United States District Court, S.D. New York.
·
01 Civ. 2668 (SHS) (S.D.N.Y. Mar 27, 2002)
·
Decided March 27, 2002

Matter, the Arbitration between MILLICOM INTER. MOTOROLA

In the Matter of the Arbitration between MILLICOM INTERNATIONAL V N.V., Petitioner, and MOTOROLA, INC. and PROEMPRES PANAMA, S.A., Respondents.
· 01 Civ. 2668 (SHS)
·United States District Court, S.D. New York.
· March 27, 2002

OPINION ORDER

SIDNEY H. STEIN, U.S. District Judge.

Millicom International, V N.V. has petitioned this Court to vacate or modify an arbitration award ordering the dissolution of its joint venture with Motorola, Inc. and Proempres Panama, S.A. on the grounds that the arbitrators exceeded their powers and disregarded the parties' agreement. In response, Motorola and Proempres have cross-moved to confirm the award. Because the award did not exceed the arbitrators' powers, Millicom's petition to vacate or modify the award is denied and respondents' motion to confirm it is granted.

I. BACKGROUND

A. The Agreement

In January 1995, the parties entered into a Shareholder's Agreement (the "Agreement"), establishing the terms of their joint ownership of Inversiones Rocafuerte, S.A., a Honduran company authorized to conduct all cellular telephone business in that country. The company subsequently changed its name to Telefónica Celular, S.A., known as Celtel.

Celtel's mission as defined in the Agreement was to "construct, maintain, and operate" a cellular telephone system in Honduras pursuant to a license granted by the Honduran government. (Agreement, Pet'r Ex. A, Resp't Ex. 1, § 2.1.) The Agreement also provided that

its terms "shall be governed by and construed in accordance with the internal law of New York," and that "disputes arising out of or in connection with" the Agreement were to be submitted to arbitration. (Agreement §§ 19.10, 19.4.) Specifically, section 19.4 of the Agreement stated that:

Any dispute arising out of or in connection with this Agreement shall be submitted for arbitration in Chicago, Illinois to be conducted in accordance with the substantive and procedural rules of the American Arbitration Association and . . .

(e) The arbitration award shall be final and binding on the Shareholders. The costs of arbitration shall be determined by the arbitration panel. Any award of the arbitrators shall be enforceable by any court having jurisdiction over the Shareholder or Shareholders against which the award has been rendered, or wherever assets of the Shareholder or Shareholders against which the award has been rendered can be located.

B. Petitioner's Claims

Millicom commenced arbitration proceedings in October 1999, and later filed two supplemental statements of claim. Millicom alleged that Motorola and Proempres had breached the Agreement and their fiduciary duties by: 1) failing to allow Millicom its turn to appoint the President of Celtel's Board of Directors; 2) refusing to transfer 25 percent of Motorola's shares in Celtel to Millicom;1 3) holding a meeting of Celtel's Board of Directors on August 23, 1999 without Millicom's representatives, at which the participants voted to purchase Motorola equipment;2 and 4) organizing Celtel's 2000 procurement process for network expansion to ensure that Motorola would win. (Petitioner's Memorandum of Law in Support of Motion to Vacate or Modify Arbitration Award at 2.)

1.

The parties initially intended for Millicom to own 50% of Celtel's shares and Motorola and Proempres to own 25% each. The Honduran government, however, required that Motorola retain a 50% equity interest because the original license had been granted to Motorola. The parties therefore structured the Agreement to give Millicom 50% control of Celtel pending the transfer of an additional 25% of the shares from Motorola to Millicom: Motorola was to hold half of its shares for the benefit of Millicom and all parties were to use "good faith, commercially reasonable efforts" to obtain the Honduran government's consent to the transfer of the shares to Millicom. (See Agreement §§ 20.1-20.3.)

2.

The parties disagreed over the reasons for Millicom's absence at the August 23 board meeting. According to Millicom, Celtel's General Manager called for a special board meeting to be held on August 20, a meeting which was unauthorized because the General Manager did not have power to call special meetings pursuant to the Agreement. Respondents' representatives then adjourned the meeting until August 23 but deliberately gave inadequate

notice to Millicom so that Millicom's representatives would be unable to attend. (Pet'r Ex. F at 10-11.) According to Motorola and Proempres' version of events, Millicom called for a board meeting originally scheduled for August 6 to be rescheduled to August 20, and then failed to appear. Respondents then rescheduled the meeting to August 23, when Millicom again failed to attend. (Resp't Ex. 4 at 4-5.) The arbitration panel found both parties at fault. (See Award, Pet'r Ex. M, Resp't Ex. 15, at 10.)

Millicom requested that the arbitrators declare Motorola and Proempres to be in material breach of the Agreement and allow it to purchase respondents' shares at net book value, pursuant to section 16.3.2 of the Agreement. (Pet'r. Ex. F at 15-16.) Section 16.3.2 provides that upon the occurrence of an Event of Default as defined in the Agreement, the non-defaulting shareholders have the option to purchase all of the shares of the defaulting shareholders at net book value. An Event of Default includes "[t]he breach by a Shareholder of any material obligation under this Agreement which is not remedied within 60 days." (Agreement § 16.3.1.)

Millicom further requested a range of monetary and equitable relief, including: transfer of the allocated shares; recission of the agreement between Celtel and Motorola for the purchase of Motorola equipment and return to Celtel of payments made under that agreement; damages from the August 23 board meeting and the purchase of Motorola equipment; costs, and "such other and further relief as the Arbitration Panel deems just and proper." (Pet'r Ex. F at 16-17.)

C. Respondents' Claims

Motorola and Proempres submitted a statement of defense denying every allegation in Millicom's statement of claim. They subsequently amended that document and filed a counterclaim alleging that Millicom had violated the Agreement and the covenant of good faith and fair dealing pursuant to New York law.

In their counterclaim, respondents charged that a series of litigation that Millicom had commenced in the Honduran court system both before and after the initiation of arbitration proceedings violated Millicom's agreement to submit disputes to arbitration and its duty of good faith and had resulted in negative publicity damaging to Celtel. (Resp't Ex. 4 at 3-4.) Specifically, in August 1999, Millicom sought a court order granting it access to Celtel's books and records, allegedly prior to requesting access to those books and records. It then filed two separate lawsuits claiming that the August 23 board meeting had not been properly convened. Finally, in March 2000, Millicom brought criminal "swindle and fraud" charges in Honduras against Celtel's General Manager and Board President, relating to Celtel's purchase of Motorola equipment authorized at the August 23 board meeting. (Id. at 6.)

Respondents further alleged that Millicom had breached its duties by refusing to participate in board meetings, failing to abide by its financial obligations, refusing to approve the purchase of Motorola equipment in 1999, interfering with the 2000 network expansion tender process, and embarking on a media campaign that damaged Celtel's interests and disclosed confidential information. (Id. at 4-10.)

In their counterclaim, Motorola and Proempres sought a declaration that Millicom was in material breach of its obligations under the Agreement and that they were entitled to purchase Millicom's shares at net book value pursuant to section 16.3.2 of the Agreement. They also requested authorization for Celtel to pay Motorola for equipment and services related to the

1999 and 2000 network expansions; an injunction requiring Millicom to withdraw the Honduran civil and criminal actions and prohibiting Millicom from filing further suits against Celtel, disclosing confidential information, or "otherwise failing to use its best endeavors to develop and expand the business of Celtel;" and "such other and further relief as the Panel deems just and proper."

D. The Hearings

The three-member arbitration panel (the "Panel") conducted three weeks of evidentiary hearings in August, September and October 2000, receiving evidence on seven topics: 1) Celtel's board presidency; 2) transfer of the operating license to Celtel and certain allocated shares to Millicom; 3) validity of the August 20 and 23 board meetings; 4) procurement processes for 1999 and 2000; 5) lawsuits and publicity generated in Honduras; 6) financing of Celtel; and 7) claims that Millicom did not participate in board meetings. (See Award at 4.)

At the conclusion of the hearings, the Panel asked if the parties would consent to the award of remedies other than those provided for in the Agreement. (Pet'r Ex. N at 2794-2796.) One of the arbitrators stated, "We can't provide remedies outside the scope of the shareholder's agreement without both of your consent."(Id. at 2795.)

Millicom informed the Panel that it would not consent to a remedy outside of the relief set forth in the Agreement. (Pet'r Ex. I.) In its Post-Arbitration Brief to the Panel, Millicom requested: 1) the book value buy-out remedy pursuant to section 16.3.2 of the Agreement; 2) the right to appoint a new president of the Board of Directors; 3) an order that Motorola "take all necessary steps to transfer the disputed shares to petitioner within 60 days; 4) a declaration invalidating the actions taken at the August 23 board meeting and rescinding the Motorola contracts; 5) compensatory and punitive damages; and 6) attorneys' fees and costs. (Resp't Ex. 7 at 45.)

Respondents notified the Panel that "pursuant [to] the International Arbitration Rules of the American Arbitration Association, and the request of the Panel, Motorola and Proempres agree that the Panel may formulate a remedy outside of the relief set forth in the Shareholders Agreement." (Pet'r Ex. H.) In their Post-Trial Memorandum to the Panel, respondents requested the book value buy-out remedy, payment of the equipment purchased by Motorola on behalf of Celtel, and damages. (Resp't Ex. 5 at 46.) In the alternative, respondents asked that the Panel dissolve the partnership and give petitioner the option of selling its shares or purchasing respondents' shares at fair market value. (Id.) Respondents argued that the Panel had authority to order such an award pursuant to New York partnership law, even without Millicom's consent. (Id. at 45-46.)

E. The Award

On March 19, 2001, the Panel issued its award, which dissolved the parties' joint ownership of Celtel on terms similar to those proposed by respondents. The Panel wrote that "the numerous defaults incurred by both Parties, and the lack of good faith and breach of duties among themselves" prevented it from ordering the book value buy-out remedy to either party. However, the Panel found that since "the Parties have demonstrated an inability to jointly operate Celtel . . . the dissolution of the co-ownership of Celtel seems an appropriate remedy." (Award at 10-11.) The award provided that Millicom would be given the option to

buy respondents' shares or sell its shares to respondents at a fair market price as determined by an outside appraiser to be selected by the parties. (Award at 11-12.)

The Panel's rulings regarding the additional relief requested by the parties reflected its determination that both sides were at fault for Celtel's management troubles. With respect to the Board Presidency issue, the Panel found that the parties had willingly failed to adhere to the rotation system provided for in the Agreement, and as of the award date, it was Millicom's turn to name the Board President. The Panel ordered the parties to convene a shareholders meeting within two weeks of the date of the award to elect a Board of Directors for Celtel, including Millicom's candidate for Board President. (Id. at 14.)

The award also provided that in the event of deadlock in any subsequent board or shareholders meeting, the parties should, "notwithstanding Section 5.8 of the Agreement," rotate the right to a tie-breaking vote. (Id. at 14.) Section 5.8 provides for the creation of a Shareholders Representative Committee, with one member nominated by each shareholder, to resolve disputes in the event of deadlock.3

3.

Section 5.8 provides:

a) In the event a resolution concerning any of the matters referred to in Section 5.6 is not passed, unless such resolution is either withdrawn or otherwise dealt with to the satisfaction of a Director Qualified Majority, said matter shall, upon written request of any two Directors, be referred for resolution to a committee of representatives of the Shareholders (the "Shareholders Representative Committee"). Each of the Shareholders shall nominate an individual, not being a Director or alternate Director of Company, to consider the matter on behalf of Shareholders.

b) as soon as practical, upon referral of said matter by the Board to the Shareholders Representative Committee, the Shareholders Representative Committee shall meet and attempt in good faith to resolve said dispute within 30 days of the referral by a resolution accepted by representatives representing at least two-thirds or more of the Share ownership of the Company.

c) in the event that any dispute referred to the Shareholders Representative Committee is not resolved at the end of the 30 day period the Shareholders shall be free to pursue the sale of their shares pursuant to Section 12.2; provided, however, that nothing in Section 5.8 shall be deemed to be a restriction of any Shareholder's right to sell its shares as provided in Section 12.2 at any time.

Regarding the transfer of the allocated shares, the Panel found that the conduct of both parties demonstrated a "tacit deferment" of the issue while Celtel pursued other matters with the Honduran government. (Id. at 5-6.) The panel ordered that Motorola should "fully cooperate with Millicom in the effort to have the Allocated Shares transferred" and, should Millicom

purchase respondents' shares in Celtel, assist Millicom with the necessary approvals from the Honduran government. (Id. at 14-15.)

Similarly, the Panel found both parties to be at fault in the problems related to board meetings. It emphasized that the failure of Millicom's board members to attend the August 20 meeting was "inexcusable and tantamount to an obstruction of corporate affairs," (Id. at 7), but cautioned, "This, however, was not sufficient grounds for Respondents to have proceeded with the conduct of substantive business matters without the participation of [petitioner's] representatives at the August 20 and 23 meetings." (Id. at 10.)

As a result of petitioner's absence at the August board meetings, the panel found that despite the parties' intent as stated in the Agreement to purchase Motorola equipment, "the price negotiated by Celtel's management and charged by Motorola for the 1999 equipment procurement was not negotiated as completely as it would have been." (Id. at 7.) It ordered Motorola to reimburse Celtel by $1.5 million. (Id. at 13.) The panel found that the Motorola press release did not adversely impact the 2000 procurement and ordered that if Millicom purchased the respondents' shares it could elect either to keep the equipment and pay Motorola or return the equipment to Motorola. (Id. at 13-14.)

Finally, the Panel found that Millicom's litigation in Honduran courts and the related disclosure of corporate information had violated Millicom's obligations under the Agreement and created a potential risk for Celtel as a publicly licensed company. (Id. at 8-9.)

Millicom then filed this petition to modify or vacate the award.

II. DISCUSSION

A. Choice of Law

Millicom seeks to modify or vacate the arbitral award pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq. The award falls under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 ("Convention"), 21 U.S.T. 2517, 330 U.N.T.S. 38, reprinted at 9 U.S.C. § 201, which applies to "arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought." Convention art. I (1). The U.S. Court of Appeals for the Second Circuit has held that the phrase "`awards not considered as domestic' denotes awards which are subject to the Convention not because made abroad, but because made within the legal framework of another country, e.g., . . . involving parties domiciled or having their principal place of business outside the enforcing jurisdiction." Bergesen v. Joseph Muller Corp., 710 F.2d 928, 932 (2d Cir. 1983). While the disputed award in this case was rendered in the United States it is nonetheless a nondomestic award because it involves two nondomestic parties — Millicom and Proempres — and involves principally conduct and contract performance in Honduras. See Yusuf Ahmed Alghanim Sons. W.L.L. v. Toys "R" Us, Inc. 126 F.3d 15, 19 (2d Cir. 1997).

However, because the award was rendered in the United States, it may be challenged pursuant to U.S. law, in this case the FAA. See Alghanim, 126 F.3d at 21-23. This includes "the full panoply of express and implied grounds for relief" contained in the statute. Id. at 23.

B. Standard of Review

"Arbitration awards are subject to very limited review" in order that "the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation" are not undermined. Folkways Music Publishers, Inc. v. Weiss, 989 F.2d 108, 111 (2d Cir. 1993). The FAA provides that a court must grant a petition to confirm an arbitration award if it is properly brought within one year of the date of the award, unless one of the statutory bases for vacatur or modification of the award is established. Ottley v. Schwartzberg, 819 F.2d 373, 375 (2d Cir. 1987). "The showing required to avoid summary confirmation of an arbitration award is high, and a party moving to vacate the award has the burden of proof" Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp., 103 F.3d 9, 12 (2d Cir. 1997) (citations omitted).

Section 10 of the FAA sets forth the limited grounds upon which an arbitration award may be vacated, including "[w]here 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." 9 U.S.C. § 10 (a)(4). To effectuate the federal policy in favor of arbitration, this section "is to be accorded the narrowest of readings." Blue Tee Corp. v. Koehring Co., 999 F.2d 633, 636 (2d Cir. 1993) (quoting Andros Compania Maritima, S.A. v. Marc Rich Co., A.G.,579 F.2d 691, 703 (2d Cir. 1978)). Section 11 provides that a court may make an order modifying or correcting an arbitral award on the grounds of mistake, improper form, or "[w]here the arbitrators have awarded upon a matter not submitted to them." 9 U.S.C. § 11.

In addition to the express terms of sections 10 and 11, the U.S. Court of Appeals for the Second Circuit has recognized implied grounds for modification or vacatur of an arbitral award where the award is in "manifest disregard" of the terms of the agreement or of the law. See Alghanim, 126 F.3d at 23. Such an error "must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term `disregard' implies that the arbitrator appreciates the existence of a clearly governing [legal or contractual] principle but decides to ignore or pay no attention to it." Id. at 24 (citing Merrill Lynch, Pierce, Fenner Smith, Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986)).

In evaluating a challenge to an arbitration award, courts are reminded that "[a]n arbitrator's decision is entitled to substantial deference, and the arbitrator need only explicate his reasoning under the contract in terms that offer even a barely colorable justification for the outcome reached in order to withstand judicial scrutiny." Alghanim, 126 F.3d at 23 (internal quotations omitted). Even where no explanation is provided, a court must confirm the decision "`if a ground for the arbitrator's decision can be inferred from the facts of the case.'" Nimkoff v. Tanner Propp Farber, 141 F. Supp.2d 420, 425 (S.D.N.Y. 2001) (citing Standard Microsystems, 103 F.3d at 12).

Millicom contends that the award should be modified pursuant to9 U.S.C. § 11 (b) or vacated pursuant to 9 U.S.C. § 10 (a) because "the arbitrators decided matters not submitted to them, exceeded their powers under [the] Agreement and acted in manifest disregard of the Agreement." (Pet. ¶ 20.) Specifically, Millicom charges that the issue of "the parties' ability

to jointly operate Celtel" was not submitted to it, and the market value buy-out remedy, the appraisal procedure for determining fair market value, and the tie-breaker remedy to resolve board and shareholder deadlocks exceeded the arbitrators' powers and were in manifest disregard of the Agreement. (Pet. ¶ 19.) Millicom asks that the award be modified to eliminate these "extra-contractual remedies," or, in the alternative, vacated entirely.

Millicom's claim that the issue of the parties' joint management of Celtel was not submitted to the Panel may be easily dismissed. Each of the specific issues on which the Panel heard evidence arose out of the parties' inability to conduct business as provided for by the Agreement. Indeed, both parties to the arbitration sought the termination of the joint venture in the form of a buy-out of the other party's interest. The parties' inability to operate Celtel was the core of the question that the arbitrators were asked to resolve.

The contention that the Panel exceeded its powers by awarding the "extra-contractual remedies" requires closer examination. The scope of an arbitrator's authority is determined by the parties' intent as expressed in the agreement or submissions. Synergy Gas Co. v. Sasso, 853 F.2d 59,63-64 (2d Cir. 1988) (citing Ottley, 819 F.2d at 376). While an arbitrator's award must "draw its essence" from the parties' agreement, and may not simply reflect the arbitrator's "own brand of justice," Local 1199, Drug, Hosp. Health Care Employees Union v. Brooks Drug Co.,956 F.2d 22, 25 (2d Cir. 1992), the effectiveness of arbitration in resolving complicated commercial disputes would be severely undermined if arbitrators were limited to the mechanical application of contested contractual provisions. Arbitrators therefore enjoy broad discretion to create remedies unless the parties' agreement specifically limits this power. See Konkar Maritime Enters., S.A. v. Compagnie Belge D'Affretement, 668 F. Supp. 267, 271 (S.D.N.Y 1987); Orlogin Inc. v. U.S. Watch Co., No. 90 Civ. 1106, 1990 WL 364470, at *3-*4 (S.D.N.Y. June 25, 1990) (under broad arbitration clause allowing arbitrators to resolve "any dispute or controversy arising between or among the parties," arbitrators had power to dissolve partnership even though prerequisites for dissolution provided in the partnership agreement had not been fulfilled).

Here, the parties' arbitration clause does not include any limit on the arbitrators' powers to craft a remedy. There is nothing to indicate that in agreeing to submit to arbitration "any dispute arising out of or in connection with [the] Agreement," the parties intended to restrict the arbitrators to those remedies explicitly set forth in the Agreement, or that section 16.3.2 was to be the exclusive remedy for breach. Section 16.3.2 provides that a non-defaulting party shall have the "option" to purchase a defaulting party's shares at book value and states that the termination of the defaulting party's interest shall be without prejudice to "any or all remedies available for damages caused by the Defaulting Shareholder by reason of an Event of Default."

In the absence of any contractual restriction on the arbitrators' authority, Millicom must "overcome a powerful presumption that the arbitral body acted within its powers." Parsons Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969,976 (2d Cir. 1974). See also, Synergy, 853 F.2d at 64 ("when it is contemplated that the arbitrator will determine remedies for contract violations, courts have no authority to disagree with the arbitrator's judgment in that respect").

In Coopertex, Inc. v. Rue de Reves Inc., No. 89 Civ. 5748, 1990 WL 6548, at *2 (S.D.N.Y. Jan. 22, 1990), the district court confirmed an arbitration award that called for specific performance of a sale agreement despite the fact that the terms of the agreement only

provided for damages in the event of breach. Noting that the contract did not explicitly preclude an award of specific performance, the court determined that the arbitrators had not exceeded their powers since they neither "violated `an express limitation on arbitral authority'" nor "`rewrote the contract.'" Id. (quoting Local Union 1566, Int'l Bhd. of Elec. Workers v. Orange and Rockland Utils., Inc., 126 A.D.2d 547, 549,510 N.Y.S.2d 671, 673 (2d Dep't 1987). See also, Parsons, 508 F.2d at 976 (arbitrators did not exceed authority in awarding damages for loss of production, despite the fact that contract provided that "neither party shall have any liability for loss of production," because "the arbitration court interpreted the provision not to preclude jurisdiction on this matter").

In support of its claim that the Panel could not award "extra-contractual" relief, Millicom points to two cases in which this Circuit vacated arbitration awards that went beyond the provisions of the parties' agreement. Both of these cases, however, involved collective bargaining agreements whose terms specifically limited the arbitrator's powers. See Leed Architectural Products, Inc., v. United Steelworkers, Local 6674, 916 F.2d 63, 64 (2d Cir. 1990), (collective bargaining agreement provided that "the arbitrator had no authority to add to, subtract from or in any way modify its terms," and that the decision of the arbitrator would be final so long as "it was not contrary to law or the provisions of the agreement"); Harry Hoffman Printing, Inc., v. Graphic Communications Int'l Union, Local 261, 950 F.2d 95, 100 (2d Cir. 1991) (collective bargaining agreement stated that "[n]either the grievance procedure nor the arbitration shall add to, alter, amend, modify, or subtract from the provisions of this agreement").

Millicom also cites Swift Indus. Inc. v. Botany Indus., Inc.,466 F.2d 1125 (3d Cir. 1972), in which the U.S. Court of Appeals for the Third Circuit affirmed the district court's vacatur of an arbitration award that ordered one party to post a $6 million bond as security for certain tax deficiencies which had yet to be determined by the tax court. Although the parties' agreement provided for reimbursement in the event of tax liability, the agreement did not address the granting of security and the maximum amount of the tax deficiency, if any, was $1.5 million. Id. at 1134. The court determined that the arbitrator's award must be set aside because it could not be "rationally derived" from the parties' agreement and therefore did not "draw its essence therefrom."Id. at 1131-34.

Courts in this Circuit have shown greater deference to arbitrators' decisions to award equitable remedies. In Compania Chilena de Navegacion Interoceanica, S.A. v. Norton, Lilly, Co., 652 F. Supp. 1512, 1517 (S.D.N.Y. 1987) the court upheld the power of the arbitration panel, under a broad arbitration clause, to order the posting of a $123,000 bond as security against potential future liability. The court pointed out that arbitrators have broad discretion in fashioning remedies and "may grant equitable relief that a Court could not." Id. at 1516, (citingSperry International Trade, Inc. v. Government of Israel, 532 F. Supp. 901,905 (S.D.N.Y), aff'd, 689 F.2d 301 (2d Cir. 1982)). See also, Konkar,668 F. Supp. at 271 (confirming arbitration award that required charterer to deposit sums withheld from hire into a jointly-held escrow account pending the final award.)

Moreover, while the arbitrator in Swift awarded a sizeable security bond where the parties' agreement contained no provision for security, the Panel here expressly addressed the contractually-provided relief and adapted it to conform to the facts of the parties' dispute. Section 16.3.2 provides that a "non-defaulting Shareholder" may purchase a defaulting shareholder's shares at book value. Thus, the parties' agreement foresees a means of terminating the joint ownership in Celtel in the event of a default by a single shareholder. The

Panel found that both parties had defaulted on their obligations, and thus neither could invoke the "severe" book value buy-out remedy, which "under these facts would work a forfeiture of [the losing] Party's investment value in Celtel." (Award at 10.) The market value buy-out remedy and related appraisal procedure awarded by the Panel achieve the same result requested by each party — the termination of joint ownership in Celtel — without bestowing a windfall on a defaulting party. Similarly, the new tie-breaker procedure reflects the arbitrators' determination that the parties were unable or unwilling to resolve disputes according the terms of the Agreement. In short, the arbitrators' award does not ignore any "clearly governing" principle of the parties' agreement, see Alghanim, 126 F.3d at 24, and does "draw its essence therefrom." Swift, 466 F.2d at 1134.

Finally, Millicom's failure to consent to remedies outside those specifically provided for in the Agreement did not limit the Panel's authority. Because the scope of authority granted to the arbitrators is determined by the parties' contract or submissions, subsequent statements by one of the parties do not affect the powers of the arbitrators. See Blue Tee Corp. v. Koehring Co., 808 F. Supp. 343, 346 (S.D.N.Y. 1992),aff'd, 999 F.2d 633 (2d Cir. 1993) (finding that a letter from one of the parties suggesting that certain issues be referred to an accountant could not define the scope of arbitral panel's authority); Raytheon Co. v. Automated Bus. Sys., Inc. 882 F.2d 6, 7 (1st Cir. 1989) (upholding an arbitration award providing for punitive damages, even though the parties' agreement did not mention punitive damages and the losing party stated in a pre-hearing memorandum that it "d[id] not consent to the submission" of punitive damages issues to the panel).

The Panel did not need the parties' permission to grant the market value buy-out or other remedies granted in the award. Its request for such permission generated unnecessary confusion. Millicom has not, however, argued that the Panel's statements constituted prejudicial misconduct that would warrant vacating the award pursuant to9 U.S.C. § 10 (a)(3), and it is doubtful that any possible prejudice to Millicom rose to this level. In its initial Notice of Arbitration, Millicom requested that the Panel grant it the right to purchase respondents' shares at net book value. (Pet. Ex. B at 12.) The dissolution of the joint venture was clearly within petitioner's contemplation when it initiated arbitration proceedings. Further, Millicom had the opportunity to reply to respondents' brief in favor of the market value buy-out remedy. (See Pet. Ex. L.) Millicom's claims that the panel exceeded its powers and manifestly disregarded the Agreement therefore fail.

III. CONCLUSION

Because the Panel's award did not exceed its powers under the parties' agreement, the petition to modify or vacate the award is denied and respondents' motion to confirm the award is granted.