

To be Argued by:
David Rabinowitz

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

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BANCO NACIONAL DE MÉXICO, S.A., : New York County Clerk's
INTEGRANTE DEL GRUPO FINANCIERO : Index No. 603266/04
BANAMEX, :
:
Plaintiff-Appellant, :
:
-against- :
:
SOCIETE GENERALE, :
:
Defendant-Respondent. :
:
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BRIEF OF *AMICUS CURIAE*
THE CLEARING HOUSE ASSOCIATION L.L.C.

MOSES & SINGER LLP
Attorneys for Amicus Curiae
The Clearing House Association L.L.C.
405 Lexington Avenue
New York, New York 10174
(212) 554-7800

Of Counsel:

David Rabinowitz
Michael Evan Avidon

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PRELIMINARY STATEMENT

The decision of the IAS Court sets a precedent dangerous to the trust reposed by the worldwide financial community in New York as a principal center of international commerce. Two major international banks, Banamex and Societe Generale, chose to center a letter of credit transaction in New York, selecting New York law and the New York courts for any disputes as permitted by Sections 5-116(a) and (e) of New York's Uniform Commercial Code. When Banamex demanded payment from Societe Generale under the letter of credit, it selected New York as the place for payment as it was permitted to do under the letter of credit. R. 106-109, 121. The presentation of documents for payment under the letter of credit was found by the Court to conform to the letter of credit and therefore "under the general rule, [Societe Generale's] obligation to pay is fixed." Decision and Order, p. 7. Nevertheless, the Court below ceded control of the banks' transaction to a Mexican court.

Knowledgeable and predictable dispute resolution is an essential part of the infrastructure of a world financial center. Assuring knowledgeable and predictable dispute resolution to the financial industry is recognized by the New York courts as an important public policy.

Letters of credit are the preeminent payment device used in modern international trade. This is because payment via letter of credit is quick, simple, predictable and backed by banks of unquestioned credit. Letter of credit operations can only remain quick and simple in New York if the rights and duties of institutions issuing and paying under letters of credit remain settled and predictable.

In international transactions where letters of credit are used, a dispute between the trading parties may erupt anywhere in the world. Consequently, many banks issuing letters of credit include clauses selecting the highly developed law of New York and the experienced and sophisticated New York courts to resolve any disputes. This assures that their obligations remain clear and foreseeable, rather than being exposed to the ad hoc determinations of unknown courts applying unpredictable law.

When banks have chosen New York law and the New York courts, their choice must be respected. For New York courts to allow disputes abroad to interfere with the smooth and predictable functioning of letters of credit between the banks that issue and process them would both erode the unparalleled value of the letter of credit device and erode New York's position as an international capital – possibly the international capital – of the letter of credit industry. For this reason, we urge reversal.

SUMMARY OF ARGUMENT

Foreign decrees are accorded comity similar to the full faith and credit accorded sister state judgments only if the foreign decrees do not offend important public policies of the State of New York. In addition, foreign decrees affecting contracts generally need not be accorded comity if the parties to the contract agreed to settle their disputes in New York.

The Mexican orders at issue here offend New York's important policy of protecting the parties' choice of New York law and forum for letter of credit disputes. Also, under the letter of credit "independence principle," the rights and duties between issuing banks and confirming banks must be insulated from disputes between other parties. Consequently, the Order below, according comity to foreign decrees in a case brought by third parties that disrupted the rights of Banamex as confirming bank against Societe Generale as issuing bank, should be reversed.

INTEREST OF THE AMICUS CURIAE

The Clearing House Association L.L.C. ("The Clearing House") is an association of eleven leading commercial banks and the nation's oldest bank association and forum.¹ Through its affiliate, The Clearing House Payments

¹ The members of The Clearing House are Bank of America, N.A.; The Bank of New York; Citibank, N.A.; Deutsche Bank Trust Company Americas; HSBC Bank U.S.A., N.A.; JPMorgan Chase Bank, N.A.; LaSalle Bank, N.A.; UBS AG; U.S. Bank N.A.;

Company L.L.C., it provides payment clearing and settlement services to its member banks and other financial institutions. The Clearing House serves more than 1,600 U.S. financial institutions and hundreds of international participants and operates a global payment-systems infrastructure that clears and settles 20 million payments for more than \$1.5 trillion per day. The Clearing House is dedicated to protecting the rights and interests of its members, as well as advancing the interests of the domestic commercial banking industry. Among other things, it is interested in ensuring stability and certainty in the legal and regulatory environment in which its member banks operate. The Clearing House frequently presents the views of its members on important public policy issues affecting the commercial banking industry by, among other things, issuing comment letters on various proposed regulatory actions. Through its activities and publications, The Clearing House has contributed to the formation of federal banking policy. The Clearing House has previously appeared as *amicus curiae* in numerous state and federal court actions.

The Clearing House is submitting this *amicus curiae* brief because a reversal of the Order below is essential to the continued preeminent role of

Wachovia Bank, N.A.; and Wells Fargo Bank N.A. We wish to inform the Court that Citigroup Inc., which owns Citibank, N.A., a member of The Clearing House, also indirectly owns Banamex, the Appellant herein.

New York in international banking and, in particular, as the leading letter of credit center in the world. If the decision below becomes the law of New York, it will drive letter of credit activity to other international financial centers where letters of credit are protected from third party interference and can function with greater efficiency because of the greater predictability of the rights and obligations of banks issuing and paying under letters of credit.

ARGUMENT

I. THE NEW YORK COURTS SHOULD ENFORCE NEW YORK CHOICE OF LAW AND FORUM CLAUSES IN LETTERS OF CREDIT; FOREIGN JUDGMENTS CONCERNING SUCH LETTERS OF CREDIT SHOULD NOT RECEIVE COMITY WHETHER OR NOT THEY PURPORT TO APPLY NEW YORK LAW

A. New York Has A Strong Interest In Protecting Its Standing As A Center For The Conduct Of International Trade And Commerce

It is well known and well recognized by the courts of New York that New York is a primary world financial center and that the State of New York has a strong interest in fostering that industry. The role of New York and the New York courts in helping to provide an atmosphere conducive to the operation of a major financial center is also well-recognized. When the major international financial institutions issuing letters of credit select the New York courts and New York law, their choice must be respected.

The Court of Appeals has repeatedly recognized the role of the law and courts of New York in fostering New York's financial industry by providing a sophisticated and reliable body of law to industry participants. Consequently, New York has readily applied New York law to disputes in that industry. It has also vigorously enforced clauses in financial contracts, including letters of credit, selecting New York law and forum.

The letter of credit at issue here under which Banamex is seeking payment from Societe Generale contained express clauses choosing New York law and New York forum, provided for presentation of drawing documents to Societe Generale in Paris, and provided that the party seeking payment could select the place of payment – and Banamex chose New York as the place of payment to it. R. 106-109, 121. The transaction between Societe Generale and Banamex was expressly centered by those major international banks in New York, not in Mexico, and those banks are entitled to the protection of New York law and forum free from interference by Mexican courts.

1. New York Courts Apply New York Law To Financial Obligations Payable In New York Despite Foreign Laws That Purport To Prohibit Payment

New York courts refuse comity to foreign laws that purport to interfere with financial obligations payable in New York, in recognition of

New York's strong public policy interest in preserving the integrity of New York's financial industry.

In Ehrlich-Bober & Co. v. University of Houston, 49 N.Y.2d 574, 427 N.Y.S.2d 604 (1980), the University of Houston was sued by a New York security dealer for breach of a contract to repurchase securities in New York. The University moved to dismiss the security dealer's breach of contract case on the ground that a Texas statute confined suits against the University to two counties in Texas. The issue before the Court was whether to accord "comity" to that statute, or to allow the action to proceed in New York. 49 N.Y.2d at 577, 427 N.Y.S.2d at 606.

The Court of Appeals, reversing the Appellate Division, denied the University's motion to dismiss. It found that New York's interest in preserving its position as the commercial and financial "nerve center" of the world required "a very strong policy" of assuring ready access by that industry to New York's courts, applying a "known, stable and commercially sophisticated body of law":

Arrayed against that policy [of limiting suits against the University of Houston] which essentially serves administrative convenience, is New York's recognized interest in maintaining and fostering its undisputed status as the pre-eminent commercial and financial nerve center of the Nation and the world (*International Planning v Daystrom, Inc.*, 24 NY2d 372; see, also, *Bache &*

Co. v International Controls Corp., 339 F Supp 341). That interest naturally embraces a very strong policy of assuring ready access to a forum for redress of injuries arising out of transactions spawned here. Indeed, access to a convenient forum which dispassionately administers a known, stable, and commercially sophisticated body of law may be considered as much an attraction to conducting business in New York as its unique financial and communications resources.

49 N.Y.2d at 581, 427 N.Y.S.2d at 608-09 (emphasis added).

In J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda) Ltd., 37 N.Y.2d 220, 371 N.Y.S.2d 892 (1975), the Court of Appeals refused comity to a Ugandan government decree that prohibited defendant, a Ugandan bank, from making any payments to Israeli companies. Although drafts were to be presented in Uganda, payment could be claimed by a negotiating bank in New York. 37 N.Y.2d at 224, 371 N.Y.S.2d at 895-96. When Chemical Bank duly claimed payment in New York, defendant refused, based on the Ugandan decree.

The Court of Appeals reversed lower court decisions that gave effect to the Ugandan law. Instead, the Court applied New York law requiring the drafts to be honored. It applied New York law to protect the “justified expectations” of the parties to the letter of credit and to protect New York’s “overriding and paramount interest” as “a financial capital of the world”:

The provision respecting reimbursement in New York was an integral part of that for which the parties bargained, it was not a discrete obligation.... The value to those in commerce of having a place at a financial capital where funds can be obtained on a simple letter of credit, away from a relatively small bank in an undeveloped country of uncertain political stability, is obvious....

...
... New York has an overriding and paramount interest in the outcome of this litigation. It is a financial capital of the world, serving as an international clearinghouse and market place for a plethora of international transactions, such as to be so recognized by our decisional law. A vast amount of international letter of credit business is customarily handled by certain New York banks whose facilities and foreign connections are particularly adaptable to this field of operation.... In order to maintain its pre-eminent financial position, it is important that the justified expectations of the parties to the contract be protected.

37 N.Y.2d at 226-27, 371 N.Y.S.2d at 897-98 (citations omitted).

In Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516 (2d Cir. 1985), the Second Circuit refused to give effect to a Costa Rican decree forbidding Costa Rican banks to pay U.S. dollars to creditors because the bank's notes were payable in New York. It held that New York law had to be applied to enforcement of the notes in New York to protect New York's interest in "maintaining New York's status as one of the foremost commercial centers in the world":

