

MEMORANDUM OF DETERMINATIONS

Claim of Uniworld Holdings, Ltd. for Wrongful Calling of a Performance Bond
Republic of Serbia
Contract of Insurance No. F448

I. Claim

Uniworld Holdings, Ltd (“Uniworld”), a holding company organized under the laws of California, purchased an OPIC policy of guaranty insurance (the “OPIC Contract”) covering the wrongful calling of Uniworld’s outstanding performance bond posted in connection with its purchase of 70% of the socially-owned capital of the Joint Stock Tourist Company Putnik AD Beograd, Serbia Montenegro (“Putnik”).

The Agency for Privatization of the Republic of Serbia (the “Agency”) organized the public tender sale to Uniworld. The parties concluded the Agreement on Sale and Purchase of Socially Owned Capital by Public Tender (the “SPA” or the “underlying contract”) on May 19, 2003. The SPA required Uniworld to make scheduled investments in Putnik certified by an audit company (KPMG), and to provide three bank guarantees.

Uniworld timely delivered to the Agency the first performance bond issued by Raiffeisen Bank for \$ 2,200,000.00. KPMG certified that Uniworld had made the scheduled investment, but the Agency found the report unsatisfactory in form. KPMG submitted a revised report, but the Agency then disputed KPMG’s conclusion. On August 5, 2004, the Agency sent Uniworld notice of failure to submit the second performance bond and demanded its submission by August 13, 2004. On August 5, 2004, however, the Agency also called the first performance bond. The Agency cited as reasons: (1) failure to make timely delivery of the second performance bond; and (2) failure to meet the investment commitment. Ultimately, the parties terminated the SPA.

On April 19, 2005, Uniworld submitted the dispute, including the issue of wrongful calling, to ICC arbitration, as provided in the SPA. On April 27, 2007, by majority vote, the arbitral panel reached a holding in favor of Uniworld, requiring, among other things, that the Agency refund to Uniworld the entire sum of the first performance bond, with 3.25% interest from the date on which Uniworld filed for arbitration. The Agency has failed to pay, notwithstanding Uniworld’s efforts to enforce the holding, and, on January 29, 2008, Uniworld filed an application for compensation (the Claim”) under the OPIC Contract.

OPIC finds that the Claim is valid and that the Insured is entitled to compensation in the amount of \$ 1,980,000 (90% coverage of the \$ 2,200,000 performance bond).

II. Factual Background

In making its determination, OPIC has treated the factual determinations of the arbitral panel in the award rendered in the Investor's favor against the Agency and Putnik in ICC Case No. 13798/AVH (the "Award") as accurate, as they are binding upon the parties according to the SPA. A certified English translation of the Award is attached as Ex. 1.

Putnik SPA

On May 19, 2003, Uniworld concluded the SPA with the Agency and Putnik, thereby acquiring 70% of Putnik for the purchase price of \$ 5,200,000. Under the SPA, Uniworld committed to invest \$ 44,332,500 over a period of five years in accordance with an agreed upon investment plan. At the end of each year, the SPA required Uniworld provide a certificate from an audit company verifying that the yearly investment conformed to contract specifications. The SPA also obligated Uniworld to provide the Agency with three successive performance bonds. Uniworld posted the first bond, in the amount of \$2,200,000 on June 23, 2003, valid until July 31, 2005. Documentation relating to the issuance and calling of Uniworld's performance guaranty is attached as Ex. 2.

Political Context

As described in correspondence following Uniworld's notice of the Claim (Ex. 2), Uniworld faced significant hostility in conducting Putnik's business. Under a new coalition government, privatizations became politically sensitive because of the resulting job losses and because of policy differences within the coalition government as to the pace of economic reform, including demands that past privatizations be reviewed. The slowing of privatization and reform led to criticism from the World Bank. The head of the Agency was dismissed. The general politicization of the privatization process, to the detriment of the investment climate, is described in publicly available sources; *e.g.*, State Department Background Notes for Serbia and Montenegro (December 2004), Economist Country Risk Service Report for Serbia, (August 2004, November 2004, March 2008).

Putnik, in particular, became a target of attack by the media and minority shareholders (Putnik employees and retirees) who tried to obstruct Putnik's management. The supervisory ministry recommended that the Agency consider amendment of the SPA to take into account the difficult operating atmosphere, but the Agency refused. Among the amendments that Uniworld requested were extension of the period in which investment had to be made and relief from the requirement to post performance bonds. The parties engaged in negotiations to amend the SPA, but they agreed to no written terms. (Award, p.17).

Dispute regarding failure to fulfill investment obligations

The SPA obligated Uniworld to invest, for the first investment year, a total of \$ 4,437,500. KPMG certified Uniworld's investment of \$ 4,441,000 in cash and other items (\$ 2,306,000), and the ship "Sirona," valued at \$ 2,335,000. But the Agency

disputed a number of investments included in the calculation and recognized investment in the amount of \$ 2,114,740 only.

KPMG Report

KPMG submitted certification of Uniworld's compliance with the investment requirements on June 28, 2004, but KPMG reported that the structure of the investment differed from the schedule set forth in the SPA. On July 16, 2004, the Agency sent notice to Uniworld that the KPMG report was incomplete because it did not list the source of assets from which Uniworld financed the investment. KPMG then submitted a corrected version of its report and an explicit statement of Uniworld's compliance with the relevant SPA provisions. The Agency's dispute over the KPMG report is described in the Award at pages 17-20 and 75-78.

Failure to Submit the Second Performance Bond

On August 5, 2004 the Agency sent Uniworld notice of failure to submit the second performance bond, which, according to the SPA, was to have been posted on or before July 1, 2004, and extended the deadline through August 13, 2004. Yet, on the same day, the Agency requested collection of the first performance bond from Raiffeisen Bank, citing as one of the reasons for doing so, failure to submit the second performance bond. Notwithstanding the KPMG report, the Agency also denied that Uniworld had met its investment obligations during the first period.

Termination of the SPA

On March 21, 2005, Uniworld attempted to terminate the SPA. The next day, the Agency notified Uniworld it had failed to fulfill its investment commitments for the first year of the agreement. The parties met in April, 2005 but could not resolve their dispute. Uniworld then submitted a request for arbitration seeking (1) return of the purchase price with interest; (2) return of its \$ 4,441,000 investment with interest; and (3) return of \$2,200,000 for the payment of the first bank guarantee with interest. On July 1, 2005, the Agency notified Uniworld that, unless it withdrew its request for arbitration and gave evidence that it would provide a second performance guaranty, the Agency would terminate the SPA. It did so on July 8, 2005, referring to a new privatization law that had entered into force the previous month and exercising remedies under it. See Award, pp. 22-24.

Arbitration

A decision was reached on April 27, 2007 by majority vote of the three arbitrators. The arbitration panel ("the Panel") awarded Uniworld over \$ 12 million. First, the Panel found the Agency and Putnik jointly and severally obligated to reimburse Uniworld the purchase price of Uniworld shares (\$ 5,200,000 with 3.25% interest from

July 31, 2005). Second, the Panel ordered Putnik to return Uniworld's investment of \$ 1,619,214 with interest of 3.25% from May 17, 2005 and the ship Sirona, which was assigned to Putnik. Third, the Panel held the Agency liable to reimburse Uniworld \$2,200,000 plus 3.25% interest from April 19, 2005 for the wrongful calling of the first performance bond. (See Award, pp. 4-5.) The third arbitrator disagreed with the majority decision to hold the Agency and Putnik jointly and severally liable for return of the purchase price of the shares, and she declined to sign the Award. See Award, pp.11-13.

The OPIC Contract covers only the wrongful calling of the performance bond by the Agency. On that issue, the Panel reached a holding in favor of Uniworld. .. The Panel's reasoning was based on Serbian legal principles applicable to contractual relationships, rights and remedies. These principles are similar to concepts in Anglo-American law of duties of good faith and fair dealing in contract relationships and the avoidance of unjust enrichment. Although the Bank's payment of the performance bond was proper, the Agency could not retain the funds in light of the termination of the SPA. The bond's purpose was to ensure Uniworld's performance. Since the SPA was terminated, Uniworld had no obligation to perform and the bond served no purpose. The Panel ruled that, as part of an accounting upon termination of the SPA, the Agency would have been entitled to retain funds to cover any actual damages resulting from termination. However, because the Agency failed to file a timely request for compensation of damages under ICC Rules of Arbitration, the Panel awarded Uniworld the entire amount of the first performance bond (\$2,200,000) with 3.25% interest from the date on which Uniworld filed the claim (April 19, 2005). See Award, pp.87-91 and, generally, 71-91.

III. The Contract

The OPIC Contract (attached as Ex. 3) is a Policy of Guaranty Insurance, written on Form PGT 1-87 Guaranty PL (Revised 1/02). It covers an investment in the form of a performance guaranty against the risk of wrongful calling. The issues to be resolved in determining the Claim is valid are: whether an event occurred that is within the scope of coverage; what amount of compensation is due; and whether Uniworld has complied with its duties under the OPIC Contract.

Scope of Coverage: Pursuant to Article II of the OPIC Contract, compensation is payable for the wrongful calling of Uniworld's performance bond by the Agency.

In relevant part, Section 2.01 of the OPIC Contract provides:

Compensation is payable, subject to the exclusion . . . and limitations . . . , if any portion of the guaranty is called, and the Insured has not materially breached the underlying contract and has sought but not received indemnification from the Agency, provided one of the following conditions also pertains . . .

(a) Unsatisfied Holding in Favor of Insured. The Insured has submitted a claim of wrongful calling to the dispute resolution procedure contained in the underlying contract, the procedure yields a holding in favor of the Insured, and notwithstanding the Insured's best efforts to enforce the holding, the Agency fails to pay the Insured the amount awarded within three months of the date of the holding. ...

With its notice of Claim, Uniworld provided documentation that the guaranty was posted, that it was called, and that the issuing bank paid the Agency and reimbursed itself by drawing against Uniworld's security (Ex. 3). In this case, the decisional procedure has yielded a holding in favor of Uniworld, yet the Agency has failed to pay the amount awarded, and more than three months have passed. Indeed, the Agency has taken active measures to postpone payment of the award and, most recently, to set aside the holding. Serbian counsel for Uniworld have described in detail the steps that Uniworld has taken to enforce the award and the efforts that the Agency has made to avoid payment. The Government of Serbia has recommended in writing that the Agency and Putnik honor the Award, and the American ambassador has written to the minister of finance urging compliance with the Award. Supporting documentation is attached as Ex. 4.

The determination as to whether the insured investor materially breached the underlying contract (which would justify calling the guaranty) or whether the beneficiary wrongfully called the guaranty is determined in this case by the holding that was reached in the arbitration to which Uniworld, the Agency and Putnik agreed to submit any dispute under the SPA. OPIC's response to Uniworld's notice of Claim took that position, in explaining why the initial submissions were being treated as a notice of Claim only, because a valid claim could be made only after satisfying one of the provisions of Article 2.01. (Ex.3).

Under the four other conditions described in Section 2.01, there would be no holding at the time of an OPIC claim determination, and so OPIC itself would have to determine both that the condition applied and that the Insured had not materially breached the underlying contract. In this case, by awarding compensation to Uniworld, the Panel held that it was the Agency and Putnik that breached the underlying contract, at least in the sense that the actions that they took under color of specific provisions of the underlying contract violated the chosen substantive law of the contract.

The exclusion contained in Section 2.02 does not apply, nor does any of the limitations contained in Section 3.02 nor does any of the amendments contained in Article VI of the OPIC Contract.

Compensation Amount: Uniworld is entitled to compensation in the amount of \$1, 980,000.

The amount of compensation is determined by the Award.

The relevant provisions of the OPIC Contract provide:

Section 3.01.1: “In the case of claims under Section 2.01(a), OPIC shall pay compensation to the Insured in the amount of the insured portion of the unsatisfied holding.”

Section 3.02 Limitations: “Compensation shall not exceed: ...
(b) The maximum amount which could be received by the Insured without breaching Section 5.01.3.”

Section 5.01.3 Duties: Self-Insurance. “The Insured shall continue at all times to bear the risk of at least 10% of any loss.”

These provisions together establish OPIC’s liability in the amount of 90% of the face amount of the bond, namely, \$1,980,000. Uniworld has certified that it has received no compensation from any other source (Ex.6).

None of the amendments contained in Article VI of the OPIC Contract is applicable.

Compliance with Duties: Uniworld has complied with its duties under the OPIC Contract to OPIC’s satisfaction.

Notice Requirement

Section 5.01(9) of the OPIC Contract provides:

Compulsory Notice: “The insured shall notify OPIC promptly of any acts or threats to act in a manner which may come within the scope of wrongful calling coverage (Article II) and shall keep OPIC informed as to all relevant developments.”

Section 4.09 of the OPIC Contract provides:

“Notices must be in writing, and shall be effective when received. Notices may be given to the Insured at the address on the title page (unless changed in writing)....”

As of the effective date of the OPIC Contract, operational difficulties had arisen, and Uniworld was attempting to negotiate amendments to the SPA, but there is no indication that the Agency had threatened to call the first performance bond.

On May 19, 2005, Uniworld notified OPIC in writing of its intent to make a claim for the wrongful calling of the performance bond in August 2004, which had taken place more than nine months earlier. OPIC acknowledged receipt of that notice in June 2005, and Uniworld's Serbian counsel provided additional details in August of 2005. OPIC attempted to respond to Uniworld by mail at the address on the title page of the OPIC Contract, but OPIC's letter of October 28, 2005 was returned to sender. The substance of OPIC's letter was that success of a claim under the OPIC Contract would depend on the outcome of arbitration. (See Ex. 3). Although Uniworld never received the letter, it did submit the dispute to arbitration and the Panel found in its favor. The US embassy promptly informed OPIC of the outcome. Uniworld made an application for compensation on January 29, 2008 (Ex. 5).

Through means other than the written notice required by the OPIC Contract, OPIC had actual knowledge of the allegedly wrongful calling, the arbitration, the holding in favor of Uniworld, the Agency's resistance to paying, Uniworld's efforts to enforce the award, and the American embassy's efforts on behalf of Uniworld. Under the totality of these circumstances, OPIC has waived non-compliance with the notice provisions of the OPIC Contract.

Continuing Eligibility

Section 5.01(2) of the OPIC Contract requires that the Insured at all times remain eligible for OPIC insurance. To be an eligible investor, a corporation must be created under the laws of the United States and more than 50% of both the total interest and of each class of shares must be beneficially owned by citizens of the United States. Uniworld is a holding company organized under the laws of California, and the California Secretary of State has certified Uniworld's good standing. Uniworld has represented that Serba Ilich, sole shareholder of Uniworld, is a U.S. citizen, both in Uniworld's original application for insurance and a certificate provided in connection with this Claim (Ex.6).

Other duties

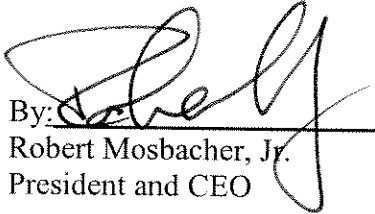
Uniworld has complied with its other duties pursuant to Section 5.01 of the OPIC Contract, including preservation of remedies against the Agency.

None of the amendments contained in Article VI of the OPIC Contract applies.

IV. Conclusion

For the foregoing reasons, OPIC concludes that the claim of Uniworld is valid and that Uniworld is entitled to compensation in the amount of the insured portion of the guaranty that was wrongfully called, namely, \$1,980,000.

OVERSEAS PRIVATE INVESTMENT CORPORATION

By:  _____
Robert Mosbacher, Jr.
President and CEO

Date: March 21, 2008