SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 3

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INTERNATIONAL FINANCE CORPORATION,

Plaintiff,

- against -

CARRERA HOLDINGS INC. (formerly CARRERA USA, INC.) and CARRERA S.P.A.,

Defendants.

Index No.: 601705/2007
Trial Dates: July 6-10 & September 9-10, 2015
Final Post-Trial Submissions: December 22, 2015
Bench Trial

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BRANSTEN, J.

OPINION OF THE COURT

Before the Court is Plaintiff International Finance Corporation's ("IFC") claim for breach of contract. The Parties appeared for a bench trial from July 6 through July 10, and September 9 through September 10, 2015.

In this nonjury trial, the Court determines both questions of law and facts. The Court considered the testimony of the witnesses, assigned weight to that testimony, and generally determined its reliability. *See Watts v. State of New York*, 25 A.D.3d 324, 324 (1st Dep't 2006). The Court also considered the witnesses' interest in the case and their bias or prejudice. *See People v. Ferguson*, 178 A.D.2d 149, 149 (1st Dep't 1991).

FINDINGS OF FACT

I. Introduction

This case is about a business relationship that began over 15 years ago and culminated in a seven-day trial involving testimony from eight witnesses and dozens of exhibits. Plaintiff's single claim hinges on the meaning of one term: "Expropriatory Event."

Plaintiff International Finance Corporation ("IFC") is a finance institution that provides services to private companies in developing countries. Defendant Carrera S.p.A. is an Italian, family-owned company that manufactures jeans and sells them throughout the world. Carrera S.p.A. and Carrera Holdings, Inc., an Ohio corporation, are part of the Carrera group (collectively, "Carrera" or "Defendant"). (Stip.[1] ¶¶ 1-4.) Carrera owns Giavoni Manufacturing ("Giavoni" or "Javoni"), a Tajik joint venture limited liability company that operates a textile manufacturing plant in Khujand, Tajikistan. The parties' relationship – and this case – revolves around IFC's investment in Giavoni.

II. IFC's Interest in Tajikistan

IFC is a member of the World Bank Group. Unlike the World Bank, which lends directly to countries, IFC invests in private enterprises in developing nations. (Stip. ¶ 1; Tr.[2] 23:11-16.) IFC became interested in Tajikistan in the late 1990s, recognizing that the

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[1] Pre-Trial Stipulations, Doc. No. 202.
[2] Unless otherwise noted, "Tr." refers to the Trial Transcript.

country had lots of need for foreign investment but little experience with a free-market economy. (Tr. 116:21-24; 120:21-23.) Following the fall of the Soviet Union in 1991, Tajikistan endured many years of civil war that nominally ended in 1997. (Tr. 114:6-8.) As Tajikistan's political climate stabilized, IFC initiated its investment activity by funding several projects with loans and capital contributions. (Tr. 114:5-116:10) ("The cotton farmers, there was a contribution … [t]he other two were straight loans.").

III. The Giavoni Project

Throughout the 1990s, Defendant Carrera sourced textiles for its jeans from factories in central Asia. Beginning in 1993, Carrera invested in Tashkent Cotton, a company that ran four clothing factories in Uzbekistan. (Tr. 451:23-452:23.) After three years of operation, the Government of Uzbekistan denied the renewal of Carrera's business license, which prohibited it from exporting the textiles produced by Tashkent Cotton. (Tr. 454:14-455:2.) As a result of the Uzbek Government's actions, Carrera lost its $4 million investment in Tashkent Cotton and was unable to resell the company's assets, which remain in Uzbekistan. (Tr. 457:18-22.)

Carrera then considered investing in neighboring countries and settled on Tajikistan. On October 1, 2000, Carrera acquired 51.2% of Giavoni's outstanding quota capital (i.e., equity) from a Maltese entity named General Business, with whom Carrera had maintained a relationship since 1991. (Stip. ¶ 6.) In 2000, Imerio Tacchella ("I. Tacchella"), Carrera's President, also became the President of Giavoni. (Tr. 449:23-24.) The remaining shares of

Giavoni were owned by Abreshim SA and Sano SA, two Tajik state-controlled entities. (Def. Ex. F, at 00644; Tr. 161:25-162-4.)[3]

According to Richard Rutherford, who at the time was IFC's team leader for central Asia, IFC first heard about Giavoni sometime in 1999 or 2000. (Tr. 22:4-6; 107:11-23.) While the parties dispute who initiated their communications (*compare* Tr. 42:20-43:21, *with* Tr. 468:21-26), by 2001, Carrera's management and IFC's investment team had begun discussions about a possible loan or investment. (Tr. 42:25-45:26.) According to Rutherford, Carrera sought the investment to expand Giavoni's operations in Khujand. *Id.* Carrera maintains that the investment was not intended solely to expand Giavoni's operations in Khujand, but also to provide political protection against the Government of Tajikistan. (Def. Ex. ZZZ, at 10.) IFC's internal contemporaneous documents confirm that Carrera "expect[ed] IFC to be a real shareholder in Giavoni," and sought "comfort in the country by asking IFC to join as a shareholder." *Id.* at 12-13.

Paolo Spagnoletto, an IFC investment officer that reported to Rutherford during this time period, testified that as part of the investment process Carrera submitted an "Appraisal Form" describing its activities in Tajikistan. (Tr. 218:16-219:12.) Vivek Jacob, IFC's main point of contact with Carrera during their negotiations, delivered the form to Spagnoletto.[4] (Tr. 218:16-219:12; 225:3-20.) I. Tacchella testified that around this time, Spagnoletto

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[3] Pinpoint citations to the parties' exhibits generally refer to the last five digits of the Bates stamped page designations.

[4] Vivek Jacob was deposed on October 2, 2009, but died before the trial.

also visited Carrera in Verona, Italy to discuss IFC's interest in Giavoni. (Tr. 471:13-472:8.)

During a visit to Asia in September 2001, Rutherford toured the Giavoni plant in Tajikistan and met with I. Tacchella in Uzbekistan. (Tr. 46:2-48:15.) Rutherford was impressed by I. Tacchella and determined that Giavoni would be a good investment for IFC. (Tr. 49:5-12.) On November 12, 2001, Rutherford mailed I. Tacchella a letter expressing IFC's interest in and concerns about Giavoni. (Pl. Ex. 7, at 01980-81.) The letter stated that IFC could provide funds via a "guaranteed loan" or "equity participation at a realistic valuation supported by an *unconditional put* on the parent with a minimum guaranteed return." *Id.* (emphasis added). Jacob responded on November 15, 2001 and rejected the loan arrangement. (Pl. Ex. 8.) He stated that Carrera was willing to enter into an equity structure and that it would be "more than happy to make all of the needed arrangements so that IFC can rely on a 'put' option … to realize its investment in Giavoni." *Id.* In internal e-mails, IFC emphasized that it would need a "strong $ based put" to proceed with the deal. (Pl. Ex. 9.) Rutherford confirmed that at the time he believed that "[IFC] needed to be very firm in our negotiations about the put." (Tr. 74:2-4.)

IV. Negotiating "Country Risk"

On March 1, 2002, IFC submitted a Mandate Letter to Giavoni and Carrera outlining the scope of due diligence. (Stip. ¶ 10; Pl. Ex. 11.) Seven days later, IFC submitted the first draft of the Put Option Agreement (the "Put Agreement") and Subscription Agreement

that would govern the parties' relationship. (Stip. ¶ 11; Pl. Ex. 12.) The March 2002 Draft of the Put Agreement permitted IFC to exit the investment during a "Put Option Period," but did not otherwise limit IFC's right to exercise its Put Option. (Pl. Ex. 12.) Indeed, as Rutherford testified, IFC sought an unconditional put precisely because it wanted to "require that its investment stake be purchased by … Carrera" so IFC could "realize its investment after a period of time." (Tr. 56:6-10.) Carrera rejected the unconditional put option. According to Spagnoletto, Vivek Jacob requested an amendment that limited IFC's option rights in the case of "political risk." (Tr. 228:4-9.)

Months later, in August 2002, Spagnoletto sent Jacob a letter entitled "Giavoni Terms," again attempting to outline their deal. (Def. Ex. G.) This one-page draft stated that the Put Option would "[n]ot [be] exercisable under conditions where defined *country risk* has materialized." *Id.* (emphasis added). At trial, Spagnoletto testified that "country risk" was "a term broadly used in IFC for general country risk." (Tr. 229:21-24.) While IFC now argues that it was only willing to consider agreeing to an exception that would cover risks of "nationalization and expropriation,"[5] Rutherford testified that at this stage, IFC "frankly, really did not know" how this term would be defined. (Tr. 82:19-21.)

Carrera maintains that "country risk" protection was not incidental to the investment; it was the transaction's raison d'être. I. Tacchella testified that Carrera was not concerned with nationalization or with the State "taking" his company. (Tr. 487:17-488:7.)

[5] Pl. Post-Trial Proposed Findings of Fact ("PFOF"), ¶ 44.

Gianluca Tacchella ("G. Tacchella"), the President of Carrera Holdings, Inc. and the CEO and Managing Director of Carrera S.p.A., also testified that Carrera's main concern was protecting itself against commercial interference by the government, not nationalization. (Tr. 792:26-793:23.) Moreover, IFC's witness Rutherford confirmed that when he met with I. Tacchella in 2001, Mr. Tacchella did not express any concerns about the possibility of nationalization. (Tr. 139:4-140:8.) Contemporaneous IFC documents also reveal IFC's awareness that Carrera's concerns in Tajikistan extended beyond "nationalization." For example, an internal IFC Office Memorandum dated October 25, 2002 – during the parties' negotiation – confirms that Carrera was concerned with "country risk." (Def. Ex. ZZZ, at 9.) In the next sentence, IFC describes Carrera's "country risk" concerns:

> "Carrera often receives solicitations from local authorities either to finance some improvement of the common grounds of the town in which Giavoni is located, Khujand, or to pay extraordinary tariffs or taxes. For illustration, in 2000 the Mayor of Khujand disconnected the electricity from the Giavoni factory as Carrera refused to pay a new tax imposed solely on Giavoni. Carrera ceased operations with the intention of leaving Tajikistan and sent over 1,000 workers home. These workers demonstrated in front of the Mayor's office making the authorities realize that Giavoni was effectively the largest and best payer in town. After two weeks Carrera resumed operations at Giavoni, though carefully limiting from then on its reliance on Giavoni deliveries. In early 2002, GoT[6] ordered the transfer of two of the top Giavoni managers, trained by Carrera, to another textile plant across the country for one month, which *significantly impaired Giavoni's operations*."
>
> (Def. Ex. ZZZ, at 9-10) (emphasis added).

[6] IFC documents sometimes refer to the Government of Tajikistan as the "GoT."

Accordingly, the Court finds that Carrera was concerned about arbitrary tariffs and taxes, the government's interference with its labor force (including its managers), and Giavoni's ability to remain operational in the face of government hostility and inspections. The Court also finds that Carrera made its concerns known to IFC.

While Carrera made clear to IFC that its concerns extended beyond nationalization, internally IFC noted its desire that the put be:

> "limited to waiving [Carrera's] obligation with the occurrence of expropriatory events such as nationalization, seizure, expropriation and similar events taking the assets and shares of Giavoni, provided that such expropriatory event, arises from circumstances beyond the control of Giavoni…"
>
> (Def. Ex. ZZZ, at 15.)

On September 6, 2002, Spagnoletto sent Jacob another Term Sheet. (Pl. Ex. 22.) The September draft also discussed a put option, but did not include an expropriatory event exception limiting IFC's right to exit the investment. *Id.* Again, Carrera objected. On September 18, 2002, Jacob returned a draft that limited IFC's ability to "hold Carrera USA, Carrera S.p.A. or Giavoni responsible for any political intervention which could cause a disruption of Giavoni's operations." (Pl. Ex. 24, at IFC-C00007999.) Spagnoletto testified that he rejected this language, and that after this exchange the parties moved on to negotiate full agreements. (Tr. 234:5-17.)

V. The Put Option Agreement

A. The Parties' Drafts

Following the exchange of term sheets, IFC and Carrera traded several drafts of the Put Agreement on October, November, and December of 2002. (*See* Pl. Exs. 32, 36, 40, 42, 43.)

First, Spagnoletto sent Jacob a draft Put Agreement on October 24, 2002, which included a provision titled "Section 2.02. Expropriatory Event." (Pl. Ex. 32, at 08283.) The clause stated that Carrera would have no obligation to pay IFC "any amount of the Put Price if an Expropriatory Event occurs, defined for purposes hereof as any law, event, action or failure to act by any Authority which has the effect of changing ownership or control of the Company . . ." *Id.* Section 2.02 also provided that *even if* an Expropriatory Event occurred, Carrera would be forced to pay the Put Price if (i) the Expropriatory Event consisted of a lawful, nondiscriminatory act of the Tajik Government, (ii) the event was permitted under any agreement with the Tajik Government, or (iii) either Carrera or Giavoni acted negligently or failed to take all reasonable measures to prevent the event or mitigate the event's effects. *Id.* at 08284.

IFC's witness Maria Virginia Schiffino testified that she was employed by IFC as a legal intern for five months in 2002, and worked on "drafting and negotiating some of the documents in connection with the [Giavoni] transaction." (Tr. 838:26-839:2.) Schiffino explained that IFC was "creating an exception to the exception, and further narrowing down the clause … to further limit the circumstances under which Carrera would have been

exonerated from paying IFC under the Put." (Tr. 849:2-6.) Carrera made several comments to the documents it received on October 24, but none of the comments concerned Section 2.02. (Tr. 239:4-16.)

On November 7, 2002, Spagnoletto sent Carrera an updated draft that included only a slight modification to the Expropriatory Event clause. (Pl. Ex. 36, at 08381.) The new draft deleted the clause that required Carrera to pay the Put Price if an Expropriatory Event occurred that was "*not for the purpose of* expropriation, requisition, confiscation, nationalization, or the like." *Id.* (emphasis added).

On November 12, 2002 and December 3, 2002, Spagnoletto sent Carrera updated drafts, which included additional conditions to be satisfied before Carrera could avail itself of the Expropriatory Event exception to its obligations to pay the Put Price. (Pl. Ex. 40, at 08592; Pl. Ex. 43, at 08740.) The additional language provided that Carrera had to fulfill certain conditions "to IFC's satisfaction," or it would be required to pay the Put Price despite the occurrence of an Expropriatory Event. (Pl. Ex. 40, at 08592.) Carrera had to satisfy IFC that (i) it had not directly or indirectly caused the Expropriatory Event, (ii) it had fully complied with its legal and contractual obligations, and (iii) it had exercised due care to avoid an Expropriatory Event and to mitigate its effects. (Pl. Ex. 43, at 8740.) Schiffino testified that she inserted these changes to limit the circumstances under which Carrera would be excused from paying the put. (Tr. 851:6-11.) When asked what she meant by "to IFC's satisfaction," Schiffino replied that "there needed to be clear tangible, unequivocal evidence of the fact that Carrera had not otherwise caused or violated any law

to lead to the expropriatory event." (Tr. 851: 18-23.) According to Schiffino, Carrera did not send any comments or seek to make changes to these clauses. (Tr. 852:25-853:2.)

B. The Executed Expropriatory Event Clause

On February 28, 2003, IFC, Carrera, and Giavoni entered into the Put Agreement as well as a Subscription Agreement memorializing the deal. (Pl. Ex. 49; Pl. Ex. 50.) The executed Put Agreement contained the Put Option clause that had been included in the December 2002 draft:

> Section 2.02. Expropriatory Event. Notwithstanding anything herein, the Sponsors shall have no obligation to pay to IFC any amount of the Put Price if an Expropriatory Event occurs, defined for the purposes hereof as any law, event, action or failure to act by any Authority *which has the effect of changing ownership or control of the Company*, such as:
>
> > (a) any condemnation, nationalization, seizure or other expropriation by any Authority of all or substantial part of the assets of Javoni, its business or operations or its quota capital or any action taken for its dissolution *or any action that would prevent it or its officers from carrying on all or a substantial part of its business or operations*; or
> >
> > (b) any assumption of custody or control by any Authority of all or a substantial part of Javoni's assets, its business operations or its quota capital;

(Pl. Ex. 49, § 2.02) (emphasis added).

The Agreement provides that "[Carrera] shall have no obligation to pay to IFC any amount of the Put Price if an Expropriatory Event occurs, defined for purposes hereof as any law, event, action or failure to act by an Authority which has the effect of changing

ownership or control of the Company." (Pl. Ex. 49 § 2.02.) "Authority" is defined in the Subscription Agreement – the definitions of which are incorporated by reference in the Put Agreement – as:

> any national, supranational, regional or local government, or governmental, administrative or judicial department, commission, authority, tribunal, agency or entity, or any person that exercises the function of the central bank, whether or not government owned and howsoever constituted or called.
>
> (Pl. Ex. 50, at 04905.)

The Put Agreement provides a non-exhaustive list of possible Expropriatory Events, including "condemnation, nationalization, seizure or other expropriation by any Authority of all or a substantial part of the assets of Javoni, its business or operations or its quota capital or any action taken for its dissolution or *any action that would prevent it or its officers from carrying on all or a substantial part of its business or operations*." (Pl. Ex. 49, § 2.02(a)) (emphasis added). The Put Agreement also provides that "any assumption of custody or control by any Authority of all or a substantial part of Javoni's assets, its business operations or its quota capital" would constitute an Expropriatory Event. (Pl. Ex. 49, § 2.02(b).)

Next, the Put Agreement limited the Expropriatory Event clause. Carrera would only be exempt from paying the Put Price:

> provided that the Sponsors and the Company shall have met the following conditions *to IFC's satisfaction*:
>
> > (i) the Expropriatory Event has not been initiated or otherwise caused directly or indirectly by an act or omission by either of the Sponsors, the Company or any of its Affiliates or Subsidiaries;

> (ii) the Company, the Sponsors and any Affiliate or Subsidiary of either of the Sponsors have complied with their respective obligations under any applicable law, rule, regulation, decrees or orders of, and contracts and agreements, if any, with any Authority;
>
> (iii) the Company, the Sponsors and their respective Affiliates and Subsidiaries have taken all proper precaution, exercised due care and taken all reasonable alternative measures to avoid the existence of an Expropriatory Event and have made all reasonable efforts to mitigate the effect of such Expropriatory Event.

(Pl. Ex. 49, § 2.02) (emphasis added).

Like the drafts, the executed "satisfaction" clause required that Carrera satisfy IFC that (i) Carrera had not directly or indirectly caused the Expropriatory Event, (ii) it had fully complied with their legal and contractual obligations to the Tajik Government, and (iii) it had exercised due care to avoid an Expropriatory Event and to mitigate its effects. *Id.*

Finally, Section 2.02 contained a clause further limiting the circumstances under which Carrera would be exempt from paying the Put Price:

> Notwithstanding any of the foregoing, an Expropriatory Event shall be deemed not to be an Expropriatory Event if:
>
> (i) such event consists of a law, rule, regulation, decree or order of the Government of the Country which: (i) is permitted by the Constitution of the Country; (ii) is not discriminatory, arbitrary or capricious; (iii) is based on a reasonable classification of the entities to which it applies; and (iv) does not violate generally accepted international law principles;
>
> (ii) such event was permitted under the terms of any contract or agreement between the Government of the Country and any of Javoni, Carrera USA and/or Carrera SpA; or

> (iii) none of Javoni, Carrera USA or Carrera SpA exercised due care and none of them took reasonable precautions and reasonable alternative measures to avoid the existence of such event and none of them made reasonable efforts to mitigate the effect of such event.

(Pl. Ex. 49, § 2.02.)

C. IFC's Investment in Giavoni

IFC agreed to invest $3 million in exchange for a 6.7% share of Giavoni's equity. (Stip. ¶ 12.) At the time, Giavoni's capital was divided between three quota-holders, with Carrera holding 54.5%, Abreshim O.J.S.C.[7] holding 37.2%, and Sano S.A. holding 8.3%. (Stip. ¶ 13.) Before the funds were disbursed, Carrera was required to fulfill certain conditions precedent under the Subscription Agreement. (Stip. ¶ 27.) Among other things, Carrera had to arrange for an internationally recognized public accounting firm to serve as Giavoni's auditors, and provide evidence of insurance coverage for Giavoni. *Id.* Carrera obtained a temporary waiver of these conditions, and IFC disbursed the full $3 million investment to Giavoni's account on June 30, 2003. (Stip. ¶¶ 28-29.)

[7] Although Abreshim is referred to as a "Abreshim O.J.S.C." in the parties' Stipulation of Facts, throughout trial and in other documents the same entity was referred to as "Abreshim S.A." (*See* Tr. 162:2-7; Def. Ex. F. at 644.)

VI. Carrera's Issues in Tajikistan

Following IFC's investment, Giavoni was subjected to several hostile actions by Tajikistan's Government. Defendants argue that these events constituted Expropriatory Events that excused Carrera's obligation to pay the Put Price.

A. Sale of Abreshim to HighRock

In March 2004, Spagnoletto was informed by Jacob that the Tajik Government sold its share of Abreshim to a private entity called HighRock Property Holdings ("HighRock"). (Def. Ex. FF, at 12330.) HighRock is a Cypriot company operated by Ukrainian citizens. (Stip. ¶ 48.) HighRock obtained a 52% controlling interest in Abreshim, as evidenced by a share certificate provided to IFC. (Pl. Ex. 123, at 04443.) Through Abreshim, HighRock became the indirect owner of 37.2% of Giavoni's outstanding capital. (Def. Ex. FF, at 12330.)

Two years earlier, during their negotiations, Carrera and IFC had collaborated on a letter warning the World Bank that the ongoing Abreshim privatization process was not being conducted "in line with the guidelines on transparency and corporate governance, promoted by the World Bank." (Def. Ex. IIII, at 08877.) IFC acknowledged that HighRock was "a Russian firm of little reputation" and the privatization process was "non-transparent." (Def. Ex. FF, at 12330.) In 2003, the World Bank intervened and temporarily stopped the sale of the government's capital in Abreshim. *Id.* However, in March 2004, the local authorities held an auction where HighRock purchased the Abreshim shares. (Def.

Ex. KKK, at 14268.) IFC e-mails reveal they had several concerns about the sale, such as: (i) the lack of advertisements and publicity of the auction, which resulted in HighRock being the only bidder; (ii) the cancellation of the auction at 8:00 a.m. and its reinstatement at 11:00 a.m.; (iii) the authorization of the sale when only one bidder was present; (iv) the absence of due diligence on HighRock, which Spagnoletto noted "[was] internationally recognized as being part of one of the largest criminal organizations in the world, (which could have been [revealed] with a simple internet search)"; and (v) the undervaluation of Abreshim's assets, which compromised the value of Carrera and IFC's investments in Giavoni. *Id.*

Around the time of the sale, Carrera informed IFC that HighRock was harassing Giavoni. (Stip. ¶ 47.) In July 2004, Gorton De Mond spoke with Jacob and requested documents connecting HighRock to organized crime. (Tr. 572:24-573:8.) Jacob responded on August 1, 2004, with an e-mail that included documents regarding HighRock's criminal activities. (Def. Ex. DDDD.) The e-mail states that it included documents from the FBI, the United Nations, Jane's Intelligence Digest, and Radio Free Europe, and discussed HighRock's Managing Director and his involvement with criminal organizations. *Id.* at 12418. However, the only attachment in the record is an article published by Jane's Intelligence Digest linking HighRock to Russian and Ukrainian crime syndicates. *Id.* at 12456-61.

IFC took the position that Carrera's response regarding HighRock's criminal links was not satisfactory. In July 2005, IFC mailed Jacob a letter requesting that Carrera

"provide IFC with as much detailed information as possible on the ownership structure of Highrock and on the reputation of its shareholders." (Pl. Ex. 123, at 04443.) Carrera again provided similar information to what was provided in August 2004 linking HighRock to organized crime. (Tr. 575:1-5.) At trial, Spagnoletto testified that he was "not in a position to validate" the information provided by Carrera; but in March 2004, Spagnoletto had conceded that HighRock's criminal connections could easily be uncovered "with a simple internet search." (Def. Ex. KK, at 14268; Tr. 324:2-5.) Accordingly, the Court does not find credible Spagnoletto's statements that IFC genuinely needed more information before it could validate that HighRock was indeed connected to organized crime.

Meanwhile, Carrera's opposition to HighRock resulted in negative effects on Giavoni's business. In a Project Supervision Report prepared by IFC in March of 2005, IFC acknowledged that the Tajik Government was "putting pressure on Carrera not to interfere with the Abreshim privatization, and is doing so by causing significant border delays and charging higher VATs on Giavoni shipments." (Def. Ex. YY, at 14217.) The Tajik Government also removed key employees from Giavoni's plant and transferred them to Gulistan, a HighRock-owned company. (Tr. 499:12-500:3; 506:10-25.) These workers included Giavoni's technical director and manufacturing director. *Id.* According to I. Tacchella, the workers were personally removed by the Tajik Minister of Industry, although he later testified that they sometimes pretended "they were out sick." (Tr. 500:5-9; 506:21-26.) In addition to removing several employees, HighRock stole materials from the Giavoni plant, including needles, machinery, paper models, and technical files for

production. (Tr. 505:5-10; Jacob Dep. Tr. 316:13-317:4.) Because of HighRock's involvement with Giavoni, the Tajik Minister of Industry also forced I. Tacchella travel to Gulistan to assist with its operations (Tr. 501:5-503:8.) The Minister of Industry threatened Giavoni's operations if Mr. Tacchella refused to assist Gulistan. *Id.*

In 2005, IFC was provided with Giavoni's financial results for the quarter ending September 30, 2004. (Def. Ex. YY, at 14215.) IFC noted that Giavoni's revenue was $6 million for the first three quarters of 2014, but the company registered a 3% net loss due to supplementary custom duties, local taxes, and $235,688 in replacement costs for missing spare parts as well as charges related to border delays. *Id.* IFC also noted that although Giavoni was hoping to produce 2 million garments per year, it was only producing 50% of that "until the situation with the Government normalizes." *Id.*

B. Value Added Taxes

From 2004 to 2005, the Tajik Government withheld or failed to refund significant amounts of reimbursable Value Added Taxes ("VAT") to Giavoni. VAT refund issues were common for all companies in developing countries. (De Mond Dep. Tr. 80:4-8). But documents prepared by Peter Dinsdale – IFC's Principal Industry Specialist – reveal that "[Giavoni had] not been receiving [VAT] rebates and this [had] a serious negative effect upon the firm's working capital to the extent that the local management [was] concerned they [would] have to stop operations in the coming months." (Def. Ex. LLL, at 2.)

Carrera sought IFC's intercession with the Government of Tajikistan in the hopes that IFC's involvement would result in a VAT refund. De Mond and other IFC colleagues met with the Tajik Ministries of Finance and Revenue in May 2005 "regarding the Giavoni issues re. taxation, vat refund and the current vat payments." (Pl. Ex. 120, at 05310.) As a result of the meetings, the Tajik Government issued Decree #175 on May 10, 2005, authorizing refunds of outstanding VAT payments to foreign investors. (Def. Ex. ZZ.) Even after this decree, however, Giavoni's VAT was not refunded. (Tr. 703:16-23.)

By November 2005, Jacob informed IFC that the Tajik Government continued to withhold $1.2 million in VAT due to Giavoni. (Def. Ex. AAA, at 00985.) Following a trip to Tajikistan in November 2005, Dinsdale e-mailed De Mond to inform him about Giavoni's operations. (Def. Ex. KKK.) Dinsdale noted that Giavoni had "severe problems" obtaining VAT refunds, and with the amounts outstanding rapidly accumulating, "there [would] come a point where they run out of working capital and will stop [operating]." *Id.* The liquidity shortage also caused production delays and, as discussed below, Carrera was forced to extend loans to supplement Giavoni's working capital and keep it afloat. (Tr. 508:12-26.)

C. Additional Taxes and Inspections

In addition to the Tajik Government's failure to refund Giavoni's VAT, the Government imposed illegal customs duties on Giavoni throughout 2004 and 2006. On October 22, 2004, Spagnoletto sent a "Summary of Giavoni Issues" to De Mond and

several other colleagues at the IFC. (Def. Ex. UU.) As of that date, Giavoni had challenged the Ministry of Finance's imposition of a 15% customs duty on Giavoni accessories (buttons, zippers, etc.), and the High Court had overruled the Ministry of Finance's calculation and imposed a 5% duty. (*Id.* at 14105.) Despite the High Court's ruling, the "Head of Customs" in Khujand continued to request a 15% payment, holding Giavoni's accessories hostage. *Id.* Spagnoletto also noted a $220,000 "supplemental income tax" imposed by the Tajik Government. *Id.* at 14106. The supplemental income tax consisted of five separate "issues" or categories. *Id.* Giavoni appealed the supplemental tax to the Minister of Industry, who submitted the issue to the Parliament's "Committee of Economy-Taxes-Budget and Finance." *Id.* That Committee annulled the supplemental tax. However, the Tajik High Court informed Giavoni that it would not recognize the Committee's ruling unless it was "deliberated by the President of Parliament." *Id.*

IFC also obtained an independent legal analysis of Giavoni's tax liability. (Def. Ex. XX-A.) Its report concluded that Giavoni's interpretation of the Tax laws was correct on at least three of the five tax issues. (Pl. Ex. 113, at 06681.) In a March 18, 2005 e-mail, IFC indicated it needed to know whether Giavoni intended to pay the taxes for the two points the analysis determined in favor of the Tajik Government, because De Mond planned to meet with the Government to advocate on Giavoni's behalf. (Pl. Ex. 115, at 06643.) Spagnoletto also requested that I. Tacchella attend the meetings. *Id.* On March 19, Spagnoletto informed De Mond that Jacob disagreed with IFC's legal assessment, and that Giavoni would not be paying any portion of the disputed taxes. (Pl. Ex. 116, at 14129.) De

Mond complained that there was no "concrete and detailed feedback from Giavoni" on its tax liability and suggested that they postpone the meeting with the Tajik authorities until IFC and Carrera reached a consensus. *Id.*

In addition to customs and supplemental taxes, Giavoni also complained of excessive tax inspections that it believed were a result of its opposition to HighRock. Tax inspections were common in Tajikistan. (Tr. 630:22-631:22.) Periodically, a tax inspector would visit a company's plant and demand back-up information to verify the tax documents the company had provided. *Id.* De Mond testified that it would be "common" for a company to be subjected to 12 tax inspections a year, and agreed that hundreds would be excessive. *Id.* Jacob testified that "40 or some odd tax inspectors" visited the Giavoni plant. (Jacob Dep. 317:5-9.) At trial, I. Tacchella estimated that approximately 380 to 400 tax inspections took place between 2004 and 2006. (Tr. 514:4-13.) Jacob notified IFC about the inspections, and De Mond acknowledged at trial that he was aware of the Tajik Government's interference with Giavoni's plant. (Tr. 649:21-650:7.)

In June 2005, IFC met with the Ministry of Revenue along with Giavoni's accountant and attorney. (Tr. 594:7-595:15.) Although Carrera was invited to attend, its representatives were not at the meeting. *Id.* De Mond testified that the Ministry allowed Giavoni and IFC to prepare a legal opinion supporting their interpretation of the tax laws, which would be used to attempt to resolve the dispute. (Tr. 595:26-596:6.) According to De Mond, neither Giavoni nor Carrera submitted such analysis, which prevented IFC from meeting with the Tajik Government. (Tr. 596:12-23.) This was "frustrat[ing]" because it

stalled the process, and De Mond testified that he "was not satisfied" with how Giavoni and Carrera had approached the tax, customs, and VAT issues. *Id.*

D. Labor Interruptions

In addition to the management-level workers removed by the Tajik Government, I. Tacchella also testified that the Governor of Khujand forced many of Giavoni's employees to work in the annual cotton harvest. (Tr. 512:7-23.) The workers were transferred to the cotton fields but were paid by Giavoni for their labor. *Id.* Neither the Tajik Government nor the owners of the cotton fields compensated Giavoni for the labor force they supplied. (Tr. 512:24-513:2.) I. Tacchella also testified that the Government threatened to withhold Giavoni's cotton supply if Giavoni did not provide labor for the harvest. (Tr. 512:8-17.)

VII. IFC's Complaints About Carrera's Management of Giavoni

As noted above, Carrera issued several loans to Giavoni to keep it afloat while it struggled with liquidity. (Tr. 508:12-26.) Jacob testified that Carrera gave Giavoni an additional $6.2 million to ensure that the company remained operational. (Jacob Dep. Tr. 218:4-25.) Jacob also testified that Carrera hired attorneys and involved local and national government officials, including the U.S. Ambassador and officials at the Tajik Embassies, to dissuade the Tajik Government from interfering with Giavoni's operations. (Jacob Dep. Tr. 322:2-19.)

Despite these efforts, IFC complains that Carrera did not do enough. For example, with regards to the supplemental tariffs imposed on Giavoni, Carrera waited until October 12, 2004 to inform Spagnoletto that a hearing would take place the next day. (Tr. 270:7-23.)

IFC also complained that Carrera failed to comply with its obligation to retain "internationally recognized independent public auditors acceptable to IFC." (Pl. Ex. 49, at 285.) On September 1, 2004, IFC sent Carrera a letter outlining the outstanding obligations that Carrera had not fulfilled since the investment. (Pl. Ex. 101.) IFC noted that "June 30, 2004 mark[ed] the first full year of IFC's investment in Giavoni," and sought information about pending items including insurance for the Giavoni plant and the appointment of international auditors. *Id.* On December 10, 2004, IFC again requested information from Carrera, and provided suggestions for financial auditors and insurance providers, which Carrera had still not retained. (Pl. Ex. 111.) On June 9, 2005, IFC again wrote Carrera to discuss "outstanding items," including the insurance and accounting requirements. (Pl. Ex. 119.) In July and August of 2005, IFC also requested documentary evidence to substantiate Giavoni's complaints about the fiscal disputes with the Government. (Pl. Exs. 123; 127.)

But Spagnoletto acknowledged that the auditors issue had existed since the beginning of the investment in 2003. (Tr. 405:5-16.) Spagnoletto admitted that IFC's document requests "were really an attempt by IFC to start building a record to support their exercise of the put option." (Tr. 315:3-5.) IFC had begun to consider the Put Option in 2005 even as it continued to demand documents from Carrera. (Tr. 315:6-7; 403:17-23.)

Accordingly, the Court finds that IFC's continued requests throughout this time were a pretextual attempt to build a documentary record that would support its exercise of the put option.

VIII. Carrera's Purchase of Abreshim's Shares in Giavoni

Throughout 2005, Carrera secretly negotiated with HighRock to buy out Abreshim's ownership of Giavoni. (Tr. 575:23-576:16.) In September 2005, Jacob e-mailed IFC seeking its signature authorizing Carrera's purchase of Abreshim's shares in Giavoni. (Pl. Ex. 128.) That was the first time IFC learned of Carrera's potential purchase of Abreshim's shares. (Tr. 576:13-23.) De Mond expressed discontent at the fact that IFC was kept out of the loop during the negotiations, but IFC promptly approved the transaction. (Tr. 598:11-18; Pl. Ex. 129.) On March 20, 2006, Jacob informed IFC that the transaction was completed and Carrera had purchased Abreshim's (and, thus, HighRock's) shares in Giavoni. (Stip. ¶ 49.) I. Tacchella testified that the transaction cost Carrera $4,050,000. (Tr. 497:5-498:10.)

IX. IFC's Exercise of the Put Option

Although IFC began to consider exercising the Put Option to exit its investment in 2005, it did not inform Carrera until 2006. (Tr. 403:17-404:18.) IFC exercised its Put Option by delivering the Put Notice to Carrera on October 10, 2006. (Stip. ¶ 30; Pl. Ex. 154.) The parties have stipulated that the Notice complied with the Put Agreement and the

Put Price was properly calculated. (Stip. ¶¶ 30-34.) Carrera informed IFC that it did not have the right to exercise the Put Option. (Stip. ¶ 33.) Carrera refused to pay the Put Price due December 11, 2006, and IFC thereafter withdrew funds – totaling $422,000.96 – from the Escrow Account on February 2, 2007. (Stip. ¶ 35.)[8]

The Parties also stipulated to the mathematical calculation of IFC's damages under the Put Agreement as of the first day of trial, July 7, 2015.

CONCLUSIONS OF LAW

I. Plaintiff's Breach of Contract Claim

IFC's sole claim is for breach of contract. IFC therefore had to prove the existence of a contract, its performance thereunder, Carrera's breach, and resulting damages. *Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dep't 2010). There is no dispute that the parties had an agreement and that Carrera refused to pay the Put Price upon IFC's demand. The only remaining issue is whether an "Expropriatory Event" occurred that excused Carrera's obligation to pay the Put Price, pursuant to Section 2.02

[8] In its Summary Judgment decision, this Court granted "International Finance's motion for summary judgment on its second cause of action [regarding the Escrow Agreement] … with respect to liability only," and ordered a hearing on the issue of damages before a special referee. (Doc. No. 174, at 15.) At the conclusion of the trial, the parties had not yet referred the Escrow Agreement damages issue to a referee. This remains to be done by the parties. (Defs.' Proposed Findings of Fact ("PFOF") ¶ 133.)

of the Put Agreement. At the summary judgment stage, this Court determined that the term "Expropriatory Event" is ambiguous.[9] (Doc. No. 174, at 9-10.)

II. Interpreting Ambiguous Contractual Terms

When interpreting a contract, the court's construction should give fair meaning to the language upon which the parties agreed. *Fernandez v. Price*, 63 A.D.3d 672, 675 (2d Dep't 2009) (citing *W.W.W. Assoc., Inc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990)). The Court's interpretation must not render any contractual language superfluous. *Biotronik A.G. v. Conor Medsystems Ireland, Ltd.*, 117 A.D.3d 551, 553 (1st Dep't 2014). Where – as here – a term is ambiguous, the Court may also consider extrinsic or parol evidence to determine the parties' intent. *Fernandez*, 63 A.D.3d at 675.

The Court may consider "evidence of conversations, negotiations and agreements made prior to or contemporaneous with" the execution of the agreement. *67 Wall St. Co. v. Franklin Nat. Bank*, 37 N.Y.2d 245, 248 (1975). The Court may consider extrinsic evidence about the purpose or object of the specific provision at issue. *Cromwell Towers Redevelopment Co. v. City of Yonkers*, 41 N.Y.2d 1, 6 (1976); *Massachusetts Mut. Life Ins. Co. v. Thorpe*, 260 A.D.2d 706, 709 (3d Dep't 1999). The parties' conduct subsequent to

[9] Neither party appealed the Court's summary judgment decision. Both parties now argue that the term "Expropriatory Event" is ambiguous and that extrinsic evidence should be employed to discern its intended meaning.

execution may also be considered as evidence of their intent.[10] *Innophos, Inc. v. Rhodia, S.A.*, 38 A.D.3d 368, 376 (1st Dep't 2007), *aff'd*, 10 N.Y.3d 25 (2008). Additionally, the Court may consider industry custom and trade usage to explain an ambiguity. *Reuters Ltd. v. Dow Jones Telerate, Inc.*, 231 A.D.2d 337, 343 (1st Dep't 1997).

However, the parties' *shared* intent is paramount. *Bolt Elec., Inc. v City of New York*, 223 F.3d 146, 150 (2d Cir. 2000) (applying New York law). Accordingly, the Court cannot give weight to one party's "uncommunicated subjective intent." *Nycal Corp. v. Inoco PLC*, 988 F. Supp. 296, 302 (S.D.N.Y. 1997) (applying New York law), *aff'd*, 166 F.3d 1201 (2d Cir. 1998). Where a term is ambiguous it should not be interpreted according to one party's internal discussions during the negotiation, unless there is evidence that those communications were shared with its adversary. *Baum v. Rockland Community Coll.*, 299 F.Supp.2d 172, 175 n.1 (S.D.N.Y. 2003) (citing *Wells v. Shearson Lehman/Am. Express*, 72 N.Y.2d 11, 24 (1988)); *see also Kenavan v. Empire Blue Cross and Blue Shield*, 248 A.D.2d 42, 48 (1st Dep't 1998) ("Thus, even if Empire intended *not* to cover such Gramm-Rudman deductions, this was a subjective intent that was not made known to the policyholders . . .").

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[10] Indeed, one court recognized that "[t]here is no surer way to find out what parties meant, than to see what they have done." *Brooklyn Life Ins. Co. of New York v. Dutcher*, 95 U.S. 269, 273 (1877).

III. Whether International Law Applies to Section 2.02

IFC argues that principles of international law are irrelevant to the interpretation of "Expropriatory Event." IFC notes that there is no extrinsic evidence that supports Carrera's contention that international law should apply to the Agreement, and that the Put Agreement explicitly designates New York law as the controlling authority. (Pl. Ex. 49 § 6.04.) Carrera counters that international law is relevant because the Court may consider "industry custom and usage" to determine the meaning of ambiguous terms. For the following reasons, international law is irrelevant here.

First, this Court previously denied IFC's motion to strike the expert testimony regarding "international law of expropriation and indirect expropriation." (Doc. No. 174, at 21.) Carrera argues that the Court has therefore deemed relevant the expert testimony regarding international law. However, when the Court denied IFC's motion to strike the expert testimony, it made no determination about the application of international law principles to the parties' agreement, and merely stated that although the testimony was untimely, IFC would not be prejudiced by the delay. *Id.* at 20.

Carrera next argues that Section 2.02 mirrors several concepts of international expropriation law, and that this "borrowing" evidences the parties' intent that international law apply to the clause. Certainly, when industry custom is widespread, there may be a presumption that the parties intended its incorporation by implication. *Jobim v. Songs of Universal, Inc.*, 732 F. Supp. 2d 407, 417 (S.D.N.Y. 2010) (applying New York law). But as the party offering evidence of industry custom, Carrera had to show either that the other

party was actually aware of the usage, or that the existence of such usage is "so notorious that a person of ordinary prudence in the exercise of reasonable care would be aware of it." *Reuters Ltd. v. Dow Jones Telerate, Inc.*, 231 A.D.2d 337, 343 (1st Dep't 1997). Carrera adduced no evidence demonstrating that international law was intended to apply. It also offered no evidence that international law principles are so "notorious" in IFC investment contracts, or international investment contracts, that any person of ordinary care would be aware of their application. *Id.* Carrera argues only that international law is relevant because the agreement parallels some concepts of international law. But that argument just begs the question.

Finally, only a subpart of Section 2.02 actually references "generally accepted international law principles," demonstrating that if the parties so desired, they were capable of invoking international law and applying it to the *entire* Expropriatory Event clause. (Pl. Ex. 49, § 2.02.) Instead, the parties agreed that New York law would govern the entire Put Agreement, further militating against the application of international law. (Pl. Ex. 49, § 6.04(a).) Accordingly, the Court will not consider the parties' expert testimony regarding international law principles to discern the meaning of Expropriatory Event.

IV. The Meaning of "Expropriatory Event"

IFC argues that the Expropriatory Event clause was intended to provide protection to Carrera only for "extreme" or "massive" events that would "essentially remove the ownership or control" of Carrera over Giavoni. (Pl. Reply. Br. at 3-4.) Carrera counters

that the extrinsic evidence established that the parties intended the Expropriatory Event clause to cover far more than a "complete" takeover or nationalization of Giavoni's assets. The Court finds that the term "Expropriatory Event" was intended to be broad.

First, the Court rejects IFC's argument that an Expropriatory Event could only occur if Carrera was deprived of its *entire* investment, because that interpretation is contradicted by Section 2.02's explicit language stating that an Expropriatory Event may occur if all "*or a substantial part*" of Giavoni's business is affected. (Pl. Ex. 49, § 2.02) (emphasis added). As stated in the summary judgment decision, the inclusion of the language "which has the effect of" in the definition of Expropriatory Event also shows an intent to expand the meaning of the term "beyond a literal change in ownership or control." (Doc. No. 174, at 9.)

IFC also argues that the First Department has held – as a matter of law – that government actions cannot constitute an Expropriatory Event unless they are "analogous to the passing of a new law by a foreign legislative body or the nationalization of a private company by the executive." *CT Inv. Mgmt. Co., LLC v. Chartis Specialty Ins. Co.*, 130 A.D.3d 1, 7-8 (1st Dep't 2015). But IFC's mischaracterizes *CT Investment* – which was a fact-bound decision – and its reliance thereon is misguided. That case involved a political risk insurance policy obtained by the plaintiff (a lender) in connection with loans made to borrowers in Mexico. *Id.* at 3. The policy included a "bankruptcy" exclusion preventing the plaintiff from recovering for losses caused by "insolvency, bankruptcy or financial default." *Id.* at 5. The court concluded that the bankruptcy exclusion precluded the lender

from recovering from the insurer because the borrower initiated a voluntary insolvency proceeding (even though it had not yet been declared "bankrupt"). *Id.* at 7.

If the bankruptcy exclusion had not applied, the policy at issue in *CT Investment* would have covered losses under an "Expropriatory Act" clause, which listed the specific acts that would entitle the plaintiff to insurance payments. *Id.* at 4. Unlike the broad clause in the present matter, the policy in *CT* covered a comparatively narrow set of acts, including "expropriation, confiscation, nationalization, requisition, or sequestration by law, order, military or administrative action." *Id.* Additionally, the policy explicitly required that if an alleged expropriatory act complied with local law, "such local law [had] been *materially altered* to permit the Expropriatory Act . . ." *Id.* (emphasis in original). Accordingly, the clause at issue in *CT* was much narrower than the clause in IFC and Carrera's Put Agreement.

When the borrower in *CT* filed for bankruptcy, the Mexican court issued an order imposing a stay and restricting the plaintiff's access to the borrower's accounts. The First Department rejected Plaintiff's argument that the stay constituted an "Expropriatory Act" *as defined by that specific policy*. *Id.* at 7-8. The policy at issue required that such act "materially alter" local law or violate international law, and the court determined that the bankruptcy stay "was not analogous to the passing of a new law by a foreign legislative body or the nationalization of a private company by the executive." *Id.* Thus, the *CT* court's ruling is limited to the interpretation of the *specific* Expropriatory Act clause at issue in

that case; it is not – as IFC contends – applicable to any agreement that uses the word "Expropriation."

Additionally, the contract at issue in *CT Investment* was unambiguous and the First Department discerned the parties' intent solely from the language of the agreement. *Id.* at 7. Here, neither party disputes that extrinsic evidence is necessary to determine the meaning of "Expropriatory Event." Moreover, the Court has determined that Section 2.02's language was intended to cover more than just nationalization. Accordingly, the Court rejects IFC's contention that *CT Investment* is applicable here.

V. The Extrinsic Evidence Supports a Broad Interpretation of Section 2.02

The Court concludes that the parol evidence shows that the parties intended for "Expropriatory Event" to cover a broad range of government actions, including economic interference with Giavoni's operations.

A. The Drafts of the Put Agreement

The drafting history of the Put Agreement shows that the parties intended "Expropriatory Event" to apply to more than complete nationalization. In March 2002, Carrera promptly rejected IFC's request for an unconditional put option. (Pl. Ex. 12) Months later, IFC submitted a term sheet that included a limit on IFC's ability to exercise the Put Option where "defined *country risk* has materialized." (Def. Ex. G.) (emphasis

added). By IFC's own admission, "country risk" encompassed general country issues and not just the risk of nationalization. (Tr. 229:21-24.)

In October 2002, IFC submitted a draft Put Option Agreement that included Section 2.02 and several exceptions. In November, an updated draft removed the language that required that a government act be "*for the purpose of* expropriation, requisition, confiscation, nationalization, or the like," broadening the types of events that would be covered by the clause. (Pl. Ex. 36, at 08381) (emphasis added). This change removed Carrera's burden to prove that the Tajik Government *intended* to cause an expropriatory event.

In subsequent drafts, IFC added a clause to Section 2.02 that required that Carrera meet certain conditions "to IFC's satisfaction." (Pl. Ex. 40, at 08592; Pl. Ex. 43, at 08740.) These additional conditions required Carrera to pay the Put Price *even if* an Expropriatory Event occurred. However, the conditions did not alter the fundamental definition of Expropriatory Event. Indeed, the final executed Put Agreement contained the same definition included in the November draft: "any law, event, action or failure to act by any Authority *which has the effect of* changing ownership or control of the Company." (Pl. Ex. 49 § 2.02) (emphasis added). Accordingly, the drafting history demonstrates the parties' intent to cover a broad range of Government acts that could affect Giavoni.

B. Contemporaneous Documents and Trial Testimony

Similarly, other extrinsic evidence established that "country risk" was at the forefront throughout the parties' negotiation of the Expropriatory Event clause. IFC acknowledged, in an October 2002 Memorandum, that Carrera's "country risk" concerns included the Government's thinly veiled requests for bribes, the imposition of excessive taxes, reduced access to infrastructure such as electricity, and the forced transfer of key employees to other businesses. (Def. Ex. ZZZ, at 9-10.) This document shows that IFC was keenly aware of the type of Government acts for which Carrera sought protection.

IFC correctly notes that the same memorandum later emphasizes IFC's desire that the Put Option's exclusion be limited to "nationalization, seizure, expropriation and similar events taking the assets and shares of Giavoni." *Id.* at 15. IFC argues that this portion of the document shows IFC "intended any carve-out clause to be limited to covering only extreme events." (Pl. Reply. Br. at 5.) However, there is no evidence that IFC communicated to Carrera its supposed intent that Section 2.02 cover only "extreme events." There is also no contemporaneous evidence or discussions between the parties that uses the words "extreme events," or discusses providing a limitation to the put option only for a complete nationalization of Giavoni. Thus, even if IFC internally discussed its wishes that the clause only cover extreme events, this was an uncommunicated subjective intent that was not made known to Carrera, and cannot be the basis for discerning the meaning of Expropriatory Event. *Kenavan v. Empire Blue Cross and Blue Shield*, 248 A.D.2d 42, 48 (1st Dep't 1998). Furthermore, if IFC intended only extreme events to be covered by the

Expropriation clause, it could have included a reference to "extreme" or "massive" events in the clause. But the final agreement's language supports the opposite interpretation – a broad interpretation – with the language "*which has the effect of*." (Pl. Ex. 49 § 2.02) (emphasis added).

IFC also relies on Schiffino's testimony to support the contention that the clause was intended to cover only "massive events." (Pl. Reply Br. at 11.) But Schiffino was an unlicensed recent law school graduate who worked at IFC as an intern for only five months in 2002, and left IFC months before the final Put Agreement was executed. (Tr. 853:23-856:14) She concededly did not communicate directly with Carrera, and her interpretation of the parties' intent is based solely on conjecture. *Id.* Significantly, when drafting the agreement she did not include any language indicating that the clause would cover only a "massive event." Accordingly, the Court does not give credit to her testimony that only extreme government actions, such as complete nationalization, could constitute Expropriatory Events.

Other witnesses also provided support for a broader interpretation of Section 2.02. Gianluca Tacchella testified that Carrera's bad experience in Uzbekistan guided its investment in Giavoni. (Tr. 793:9-23.) In Uzbekistan, Carrera was "obligated to close the factories, but still maintained the ownership" of the company. *Id.* Carrera therefore understood that nationalization was unlikely and was concerned about other hostile economic actions by the government. *Id.* I. Tacchella confirmed that nationalization was not a concern for Carrera. (Tr. 487:26- 488:7.) Still, IFC complains that Carrera's witnesses

either were not involved in the negotiations, or self-servingly testified that the definition of Expropriatory Event was intended to be broad. But IFC's own witnesses did not contradict Carrera's testimony. For example, Rutherford testified that by 2002, nationalization was "assumed [to be] a legacy of the past," and that Carrera would have essentially been bargaining for nothing if it only sought protection against such extremely unlikely event. (Tr. 121:20-122:8; 161:10-11.) Spagnoletto similarly testified that the reason Carrera sought the Expropriatory Event clause was because "they were concerned with undue interference, or tax, or any other issues that could be in question." (Spag. Dep. 206:18-207:13.)

C. Conclusion

For the foregoing reasons, the Court finds that the parties intended the term "Expropriatory Event" to cover a broad range of actions by the Tajik Government that had "the effect of changing ownership or control of the Company," including "any action that would prevent it or its officers from carrying on all or a substantial part of its business or operations." (Pl. Ex. 49 § 2.02.) These actions included, but were not limited to, the "country risk" from which Carrera sought IFC's protection. Accordingly, Government actions that would constitute an Expropriatory Event included the imposition of arbitrary duties, taxes, or customs holds; interference with Giavoni's labor force; requests for bribes; or any other government acts that "would prevent it or its officers from carrying on all or a substantial part of its business or operations." (Pl. Ex. 49, § 2.02.)

VI. Whether the Alleged Acts Constituted an "Expropriatory Event"

Both parties agree that only the events between the execution of the Put Agreement in February 2003 and IFC's exercise of the Option in October 2006 are relevant. (Pl. Reply Br. at 15; Defs. PFOF ¶ 65.) The Court will consider each alleged Expropriatory Event in turn.

A. The Privatization of Abreshim

First, the Court concludes that the privatization of Abreshim cannot constitute an Expropriatory Event as defined in the Put Agreement. Carrera argues that the transfer of ownership in Abreshim from the Tajik Government to HighRock constituted a "change in ownership" caused by the Tajik Government. (Defs. Br. at 28.) But this argument is specious. First, Section 2.02 requires an "action or failure to act by any Authority which has the effect of changing ownership or control *of the Company* [i.e., Giavoni]." (Pl. Ex. 49, § 2.02) (emphasis added.) Although the ownership of *Abreshim* changed when the Tajik Government privatized it, Abreshim itself continued to own 37.2% of Giavoni. Therefore, Giavoni's *direct* ownership did not change.

Even if the Court entertained Carrera's *indirect* ownership change argument, the privatization would still not constitute an Expropriatory Event. The Court must interpret Section 2.02 by reading "the entirety of the agreement in the context of the parties' relationship," rather than isolating distinct provisions. *Macy's Inc. v. Martha Stewart Living Omnimedia, Inc.*, 127 A.D.3d 48, 54 (1st Dep't 2015). It is clear from the context of the

entire agreement that the parties intended to release Carrera from the obligation to pay the Put Price only if *Carrera's* control of Giavoni was affected. A contrary ruling would absolve Carrera of the obligation to pay the Put Price if the government nationalized another Giavoni quota-holder's shares, regardless of whether Carrera's ownership in Giavoni remained unaffected. The Court cannot interpret the agreement to produce this "absurd result." *Macy's Inc.*, 127 A.D.3d at 54.

Finally, Carrera complains that HighRock's indirect ownership in Giavoni allowed it to steal "critical materials, technical files, specialized needles, and replacement parts from Javoni's factory." (Defs. Br. at 31.) But the Expropriatory Event clause makes clear that the qualifying act or omission must be caused "by an Authority," and Carrera concedes that HighRock is a private entity, not an "Authority" as defined by the Parties' agreements. (Defs. Reply Br. at 3.) Accordingly, the Court determines that the privatization of Abreshim and HighRock's involvement in Giavoni were not Expropriatory Events.[11]

[11] It is important to note, however, that Carrera believed that the Government's hostile acts discussed in the following sections (i.e., the tax issues and labor interruptions) were a result of Carrera's opposition to HighRock. Such hostile acts *by the Government* would – and indeed do – constitute an Expropriatory Event, even though their driving force may have been Carrera's conflict with HighRock.

B. Giavoni's Tax Issues

Next, the Court finds that the tax issues Giavoni faced from 2003 through 2006 amounted to an Expropriatory Event. Carrera established that the Tajik Government employed arbitrary tax dispute practices designed to "punish" taxpayers. (Pl. Ex. 113, at 06683.) IFC's own documents describe the Tajik Government's actions toward Giavoni as "systematic harassment." (Def. Ex. TT, at 04692.)

I. Tacchella testified that the failure to receive VAT refunds caused severe liquidity issues for Giavoni. (Tr. 508:12-19.) This testimony was credible. While IFC again complains that Mr. Tacchella's testimony is self-serving, IFC's own representatives and contemporaneous documents support it. IFC's representative Peter Dinsdale acknowledged – after visiting Giavoni in November 2005 – that the outstanding VAT refunds had "a serious negative effect upon the firm's working capital" and that it would soon bring Giavoni's operations to a grinding stop. (Pl. Ex. 137, at 2.) The effects were so severe that IFC's representatives met with the Tajik Ministries of Finance, and persuaded them to pass a decree authorizing foreign investors' VAT refunds. (Pl. Ex. 120, at 05310; Def. Ex. ZZ.) This is significant because IFC's October 2002 Memorandum shows that IFC understood its role as follows:

> "IFC would intervene and play the role of a neutral broker between Carrera and the Government of Tajikistan (GoT) *only in the extreme case that an expropriatory event, as specifically defined in the put option agreement, occurs without the consent and despite the due diligence of Carrera."*
>
> (Def. Ex. ZZZ, at 1) (emphasis added).

Accordingly, IFC's intervention demonstrates its understanding that the Government's actions were sufficiently severe to constitute an Expropriatory Event. *See Innophos, Inc. v. Rhodia, S.A.*, 38 A.D.3d 368, 376 (1st Dep't 2007) (the parties' post-execution conduct may be considered evidence of their intent). But even after IFC interceded on Giavoni's behalf and the Government passed the decree, the local authorities continued to withhold Giavoni's VAT refunds. (Tr. 703:20-23.) By November 2005, the Tajik Government owed Giavoni $1.2 million in VAT refund. (Def. Ex. AAA, at 00985.)

The Tajik Government also imposed additional taxes and conducted intrusive tax inspections that affected Giavoni's operations. In line with the pattern described by IFC as "systematic harassment," the Tajik Government imposed a 15% customs duty instead of the proper 5% duty. (Def. Ex. UU, at 14105.) The Government refused to release $755,000 worth of accessories from customs until Giavoni paid. *Id.* I. Tacchella testified that the liquidity issues caused by the taxes, along with the government's refusal to release Giavoni's imports from customs, caused production delays that severely affected Giavoni's ability to function. (Tr. 508:12-510:15.) During the same period, Spagnoletto reported that Giavoni was also assessed a "supplemental" income tax of $220,000. (Def. Ex. UU, at 14105.) Even IFC's independent analysis concluded that three out of the five categories of "supplemental" taxes assessed by the government were not legitimate. (Pl. Ex. 113, at 06681.)

In addition, I. Tacchella testified that between 2004 and 2006, Giavoni was subjected to approximately 400 tax inspections by the Tajik Government. (Tr. 514:4-8.)

Although IFC again argues that these statements are not credible, IFC's witness De Mond confirmed that Giavoni consistently complained about excessive tax inspections during that time. (Tr. 630:22-25.) De Mond also confirmed that hundreds of inspections would certainly be excessive, confirming that they were another Government harassment tactic. (Tr. 631:17-22.) Accordingly, the Court finds I. Tacchella's testimony about the severity of the tax inspections and their impact on Giavoni's operations credible.

For the foregoing reasons, the Court determines that the Tajik Government's tax-related actions against Giavoni constituted an Expropriatory Event under the Put Agreement. Collectively, the Government's seizure of Giavoni's imports and working capital (i.e., VAT refunds), its continued demands for additional taxes, and its excessive inspections of Giavoni's plant "prevent[ed] [Giavoni] or its officers from carrying on all or a substantial part of its business or operations." (Pl. Ex. 49, § 2.02.)

C. Labor Interruptions

The Court also determines that the Tajik Government's interferences with Giavoni's labor force exacerbated the effects of the Government's other actions and amounted to an Expropriatory Event.

In June 2005, at a meeting with IFC, Carrera discussed the Tajik Government's takeover of Giavoni's labor force. (Tr. 510:3-513:2.) The Tajik Government forced Giavoni's workers to leave the Giavoni plant to participate in the annual cotton harvest, slowing Giavoni's operations. *Id.* Giavoni continued to pay the workers for their labor, but

the Government never reimbursed or otherwise compensated the company. *Id.* Instead, the Government threatened to withhold Giavoni's cotton deliveries if they refused to provide workers for the harvest. *Id.* Collectively, the Government's hostile tax treatment and its interruptions with Giavoni's labor prevented Giavoni from "carrying on all or a substantial part of its business or operations." (Pl. Ex. 49, § 2.02.)

D. Conclusion

For the foregoing reasons, the Court determines that the Tajik Government's actions against Giavoni between 2004 and 2006 prevented Giavoni from "carrying on … a substantial part of its business or operations." (Pl. Ex. 49, § 2.02.) Accordingly, the Court concludes that an Expropriatory Event occurred, which excused Carrera's obligation to pay the Put Price when IFC demanded it in October 2006.

VII. Whether the "Satisfaction" Clauses Were Met

IFC argues that even if an Expropriatory Event occurred, Carrera failed to meet the other conditions under Section 2.02 "to IFC's satisfaction." (Pl. Br. at 40.) IFC argues that it was not satisfied by Carrera's efforts to mitigate the effects of the alleged Expropriatory Events. Additionally, IFC cites sub-clause (iii) of the third part of Section 2.02, which prevents Carrera from relying on the exception if:

> "none of Javoni, Carrera USA or Carrera SpA exercised due care and none of them took reasonable precautions and reasonable alternative measures to avoid the existence of such event and none of them made reasonable efforts to mitigate the effect of such event."
>
> (Pl. Ex. 49, § 2.02.)

A. Legal Standard for Satisfaction Clauses

Where an agreement includes conditions precedent that must be met to one party's "satisfaction," New York courts place those clauses into two categories: (1) clauses relating to "operative fitness, utility or marketability" are examined under an objective, reasonable person standard; and (2) clauses relating to a party's "fancy, taste, sensibility, or judgment" are examined under a subjective standard. *Alper Blouse Co. v. E. E. Connor & Co.*, 309 N.Y. 67, 70 (1955); *Fursmidt v. Hotel Abbey Holding Corp.*, 10 A.D.2d 447, 449 (1st Dep't 1960); *Christie's Inc. v. SWCA, Inc.*, 22 Misc.3d 380, 383 (Sup. Ct. N.Y. Cnty. 2008). The objective satisfaction standard requires that a party's decision to reject the performance be reasonable. *J.D. Cousins & Sons, Inc. v. Hartford Steam Boiler Inspection and Ins. Co.*, 341 F.3d 149, 153 (2d Cir. 2003) (applying New York law). The subjective standard, by contrast, has been described as "untrammeled" and a party's decision to reject performance thereunder is only required to be *honest* and in *good faith*. *Id.* Thus, the power to withhold approval is "untrammeled" only where the object of the contract is to gratify taste, serve personal convenience, or satisfy individual preference. *Id.* (citing *Alper Blouse Co.*, 309 N.Y. at 70-71).

Here, the Court determines that the clause at issue must be examined under an objective standard. "[W]hen contract duties are contingent upon a particular condition being 'satisfactory' to one party … that party's rejection of the condition is to be judged by an objective standard of reasonableness." *Blask v. Miller*, 186 A.D.2d 958, 960 (3d Dep't 1992). Although IFC argues that this case warrants application of the subjective standard – effectively granting it the unilateral right to reject Carrera's invocation of the Expropriatory Event clause – the conditions at issue here do not relate to IFC's "fancy, taste, sensibility, or judgment." *Alper Blouse Co.*, 309 N.Y. at 70-71; *see, e.g., Duplex Safety Boiler Co. v. Garden*, 101 N.Y. 387, 390 (1886) (citing cases involving contracts for the tailoring of suits or the creation of art such as paintings or sculptures, where the subjective standard applies). IFC also argues that the clauses at issue here require its "individual business judgment." (Pl. Br. at 41-42) (citing *Wynkoop Hallenbeck Crawford Co. v. W. Union Tel.* Co., 268 N.Y.108, 112 (1935) (holding a company's judgment as to the allocation of "administrative and overhead charges" is a subjective matter); *Baker v. Chock Full O'Nuts Corp.*, 30 A.D.2d 329, 332 (1st Dep't 1968) (finding that an advertising client's satisfaction with an ad agency's final product is subjective); *Lo Cascio v. James V. Aquavella, M.D., P.C.*, 206 A.D.2d 96, 101 (4th Dep't 1994) (holding that an ophthalmologist's performance, including his working relationships with his employer, its patients and staff, was a subjective matter to be determined by the employer). Unlike the cases cited by IFC, the conditions at issue here included (i) that Carrera did not cause the Expropriatory Event, (ii) that Carrera complied with all applicable laws, and (iii) that

Carrera exercised due care and took all "reasonable" measures to avoid the Expropriatory Event. (Pl. Ex. 49, § 2.02.) Whether these conditions were met can be determined under an objective, reasonable person standard. Indeed, the inclusion of the word "reasonable" in subpart (iii) of the "satisfaction" clause further supports applying the objective standard.

For the foregoing reasons, the Court determines that the objective, reasonable person standard applies to that section of the Expropriatory Event clause that requires IFC's satisfaction with Giavoni and Carrera's conduct. Thus, Carrera is only required to pay the Put Price if IFC's dissatisfaction with its actions are reasonable.

B. Fiscal Issues

First, IFC argues that it was not satisfied with Carrera's handling of the fiscal disputes with the Tajik Government. However, the evidence established that IFC's dissatisfaction is unreasonable.

IFC complained that Carrera failed to retain "internationally recognized independent public auditors acceptable to IFC," as required by the Put Agreement. (Pl. Ex. 49, § 4.01.) But IFC waived this condition before disbursing the funds to Carrera. (Stip. ¶¶ 28-29.) Significantly, IFC also admitted that as Giavoni's shareholder, it had the contractual right to review the company's records. (Tr. 646:16-647:10.) It also admitted that the one time it sought to review those records, it was provided full access to the documents. *Id.* IFC also complained that Carrera failed to respond to its requests for audited financials throughout 2005. But IFC conceded that the financial audit issues existed since

2003, and that by 2005 IFC had begun considering the Put Option and was merely trying to build a record to support its actions. (Tr. 315:6-7; 403:17-23; 405:5-16.) Thus, the Court determines that IFC's continued requests for information were not good faith requests aimed at reviewing Giavoni's financials – they were a pretext for building a record against Carrera.

IFC also contends that Carrera did not involve it in the conversations with the tax and customs authorities until a hearing that took place in October 2004. But – as IFC continuously points out – IFC had no affirmative duty to assist Carrera, and Carrera had no duty to involve IFC in its conversations with the Government. Furthermore, the evidence established that the October 2004 hearing was "sudden" and that Carrera itself did not have advance notice. (Pl. Ex. PP, at 06303.)

Finally, the Court finds that Carrera continuously endeavored to prevent the negative effects of the Government's hostile acts. Carrera provided Giavoni with millions of dollars in loans to ensure that the company remained operational. (Jacob Dep. Tr. 218:4-25.) Carrera also hired attorneys and involved local and national government officials, including the U.S. Ambassador and officials at the Tajik Embassies, to dissuade the Tajik Government from interfering with Giavoni's operations. (Jacob Dep. Tr. 322:2-19.) Carrera's attorneys took Giavoni's case up through several layers of appeals, ultimately going directly to the Tajik parliament. (Def. Ex. UU, at 14105.) Accordingly, the Court determines that IFC's dissatisfaction with Carrera's handling of the fiscal issues is unreasonable.

C. The Abreshim Privatization and HighRock

Next, the Court finds that IFC's protests about Carrera's actions regarding HighRock are irrelevant because the HighRock privatization did not constitute an Expropriatory Event. Section 2.02 required Carrera to mitigate the effects of an "Expropriatory Event" or exercise due care with regards to such event. (Pl. Ex. 49, § 2.02.) Since the Abreshim privatization and HighRock actions were not Expropriatory Events, Carrera was not contractually obligated to satisfy IFC when handling the HighRock situation.[12]

D. Failure to Mitigate Losses

Finally, IFC argues that Carrera failed to exercise – to IFC's Satisfaction – proper precaution and due care to "mitigate the effects" of Expropriatory Events by continuing to pour money into Giavoni despite its losses. (PX-49, Section 2.02(iii).) IFC argues Carrera

[12] The Court notes that, in any event, IFC's dissatisfaction about the HighRock situation is pretextual. IFC complains that Carrera purchased Abreshim's shares in Giavoni without inviting IFC to the shareholders' assembly where the transaction was approved. But it is clear that IFC understood that ousting HighRock was beneficial to Giavoni. In fact, Carrera sought IFC's approval and IFC promptly provided it without complaints, belying IFC's assertion that they were not satisfied with Carrera's actions. (Pl. Ex. 129.) IFC also complains that Carrera failed to provide enough proof that HighRock was linked to organized crime. But Carrera had already provided documents and press releases linking HighRock to organized crime. (Def. Ex. DDDD.) Significantly, IFC admitted at trial that it continued to request more information not because it was truly unsatisfied with the documents, but because IFC was attempting to build a record against Carrera to exercise the Put Option. (Tr. 672:15-674:7.) Accordingly, the Court finds that IFC's dissatisfaction was pretextual, and not reasonable.

should not have increased its quota share of Giavoni by buying out HighRock, and should not have provided Giavoni loans when the company needed working capital.

First, IFC is incorrect that Carrera's attempts to save Giavoni by providing loans and buying out HighRock were a failure to mitigate. IFC is generally correct that a party who is injured has a general duty to minimize its damages. (Pl. Br. at 42-43) (citing *Golbar Props., Inc. v. N. Am. Mortg. Inv'rs*, 78 A.D.2d 504, 505 (1st Dep't 1980) (bank's decision to pour additional funds into an empty building rather than foreclose was a failure to mitigate), *aff'd*, 53 N.Y.2d 856 (1981). But *Golbar Properties* explicitly states that "[t]he duty has variously been described as a duty to mitigate damages or a limitation against the *injured party* recovering damages for avoidable circumstances." *Id.* (emphasis added). Accordingly, the rule works to reduce the award granted to a party who is claiming damages. Here, however, Carrera is not the "injured party" seeking damages – IFC is. Accordingly, *Golbar Properties, Inc.* is inapposite.

Moreover, to the extent Carrera was contractually bound to "mitigate the effect of such [Expropriatory Events]," the Court determines that it did so. (Pl. Ex. 49, § 2.02.) Carrera was required to act "in good faith and with conscientious fairness, morality and honesty in purpose' and displaying 'good and prudent management of the corporation." *People ex rel. Spitzer v. Grasso*, 50 A.D.3d 535, 545 (1st Dep't 2008). As noted above, Carrera expended significant resources to buy out HighRock, keep Giavoni afloat with loans, and reduce the effects of the Tajik Government's hostile actions. The Court therefore finds that Carrera exercised due care pursuant to the provisions of Section 2.02.

For all the foregoing reasons, Carrera was excused from paying the Put Price when IFC demanded it in 2006.

HOLDING

Accordingly, after due deliberation and careful consideration, it is hereby

HELD that Plaintiff's first cause of action for breach of contract is denied.

The foregoing constitutes the Decision of the Court. Counsel for the Defendant is directed to enter this Decision and, within three days thereof, serve Plaintiff a copy with notice of entry.

Counsel for each Party may obtain its own trial exhibits from this Court's part clerk.

Dated: New York, New York
June 29, 2016

ENTER

Hon. Eileen Bransten, J.S.C.