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COURT OF APPEALS

STATE OF NEW YORK

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IRB-BRASIL RESSEGUROS, S.A.,

Respondent,

-against-

No. 191

INEPAR INVESTMENTS, S.A.,

Appellant.

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27 Madison Avenue  
New York, New York 10010  
October 11, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE THEODORE T. JONES

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 191, IRB-  
2 Brasil. Come on up.

3 Counsel, would you like any rebuttal time?

4 MR. NEWMAN: Yes, sir. We'd like four  
5 minutes, please.

6 CHIEF JUDGE LIPPMAN: Four minutes. Go  
7 ahead. You're on.

8 MR. NEWMAN: Thank you, Chief Judge, and  
9 welcome home. I'm Fred Newman. Good morning. With  
10 me is my colleague Helene Hechtkopf, who wrote the  
11 brilliant briefs that you have before you.

12 We're here to ask Your Honors to do one  
13 thing: to say to New York, to say to parties to  
14 sophisticated commercial transactions all over the  
15 world, that you can rely on a New York court to  
16 enforce your commercial contract the way it is  
17 written, and not to read into it words that are not  
18 there.

19 CHIEF JUDGE LIPPMAN: What are - - -

20 JUDGE READ: Mr. Newman - - -

21 CHIEF JUDGE LIPPMAN: Go ahead, Judge Read.

22 JUDGE READ: Mr. Newman, I have one  
23 question. Just as a matter of curiosity. The fiscal  
24 agency agreement in the global note did have the  
25 words you suggest should have been in the guarantee,

1 "without regard to conflict of law principles". Is  
2 that significant in any way, or does that cut for or  
3 against you in any way?

4 MR. NEWMAN: Thank you, Judge Read. I have  
5 a couple things to say about that. First, we're here  
6 on the guarantee and the note that was - - - the  
7 guarantee is the instrument was sued upon. And that  
8 does not include the words "without regard to  
9 conflicts of law issues" which is in the fiscal  
10 agreement.

11 JUDGE CIPARICK: So does that make a  
12 difference?

13 MR. NEWMAN: The agreement was - - - I'm  
14 sorry, Your Honor?

15 JUDGE CIPARICK: Does it make a difference?

16 JUDGE READ: Does it make a difference?

17 MR. NEWMAN: Well, yes, it does make a  
18 difference.

19 JUDGE CIPARICK: Why is that?

20 MR. NEWMAN: Because the guarantee is the  
21 document which is sought to be enforced. The  
22 guarantee is the agreement - - -

23 CHIEF JUDGE LIPPMAN: Counsel, what about  
24 5-1401?

25 MR. NEWMAN: Yes.

1 CHIEF JUDGE LIPPMAN: What's the purpose of  
2 that statute? And how does it sit vis-a-vis the  
3 argument that you're making?

4 MR. NEWMAN: 5-1401 is a permissive  
5 statute. It is not a mandatory statute.

6 CHIEF JUDGE LIPPMAN: What's it designed to  
7 do, in your view?

8 MR. NEWMAN: It is - - - it is designed,  
9 according to the legislative history, and it was  
10 designed to open the courts of New York to people who  
11 had sophisticated commercial transactions above  
12 250,000 dollars - - -

13 CHIEF JUDGE LIPPMAN: Is it designed to let  
14 people choose to have their case in New York, kind of  
15 irrespective or not centering necessarily on the  
16 contacts in New York, that one would do when you're  
17 doing the kind of analysis - - - a conflicts analysis  
18 that you do if they're - - - if it wasn't under that  
19 provision?

20 MR. NEWMAN: No, that's exactly right, Your  
21 Honor. But what it is designed to do and what it  
22 does is it says that you people like Inepar, S.A. in  
23 Brazil, who have no connection with New York at all,  
24 no reasonable relationship, can choose to have a New  
25 York court hear your dispute.

1 CHIEF JUDGE LIPPMAN: When you choose that,  
2 what law are you guided by?

3 MR. NEWMAN: You are allowed to choose the  
4 law that you want to have it guided by, in whole - -  
5 -

6 JUDGE GRAFFEO: Where do you find that - -  
7 -

8 MR. NEWMAN: - - - or in part.

9 JUDGE GRAFFEO: - - - where do you find  
10 that in the legislative history? Because I thought  
11 its purpose was fairly clear. The legislature  
12 indicated that they were concerned about maintaining  
13 predictability and maintaining New York's pre-  
14 eminence in international finance, so they wanted  
15 clear rules.

16 MR. NEWMAN: That - - -

17 JUDGE GRAFFEO: It seems to cut against  
18 your argument, I thought.

19 MR. NEWMAN: Well, no. It's exactly - - -  
20 it is exactly our argument. Predictability,  
21 consistency, all come from freedom of contract; that  
22 a party can express its choice of what law it wants  
23 to apply.

24 CHIEF JUDGE LIPPMAN: But - - -

25 MR. NEWMAN: There's no read - - - there's

1 no way to read - - -

2 CHIEF JUDGE LIPPMAN: Why wasn't New York  
3 the intention here? Why wasn't the intention to be  
4 bound by New York's commercial law and not by New  
5 York's conflicts law?

6 MR. NEWMAN: Because that's not what it  
7 says. It says "in whole or in part". In whole or in  
8 part means - - -

9 JUDGE SMITH: Why - - -

10 MR. NEWMAN: - - - in whole or in part.

11 JUDGE SMITH: - - - why would anyone write  
12 an agreement to accomplish what you say this  
13 accomplished, which is to get New York's normal  
14 conflict of laws principles, which of course, will  
15 send you right back to Brazil. They didn't have to  
16 write the - - - they could have left the clause out  
17 and done the same thing.

18 MR. NEWMAN: Well, we've been debating that  
19 question, Judge Smith, for a long time. The  
20 guarantee is a guarantee of notes. The notes could  
21 have been bought anywhere in the world. And - - -

22 JUDGE JONES: Is it your position that the  
23 guarantee - - -

24 MR. NEWMAN: I'm sorry?

25 JUDGE JONES: Is it your position that the

1           guarantee is to be considered separately from the  
2           main notes?

3                       MR. NEWMAN:   Yes.   Yes.   The guarantee is a  
4           contract.   The guarantee is the obligation that is  
5           sought to be enforced.

6                       Going back to Judge Smith's question, that  
7           is the question.   I mean, and the point - - - the  
8           ultimate, overarching policy point is if you want to  
9           say New York law applies without conflicts law, then  
10          you say it.

11                      JUDGE SMITH:   That's - - - the Restatement  
12          says the opposite, doesn't it?   The Restatement says  
13          that when say New York law applies, you mean the  
14          local law of New York.

15                      MR. NEWMAN:   The Restatement is not  
16          relevant here, Your Honor, because that section of  
17          the Restatement which is in our brief, it's 142, is -  
18          - - requires a reasonable relationship.   The New York  
19          law, the 5-1401, expressly, as Judge Lippman pointed  
20          out, removes that relationship.

21                      JUDGE SMITH:   But isn't that - - - isn't  
22          that a fortiori?   I mean, you have party - - - you  
23          have a statute that says you don't have to have any  
24          relationship at all with New York to choose New York  
25          law.

1 MR. NEWMAN: Right.

2 JUDGE SMITH: If you - - - if parties with  
3 no relationship at all with New York say we're  
4 choosing New York law, including its conflicts  
5 principles, they might as well remain silent, because  
6 they're con - - - your conflicts principles will send  
7 you right back where you came from.

8 MR. NEWMAN: Well, that could happen.

9 JUDGE GRAFFEO: Why is your interpretation,  
10 from a policy standpoint, the better resolution of  
11 this case?

12 CHIEF JUDGE LIPPMAN: Why does it serve New  
13 York?

14 MR. NEWMAN: Well, the answer to both of  
15 those questions is predictability, consistency,  
16 understanding worldwide that when - - - if you want  
17 to choose - - -

18 CHIEF JUDGE LIPPMAN: Predictability as  
19 being the commercial law, that it's predictability  
20 under the substantive law?

21 MR. NEWMAN: Well, Your Honor - - -

22 CHIEF JUDGE LIPPMAN: Because otherwise, as  
23 Judge Smith has been saying to you a number of times,  
24 what do you need New York law if you're going to do  
25 the kind of contacts analysis that you're talking

1 about?

2 MR. NEWMAN: You need New York courts to  
3 understand - - - to read - - - you need - - - if  
4 you're somebody in Baku, you need to be comfortable  
5 that the court that is reading your contract,  
6 whatever it says, will be applied according to its  
7 terms and not have terms read into it. And that is  
8 why it's in the public - - - it should be the public  
9 policy - - -

10 JUDGE CIPARICK: But it seems that the  
11 certainty - - -

12 MR. NEWMAN: - - - of New York.

13 JUDGE CIPARICK: - - - it seems that the  
14 certainty and predictability is better served by just  
15 adopting the commercial law of New York as opposed to  
16 the conflicts law.

17 MR. NEWMAN: Well, I agree with that, Your  
18 Honor. But that's not what the statute says.

19 CHIEF JUDGE LIPPMAN: What's - - -

20 MR. NEWMAN: The statute says - - -

21 CHIEF JUDGE LIPPMAN: - - - what's the  
22 answer - - -

23 MR. NEWMAN: - - - in whole or in part.

24 CHIEF JUDGE LIPPMAN: - - - what's the  
25 answer to Judge Graffeo's question? What policy

1 objectives are served by your position?

2 MR. NEWMAN: The policy objective that is  
3 served by our position is to provide that New York  
4 courts will apply contracts as they are written and  
5 not read into them words that are not there. That  
6 should be our policy. We enforce freedom of contract  
7 - - -

8 CHIEF JUDGE LIPPMAN: That's the policy in  
9 New York, even given the statute?

10 MR. NEWMAN: The sta - - - Your Honor, with  
11 respect, the statute doesn't overrule that. The  
12 statute is permissive. It says you can choose  
13 whatever you want to choose. That's what freedom of  
14 contract is all about. That's why - - - and that's  
15 why, by the way - - -

16 JUDGE GRAFFEO: Shouldn't you indicate that  
17 more expressly in your contract, if that's the  
18 interpretation?

19 MR. NEWMAN: Well, you should do that.  
20 Which is why - - -

21 JUDGE GRAFFEO: I mean, the plain - - -

22 MR. NEWMAN: - - - you should draft it - -  
23 -

24 JUDGE GRAFFEO: - - - language reading of,  
25 you know, saying this contract's going to be governed

1 by the law of the State of New York, seems to imply  
2 the commercial law of the State of New York is going  
3 to apply to the case.

4 MR. NEWMAN: It - - - well, they could say  
5 that. But it also - - - the law of the State of New  
6 York, period, means the law of the State of New York,  
7 period. It doesn't mean the law of the State of New  
8 York, just commercial law, and it doesn't mean the  
9 law of the State of New York, but not counting its  
10 conflicts. They know how to do it. That's on page  
11 326.

12 The note is different - - - as Judge Read  
13 points out, the note is different from the guarantee.  
14 They were drafted by the same lawyers. The note says  
15 it's New York law applies without its contract  
16 provisions - - -

17 JUDGE SMITH: Well, what do you say was in  
18 the mind of that lawyer when he wrote those two  
19 different phrases? He says I want - - - I want New  
20 York substantive law for the note and New York  
21 conflicts law for the guarantee?

22 MR. NEWMAN: You know, I have no idea what  
23 was in his mind. I don't know if it was a mistake,  
24 to be honest. But let's assume it was a mistake.  
25 We're not in the business of rewriting contracts.

1                   JUDGE SMITH: Well, I mean, is it - - - I  
2 mean, does it have to be a mistake? I mean, can't  
3 the law - - - can't "the law of New York" mean the  
4 substantive law of New York? Is that such a strain  
5 on the words? That's what the Restatement thinks it  
6 normally means.

7                   MR. NEWMAN: Well, no. I mean, with  
8 respect, I think the law - - - well, I submit to you  
9 that "the law of New York" means the law of New York  
10 as in - - - in whole.

11                  JUDGE SMITH: It's not self-evident, is it,  
12 that the law - - - when you say I want to apply New  
13 York law, you mean I want to apply the New York - - -  
14 the law, be it Brazilian law, that New York conflicts  
15 of law principles would have me apply? That's not  
16 the natural way of saying that.

17                  MR. NEWMAN: No. However, we have to look  
18 at the - - - the statute has been in existence for -  
19 - - since 1984. So that's almost thirty years. And  
20 over those thirty years, the practice has developed  
21 to include, without - - - the term "without regard to  
22 New York" - - -

23                  CHIEF JUDGE LIPPMAN: Don't - - -

24                  JUDGE CIPARICK: Doesn't the statute - - -

25                  CHIEF JUDGE LIPPMAN: - - - don't you

1           undermine the statute - - -

2                   JUDGE CIPARICK:   Yes.

3                   CHIEF JUDGE LIPPMAN:   - - - by reading it  
4           in your way?

5                   MR. NEWMAN:   No.   With respect, no, because  
6           - - -

7                   JUDGE CIPARICK:   The statute creates an  
8           exception.

9                   MR. NEWMAN:   - - - the statute says "in  
10          whole or in part".

11                   JUDGE CIPARICK:   The statute creates an  
12          exception to the contacts rule.   Does - - -

13                   MR. NEWMAN:   Yes.

14                   JUDGE CIPARICK:   It seems as if you are  
15          undermining it.

16                   MR. NEWMAN:   It makes the - - - it makes an  
17          exception.   You do not need contacts.   You do not  
18          need a reasonable relationship.   But you could say -  
19          - - under the statute, very clearly, you could say I  
20          only want the conflicts laws to apply; I don't want  
21          any other laws to apply.   5-1401 would allow you to  
22          write, I only want to have New York's conflicts of  
23          law - - -

24                   JUDGE SMITH:   And you say, in substance,  
25          that's what they did?

1 MR. NEWMAN: Yes.

2 JUDGE SMITH: Why would anyone ever do  
3 that?

4 MR. NEWMAN: I don't know. I can't answer  
5 that question. I mean, all I can tell you is what  
6 the - - - and it's not the way we litigated the case;  
7 it's not in the case. I don't know why it was  
8 drafted that way.

9 JUDGE GRAFFEO: If two parties want to  
10 enter into a contract, and they want New York's  
11 substantive law to apply, how would they word the  
12 phrase, then? Under the General Obligation Law, they  
13 have to say, subject to the laws of the State of New  
14 York, but not the conflicts law?

15 MR. NEWMAN: That is exactly what - - -

16 JUDGE GRAFFEO: In other words, the other  
17 side of the coin?

18 MR. NEWMAN: That is exactly what the task  
19 force of the New York State Bar Association just  
20 recommended last year in its - - - in the document we  
21 cited.

22 CHIEF JUDGE LIPPMAN: Okay, counsel.

23 MR. NEWMAN: Thank you. Thank you.

24 CHIEF JUDGE LIPPMAN: You'll have rebuttal  
25 time. Thank you.

1 MS. KUCK: Good morning.

2 CHIEF JUDGE LIPPMAN: Good morning - - -

3 MS. KUCK: Lea Haber Kuck on behalf of - -

4 -

5 CHIEF JUDGE LIPPMAN: - - - counsel. What

6 - - -

7 MS. KUCK: - - - IRB-Brasil Resseguros.

8 CHIEF JUDGE LIPPMAN: - - - what about your  
9 adversary's interpretation, the statute's permissive,  
10 and if you want to have New York law, you've got to  
11 say I don't want the conflicts law?

12 MS. KUCK: I think the one thing that we've  
13 been ignoring, we haven't talked about 5-1402, which  
14 was passed at the same time as 5-1401. And in  
15 5-1402, essentially what the legislature said is we  
16 will open up the courts of New York to parties with  
17 large commercial transactions if they meet certain  
18 criteria. They have to have a transaction over a  
19 million dollars, they have to submit to New York  
20 jurisdiction, and they have to choose New York law  
21 pursuant to 5-1401.

22 And that was a balancing. If you look at  
23 the legislative history, there were some people who  
24 were opposed to opening up the courts of New York in  
25 that way. And the legislature balanced it, and they

1           said the price of coming into New York is you have to  
2           take New York law. It cannot be that when they said  
3           "in whole", in 5-1401, they were creating a loophole  
4           and saying, okay, you can come into New York, and you  
5           choose New York law, but you can choose the conflicts  
6           laws of New York, so ultimately the New York courts  
7           are applying some other law.

8                     The reason for this was to allow people to  
9           avail themselves of the well-established commercial  
10          jurisprudence of New York and to allow that law to  
11          develop. It was - - -

12                    JUDGE READ: Well, what if you - - - what  
13          if you wanted to have New York conflicts law apply?

14                    MS. KUCK: What - - -

15                    JUDGE READ: Could you say New York law,  
16          including its conflicts of law? Would that be  
17          permissible under the statute?

18                    MS. KUCK: I would say one of two things.  
19          You know, there's two dollar thresholds for 5-1401  
20          and 5-1402. If you didn't need 5-1402 to get into  
21          the New York courts, you had other contacts, you  
22          could get into the New York courts, otherwise, then I  
23          would say all you have to do is leave your contract  
24          silent, because you - - - as was pointed out, you end  
25          up back at the same point. Or you could say "New

1 York conflicts".

2 But I think if you're under 5-1402, if you  
3 need 5-1402 to get into the courts of New York, then  
4 I think you have to choose the substantive or the  
5 commercial law of New York, because that's the - - -

6 JUDGE SMITH: You're saying that even in  
7 the - - -

8 MS. KUCK: - - - that's the balance.

9 JUDGE SMITH: - - - even in the perhaps  
10 unlikely case where someone said we want New York  
11 conflicts principles to apply, you'd say that that  
12 effort would fail, because then you would not have  
13 qualified under 5-1402?

14 MS. KUCK: Well, I think you end up at the  
15 same place, because then you have to be under 5-1401  
16 that says okay, the conflict rule we're going to  
17 apply here is that we don't look at whether there's a  
18 reasonable relationship to New York. So it gets you  
19 to the same place. I think - - -

20 JUDGE SMITH: Oh, I see. You say the  
21 conflict rule is we don't apply the conflict rule?

22 MS. KUCK: Right. I mean, we don't apply  
23 the common law conflict rule. 5-1401 gives us the  
24 conflict rule. So even if you read the clause the  
25 way that Mr. Newman is reading it, we would say that

1 the rule you get under the conflicts test is in  
2 5-1401 that says you apply the New York commercial  
3 law regardless of the contacts with New York.

4 JUDGE SMITH: Okay. Suppose - - -

5 JUDGE GRAFFEO: Why - - -

6 JUDGE SMITH: Sorry.

7 JUDGE GRAFFEO: Why the difference in  
8 language, then, between the notes and the guarantee?  
9 What do we do with that?

10 MS. KUCK: Well, I would say that I would  
11 disagree with Mr. Newman, that you don't read the  
12 documents together. It's a long, well-established  
13 principle of contract interpretation that where you  
14 have agreements that are executed at the same time,  
15 dealing with the same subject matter, they must be  
16 read as one. And that's this court's decision in *Nau*  
17 *v. Vulcan Railway & Construction*, 286 N.Y. 188  
18 (1941). And also, there's an equally well-  
19 established principle set forth by this court in  
20 *Catskill National Bank v. Dumary*, 206 N.Y. - - -

21 JUDGE READ: So what do you do? You read  
22 the with - - -

23 MS. KUCK: Well - - -

24 JUDGE READ: - - - you read the "without  
25 regard to conflict of law principles" in the fiscal

1 agency agreement into the guarantee?

2 MS. KUCK: I don't think you're reading it  
3 into the guarantee. What I would say is if you look  
4 at - - - it's in the record at 241 - - - if you look  
5 at the fiscal agency agreement, which we agreed in  
6 the undisputed statement of facts is the governing -  
7 - - it set up the note program - - - it says  
8 actually, "this agreement the notes and the  
9 guarantees, shall be governed by and construed in  
10 accordance with the laws of the State of New York  
11 without regard to the conflicts of law principles."  
12 It then attached the form of note and the form of  
13 guarantee.

14 Now, it may well be that in those  
15 documents, three different formulations were used.  
16 But although they use different language, they have  
17 to be read to mean the same thing. And the fiscal  
18 agency agreement makes clear what the intent was.  
19 They were all - - -

20 JUDGE CIPARICK: That's the overriding - -  
21 -

22 MS. KUCK: - - - intended to be read.

23 JUDGE CIPARICK: - - - agreement, is the  
24 fiscal agency agreement? That's overriding the other  
25 two documents?

1 MS. KUCK: The fiscal agency agreement,  
2 right, is the governing doc - - - and it - - -

3 JUDGE CIPARICK: Governing document.

4 MS. KUCK: - - - specifically references -  
5 - - at 241 it references - - -

6 JUDGE CIPARICK: The guarantee.

7 MS. KUCK: - - - the notes and the  
8 guarantee. And it attaches the forms.

9 JUDGE CIPARICK: Um-hum.

10 MS. KUCK: So anybody looking at this would  
11 understand that the expectation was that they would  
12 be read as a whole and they would all mean the same  
13 thing.

14 CHIEF JUDGE LIPPMAN: Counselor, what would  
15 happen if you applied the New York conflicts rules in  
16 this case?

17 MS. KUCK: Well, I think, if you got - - -  
18 if we applied the New York conflicts rules - - - I  
19 would say we apply 5-1401, and we're exactly where we  
20 are - - - but I would say if you apply the center of  
21 gravity test, even in that circumstance, the first  
22 step in that test is whether there is a conflict  
23 between the two laws. You have to - - - the person  
24 advocating the conflict has to show there's a  
25 conflict.

1                   Not surprisingly, the laws of Brazil, just  
2                   like the laws of New York, do not permit people to  
3                   borrow money and then refuse to pay it back on the  
4                   grounds they weren't authorized to take it in the  
5                   first place. There are - - - we do disagree as to  
6                   whether the authorizations were proper. But we put  
7                   in an affidavit on the ratification and apparent  
8                   authority principles where our expert says even if  
9                   there was not the proper authorization, the Brazilian  
10                  law would still hold people to their bargain, given  
11                  their conduct over the course of the relationship.  
12                  That's exactly the same as New York.

13                  So we would say, no matter how you look at  
14                  it, whether you're under the plain language of the  
15                  contract, whether you're under 5-1401, or whether  
16                  you're under the common law test, no matter how you  
17                  look at it, you get back to New York law.

18                  JUDGE SMITH: You're also saying it's a  
19                  false conflict. You're saying you win under  
20                  Brazilian law.

21                  MS. KUCK: I'm sorry?

22                  JUDGE SMITH: You're also saying it's a  
23                  false conflict and you win under Brazilian law?

24                  MS. KUCK: We would say that you - - - it's  
25                  the same in each place. Our expert - - - the way

1           that this worked was, there were motions to - - -

2                   JUDGE SMITH:  Yes.  But isn't that what a  
3           false conflict is, that is - - -

4                   MS. KUCK:  Yes.

5                   JUDGE SMITH:  Yes.  So you could - - - and  
6           I'm not really suggesting it - - - we could say we're  
7           not going to worry about what law applies.  
8           Substantively, you win?

9                   MS. KUCK:  Right.  Because the first step  
10          is, is there actually a conflict.  And if you think  
11          about it, there's not.  Well-established commercial  
12          law anyplace doesn't allow people to conduct  
13          themselves as if they have a valid guarantee and then  
14          at the last minute say, oops, sorry, I didn't  
15          authorize it, I can't pay.

16                  JUDGE READ:  So what should - - - what  
17          should parties understand going forward?

18                  MS. KUCK:  I think that the rule should be  
19          that if you're in a large commercial case, as the  
20          statute is intended to cover, if you indicate a  
21          preference for New York law, then the courts of New  
22          York will apply that - - - and you meet the  
23          requirements of 5-1401, they won't - - - you don't  
24          have to go through a highly intensive factual  
25          analysis.

1                   JUDGE READ:  So you don't - - - you don't  
2                   need to read it - - - you don't need to write a  
3                   clause that's - - - you don't need to add the clause  
4                   "without regard to conflict of law principles" or  
5                   "with the exception", just the kind of provision  
6                   that's in the guarantee as opposed to what's in the  
7                   fiscal agency agreement and the global note is  
8                   sufficient?

9                   MS. KUCK:  I think you can say New York law  
10                  governs.  Because otherwise, if you went under normal  
11                  contract principles of interpretation, the other  
12                  clause would make no sense.  It would be absurd.  It  
13                  would be commercially unreasonable, and it wouldn't  
14                  meet the expectations of the parties.  So - - -

15                 JUDGE SMITH:  If you were - - - if you were  
16                 asked - - - if you were counseling someone on how to  
17                 write the agreement, you'd put that phrase in,  
18                 though, "without regard to conflict of laws  
19                 principles"?

20                 MS. KUCK:  I do get asked that all the  
21                 time, and I'll tell you what my current formulation  
22                 is.  It's the law - - - you know, "the agreement  
23                 shall be governed by the law of New York, without  
24                 regard to its conflicts of law principles that would  
25                 require application of a different law."  And the

1 reason that we put that last part in is because there  
2 are many people who say that 5-1401 is itself a  
3 conflicts principle. So you don't want to opt  
4 yourself out of 5-1401.

5 There's no right way to do this. There's  
6 any number of ways to do that. And you can see it in  
7 the documents here.

8 CHIEF JUDGE LIPPMAN: But if - - - but if  
9 you don't say it, you're still okay?

10 MS. KUCK: I think you're still okay. And  
11 could I say - - - and if I could say one thing about  
12 the predictability - - -

13 CHIEF JUDGE LIPPMAN: Sure. Go ahead.

14 MS. KUCK: - - - predictability point. I  
15 mean, Mr. Newman was talking about in a situation  
16 where you have a default under the contract. If you  
17 have a default, then what he's saying is, well, then  
18 we come into New York and if four different  
19 noteholders come into New York, we do a highly  
20 intensive, fact-intensive analysis, and we'll figure  
21 out what law applies. But what happens if over the  
22 course of performance, the guarantor has a question?  
23 There's a payment date, or there's something they  
24 need to figure out how they're supposed to perform.

25 Well, they don't know here where the

1 investors are from, because the way this works is  
2 investors just get an account number. The guarantor  
3 doesn't know where the investors are from. But if  
4 even if they do know where the investors are from,  
5 you could have five investors: you could have one  
6 from Argentina, Brazil, England, Brussels. Those all  
7 have contacts with this deal.

8 So you could end up with five different  
9 possible governing laws. How are they supposed to  
10 conduct their self (sic) as they perform over the  
11 course of the relationship? That would be  
12 commercially unreasonable. So this clause is in  
13 there for the benefit of the guarantor as well as the  
14 benefit of the investors.

15 CHIEF JUDGE LIPPMAN: Okay. Thanks,  
16 counselor.

17 Counselor, rebuttal.

18 MR. NEWMAN: Just a few quick points.

19 JUDGE CIPARICK: Can you address counsel's  
20 last point?

21 MR. NEWMAN: I beg your pardon?

22 JUDGE CIPARICK: Can you address counsel's  
23 last point?

24 MR. NEWMAN: I'd be delighted to. What was  
25 it?

1                   JUDGE CIPARICK:  If you have investors from  
2 many different countries and - - -

3                   MR. NEWMAN:  The law should be perfectly  
4 clear - - - thank you.  And this was one of the main  
5 points.  I disagree with the thrust of what my  
6 esteemed counsel says, because there is no ambiguity  
7 here.  The ambiguity, the uncertainty, comes from the  
8 fact that we have now - - - the First Department has  
9 now read into a perfectly clear - - - sorry - - -  
10 perfectly clear and unambiguous provision words that  
11 don't exist.  It has also read out of 5-1401 and 5-  
12 1402 the condition that parties may choose New York  
13 law in whole or in part.

14                   Now, why they would choose part instead of  
15 whole; why would they - - - that's up to the party -  
16 - -

17                   JUDGE SMITH:  Well, you could imagine that  
18 they might choose one part of the substantive law and  
19 not another.  They might say well, so the internal  
20 affairs of the company will be governed by the law of  
21 the state of incorporation, but otherwise we choose  
22 New York law.  That seems to make commercial sense.  
23 I have trouble why you want only New York conflicts  
24 laws and nothing else.

25                   MR. NEWMAN:  Well, I do too, frankly.  But

1 I don't think it's - - - but, with respect to all of  
2 us, I don't think it's any of our business if  
3 somebody decides that they want to have a New York  
4 court, whose judgment they respect, who is  
5 sophisticated, who is commercially - - - the  
6 commercial division, commercially sophisticated, just  
7 like Bob Hague who helped set up the commercial  
8 division, and Your Honor, Judge Lippman. New York  
9 courts know how to apply laws. And they know how to  
10 apply conflicts laws.

11 JUDGE SMITH: What does it - - - I mean,  
12 your adversary suggests that what you're really doing  
13 is you're suggesting there's a loophole that the  
14 legislature said you've got to take New York law to  
15 get into the New York courts, and you're saying well,  
16 there's a way to get into the New York courts and  
17 keep Brazilian law, by just adopting the New York  
18 conflict principles.

19 MR. NEWMAN: No.

20 JUDGE SMITH: Doesn't that undermine the  
21 purpose of the statute?

22 MR. NEWMAN: No, because that's not what  
23 the statute says, Your Honor, particularly 1402,  
24 which is not a choice of law clause; 1402 says that  
25 somebody who's done these things, like our client,

1 can be sued. 1402 is a jurisdictional point. And it  
2 says that if you choose New York law in whole or in  
3 part, you may be sued in New York. That's what 1402  
4 says.

5 JUDGE SMITH: And that's true, even if the  
6 choice of New York law is essentially illusory, as  
7 you say it is here?

8 MR. NEWMAN: Well, it's not - - - that is  
9 true. But I would quarrel with the term illusory.  
10 But, yes.

11 JUDGE SMITH: But it is - - - but you would  
12 acknowledge that the law is the same as if there were  
13 no choice of law clause in the contract?

14 MR. NEWMAN: Correct. Yes, I would.

15 JUDGE CIPARICK: If this action were  
16 brought in Brazil - - -

17 MR. NEWMAN: Yes.

18 JUDGE CIPARICK: - - - what law would  
19 govern? This very same contract.

20 MR. NEWMAN: You know, I think the law of  
21 Brazil would govern. There - - - I'm not a Brazil  
22 lawyer. It could have been brought in Brazil,  
23 because the provisions are all nonexclusive. I mean,  
24 there is a nonexclusive jurisdiction provision, which  
25 is the same in the same paragraph as the choice of

1 law provision. It could have been brought in Brazil.

2 JUDGE CIPARICK: And if it was an action -

3 - -

4 MR. NEWMAN: I mean, you might ask why IRB,  
5 which is owned by the Brazilian government, didn't  
6 bring this in Brazil. I don't know the answer to  
7 that. Maybe because the law would have been  
8 different.

9 CHIEF JUDGE LIPPMAN: Okay. Thanks,  
10 counselor.

11 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of IRB-Brasil Resseguros, S.A. v. Inepar Investments, S.A., No. 191 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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