

**Financial Guaranty Insurance Company v IKB  
Deutsche Industriebank AG**

2008 NY Slip Op 33495(U)

December 29, 2008

Supreme Court, New York County

Docket Number: 600704/08

Judge: Herman Cahn

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

JUSTICE: Hermon Cahn

PART 49M

Financial Guaranty Insurance Company and FGIC UK Limited

INDEX NO. 600704/08

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 007

MOTION CAL. NO. \_\_\_\_\_

IKB Deutsche Industriebank AG, IKB Credit Asset Management GM BH, Hannover AG Limited, and Calyon Credit Agricole CTB

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

FOR THE FOLLOWING REASON(S):

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE .....

FILED

JAN 05 2009

COUNTY CLERK'S OFFICE NEW YORK

Dated: 12/29/08

Her Cahn

J.S.C.

Check one:  FINAL DISPOSITION

Check if appropriate:  DO NOT

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK; IAS PART 49

-----x  
FINANCIAL GUARANTY INSURANCE COMPANY  
and FGIC UK LIMITED,

Plaintiffs,

-against-

Index No. 600704/08

IKB DEUTSCHE INDUSTRIEBANK AG,  
IKB CREDIT ASSET MANAGEMENT GMBH,  
HAVENROCK II LIMITED, and  
CALYON CREDIT AGRICOLE CIB,

Defendants.

-----x

**FILED**  
JAN 05 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

**CAHN, J.:**

This case involves a complex and tangled web of sponsors, issuers and conduits of collateralized debt obligations (CDO) of asset-backed securities, parties to credit default swaps (CDS), insurers that guarantee the payment obligations under CDS, as well as beneficiaries of such guarantee.

More specifically, plaintiffs Financial Guaranty Insurance Company (FGIC-NY, a New York-based corporation) and its United Kingdom affiliate FGIC UK Limited (FGIC-UK; together with FGIC-NY, collectively, FGIC) seek to invalidate a financial commitment (the Commitment Agreement) issued by FGIC-UK to defendant Havenrock II Limited (Havenrock).

Havenrock is a special purpose Jersey-based company located in the Channel Islands, that was formed in connection with an off-balance sheet structured financing transaction undertaken by a German bank, defendant IKB Deutsche Industriebank AG (IKB-AG) and its affiliate

defendant IKB Credit Asset Management GMBH (IKB-CAM; together with IKB-AG, collectively, IKB).

IKB was the sponsor of a structured investment conduit vehicle named Rhineland Funding Capital Corporation (Rhineland), a Delaware company that issued and sold commercial paper to investors secured by CDOs, including securitized sub-prime mortgages, that were acquired or purchased by Jersey-based companies affiliated with Rhineland (the JPCs).

The Commitment Agreement provides that, upon the occurrence of certain events under the CDS (as discussed below), FGIC-UK is required to issue the Master Financial Guarantee (the MFG). Pursuant to the MFG, Calyon, a French investment bank affiliated with Credit Agricole that served as the interim liquidity provider for the transactions, is the ultimate and intended beneficiary of the payment obligations under the MFG.

In their complaint filed in this Court (the Complaint), plaintiffs allege that they were fraudulently induced by IKB and Havenrock into entering the Commitment Agreement and the MFG. The Complaint asserts four causes of action: fraud, negligent misrepresentation, fraudulent concealment/non disclosure and promissory estoppel. It also seeks declaratory relief that the Commitment Agreement is void and unenforceable, as well as injunctive relief against Havenrock and Calyon that they be enjoined from enforcing the Commitment Agreement.

In response, defendants IKB and Havenrock each filed a motion to dismiss the complaint on the ground of forum non conveniens (motion sequence number 007).<sup>1</sup> Both FGIC and Calyon

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<sup>1</sup> IKB also filed a motion to dismiss for lack of personal jurisdiction and lack of standing on the part of FGIC-UK to sue under New York banking law. In addition, IKB filed a motion for a protective order. The parties have asked the Court to hold these motions in abeyance.

oppose the motions to dismiss. For the reasons stated herein, the relief sought in the motions is granted.

### **Background**

It is alleged in the complaint, that an IKB executive came to New York in November 2006 to meet with a FGIC-NY employee, who was formerly employed by Ambac Financial Group, to discuss whether FGIC would be interested in doing one or more transactions with IKB, similar to the one such employee had previously done while he was at Ambac. In that transaction, Ambac provided a financial guaranty for a \$3 billion IKB-sponsored structured financing transaction. Compl, ¶ 31-33. After FGIC expressed an interest, Calyon agreed to become the “liquidity provider” for the transactions. *Id.* ¶ 35.

Specifically, under an asset-based commercial paper (ABCP) program sponsored by IKB, Rhineland would issue and sell short term commercial papers to investors. It would advance the proceeds thereof to the affiliated JPCs to enable them to buy eligible assets, including CDOs, to secure the payment obligations under the ABCP. To “backstop” such obligations in the event of a default on the underlying assets, Rhineland, through the JPCs, entered into “put options” with Calyon, pursuant to which Calyon committed to Rhineland to buy at par value, upon the occurrence of specified default events, up to \$2.5 billion in assets from Rhineland’s portfolio. To hedge its own risk, Calyon, as a “protection buyer,” entered into two credit default swaps (CDS)<sup>2</sup>

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<sup>2</sup> Under a CDS, the “buyer” pays a fee to the “seller.” If no credit event occurs when the CDS matures, the buyer continues to pay the fee. If there is a credit event, fee payment stops and the seller is required to settle the trade by paying the buyer cash based on the average trading price of a “referenced obligation.” The price is determined by taking a “dealer poll” where dealers of the obligation provide the price at which such obligation is trading. *See* Hollywood Aff. ¶ 25.

with Havenrock, as a “protection seller.”

In turn, to support or hedge its own payment obligations to Calyon under the two CDS, Havenrock, IKB’s affiliate, entered into certain transactions, including: (1) a non-recourse loan arrangement with an IKB affiliate with respect to 25% of Rhineland’s \$2.5 billion portfolio, up to an amount of \$625,000,000; and (2) the Commitment Agreement with FGIC-UK with respect to the balance (i.e. 75%) of the portfolio, up to an amount of \$1.875 billion. In exchange for fees paid by or on behalf of Havenrock, FGIC-UK is obligated under the Commitment Agreement to take on \$1.875 billion of Havenrock’s credit risk. In particular, pursuant to the terms of the Commitment Agreement, FGIC-UK is obligated to issue a financial guaranty to Havenrock (i.e. the MFG) for the ultimate benefit of Calyon, when \$625,000,000 of losses on Rhineland’s portfolio had been realized and certain other conditions were met. Compl, ¶ 38-40.

Notably, FGIC-NY, a New York-based insurance company that issues financial guarantees to municipalities and commercial entities, is not a party to any of the transaction documents, including the Commitment Agreement and the MFG. This is because it is not licensed to underwrite insurance or issue financial guarantee in the United Kingdom. However, through reinsurance treaties with its wholly-owned subsidiary FGIC-UK, FGIC-NY reinsures certain obligations of FGIC-UK. *Id.* ¶ 3-5, 41-42.

The Commitment Agreement and related transaction documents were executed in June 2007. Soon thereafter, a global credit crisis erupted in connection with various CDOs, including sub-prime mortgage securities, that formed a significant portion of Rhineland’s portfolio. At the same time, IKB, the sponsor of Rhineland, faced substantial financial difficulties itself. Consequently, through its affiliated JPCs, Rhineland exercised the put options and “put” its

entire portfolio to Calyon, which paid \$2.5 billion to buy the CDOs pursuant to the option terms.

As the ultimate beneficiary of the MFG, on March 17, 2008, Calyon commenced an action in England against FGIC-UK, asserting that the Commitment Agreement is a binding obligation of FGIC-UK. On March 20, 2008, FGIC-UK notified Calyon of an alleged breach by Calyon of certain “dealer poll” (*see* fn 2) obligations under the Commitment Agreement. On May 1, 2008, Calyon withdrew its English action and asserted counterclaims in respect of the Complaint, seeking a declaration that FGIC-UK is bound by the Commitment Agreement and the MFG.

On May 12, 2008, FGIC-UK commenced suit in England against Calyon and Havenrock, alleging that Calyon is in breach of the Commitment Agreement. On May 27, 2008, during a conference before this Court, counsel for plaintiffs, IKB and Havenrock agreed in principle that plaintiffs would withdraw the New York action and transfer this litigation to England; however, Calyon’s counsel indicated that his consent was subject to consultation with his client. On June 12, 2008, Calyon challenged the English court’s jurisdiction. On July 23, 2008, after opposing the instant motions to dismiss based on forum non conveniens, FGIC-UK also opposed Calyon’s challenge to the English court’s jurisdiction.

In August 2008, FGIC and Calyon executed a “Deed of Settlement,” pursuant to which they purportedly agreed, among other things, that FGIC-UK would pay Calyon \$200,000,000; and that FGIC-NY, via an inter-company agreement, would pay \$130,000,000 to settle reinsurance obligations owed to FGIC-UK, and all loss adjustment expenses incurred by FGIC-NY or FGIC-UK. After signing the Deed of Settlement, a copy of which has not been provided to Havenrock (even though it was a defendant in that action) or this Court, FGIC-UK

discontinued the English action. Hence, it appears that the only action among the parties at this time is the instant action.

### Discussion

In New York, the common law doctrine of forum non conveniens is codified in CPLR 327, which permits a court to dismiss an action when it finds that “in the interest of substantial justice the action should be heard in another forum.” CPLR 327 (a).<sup>3</sup>

In addressing this doctrine, the Court of Appeals explained that “the burden rests upon the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation.” *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 (1984), *cert denied* 469 US 1108 (1985). The factors that are generally considered in the context of a motion to dismiss based on forum non conveniens include, among others: (1) residency of the parties; (2) primary situs of the transactions out of which the action arose; (3) availability of another forum where plaintiff may bring suit; (4) burden on the New York courts; and (5) potential hardship to the defendant. *Id.* at 479. The Court of Appeals also noted in *Pahlavi* that “no one factor is controlling,” and that the “great advantage” of this doctrine is “its flexibility based on the facts and circumstances of each case.” *Id.* (citations omitted).

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<sup>3</sup> The parties have agreed to hold personal jurisdiction issues in abeyance, pending the ruling on forum non conveniens issues. This Court is fully aware that the Appellate Division, First Department, has held that a court may not reach forum non conveniens issues when questions exist as to whether the court has personal jurisdiction over a defendant. *See e.g. Wyser-Pratte Mgmt. Co., Inc. v Babcock Borsig AG*, 23 AD3d 269, 269 (1st Dept 2005); *Edelman v Taittinger, S.A.*, 298 AD2d 301, 303 (1st Dept 2002); *but see American BankNote Corp. v Daniele*, 45 AD338 (1st Dept 2007) (decided non conveniens issues prior to jurisdictional issues); and *see: Sinochem Int'l Co., Ltd. v Malaysia Int'l Shipping Corp.*, 549 US 422 (2007). In any event, “[o]n a motion to dismiss on the ground of forum non conveniens, jurisdiction over the defendant is presumed.” *Shin-Etsu Chemical Co. Ltd. v ICICI Bank Ltd.*, 9 AD3d 171, 176 (1st Dept 2004).

1. Residency of the Parties

One of the factors in a forum non conveniens analysis is residency of the parties.

*Pahlavi*, 62 NY2d at 479. In the instant case, except for FGIC-NY, which is based in New York, all other parties are foreign entities, to wit: FGIC-UK (England); IKB-AG (Germany), IKB-CAM (Germany), Havenrock (Jersey) and Calyon (France).

Notably, unlike plaintiff FGIC-NY, which is not a signatory to any transaction documents, nonresident plaintiff FGIC-UK is the signatory to the Commitment Agreement and the intended issuer of the MFG. However, plaintiffs jointly argue that their choice of forum should be accorded deference.

Generally speaking, although a defendant invoking forum non conveniens usually bears the burden in opposing a plaintiff's chosen forum, when the plaintiff is a foreign entity, such as FGIC-UK, its choice of forum is entitled to less deference because the assumption that the chosen forum is more convenient to plaintiff is less reasonable. *See e.g., Piper Aircraft Co. v Reyno*, 454 US 235, 255-256 (1981); *Pahlavi*, 62 NY2d at 482. Under such a scenario, the nonresident plaintiff must show "more than its own convenience for selecting the forum when the choice imposes a heavy burden on the court and the defendant." *Pahlavi*, 62 NY3d at 482.

FGIC-UK has failed to make such a showing. Indeed, FGIC-UK had previously chosen the English courts to litigate against Calyon and Havenrock certain contract issues arising under the Commitment Agreement and the MFG. In fact, by its English counsel, FGIC-UK had asserted that "England is the place for performance of the obligation" under the Commitment Agreement and the MFG because, among other things, clause 16.2 of the Commitment Agreement designates the courts of England as having jurisdiction (though not exclusive) to hear

disputes arising out of such Agreement, and the MFG contains a clause which provides that the courts of England have “exclusive jurisdiction” to determine all disputes arising under the MFG. *See* Rosenbaum Reply Aff, Ex H, ¶ 35-43. Thus, FGIC-UK’s argument, that its choice of forum is entitled to deference and should be controlling, is without merit.

With respect to FGIC-NY, because it is the only party (out of six) that is a New York resident, application of the “residency of the parties” factor militates in favor of granting the motions to dismiss based on forum non conveniens. *Wyser-Pratt Mgmt Co., Inc. v Babcock Borsig AG*, 23 AD3d 269, 270 (1st Dept 2005) (“Although plaintiff New York resident’s choice of forum is presumptively favored, it is not dispositive. The fact that five of the nine defendants are German residents is entitled to, and was properly accorded, substantial weight”) (internal citations omitted).

Despite the foregoing, plaintiffs argue that this case has a “substantial nexus” to New York. Pl Opp Br, at 15-25. This argument is addressed below.

## 2. Situs of the Transaction

In *Pahlavi*, the Court of Appeals noted that “transactions out of which the cause of action arose occurred primarily in a foreign jurisdiction” weighed in favor of dismissal of the action based on forum non conveniens. 62 NY2d at 479; *see also World Point Trading PTE, Ltd. v Credito Italiano*, 225 AD2d 153, 159 (1st Dept 1996). In other words, New York courts “need not entertain causes of action lacking a substantial nexus with New York.” *Nguyen v Banque Indosuez*, 19 AD3d 292, 294 (1st Dept 2005), *quoting Martin v Mieth*, 35 NY2d 414, 418 (1974); *see also Shin-Etsu Chemical Co., Ltd. v ICICI Bank Ltd.*, 9 AD3d 171, 176 (1st Dept 2004).

Plaintiffs assert that this case has extensive connections to New York because, among other things: (a) key events occurred in New York, which included negotiation, analysis and approval of the transactions; (b) locus of IKB's alleged frauds is New York because FGIC-NY, as opposed to FGIC-UK, is the primary victim and suffered economic injury in New York; and (c) payments for the transactions were mostly made in bank accounts in New York.

Plaintiffs' assertions, though facially appealing, are unpersuasive when carefully analyzed. First, while it is true that certain business meetings and negotiations took place in New York (e.g. November 29, 2006, March 21, 2007 and April 10, 2007 meetings), they also occurred elsewhere (e.g. January 29, 2007 meeting in Las Vegas; March 5-6, 2007 due diligence in Germany, and June 8, 2007 closing of transactions in Germany). It is also true that when viewed from FGIC-NY's own perspective, many e-mails, documents and conference calls were made or sent to its New York office and such communications were handled, analyzed and approved by FGIC-NY's staff. Yet, it is equally true that such communications frequently originated from foreign countries and that nonresident participants in the transactions engaged in similar activities. Thus, a mirror image argument can be made that a significant portion of the transactions took place outside of New York, including the fact that the Commitment Agreement and the MFG, which require performance in England, were prepared by English counsel, and were completed and executed outside of New York by nonresident parties. *Kuwaiti Engineering Group v Consortium of Int'l Consul., LLC*, 50 AD3d 599, 599 (1st Dept 2008). *Cf. American Banknote Corp. v Daniele*, 45 AD3d 338, 339 (1st Dept 2007) (affirming denial of dismissal because key witnesses were located in New York or New Jersey, defendants' alleged

wrongdoings were committed in New York, and defendants' bank accounts that allegedly formed a central part of the fraudulent scheme were located in New York).<sup>4</sup>

With respect to IKB's alleged fraudulent acts that induced FGIC into entering transactions encompassed by the Commitment Agreement and the MFG, it is not argued that such acts were committed in New York. Indeed, plaintiffs assert that the fraud claim is based on either conversations between the parties that occurred primarily outside of New York, or based on financial statements, reports, press releases or presentations that were produced by IKB in Germany. Compl, ¶ 43-68. Yet, plaintiffs argue that, under New York tort law, because FGIC-NY is the "primary victim" of the alleged frauds, its economic injury suffered in New York made New York the locus of the fraud, and formed a component of the "substantial nexus" to New York. Pl Opp Br, at 19-20.

However, plaintiffs do not dispute that both the Commitment Agreement and the MFG require the application of English laws, and that the MFG mandates any disputes be heard exclusively in the English courts. The U.S. Supreme Court has held that choice of law and forum clauses are presumptively valid, especially where the transactions are international in nature. *M/S Bremen v Zapata Off-Shore Co.*, 407 US 1, 15 (1972) ("[I]n light of present-day commercial realities and expanding international trade . . . [a] forum clause should control absent a strong showing that it should be set aside"). Indeed, it is the policy of the New York courts to enforce

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<sup>4</sup> Plaintiffs' reliance on *Daniele* for support is misplaced, because the facts in *Daniele* and this case are distinguishable. As discussed more fully below, based on this Court's analysis of the parties' assertions, key witnesses in this action are located in New York, Germany, England and other countries; the defendants' alleged fraudulent representations were not committed in New York; and although the bank accounts for the transactions were located in New York, plaintiffs do not allege that such accounts were a central part of the defendants' alleged fraudulent scheme.

contractual choice of law and forum clauses. See e.g., *Indosuez Int'l Fin., B.V. v National Reserve Bank*, 304 AD2d 429, 430 (1st Dept 2003); *Union Bancaire Privee v Nasser*, 300 AD2d 49, 50 (1st Dept 2002); *Premium Risk Group, Inc. v Legion Ins. Co.*, 294 AD2d 345, 346 (2d Dept 2002). Also, it has been emphatically noted in *Roby v Corp. of Lloyd's* (996 F2d 1353 [2d Cir 1993]) *cert denied* 510 US 945 (1993), that:

It defies reason to suggest that . . . [a] plaintiff simply would have to allege violations of *his country's tort law* . . . in order to render nugatory any forum selection clauses that implicitly or explicitly required the application of the law of another jurisdiction. We refuse to allow a party's solemn promise to be defeated by artful pleading.

*Id.* at 1360 (emphasis in original). Here, plaintiffs have not shown or even alleged, that under English law with respect to fraud claims, the locus of such claims is determined by where plaintiff's economic injury occurred, as opposed to where the fraud was committed. Instead, plaintiffs only argue that English law is inapplicable because this is a tort claim. Further, none of the cases cited in support of plaintiffs' argument involved parties to international transactions, such as the instant case. Moreover, it has been held that a choice of forum clause also encompasses the law for a tort claim if such claim depends on the relation of the contracting parties. *Cfirstclass Corp. v Silverjet plc*, 560 F Supp 2d 324, 329 (SDNY 2008) (a "contractually-based forum selection clause will also encompass tort claims if the tort claims ultimately depend on the existence of a contractual relationship between the parties").

Even assuming the feasibility of plaintiffs' argument, it is undisputed that FGIC-UK is contractually and primarily liable for the obligations under the Commitment Agreement and the MFG. FGIC-NY's secondary liability is derived from its inter-company agreements (i.e the reinsurance treaties) with FGIC-UK. Because England-based FGIC-UK is the primary party

required to fulfill the obligations under the transaction documents, England is the locus and proper forum for the fraud claim.

Plaintiffs also argue that, because FGIC-NY is FGIC-UK's parent, even though FGIC-NY is not a party to the Commitment Agreement and the MFG, FGIC-UK's economic loss also made FGIC-NY a proper plaintiff to bring an action against IKB in New York.<sup>5</sup> This argument is without merit. As an initial matter, "in terms of legal responsibility, parent, subsidiary or affiliated corporations are treated separately and independently and one will not be held liable for the contractual obligations of the other, unless it is shown that there was an exercise of complete dominion and control." *Alexander & Alexander of New York, Inc. v Fritzen*, 114 AD2d 814, 815 (1st Dept 1985), *affd* 68 NY2d 968 (1986). Plaintiffs have not argued "complete dominion and control" or piercing the corporate veil, such that FGIC-UK and FGIC-NY (on one hand) or IKB and Havenrock (on the other hand) should be treated as a single entity. Secondly, the case relied on by plaintiffs, *Lumbermens Mutual Casualty Co. v Commonwealth of Pennsylvania* (18 Misc 3d 1122(A) [Sup Ct, NY County 2008]), for the proposition that a corporate parent has standing to sue when its subsidiary is harmed, was reversed on appeal. *See Lumbermens*, 52 AD3d 212 (1st Dept 2008).

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<sup>6</sup> Plaintiffs also argue that, although Havenrock conducted no business in New York, because IKB, as agent for Havenrock, conducted business on its behalf, Havenrock, as principal, cannot rely on its own physical absence from New York to establish a lack of purposeful activity in this forum. This argument only pertains to whether Havenrock may be subject to this Court's jurisdiction, not whether Havenrock's activities, if any, had sufficient nexus to New York. In any event, in analyzing non forum conveniens issues, personal jurisdiction is presumed.

### 3. Availability of Alternative Forum

In *Pahlavi*, the Court of Appeals noted that, even though the availability of another forum where plaintiff could bring suit was an important factor, it emphasized that “we have never held that it was a prerequisite for applying the *conveniens* doctrine.” 62 NY2d at 481. Indeed, the Court of Appeals affirmed the lower court’s dismissal of plaintiff’s action based on *forum non conveniens*, in spite of the fact that there was no other forum in which plaintiff could obtain the relief sought. *Id.* at 484.

In this case, plaintiffs and Calyon do not contend that there is no alternative forum. Instead, they argue that New York is a more appropriate forum because Calyon, a co-defendant here, consents to this Court’s jurisdiction, but challenged the English court’s jurisdiction in the then pending action commenced by FGIC-UK against Calyon and Havenrock. Pl Rep Br, at 26-30. This argument is without merit. FGIC-UK and Calyon had chosen the English courts to hear their disputes under the Commitment Agreement and the MFG. Also, the transaction documents require the application of English laws, and under the MFG in particular, designates exclusive jurisdiction with the English courts. Clearly, the English courts provide an alternative forum to hear and adjudicate the instant case.

Notwithstanding the foregoing, plaintiffs argue that because the New York courts, as opposed to the English courts, provide for more extensive discovery, justice would be better served if this Court denies the motions to dismiss based on *forum non conveniens*. In support for their argument, plaintiffs cite to: *Waterways Ltd. v Barclays Bank PLC*, 174 AD2d 324, 328 (1st Dept 1991); *Republic of Lebanon v Sotheby*, 167 AD2d 142, 145 (1st Dept 1982); *Creditanstalt Inv. Bank AG v Chadbourne & Parke LLP*, 4 Misc 3d 481 (Sup Ct, NY County 2004), *affd* 14

AD3d 414 (1st Dept 2005); *Aboujdid v Gulf Aviation Co.*, 108 Misc 2d 175, 178-179 (Sup Ct, NY County 1980). Pl Rep Br, at 31-32.

The cited cases are inapplicable because none of them involve contractual choice of law and forum clauses where foreign laws and foreign tribunals apply. In fact, in one of the cited cases, *Waterways*, the governing documents required the application of New York law. *Id.* at 325. Thus, even if New York discovery is more extensive, English law applies. *Roby*, 996 F2d at 1363 (“international comity dictates that American courts enforce [forum selection and choice of law clauses] out of respect for the integrity and competence of foreign tribunals . . . contracts entered into freely generally should be enforced because [such clauses] likely will be reflected in the value of the contract as a whole”). Further, it has been held that “some inconvenience or the unavailability of beneficial litigation procedures similar to those available in [the United States] courts does not render an alternative forum inadequate [internal citation omitted].” *Scottish Air Int’l, Inc. v British Caledonian Group plc*, 81 F3d 1224, 1234 (2d Cir 1996). The fact that New York discovery rules are more expansive and favorable will not serve as a basis to deny a motion for a non conveniens dismissal.

#### 4. Burden on the New York Courts

Plaintiffs argue that New York has a strong interest in this matter because the New York State Insurance Department (NYID) has been monitoring the financial health of New York insurance and bond guaranty companies, including FGIC-NY, as it was one of New York’s top bond insurers. Plaintiffs argue that this Court has an interest in hearing disputes that affects New York’s financial market, such as the instant case. However, the parties to the various agreements

have clearly agreed that their disputes should be adjudicated by the British courts. This Court's interest in the matter will not be heard to override their freely entered agreement.

Defendants contend that: (a) London, like New York, is a center for international finance and insurance; (b) FGIC-UK is an insurance company subject to the regulatory laws of England where the English courts clearly have jurisdiction; (c) IKB, like FGIC, is a victim of sub-prime mortgages and has been taken over by German regulators; and (d) adjudication of this case requires the application of foreign laws involving, among other things, accounting and disclosure obligations, including German data protection and privacy regulations, as to which the English courts have familiarity because England, like Germany, is a member of the European Union.

It is clear that the Commitment Agreement and the MFG call for the application of English laws. Although our courts are capable of applying English law, it can hardly be disputed that English courts are more familiar with their own laws and better equipped in their application. *See e.g., Neuter, Ltd. v Citibank, N.A.*, 239 AD2d 213 (1st Dept 1997) (involving Swiss law). It is equally undisputed that English laws provide adequate remedies for plaintiffs' claims, including fraud, misrepresentation and non-disclosure. *Roby*, 996 F2d at 1365. Thus, the application of foreign substantive and procedural laws favors the dismissal of this case in favor of a foreign forum, where plaintiffs' claims can be readily heard and adjudicated.

5. Potential Hardship on Defendants

In *Alberta & Orient Glycol Co., Ltd. v Factory Mutual Ins. Co.* (49 AD3d 276 [1st Dept 2008]), the First Department affirmed the trial court's ruling which granted, among other things, motion of defendants to dismiss plaintiff's action due to forum non conveniens. Agreeing that Canada was the more appropriate forum than New York, the First Department held that the trial

court properly considered the following factors, including: “the domicile of plaintiff and many of the defendants, the site of the loss, the location of records and files, the number of witnesses in Canada and in locations other than New York” as well as the application of Canadian law to the dispute. 49 AD3d at 277.

In this case, the parties dispute not only the number and locations of key party witnesses, they also dispute the number and locations of potential non-party witnesses, such as corporate affiliates, attorneys, accountants and rating agencies that may have information relevant to the dispute. Yet, it is undisputed that the parties, except for FGIC-NY, are nonresidents of New York, and that many of defendants’ executives are residents of foreign countries while most of the executives of FGIC-NY are located in New York. Further, it is undisputed that the parties are large corporations, and their executives and employees are quite used to international travel. Indeed, the parties in this case have been engaged in trans-Atlantic litigations, in New York and England.

Despite the foregoing competing data, it is not crucial to a determination of these forum non conveniens motions as to which party will be more burdened if this Court decides or declines to hear this case. Indeed, as noted, the location of witnesses or the hardship on defendants or plaintiffs is only one of the factors in a forum non conveniens analysis, and “no one factor is controlling.” *Pahlavi*, 62 NY2d at 479.

#### 6. Deed of Settlement

As discussed above, plaintiffs and Calyon have entered into the “Deed of Settlement,” which purportedly provides for, among other things, FGIC-UK’s discontinuance of the action against Calyon and Havenrock in the English courts, in exchange for certain payments to be made

by FGIC-UK (funded in part by FGIC-NY) to Calyon, and Calyon's dismissal of its counterclaims against FGIC in this action, without prejudice. Plaintiffs argue that the settlement moots the forum non conveniens arguments of IKB and Havenrock because, inter alia, (a) discontinuance of the English action discredits any contention that the transfer of this action to the English courts would increase efficiency; and (b) the settlement required the approval of NYID, which confirms New York's nexus to, and paramount interest in, this matter. Pl Sup Br, at 4-5.

Plaintiffs' arguments are unpersuasive. First, although the settlement represents a calculated and strategic move on the part of plaintiffs and Calyon to resolve (whether in whole or in part) their disputes, it does not change the forum non conveniens analysis discussed above. The fact that FGIC-UK has discontinued the English action, such that the instant action pending in this Court is the only remaining action among the parties, also does not mean that the United Kingdom is not the proper forum to hear this action. Undeniably, the parties to the Commitment Agreement and MFG are sophisticated businesses with global operations, and they were represented by highly-skilled counsel in the drafting and negotiation of such documents. The very terms of these documents require the application of English laws and designate the English courts as having primary, if not exclusive, jurisdiction, to hear disputes thereunder. In such regard, the settlement cannot be used to disavow or displace the contractually chosen laws and forum for these international transactions among multinational parties. *Roby*, 996 F2d at 1363 ("Forum selection and choice of law clauses eliminate uncertainty in international commerce and insure that the parties are not unexpectedly subjected to hostile forums and laws. Moreover, international comity dictates that American courts enforce these sorts of clauses out of respect for the integrity and competence of foreign tribunals").

Furthermore, the fact that NYID's approval was obtained in connection with the Deed of Settlement does not mean that the transactions under the Commitment Agreement and related documents were not international in nature, or that New York's nexus to or interest in such transactions was significantly more than other countries. If anything, NYID's approval was sought because FGIC-NY is a New York insurance company subject to the supervision and regulatory power of NYID. Also, pursuant to the settlement, FGIC-NY's payment to FGIC-UK is not inconsistent with its obligations under pre-existing reinsurance contracts it had with FGIC-UK. Indeed, the structure of the settlement, whereby FGIC-UK is required to pay Calyon directly and FGIC-NY funded a portion of such payment by paying FGIC-UK, confirms that FGIC-UK, an England-based insurance company subject to English laws, is the sole or primary obligor under the Commitment Agreement and the MFG.

### **Conclusion**

Based on the foregoing analysis, after considering the totality of facts and circumstances of the instant case and weighing all of the competing factors, the Court concludes that defendants' motions to dismiss based on forum non conveniens should be granted.<sup>6</sup>

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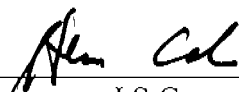
<sup>6</sup> In light of the foregoing, this Court need not address other issues raised by the parties, such as whether the pending sale of IKB's stock to Lone Star Funds, a Texas-based company, as such issue is irrelevant to the forum non conveniens analysis.

Accordingly, it is

ORDERED that defendants' motions to dismiss on the basis of forum non conveniens pursuant to CPLR 327 (motion sequence number 007) are hereby granted.

Dated: December 29, 2008

ENTER:

  
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J.S.C.

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