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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 31
NASSAU COUNTY

In the Matter of the Arbitration of Controversies Between:
SNOWLIFT, INC., as a member of SNOWLIFT LLC, on behalf of itself and in the right of SNOWLIFT LLC, Nominal Claimant.

Petitioners.

Sequence No.: *001 & 002*
Index No.: 009367/08
XXX

- against -

PENAUILLE SERVISAIR LLC (f/k/a GLOBEGROUND NORTH AMERICA, LLC) n/k/a SERVISAIR LLC.

Respondents.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Cross-Motion and Affidavits Annexed	X
Order to Show Cause and Affidavits Annexed	X
Answering Affidavits	X
Replying Affidavits	X

Motion (seq. No. 1) by the attorneys for the petitioner for an order pursuant to CPLR 7510 confirming the Final Award of the arbitrator is granted; and cross-motion (seq. No. 2) by the attorneys for the respondents for an order pursuant to CPLR 7511(b) vacating the Final Award on the grounds that the arbitration panel exceeded its power and/or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made or, alternatively, modifying the Final Award, pursuant to CPLR 7511(c), on the grounds that the arbitration panel made an award on a matter not submitted to it (and the award may be corrected without affecting the merits of the decision upon the submitted issues) is denied.

The subject arbitration arose out of a business dispute between the only two members of Snowlift LLC, (the company) a snow removal and snow clearing business that conducts its operation at various airports and other locations in the United States. The two members of Snowlift LLC are petitioner, Snowlift Inc. (SL) and respondent Penaville Servisair, LLC (PSL) . On September 1, 2003, SL and PSL entered into a "limited Liability Company Operating Agreement of Snowlift LLC" (the operating agreement). One hundred units of membership were issued by Snowlift LLC. Fifty-one (51) units were issued to PSL and 49 units were issued to SL.

PSL is a 51% owner and SL a 49% owner of Snowlift LLC. Although the ownership interests were split on a 51-49 basis, the share of profits and losses were to be borne by the parties in equal proportion, i.e., 50-50. According to the Operating Agreement if there was a "change of control" the member affected by the "change of control" had to give notice of such change and offer its units in Snowlift LLC for a sale at a price to be calculated in accordance with a formula set forth in the Operating Agreement. Petitioner claims that from January 2005 through 2006 the respondent and its group engaged in a course of transactions by which a "change of control" had occurred. Petitioner further contends that despite the alleged "change of control" respondent failed to send petitioner the required notice of a "change of control" and never offered its units in Snowlift LLC for a sale at a price in accordance with the required formula. Respondent contends there was no "change of control" and therefore it did not offer the units for sale to the petitioner.

Snowlift, Inc., as a member of Snowlift LLC on behalf of itself and in the right of Snowlift LLC, as a nominal claimant, made a demand for arbitration setting forth the following claims for relief:

> On the First Claim For Relief:
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> (A) A declaratory judgment declaring that a Change of Control affecting PSL, as defined in Section 7.06 of the LLC Operating Agreement, has occurred.
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> On the Second Claim for Relief:
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> (B) An order compelling and directing PSL to provide such written notice and advise *nunc pro tunc* so that the Offer can be made within ten (10) days of such date and the Required Purchase Price be calculated in accordance with such dates. (Statement of Claim, pg. 25, ¶ 46, Exhibit B, Notice of Cross Motion).

Each party appointed a non-neutral arbitrator. When the two non-neutral arbitrators were unable to agree on the third arbitrator, the American Arbitration Association appointed the neutral arbitrator. The arbitrators conducted hearings on September 5, 2007, February 8, 2008, February 11, 2008 and February 27, 2008. The arbitrators also issued several scheduling and procedure orders during the course of the proceeding including Orders No. 4 and 5.

The arbitrators issued their Final Award on May 15, 2008. The arbitrators found that there had been a Change of Control with respect to respondent; the respondent was deemed to have given notice of the Change of Control; the dispute between the parties included a dispute as to a calculation of the Buyout Price; and the respondent was required to offer its units to petitioner at the Buyout Price of $3,500,000.00. The Final Award under the caption Brief Explanation of Certain Points stated:

> 19. The panel finds and concludes that the transaction was a Change of Control within the meaning of Section 7.06 of

the agreement and triggered certain rights and obligations of the parties under that section.

The Change of Control Date

20. The panel finds that it is not necessary to determine a change of control date because based on the evidence presented the amount of the Required Purchase Price determined in this award would not materially change with a different date.

The Required Purchase Price

21. The panel took into account the various matters raised by the Respondent in evaluating the Required Purchase Price. Therefore, the panel found that the Claimant was entitled to the relief awarded in this award.

The Scope of the Award, the Agreement and the Dispute

22. The remedy provided in this award is within the scope of the agreement and of the dispute presented for decision. The agreement provides that the rules of the American Arbitration Association govern this proceeding. Rule R-43 authorizes the panel to make a "just and equitable" award. The remedy sought in the demand included such other relief as the panel deemed appropriate, clearly invoking the full power of the panel to enter a just and equitable award. The panel entered a scheduling an procedure order under AAA Rule R-30 after discussion with counsel for the parties identifying the issues to be presented. The parties had a full and fair opportunity to present proofs and presented extensive proofs and argument on the issues without objection.

Petitioner commenced this proceeding to confirm the Award. Respondent cross-moved to vacate and/or modify the Award.

Respondent contends that the buy-out issue was never before the arbitrators and they should not have determined a Required Purchase Price. The only relief requested by the claimant and before the arbitrators, asserts the respondent, was a declaratory judgment regarding "change of control," including the date of any such change, and, if applicable, a mandatory injunction to effectuate the offering of the membership shares. Respondent moves to vacate pursuant to CPLR 7511(b) or modify pursuant to CPLR 7511(c).

7511. Vacating or modifying award
(b) Grounds for vacating.

1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by:

* * *

(iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or

(iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

* * *

(c) Grounds for modifying. The court shall modify the award if:

1. there was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award; or

2. the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted.

In a dissent, the one panel member selected by the respondent states that he:

> "joins this award but dissents from **paragraphs 3, 4, 17 and 18**. That panel member would decide that the transaction at issue would not be a change of control within the meaning of the agreement. That panel member recognizes, however, that, in view of the decision of the majority of the panel, a just and equitable award is necessary to establish the Required Purchase Price and, therefore, joins the majority and makes this award unanimous as to all other aspects of the award (emphasis added).

The Findings, Declarations and Award the minority arbitrator dissented from are as follows:

> 3. The panel finds and declares that there was a change of control within the meaning of the agreement, that the Respondent breached the agreement and that the Claimant was injured as a result of the breach.
>
> 4. Therefore, in the exercise of its discretion to enter a just and equitable award, the panel declares that the Respondent is deemed

> to have given notice of change of control pursuant to Section 7.06 of the agreement.
>
> 17. The panel briefly explains certain points about its decision as follows:
>
> The Change of Control
>
> 18. The panel finds that the transaction in issue, through the ownership chain from the remote parent to the Respondent, involved a change in the power to direct or cause the direction of the management of the policies of the Respondent.

Moreover, the respondent contends the award should be vacated since the Panel exceeded its powers or so imperfectly executed them that a final and definite award on the subject matter was not made due to the failure to decide the "change of control" date and by rewriting the agreement eliminating the buy-out formula.

Respondent objected to the Panel's taking testimony on the issue of the buy-out price. However, the record before the Court demonstrates that the Panel gave respondent ample notice of its intentions to pursue this issue. The Scheduling and Procedural Order No. 4, issued by the arbitrators, states: "The October 1 hearing shall be for the presentation of evidence and argument about claims for . . . a calculation of a buy-out amount under the agreement, including the determination of a change of control date, and the defense of waiver." Further, the Scheduling and Procedural Order No. 5 advised the parties that "at the next hearing the panel will hear evidence on . . . (c) the date of the change of control; (d) the notice and waiver defenses; and (e) the calculation pursuant to Section 7.04 of the agreement ("Required Purchase Price") of the agreement;" respondent had the opportunity to present evidence supporting its position. There is nothing in the Operating Agreement that prevented the Panel from going beyond the issue of "change of control" as it apparently did in the subject arbitration. *See,* In the Matter of the Arbitration between Millicom International V N.V. and Motorola, Inc., Proempres Panama, S.A., 2002 U.S. Dist. LEXIS 5131.

Absent a provision in the arbitration clause itself, an arbitrator is not bound by principles of substantive law or rules of evidence. *See,* Lentine v. Fundaro, 29 N.Y.2d 382. The arbitrators may do justice as they see it, applying their own sense of law and equity to the facts as they find them to be and make an award reflecting the spirit rather than the letter of the agreement, even though the remedy exceeds the spirit rather than the letter of the agreement and even though the award exceeds the remedy requested by the parties. *See,* Silverman v. Benmor Coats, Inc., 61 N.Y.2d 299 at 308.

The Court has given great deference to the opinion of the dissenting arbitrator, selected by the respondent who determined "that, in view of the decision of the majority of the panel, a just and equitable award is necessary to establish the Required Price. . ." Clearly after reviewing all the facts the dissenting arbitrator had the opportunity to follow the respondents' arguments

regarding the relief awarded but chose to concur with the majority as to the issues that the respondent alleges were not property before the panel. The respondent has failed to demonstrate that its rights were prejudiced by misconduct. CPLR 7511(b)(1)(i); or that the award exceeded the panel's powers. CPLR 7511(b)(1)(iii). *See,* Silverman v. Benmor Coats, Inc., *supra;* Moore v. Bamaco Group America, Inc., 114 A.D.2d 456.

Further, the respondent has not established that the arbitration award contained a mathematical miscalculation or computational error, or that "the award is imperfect in a matter of form, not affecting the merits of the controversy" (CPLR 7511[c][3]) to warrant a modification of the award. *See,* WBP Central Associates LLC v. Deco Construction Corp., 44 A.D.3d 781.

The petitioner's application to confirm the Final Award is granted. The respondent's application to vacate the award is denied.

So Ordered.

A.J.S.C.

Dated: September 16, 2008