upon the expense basis provided in Exhibit “C.”

Exhibit “C,” consisting of nine pages, sets forth in articulated detail the COPAS accounting procedure for joint operations.

In his reasoned award, the arbitrator explained:

My role as arbitrator in this proceeding is to determine if the accounting issues raised were handled correctly by [EOG] in accordance with the [Operating Agreement] and its Exhibit “C[,]” the COPAS Accounting Procedure, and not to decide which [ExPert] Company is the Operator of the Lake [Salvador] Field. The correct state of the Operator of the Lake Salvador Field is not necessarily a factor in the handling of accounting issues under the [Operating Agreement].³

³ In Subsection XV of the Procedural Agreement, the parties waived their respective rights to object to the absence of any necessary party and also expressly “entitled” any “person” having a direct interest in the arbitration to attend the hearing. Ostensibly, as CFO for Consultants, Ledet attended the hearing in that capacity as well as in his capacity as CFO of EOG.

Based on the relevant provisions of the Operating Agreement, the arbitrator's reliance on the Consultants records was within the parameters of the arbitration claim as defined by the parties.

Accordingly, the arbitrator was authorized to award an amount which was supported by the Consultants records and, therefore, did not exceed his powers by his award of \$1,596,269.15. And the trial court correctly confirmed the amount of the arbitrator's reasoned award.

Because we have concluded that the arbitrator did not exceed his powers so as to entitle EOG to a judgment vacating the reasoned award, we find no error in the trial court's exclusion of the entire transcript of the arbitration hearing as irrelevant. See La. C.E. art. 401 (defining relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence").

DECREE

For these reasons, EOG failed its burden of proving that the arbitrator exceeded his powers so as to warrant a judgment vacating the reasoned award. The trial court correctly confirmed the reasoned award and ordered EOG to credit the joint account in the amount \$1,596,269.15. The trial court's judgment is affirmed. Appeal costs are assessed against defendant-appellant, ExPert Oil & Gas, LLC.

AFFIRMED.

STATE OF LOUISIANA

COURT OF APPEAL

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MACK ENERGY CO., ET AL

VERSUS

EXPERT OIL AND GAS, L.L.C.

TIMH by [signature]

HIGGINBOTHAM, J., dissenting,

I respectfully disagree with the majority in this case, because I believe that the arbitrator exceeded his powers and the arbitration award should have been vacated. See La. R.S. 9:4210.

The agreement that provides for arbitration is the source of the arbitrator's powers. **KeyClick Outsourcing Inc. v. Ochsner Health Plan, Inc.**, 06-359 (La. App. 5 Cir. 10/31/06) 946 So. 2d 174, 178. In this case, the Procedural Agreement provided that the issues to be decided by the arbitrator shall be those formally submitted.

The record clearly shows that the issues "formally submitted" gave the arbitrator the power to render an award of *no more* than \$809,394.14. As the total award greatly surpassed the submitted amount, the arbitrator exceeded his power. Therefore, the arbitration award should be vacated.