

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
International Arbitration Tribunal

In the Matter of the Arbitration between:

Re: 50 195 T 00010 07

ROTA International Exporting, LLC
vs
Overseas Private Investment Corporation

AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into between the above-named parties and dated September 14, 2004, and having been duly sworn, and having duly heard the proofs and allegations of the Parties, do hereby, AWARD, as follows:

1. Claimant's claim is dismissed.

The administrative fees and expenses of the American Arbitration Association totaling \$8,500.00 and the compensation and expenses of the arbitrator totaling \$16,267.50 shall be borne equally by the Parties. Therefore, Overseas Private Investment Corporation shall reimburse ROTA International Exporting, LLC the sum of \$4,250.00, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by ROTA International Exporting, LLC.

2. This award is in full settlement of all claims submitted to this Arbitration.

Reasons for the Award

On May 31, 2004 the Overseas Private Investment Corporation ("OPIC"), the Respondent in this case, and ROTA International Exporting, LLC ("ROTA"), the Claimant, entered into a Loan Agreement under which OPIC made a loan to ROTA of \$1,670,000. The Loan Agreement provided that the loan was to be used to support a Project in Guinea-Bissau, which was to be carried out by ROTA. The Project was defined in the Loan Agreement as a project to produce cashews in Guinea-Bissau for marketing in the United States. Later the parties entered into a "Rider" to that Loan Agreement, in the form of OPIC Insurance Contract No. F510 (the "Contract"), which was effective as of September 14, 2004. The Contract provided that terms capitalized in the Insurance Contract (including the term "Project") had the same meaning as in the Loan Agreement.

The Insurance Contract provided protection against certain defined political risks. The Contract stated, in its first paragraph:

OPIC hereby insures ROTA...(the "*Insured*")...against the Insured Risk of the loss of 90% of its direct equity investment (the "*Investment*") in the Project...caused by

Inconvertibility, Expropriation or Political Violence, as each of such terms are [sic] defined in this Rider....

The Contract further stated,

In the event of Expropriation, OPIC will provide compensation in the amount of 90% of the net book value of the Investment as of the date the expropriatory effect commences, based on financial statements of the Insured.

The president of ROTA, Ronald Jordan, made a direct equity investment in ROTA of \$900,000. Mr. Jordan also personally guaranteed repayment of ROTA's borrowing from OPIC. Using at least some of the proceeds of the equity investment and loan, ROTA (directly or through at least one affiliated organization) expended substantial sums in the Project and acquired assets connected with the Project in Guinea-Bissau.

Difficulties arose in the Project. In various pieces of correspondence, ROTA indicated its intention to submit a claim for the expropriation of its assets in Guinea-Bissau. According to various statements by Claimant's personnel and representatives, the allegedly expropriatory acts commenced in or about March 2005. A letter to OPIC from ROTA'S counsel dated April 7, 2006 (Exhibit 31¹) stated ROTA's "formal claim for compensation pursuant to Insurance Contract #F501." The claim was based on the assertion that "ROTA, as the insured, suffered denial of its fundamental rights in the Project" when "the demonstrably illegal conduct" of a judge in Guinea-Bissau resulted in "ROTA's complete inability to operate the Project" and to further losses. ROTA claimed compensation of \$810,000 (an amount equal to 90 percent of Mr. Jordan's equity investment in ROTA), which amount was characterized in the letter of April 7, 2006 and an attached affidavit (Exhibit 32) as 90 per cent of "the net book value of ROTA's investment" in the Project.

By a Memorandum of Determinations (apparently undated), OPIC denied the claim. On January 3, 2007 ROTA filed a Demand for Arbitration under the Dispute Resolution clause of the Contract. Following three telephonic preliminary conferences with counsel, I issued Procedural Order No. 3, dated July 14, 2007. Exercising my authority under Article 16(3) of the ICDR Rules, I ordered that the case be bifurcated, and that the first issue to be tried was "'the net book value of the Investment as of the date the [alleged] expropriatory effect commence[d]' for purposes of Insurance Contract No. F510." On August 13 Respondent submitted a motion for "an award disposing of this case" on the ground that ROTA was not entitled to compensation "regardless of the merits of its claim," together with a supporting brief. Claimant filed a brief in response on September 13. A hearing on the issue of the net book value of the Investment was held on October 29, and the parties submitted post hearing briefs, the last of which was filed on December 5.

¹ Unless otherwise indicated, references to Exhibits herein are to the Exhibits as collected and numbered in the parties' joint submission of Combined Materials for Article 16(3) Motion.

For the reasons stated below, I hold that the net book value of the Investment as of the date of the alleged expropriatory acts was a negative amount. Thus, under the terms of the Contract, the maximum recovery for the alleged expropriation is zero, and Claimant's claim must be dismissed.

I did not reach this conclusion easily. The Contract itself lacks clarity on at least one critical point. There is evidence to indicate that ROTA's representatives who applied for the Insurance Contract misunderstood the extent of the expropriation insurance they were buying under the terms of the Contract. Furthermore, the fairness of the Contract, as it applies to the expropriation of the investment of a small investor at an early stage of a project (which is the case here), is not apparent. For that reason it is questionable whether the Contract, and others entered into on the same terms and applying to similar circumstances, will achieve their purpose, as expressly or implicitly stated by OPIC, of encouraging the investments of small investors by providing effective coverage against the risk of expropriation.

The Contract was, however, an agreement between two legally competent parties—one an experienced governmental agency and the other represented by men experienced in agri-business who had counsel available to them. Both parties had the capacity to read, question and understand the terms of the contract they signed. No question has been raised as to whether the Contract was unconscionable or otherwise made in such a way as to render it unenforceable. Nor has it been argued that the political risk coverage provided was so insignificant as to render the Contract void for failure of consideration. I approach the matter, therefore, as one simply of contract interpretation.

With respect to the Contract's lack of clarity, it is not clear on the face of the Contract what the "Investment" was that was insured. The Contract's statement that it was issued to ROTA to cover "90% of its direct equity investment (the "**Investment**") in the Project" (emphasis added) could refer grammatically only to ROTA's direct equity investment. There is no other noun to which "its" could refer. But of course ROTA made no direct equity investment in the Project. The only direct equity investment in this case was Mr. Jordan's direct equity investment in ROTA.

The parties, however, have relieved me of the duty of unraveling this puzzle. Both agree that the insured Investment is the \$900,000 contributed by Mr. Jordan as an equity investment in ROTA. I accept that as the proper interpretation of this Contract for purposes of this claim. The insurance covers the \$900,000 contributed by Mr. Jordan to help finance the Project. However, the insurance was provided to ROTA, not to Mr. Jordan. ROTA, and only ROTA, is named as the "Insured."

What, then, was the "net book value" of this investment (the "Investment") at the time of the alleged expropriation? The term net book value has a clear meaning in legal and accounting terms. As stated by Respondent's expert witness, Robert B. Lechter, it is "the difference between the total assets [of an enterprise] (net of accumulated depreciation, depletion and amortization) and the total liabilities of the enterprise as they appear on that enterprise's balance sheet." Exhibit 39, Lechter Report, p. 4.

The terms of the Contract show clearly that in this case the balance sheet in question is that of ROTA. The Contract required that compensation for expropriation losses be based on the net book value of the Investment "based on financial statements of the Insured." As stated above, the Contract expressly identified ROTA as the "the Insured." Although Mr. Jordan had made an investment in the Project through his contribution of equity capital to ROTA, he was not "the Insured," as that term was defined in the Contract. On this point I think there is no ambiguity in the terms of the Contract. Consequently, the cases cited by Claimant on a court's or arbitrator's powers in construing ambiguous terms have no application here.

I find that the book value of the Investment in this case as shown on the books of the Investor, ROTA, was negative as of the date of the alleged expropriation in March 2005. In the course of presenting its claim to OPIC, ROTA submitted two documents, each titled "ROTA Balance Sheet As of March 31, 2005." One of the documents (Exhibit 21) showed that total liabilities exceeded total assets by \$505,114.14. The second document (Exhibit 22) showed that total liabilities exceeded total assets by \$930,053.09. See also ROTA balance sheets as of December 31, 2004, Exhibits 17 and 18.

An affidavit by ROTA's controller, Wendy Blythe, stated that the "net book value" of ROTA's investment as of March 2005 was "approximately \$942,378.60." Exhibit 32. It was clear, however, from the attachment to that affidavit (Exhibit 33) and from Ms. Blythe's testimony at the hearing, that this figure included only the values, actual or estimated, of the assets owned directly (or perhaps indirectly) by ROTA that Claimant claimed were expropriated. Ms. Blythe testified that these were not complete balance sheets showing net book value. These documents did not include liabilities of ROTA. Tr. 244-45, 249, 263. ROTA's liabilities included the balance due on the OPIC loan of \$1,670,000. The balance due, as recorded on the balance sheets of March 31, 2005, was \$1,499,259.19 (Exhibit 21) or \$1,322,865.00 (Exhibit 22). See also Exhibits 17 and 18. This evidence confirms that ROTA's liabilities exceeded its assets, and that the net book value of ROTA's investment in the Project in March 2005 was a negative number.

Claimant advances a number of arguments to support its contention that it was entitled to recover 90 percent of Mr. Jordan's \$900,000 investment. It refers to the unrebutted testimony of two ROTA representatives who said that, when they discussed the insurance contract that OPIC offered them, the OPIC representatives told them that the entire equity investment of \$900,000 was insured. OPIC does not dispute that, but says that, notwithstanding this coverage, if there were an expropriation, ROTA's recovery was limited to the net book value of the Investment at the time of expropriation. Apparently this limitation on recovery, which applied under the terms of the Contract, was not discussed with the ROTA representatives. The evidence of record, confirmed by a submission of Claimant's counsel of September 25, 2007, shows that the term "net book value" was not discussed in the meetings between the OPIC and ROTA representatives. Tr. 27, 159-60, 169, 220.

Claimant has submitted extensive evidence with regard to the expropriation insurance coverage the ROTA representatives believed they were buying. Mr. Jordan testified, clearly and repeatedly, that, when OPIC's representatives explained the proposed insurance contract to him and the other ROTA representative, Walter Britt, the OPIC representatives "said if I was expropriated it [the insurance] would pay 90 percent of what I put in." Tr. 168. "All I would be out would be 10 percent." Tr. 158. He expected this recovery "even if the company went bankrupt." Tr. 180. Mr. Britt's testimony was to the same effect. Tr. 219. OPIC offered no evidence to rebut this testimony, although the OPIC personnel who allegedly made the statements that Mr. Jordan and Mr. Britt relied on were apparently available to testify.

Although it was not rebutted, the testimony of Mr. Jordan and Britt was not entirely unequivocal and free from internal inconsistency. Both Mr. Jordan, Tr., 172-73, and Mr. Britt, Tr. 224, testified that they understood the insurance did not cover commercial risks—a position not logically consistent with Mr. Jordan's testimony that he would recover even if the company became bankrupt. Further, Mr. Jordan, immediately after testifying that he was told he would recover \$810,000 if there were an expropriation, also testified, in response to a leading question by his counsel on direct examination, that "precisely 810,000 of [Mr. Jordan's] \$900,000 investment was covered by this insurance." Tr. 158. Mr. Jordan seems to have missed the critical point that under the terms of the Contract, there could be coverage of up to \$810,000 but a recovery of a lesser amount if the net book value of the investment were less. Mr. Britt in his testimony seemed also to equate coverage with recovery. See Tr. 219. Claimant's counsel argues in his post-hearing brief of November 28 that I should find that "OPIC advised Mr. Britt and Mr. Jordan that the policy insured Mr. Jordan's \$900,000 investment." I do so find. I am unable to find, however, that the OPIC representatives promised \$810,000 in recovery irrespective of net book value.

I think it likely that the ROTA representatives believed that if there were an expropriation of all of the Project's assets, they would recover \$810,000 in compensation, regardless of whether the investment failed or succeeded and whether or not its assets exceeded its liabilities. On the basis of the evidence of record, however, I am unable to find that the OPIC representatives went this far in mis-describing the insurance provided under the terms of the Contract.

Just what the OPIC representatives said to Mr. Jordan is not entirely clear. Apparently they were anxious to sell a new product. In their description of the product they may well have made the same mistake that Mr. Jordan made of confusing or conflating insurance coverage under the Contract with recovery under the Contract. It is common ground between the parties, however, that the concept of net book value was not discussed between the parties' representatives. On the basis of the evidence, I am unable to conclude that an OPIC representative told Mr. Jordan that he would recover \$810,000 if an investment with a negative net book value were expropriated.

Further, even if an OPIC representative had made such a statement, there is no evidence that the representative knew his statement to be false or that he intended to deceive.

There was no fraud in the inducement of the Contract, and Claimant does not argue that there was.

I have had no case cited to me that suggests that, in the absence of fraud or overreaching, the terms of an unambiguous written contract may be modified by parol evidence showing that the negotiators for one of the parties--or even the negotiators for both of the parties--did not understand the terms of the contract. Absent fraud or a similar ground for holding a contract void or voidable, experienced businessmen, with expert legal advice available to them, must be bound by the terms of the contract they signed.

Perhaps, in fairness to men experienced in business but inexperienced in political risk insurance, the OPIC representatives might have called the ROTA representatives' attention to the net book value limit on recovery, and might have explained what this limitation meant. In a program designed to assist small investors, conscientious representatives of OPIC might have called greater attention to the limitations, as well as the positive aspects, of the insurance they offered. In recommending that ROTA purchase political risk insurance, Tr. 111, 216, and saying their "new product, it's a Wrap," was "just as good as the regular policy" (Tr. 155-56; see Tr. 171), they might have called ROTA's attention to the terms of "a standard long form of [OPIC] contract for small businesses," Tr. 63. Perhaps the standard form contract could have provided different protection—and perhaps greater protection--in the case of expropriation than the protection provided by the Contract. See Tr. 64-65, 289-90, 295-96, 312; Report of Conal Duffy (Exhibit 41), pp. 2-3. But the evidence does not tell us whether there was in fact a measure of recovery for expropriation under the standard contract that would have been more advantageous to ROTA in this case. The OPIC representatives might have said more to explain the insurance they were selling, but their silence alone is no basis for disregarding the terms of the written Contract entered into in this case.

Claimant argues that the expropriation insurance provided by the Contract, as I have found it to be limited, provides only scant protection--in fact in many cases no protection--to small start-up investments. At the outset of a project that has been heavily financed by borrowing, the liability on the loan may well outweigh the assets of the project. Initial expenditures for start up expenses will typically not be capitalized, so that the assets of a start-up venture will be outweighed by its liabilities, in particular its liability on its long term loan. Tr. 117-20. That is what happened in this case. And, since the expropriation insurance in this case expired when the loan from OPIC was repaid, it might well be that the net book value of the investment that was insured in this case would never become positive while the insurance was in effect.

There is a great deal of sense—common sense and business sense—to this argument. In fact, in light of these considerations, OPIC has in the past issued expropriation insurance policies to start-up enterprises providing that the enterprise's long term debt was, for a limited time, to be excluded in the calculation of the enterprise's net book value for purposes of compensation for expropriation. Report of Conal Duffy (Exhibit 41), p.2. Such a policy was available in 2004, when the Contract was made. Tr. 295-96.

OPIC's stand-alone contract for small businesses provides that, if certain conditions are met, "then the accumulated losses [of the new enterprise] will be disregarded in determining compensation in the event of expropriation." Tr. 64. This contract, OPIC Form KGT 12-85 SBC (Exhibit 11) is a standard form. Tr. 63. It was frequently used in the past, Tr. 312, and, according to Ruth Nicastrì, an experienced OPIC employee, it is still available to insureds who ask to see it, Tr. 67-68. Ms Nicastrì was asked on direct examination, "does OPIC ever disregard the debt of a start up company?" Her answer was "no." Tr. 62. I regard that as a statement of what OPIC "does," and not as an unambiguous statement that OPIC never in the past disregarded a start-up company's debt. I give full credence to Mr. Duffy's statement that in 2004 OPIC offered policies to small businesses in which debt was disregarded in determining the net book value of a start-up business for purposes of determining compensation for expropriation.

That, however, is not the policy that was sold and bought in this case. The expropriation coverage provided by the Contract in this case was scant. The insurance provided by the Contract was not without value, however. It might have provided some compensation for expropriation if the Project had been a substantial financial success in its early years. And of course the policy also provided insurance against inconvertibility and political violence without regard to the enterprise's net book value. There was no failure of consideration. Claimant purchased insurance that did provide protection against certain political risks. There is no evidence to suggest that the price it paid for this insurance was unfairly high. The Claimant must be held bound to the limits of the policy it bought and paid for.²

The argument on which Claimant relies in its final briefs and argument, as I understand it, would require me to find that ROTA was insured against a diminution of the net book value of Mr. Jordan's equity investment on the books of Mr. Jordan. This appears to be the view of Claimant's expert, Frank A. Spady, who states, "Investment is generally defined in terms either its cost or fair market value to the investor," whom he apparently identifies as Mr. Jordan. Spady Report (Exhibit 40). Mr. Jordan too said repeatedly that the insured investment was "my net equity investment." (emphasis added). Tr. 180. See also the testimony of Mr. Britt, Tr.230 ("we didn't buy a net book value coverage").

Mr. Jordan's books would indeed probably show a net book value of his investment in ROTA of \$900,000—the price of the shares purchased by Mr. Jordan—less any returns of capital noted on Mr. Jordan's books of account and any liabilities on Mr. Jordan's balance sheet. See Spady Report, Exhibit 40. Because Claimant does not acknowledge that there were any returns of capital to Mr. Jordan (certain payments to him by ROTA

² I find Respondent's argument based on "industry usage" unpersuasive in this case. I believe the evidence submitted by Respondent does indeed support Respondent's contention that OPIC's use of the "net book value" standard in this case is consistent with "industry usage." The cases referred to by Respondent on this issue, however, appear to be cases in which all of the contracting parties were knowledgeable members of the relevant industry, and so knew, or ought to have known, the relevant industry usage. Here there is no evidence that the two ROTA representatives knew about a practice in the political risk insurance industry limiting compensation for expropriation to the net book value of the investment, or that anyone at OPIC explained that practice to them. See also Report of Conal Duffy (Exhibit 41), pp. 3-4 ("other insurers...factor out debt during project start-up").

were claimed to be salary payments, Tr. 163-64) and because no liabilities of Mr. Jordan related to ROTA have been acknowledged (I put aside the question whether Mr. Jordan's guarantee of ROTA's borrowing should have been listed on Mr. Jordan's books as a liability), then the net book value of Mr. Jordan's investment in ROTA and in the Project would have been \$900,000 at the outset, and would have remained at that level regardless of the profits and losses of the Project, at least until such time as Mr. Jordan adjusted his books to reflect that the value of his equity interest in ROTA had increased, diminished or been extinguished by events that affected ROTA.

But, as I have said, that analysis is not the analysis required under the Contract, nor is that analysis consistent with the conduct of the parties in the course of the claims process. Claimant has never purported to provide a set of books or a balance sheet for Mr. Jordan. The Investment that was insured under the Contract was ROTA's investment. It was presumably for this reason that Claimant's "formal claim" was for losses suffered by ROTA, and that the purported "balance sheets" that it submitted to OPIC were those of ROTA, and not Mr. Jordan.

Respondent's motion to dismiss this claim is granted. Both parties having had full opportunity to submit written evidence, oral testimony, briefs and argument on the issue herein discussed, which issue is dispositive of the case on the merits, I hereby declare the hearings closed pursuant to Article 24(1) of the ICDR Rules.

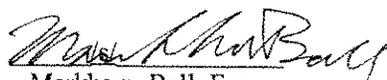
The claim is dismissed.

The fees and expenses of the arbitrator and the administrator shall be borne equally by the parties. In other respects, each party shall itself bear the costs it has incurred in relation to this proceeding.

I hereby certify that, for the purposes of Article 1 of the New York Convention of 1958, on the Recognition and Enforcement of Foreign Arbitral Awards, this Final Award was made in Washington, DC, USA.

January 9, 2008

Date


Markham Ball, Esq.

District of Columbia

SS:

I, Markham Ball, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

January 9, 2008

Date


Markham Ball, Esq.