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NEW YORK COURT OF APPEALS CASE COMPILATIONS: INDOSUEZ INT'L FINANCE V. NAT'L RESERVE BANK

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*INDOSUEZ INT'L FINANCE V. NAT'L RESERVE BANK*¹
(decided May 7, 2002)

I. SYNOPSIS

In a unanimous decision, the New York Court of Appeals upheld the lower courts' decisions that New York law governs the forward currency exchange transactions entered into by two foreign parties.² The court held that the New York choice of law provision in the transactions is valid because New York has the paramount interest in the transactions.³ In addition, the court held that New York has personal jurisdiction over the foreign defendant because the defendant not only consented to be sued in New York but also had minimum contacts with New York.⁴ The court further held that New York has subject matter jurisdiction under Banking Law § 200-b even when plaintiff designated New York as the place of performance after the contracts were executed.⁵

II. BACKGROUND

This case was brought to recover debts arising from the breach of a series of currency exchange agreements.⁶ Indosuez International Finance (IIF), a Netherlands corporation, and National Reserve Bank (NRB), a Russian bank, entered into fourteen future currency exchange contracts from September 1997 through July 1998.⁷ Each of the transactions was confirmed and signed on behalf of NRB by its deputy chairman of the board. The contracts specified the settlement dates and forward rates.⁸

The transactions were denominated in U.S. dollars and their value depended on the depreciation or appreciation of the Russian

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1. 98 N.Y.2d 238 (2002).
 2. *Id.* at 242.
 3. *Id.* at 245.
 4. *Id.* at 246-47.
 5. *Id.* at 248.
 6. *Id.* at 243.
 7. *Indosuez*, 98 N.Y.2d 238 at 242.
 8. *Id.*

ruble against the U.S. dollar.⁹ If on the settlement date, the ruble had depreciated against the dollar, NRB would pay IIF in dollars. However, if the ruble appreciated, IIF would pay NRB in dollars.¹⁰ In effect, the parties bet on the improving relationship between the value of the ruble against the U.S. dollar.

Seven of the agreements were option transactions requiring IIF to pay NRB an option premium.¹¹ Under these option transactions, in consideration of the option premium, NRB waived its rights to payment even if the ruble appreciated against the dollar. IIF paid the option premiums on six out of seven transactions to a New York bank designated by NRB.¹²

Ten of the fourteen agreements contained New York choice of law clauses, and the remaining four had English choice of law clauses.¹³ Two of the confirmations required payment to be made through Bank of America in New York; the rest required the affected party to be paid through whichever bank that party designated.¹⁴ Six of the confirmations contained New York forum selection clauses, and the other eight either had no forum selection clause or designated the "courts of England or any other courts of competent jurisdiction."¹⁵

In the summer of 1998, Russia had a currency crisis causing a precipitous decline in the value of the ruble against the U.S. dollar. As a result, the Russian Central Bank and Russian government declared a 90-day moratorium prohibiting Russian residents from paying nonresidents under forward currency exchange transactions.¹⁶

This moratorium on the payment of foreign debts triggered a breach of the contracts. According to the terms of the International Swap Dealers Association Master Agreement (ISDA), which was incorporated by reference to the transactions, the moratorium was illegal.¹⁷ This "illegality" allowed IIF to declare an "Early Termination Date" for transactions having settlement dates falling dur-

9. *Indosuez*, 98 N.Y.2d at 242.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Indosuez*, 98 N.Y.2d 238 at 243.

14. *Indosuez*, 98 N.Y.2d 238 at 243.

15. *Id.*

16. *Id.*

17. *Id.*

ing the moratorium period.¹⁸ IIF notified NRB of the breach and instructed NRB to pay the amount due into an account in New York. NRB failed to pay, resulting in a debt of more than \$110 million.¹⁹

IIF brought an action in the supreme court alleging breach of the agreements.²⁰ NRB filed an answer, with several affirmative defenses. NRB claimed Russian law applied. Under Russian statute, NRB argued, the transactions are void because they were not signed and approved by NRB's Accountant General as required.²¹ However, IIF maintained that New York law applied the contracts were valid. IIF argued that the deputy chairman had apparent authority to bind NRB, and also argued that NRB ratified the contracts by accepting the option premiums.²² IIF moved for summary judgment and the court granted partial summary judgment to IIF as to liability. The court rejected NRB's arguments and found that New York and English law govern the contracts. Under either law, the court reasoned, the contracts are valid and NRB was in breach. Then, the court referred the case to a referee to calculate damages. The referee determined the damages, including interests and attorney's fees, to be over \$19 million. The Supreme Court approved the damages. NRB appealed.

On appeal, the Appellate Division, First Department, unanimously affirmed the trial court's decision.²³ The appellate division held that the parties would not be bound by choice of law or forum selection clauses if the contracts themselves were invalid.²⁴ However, applying New York traditional choice of law rules, the appellate division held that New York law applied and the contracts were valid.²⁵ The court emphasized that because payments under the transactions were denominated in U.S. dollars, and payments were to be made through a New York bank, New York had a "paramount

18. *Indosuez*, 98 N.Y.2d at 243.

19. *Id.*

20. *International Indosuez Fin. B.V. v. Nat'l Reserve Bank*, 1999 N.Y. Misc. LEXIS 476 (Sup. Ct. 1999).

21. *Id.*

22. *Id.*

23. *Indosuez Int'l Fin. B.V. v. Nat'l Reserve Bank*, 720 N.Y.S.2d 102 (App. Div. 2001).

24. *Id.* at 103.

25. *Id.*

interest, as an international clearinghouse and marketplace for a plethora of international transactions denominated in U.S. dollars, in ensuring orderly dollar currency transactions."²⁶

The court also found the contracts valid under New York law on the grounds of apparent authority and ratification.²⁷ The court reasoned that the deputy chairman lacked actual authority to bind NRB, but he had apparent authority.²⁸ The court further held that NRB ratified the transactions by accepting the premium payments from IIF and never objected to the deputy chairman's authority.²⁹ The court also held that New York had personal jurisdiction over NRB and New York courts have subject matter jurisdiction.³⁰ NRB appealed the case to the New York Court of Appeals.

III. DISCUSSION

On appeal, the New York Court of Appeals was faced with three issues. The questions presented were whether New York or Russian law governed the transactions whether New York had personal jurisdiction over the foreign defendant, and whether New York courts had subject matter jurisdiction.³¹ The court began its decision by concluding that New York law governed the transactions and unanimously affirmed the lower courts' decisions.³²

A. Choice of Law

NRB argued that Russian law governed the transactions and under Russian law the contracts were void.³³ NRB emphasized that, in determining the applicable law, the court must consider two different issues that required two distinct choice of law analyses.³⁴ The court must first consider whether the deputy chairman had the authority to bind NRB under Russian law. Second, the court must

26. *Indosuez Int'l Fin. B.V. v. Nat'l Reserve Bank*, 720 N.Y.2d 102, 103 (App. Div. 2001) (citing *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda), Ltd.*, 37 N.Y.2d 220 (1975)).

27. *Indosuez*, 720 N.Y.S.2d at 104.

28. *Id.*

29. *Indosuez*, 720 N.Y.S.2d at 104.

30. *Id.*

31. *Indosuez*, 98 N.Y.2d at 240.

32. *Id.*

33. Brief for Defendant-Appellant, *Indosuez*, 98 N.Y.2d 238 (1 No. 38).

34. *Id.* at 15-16.

determine whether the contracts were valid.³⁵ In attempting to prove Russian law governed the contracts, NRB introduced the affirmation of an expert on Russian law.³⁶ The expert testified, under Article 7 of the Russian Law of Accounting, only the Accountant General of NRB had the authority to sign the transactions.³⁷ Since the Accountant General did not sign the confirmations, NRB argued, they were void.³⁸

NRB further argued that applying New York substantive law to the agency question would violate NRB's right to due process of law under the 14th Amendment to the U.S. Constitution.³⁹ NRB maintained that New York had no relationship with the agency issue because both the purported agent and the principal are Russian residents and all contacts occurred in Russia.⁴⁰

On the other hand, IIF argued that New York law governed the transactions.⁴¹ IIF maintained that the deputy chairman may not have had actual authority to bind NRB, but he had apparent authority to act on NRB's behalf. IIF further argued that NRB ratified the contracts by accepting IIF's option premiums, and NRB should also be estopped from contesting the validity of the confirmations because it never objected to the deputy's authority prior to the lawsuit.⁴²

In resolving the choice of law issue, the court rejected NRB's arguments and held that New York law applies. The court noted that NRB failed to show that a principle of apparent authority similar to the law of New York does not exist in Russian law.⁴³

Under a traditional New York choice of law analysis, a court is required to apply the law of the state that has the most significant

35. Brief for Defendant-Appellant, *Indosuez*, 98 N.Y.2d 238 (1 No. 38).

36. *Id.* at 46-47 (citing *Lyubarskaya Aff.* Para 7, dated May 13, 1999 (NRB offered this affirmation in evidence to the trial court as proof that the contracts were invalid under Russian law)).

37. Brief for Defendant-Appellant, *Indosuez*, 98 N.Y.2d 238 (1 No. 38) at 46-47.

38. *Id.*

39. *Id.* at 35-38.

40. *Id.*

41. IIF Brief, pg.5 (brief submitted to New York Court of Appeals, dated February 19, 2002).

42. IIF Brief, pg.5 (brief submitted to New York Court of Appeals, dated February 19, 2002).

43. *Indosuez*, 98 N.Y.2d at n.3.

relationship to the particular issue in conflict.⁴⁴ The law of the state having the greatest interest in the litigation will be applied.⁴⁵ The state interests to be considered are those that relate to the purpose of the particular law in conflict.⁴⁶

Applying the significant relationship test, the court concluded that New York law applies because New York has a greater interest in the litigation than Russia.⁴⁷ The court reaffirmed the Appellate Division's reasoning that New York has the paramount interest because of the types of contracts involved.⁴⁸ The parties entered into the forward currency exchange transactions to hedge losses on their investments. They selected the use of New York law and forum because of New York's experience with and ability to ensure orderly dollar currency transactions.⁴⁹ The parties agreed that payments were to be made in U.S. dollars, IIF paid premiums to NRB through a New York bank, and two confirmations required payment to be made to a New York bank. Therefore, New York had the paramount interest in enforcing the transactions.⁵⁰

On the other hand, Russia's interests were not as great as those of New York.⁵¹ NRB's defaults were precipitated by a Russian currency crisis and the Russian government declared a moratorium on the repayment of foreign debt, triggering the breach.⁵² The parties did not select Russian law. Thus, Russia's interests could not have been greater than New York's.⁵³

After concluding New York law governs, the court held that the contracts are valid under New York substantive agency law.⁵⁴ Under New York agency law, the deputy chairman had apparent authority to bind NRB, and IIF was reasonable in relying on the deputy's authority.⁵⁵ The deputy had signed five (5) prior similar

44. See *J. Zeevi & Sons, Ltd.*, 37 N.Y.2d at 226-227 (1975).

45. Restatement 2nd of Conflict of Laws §§ 188 (1), 292 (1).

46. *Id.*

47. *Indosuez*, 98 N.Y.2d at 241.

48. *Indosuez*, 98 N.Y.2d at 241.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 243.

53. *Id.* at 245.

54. *Indosuez*, 98 N.Y.2d at 246.

55. *Indosuez*, 98 N.Y.2d at 246.

transactions' and NRB collected over \$33 million from IIF.⁵⁶ NRB accepted premium payments through a New York bank on six option transactions from IIF and did not object to the deputy's authority. Such conduct, the court concluded, constitutes an implied representation that the deputy chairman had authority to bind NRB.⁵⁷ Further, NRB ratified the transactions because it accepted the premiums and did not raise the authority issue during the course of performance.⁵⁸ Instead, NRB acknowledged the debt in its letters to IIF.⁵⁹ Therefore, the court concluded that the contracts are valid and enforceable.

B. Personal Jurisdiction

After concluding that New York law governs the contracts, the court addressed the second issue of whether New York could exercise personal jurisdiction over NRB under the New York long arm statute. NRB argued that New York had no personal jurisdiction over it regarding the confirmations that did not contain a New York forum selection clause. The court rejected this argument and concluded that personal jurisdiction was properly exercised on two grounds: consent and minimum contacts.⁶⁰

First, the court concluded that NRB consented to personal jurisdiction by expressly including New York forum selection clauses in six confirmations. Since the fourteen confirmations form a global agreement, the forum selection clauses are incorporated in the other eight transactions that did not contain any forum selection provisions.⁶¹

Second, NRB had the requisite minimum contacts with New York to support the constitutional exercise of personal jurisdiction. Since the New York long arm statute is limited and is not equal to the limit of due process, the court cited CPLR Section 302(a)(1) to support the statutory basis.⁶² The court also said exercising per-

56. IIF brief.

57. *Indosuez*, 98 N.Y.2d at 241.

58. *Id.*

59. *Id.* at n.4.

60. *Indosuez*, 98 N.Y.2d at 246-48.

61. *Id.*

62. *Id.* at 246. CPLR Section 302(a)(1) gives the court authority to exercise personal jurisdiction over a non-domiciliary defendant when the defendant transacts busi-

sonal jurisdiction over NRB did not offend the due process requirements of the Fourteenth Amendment of the U.S. Constitution.⁶³ NRB received premium payments from IIF through a New York bank, two confirmations designated New York as the place of performance, payments on five prior transactions were made in New York bank, and NRB had a bank account in New York. Through these transactions, NRB purposefully availed itself of the privileges and benefits of the laws of New York.⁶⁴ Therefore, these contacts are sufficient to subject NRB to personal jurisdiction in New York.

C. *Subject Matter Jurisdiction*

The court briefly decided the third issue by concluding that New York courts have subject matter jurisdiction over the claims under Banking Law § 200-b. This statute grants subject matter jurisdiction over claims by foreign parties where the action is brought to recover damages for the breach of a contract made or to be performed within the state.⁶⁵

NRB argued that the courts of New York lacked subject matter jurisdiction over the claims because IIF designated New York as the place of performance after the contracts were executed. However, IIF argued that New York courts have subject matter jurisdiction because two of the confirmations expressly required payments to be made through a New York bank. Further, the other twelve confirmations granted the affected party the right to designate the place of payment. The New York Court of Appeals rejected NRB's arguments and held that New York courts have subject matter jurisdiction over the claims. The court emphasized that subject matter jurisdiction under Banking Law Section 200-b extends to claims where a party chooses New York for the place of performance even after the contract is formed.⁶⁶

ness in New York or contracts anywhere to provide goods and services in New York, and the cause of action arises out of the contacts.

63. *Indosuez*, 98 N.Y.2d at 247. Due process requires a non-domiciliary defendant to have minimum contacts with a forum state in order for the state to exercise personal jurisdiction over the defendant. Exercising personal jurisdiction cannot offend the traditional notion of fair play and substantial justice.

64. *Indosuez*, 98 N.Y.2d at 247.

65. N.Y. Banking Law § 200-b (2) (McKinney 2001).

66. *Indosuez*, 98 N.Y.2d at 248.

IV. CONCLUSION

In *Indosuez v. National Reserve Bank*, the New York Court of Appeals held that New York substantive law applied to a series of forward currency exchange transactions entered into by the parties, thereby affirming the decision of the Appellate Division. It held that under New York's substantive law of agency, the contracts were valid and enforceable because the agent of NRB who signed the contracts had apparent authority, upon which IIF reasonably relied. The court also held that New York had both personal and subject matter jurisdiction over NRB.

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