

IRB-Brasil Resseguros S.A. v Inepar Invs., S.A.

2009 NY Slip Op 31723(U)

July 31, 2009

Supreme Court, New York County

Docket Number: 604448/06

Judge: Shirley Werner Kornreich

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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 604448/2006

IRB-BBRASIL

vs

INEPAR INVESTMENTS

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 5/7/09

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3

4-6

7

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

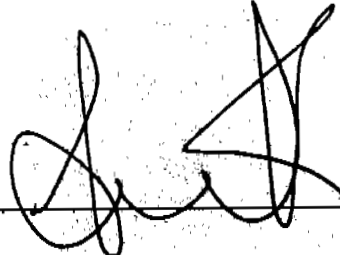
FILED

AUG 03 2009

COUNTY CLERK'S OFFICE
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

Dated: 7/31/09



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----- X
IRB-BRASIL RESSEGUROS S.A.,

Plaintiff,

Index No.: 604448/06

-against-

INEPAR INVESTMENTS S.A. and INEPAR S.A.
INDUSTRIA E CONSTRUÇÕES,

Defendant

KORNREICH, SHIRLEY WERNER, J.:

FILED

AUG 03 2009

**COUNTY CLERK'S OFFICE
NEW YORK**

DECISION
and ORDER

Motion sequence numbers 003 and 004 are hereby consolidated for disposition.

This is an action to recover \$26,476,482.86 in accrued interest and principal allegedly due pursuant to a note program and guaranty executed on September 24, 1996. That year, defendant Inepar S.A. Industria E Constrções (IIC) was seeking to raise capital and refinance its debt through the issuance of a Medium-Term Note Program in the international market. In September 1996, defendant Inepar Investments S.A. (Inepar Investments), a wholly owned subsidiary of non-party Inepar Energia, a company in which IIC owns 60% of the common stock, initiated a \$30,000,000 Guaranteed Euro Medium-Term Note Program (Note Program) by which it offered interests in a Permanent Global Note (Global Note) to investors. The Note Program was guaranteed by IIC. Plaintiff IRB-Brasil Resseguros S.A. (IRB) purchased \$14,000,000 in notes from the Program. Inepar Investments defaulted, and IRB filed the instant action for breach of contract against Inepar Investments under the Global Note and IIC under the guarantee. IIC, in motion sequence 003, seeks summary judgement claiming that IRB has no rights under the guarantee and that the guarantee is void pursuant to Brazilian law. IRB, in motion sequence 004, moves for summary

judgement against IIC, arguing that no material issues of fact exist surrounding IIC's obligations under the guarantee.

I. Background

A. Joint Statement of Material Facts

Pursuant to Commercial Division Rule 19-a, the parties have submitted a Joint Statement of Material Facts. The following facts are not in dispute. IRB is a 50% state-owned corporation organized under the laws of Brazil and headquartered in Rio de Janeiro. IIC also is incorporated in Brazil. Its primary business is the procurement of equipment and services relating to the use and distribution of electric power. Inepar Investments was a corporation organized under the laws of the Republic of Uruguay and was a wholly-owned subsidiary of non-party Inepar Energia. The following was submitted pursuant to the Joint Statement of Material Facts.

1. Relevant Transaction Documents

The Note Program was governed by a Fiscal Agency Agreement (Agreement) executed on September 24, 1996 between Inepar Investments, IIC and the Chase Manhattan Bank as Fiscal Agent. The Agreement provided that interests acquired via the Note Program would first be issued as Temporary Global Notes, and then would be exchanged for interests in the Global Note. Each Global Note would be assigned a unique identification number and credited to an account at a common depository, Euroclear Bank S.A./N.V. (Euroclear). The Agreement provided that IIC would guarantee the Global Notes and the documents would be signed by two of its "Authorized Officers." The Agreement further provided that "[t]his Agreement, the Notes and the Guarantee shall be governed by, and construed in accordance with, the laws of the State of New York, without regard to conflict of laws principles."

On September 24, 1996, IIC executed the Guarantee pursuant to which it “unconditionally and irrevocably guarantee[d] to the Relevant Account Holders and the Relevant Note Holders from time to time the due and punctual payment of principal and interest...under the Notes, when and as the same shall become due and payable, whether at maturity, upon redemption, by declaration or otherwise, according to the terms hereof.” The Guarantee defines Relevant Account Holders as “each account holder with a Clearing System [Euroclear] which, at the time specified in Section 3, has credited to its respective securities account with the relevant Clearing System rights in respect of such [Global Note].” Sections 2 and 3 of the Guarantee contain the following pertinent terms and conditions:

2. The records of [Euroclear] shall, in the absence of manifest error, be conclusive evidence of the identity of the Relevant Account Holders and the principal amount of rights in respect of Global Bearer Notes credited to the securities account of each Relevant Account Holder at any time.

3. Any statement issued by [Euroclear] to any Relevant Account Holder relating to a specified Global Bearer Note or Global Bearer Notes and stating the principal amount of rights in respect of Global Bearer Notes which are credited to the securities account of such Relevant Account Holder and certified on behalf of [Euroclear] to be a true record of such securities account as aforesaid shall, in the absence of manifest error, be conclusive evidence...of the records of [Euroclear] for the purpose of Section 2 hereof (but without prejudice to any other means of producing such records in evidence).

The Guarantee further provides:

The Guarantor hereby agrees that its obligations hereunder shall be unconditional and irrevocable, irrespective of the validity, regularity, or enforceability of the Notes, any change in or amendment to the Notes, the absence of any action to enforce the same, any assumption by any corporation or other person of any obligations under the Notes, the recovery of any judgment against the Issuer or any action to enforce the same, or any other circumstance which might otherwise constitute a legal or equitable discharge or defense of a guarantor...and covenants that this Guarantee shall not be discharged except by complete performance of the obligations contained in the Notes and this Guarantee.

In addition, IIC certified that “the obligations binding upon it contained in [the] Guarantee are

owed to, and shall be for the benefit of...the respective heirs, successors and assigns" of all Relevant Account Holders and Relevant Note Holders. The Guarantee also stated that it "is governed by, and shall be construed in accordance with, the laws of the State of New York." The Guarantee was signed on IIC's behalf by Jauneval de Ohms and Di Marco Pozzo, Executive Officers and members of the Board of Directors of IIC.

On September 30, 1996, IRB acquired \$14,000,000 in Temporary Global Notes from its trading accounts at Lehman Brothers and Smith Barney. IRB's interests in the Temporary Global Notes were assigned identification numbers XS 0070053854 and 069990-0X-8. These interests were subsequently redeemed for an interest in the Global Note marked with identification number XS 007005385-4. In pertinent part, the Global Note provides:

For purposes of this Permanent Global Note, the securities account records at Euroclear...shall, in the absence of manifest error, be conclusive evidence of the identity of the Holders of Notes and of the principal amount of Notes of the Series represented by this Permanent Global Note credited to the securities account of such Holders. Any statement issued by Euroclear...to any Holder relating to a specified Note or Notes credited to the securities account of such Holder and stating the principal amount of such Note or Notes and certified by Euroclear...to be a true record of such securities account shall, in the absence of manifest error, be conclusive evidence of the records of Euroclear...for the purpose[] of...fil[ing] any claim, tak[ing] any action or institut[ing] any proceeding to enforce, directly against the Issuer, the obligation of the Issuer hereunder to pay any amount in respect of each Note represented by this Permanent Global Note which is credited to such person's securities account with Euroclear...without the production of this Permanent Global Note; provided that the bearer hereof shall not theretofore have filed a claim, taken any action or instituted proceedings to enforce the same in respect of such Note.

As in the Agreement, the Global Note also provided that it "shall be governed by, and construed in accordance with, the laws of the State of New York, without regard to conflict of laws principles."

The \$14,000,000 in principal from the Global Note was due on October 1, 2001, and interest was to be paid on certain specified days at a rate of 9.9% per annum. Between April 1997

and October 2000, Inepar Investments made eight interest payments pursuant to the Global Note. No further interest payments were made. In addition, neither Inepar Investments nor IIC paid plaintiff the \$14,000,000 of principal due on October 1, 2001.

2. *Affidavit of Eduardo Cesar Do Nascimento*

Eduardo Cesar Do Nascimento, the Managing Director of non-party BB Securities Limited (BB Securities) avers the following. BB Securities, a member of the Banco do Brasil group, is an international securities house that provides investment services to its clients. As part of this function, BB Securities acts as custodian of certain accounts for its clients, held at Euroclear. As custodian, BB Securities interacts with Euroclear concerning the accounts and securities being held on its clients behalf. Mr. Nascimento states that it is industry practice for a Euroclear account to be held in the custodian's name on the clients' behalf. As such, BB Securities would maintain separate accounts at Euroclear for each of its clients. Mr. Nascimento further avers that BB Securities has acted as custodian for IRB's Euroclear accounts since November 1997. As custodian, BB Securities maintains no ownership interest in securities being held on IRB's behalf and is not entitled to any of the latent benefits arising from these securities. IRB, thus, retains all legal and equitable rights arising out of its securities being held at Euroclear. Mr. Nascimento confirmed that "BB [Securities] is currently holding, on behalf of IRB, notes with a face value of US \$14,000,000 bearing ISN Code: XS0070053854, Common Code: 0070052385...issued by [Inepar] in a securities clearance account number 97497...at Euroclear."

Mr. Nascimento also averred that at BB Securities request, on November 11, 2004, Euroclear issued a "Statement of Account for the Purpose of Filing a Claim" (Statement of Account) verifying that it is holding the notes in question on IRB's behalf. A copy of the notarized

Statement Account was attached to his affidavit as Exhibit B. In the Statement of Account, Euroclear certifies that it is holding \$14,000,000 of notes bearing ISN Code: XS0070053854 and Common Code: 0070052385 in BB Securities Euroclear Clearance Account # 97497. It further states that the “above holding is allocated on [BB Securities] books to [IRB].” The Statement of Account also provides that as of November 11, 2004, Euroclear had “blocked” the securities being held in this account. Mr. Nascimento avers that Euroclear’s operating procedures demand that once a statement of account is issued, the account becomes “blocked”, meaning that no securities may be transferred in or out of the account until it becomes “unblocked.” Mr. Nascimento further avers that no securities have been transferred from this account since November 11, 2004, and that BB Securities continues to hold these notes in its account at Euroclear on plaintiff’s behalf. As proof of the blockage, Mr. Nascimento attaches a second notarized letter from Euroclear to BB Securities dated January 23, 2008 (January Letter). The January Letter provides:

[Euroclear certifies] that on 11 November 2004, [Euroclear] issued to you a statement of account with respect to USD 14,000,000 of INEPAR INVESTMENTS S.A. 9.9% due on 30 September 2001 ISIN XS0070053854 (the “Notes”). Upon the issuance of such statement of account, it is Euroclear’s procedure to block the holding in the Participant’s Securities Clearance Account. The effect of blocking is that the securities cannot be transferred in or out of the account. We confirm that the holding in your account has been blocked as from 11 November 2004.

3. Natal Bressan Deposition

Mr. Natal Bressan, who was responsible for overseeing the Note Program and who signed the Agreement and Global Note on behalf of Inepar Investments, testified to the following. Mr. Bressan speaks Portugese and is not able to read, write or understand English. Mr. Bressan is a member of IIC’s board of directors and is an executive director at Inepar Energia. Regarding the responsibilities of IIC’s board of directors, Mr. Bressan stated that the board approves the

company's strategic plan as well as its investment opportunities. With regard to Inepar Investments, Mr. Bressan stated he was responsible for obtaining funding necessary for the company to make investments in the Argentina power industry. In connection with his fund-raising efforts, Mr. Bressan averred that he had authority to sign documents on Inepar Investments behalf. He further stated that IIC's board of directors granted him power of attorney to negotiate the entire Note Program on IIC's behalf.

Mr. Bressan averred that this was the first note series Inepar had issued in the international market. On this point, Mr. Bressan stated that since the company did not know in advance who would be purchasing interests in the Global Note, it wanted to make sure that the transaction was executed correctly in order to not adversely impact any future note issuances. Consequently, during the course of this transaction, IIC partnered with Boavista Banking Ltd. (Banco Boavista) and was advised by the Brazilian law firm of Machado, Meyer, Sendacz e Opice (Machado Meyer) which Mr. Bressan described as having a "reputation of excellence." Mr. Bressan testified that it was the trust he placed in Banco Boavista and Machado Meyer that allowed him to frequently sign English documents without having entirely read through them. On this point, when discussing his execution of the Agreement, Mr. Bressan elaborated that:

As I mentioned, we deal with partners that are entirely trustworthy and Banco Boavista is such a partner. And this was not the first transaction we conducted with them. ...Since Banco Boavista had been a partner in numerous other transactions, we were to sign [the Agreement] in the form it was presented. Furthermore, it could not be changed, otherwise there would be no investors...My understanding in signing [the Agreement] was that we were going to seek investors in the world market who would be interested in these notes at the rate and with the maturity posted...I signed [the Agreement] in good faith as presented by Machado Meyer and Banco Boavista, which was an extremely, extremely, extremely trustworthy partner.

With regard to the Guarantee, Mr. Bressan averred that IIC was to be the guarantor of the

entire Note Program so long as it “conducted all the acts that would have given it the power to do so.” He further averred that in order for the Guarantee to be legally effective, it needed to be approved by IIC’s board of directors. In negotiating the Note Program, it was his understanding that the Guarantee would be formally approved. In fact, Mr. Bressan stated it was “common for [IIC] to engage in credit operations even without a guarantee based solely on the company’s risk.” As the person responsible for coordinating all of the documents relevant to the Note Program, Mr. Bressan stated that he forwarded the Guarantee to Messrs. Oms and Pozzo who then signed it in “good faith.” He did not recall having any discussions with either of them regarding the Guarantee. Mr. Bressan also testified that he did not recall if IIC’s board approved the Guarantee. However, it was Mr. Bressan’s belief that, in fact, the Guarantee did not need to be brought to the board’s attention. On this point, Mr. Bressan elaborated:

That the board of directors meeting in this regard did not occur to authorize the guarantee. That [Messrs. Oms and Pozzo] signed the document in good faith as the document had been presented to them by trustworthy companies such as Banco Boavista and Machado Meyer...

There would be no need for any discussions [with the board], either for this or other transactions. The need is for - the need for the funding and as well as the rate and the maturity to meet the needs of a specific project, that would be discussed. That would be the objective and the focus...

All of the documents that Banco Boavista and the firm of Machado Meyer provided to us were signed. And we understood that these were documents that would allow us to execute the transaction and obtain the funding that Inepar Investments needed. My focus at the time...was on seeking the funding we required, not on analyzing documents.

4. Machado Meyer Legal Opinion

In a letter dated September 24, 1996, Machado Meyer issued a legal opinion (Machado Meyer Opinion) relating to the transaction documents affiliated with the Note Program. Machado Meyer analyzed the materials pursuant to Brazilian law. After examining multiple documents,

including the Agreement and Guarantee, Machado Meyer concluded, *inter alia*, that:

3. The Transaction Documents and the transactions contemplated thereby have been duly authorized and the Transaction Documents have been duly executed and delivered by the Guarantor and constitute legal, valid, and binding obligations of the Guarantor...
4. All acts, conditions and events required to be done and performed by the Guarantor and to have occurred prior to the execution and delivery of each of the Transaction Documents have been done, performed and have occurred in due compliance with all applicable Brazilian laws and regulations.
5. The Guarantee constitutes a valid and legally binding obligation of the Guarantor enforceable in accordance with its terms, and, upon its translation into Portuguese by a sworn translator, the Guarantee will be in appropriate form to be admissible in evidence in the courts of Brazil and will contain no provision that is contrary to law or public policy in Brazil or that would for any reason not be upheld by courts of Brazil.
9. ...[T]he Guarantor has obtained all authorizations, consents or approvals required for or in connection with the execution and delivery of the Transaction Documents, and the performance by the Guarantor of the obligations expressed to be undertaken herein.
13. The choice of New York law as the governing law of the Transaction Documents and the Notes will be recognized and given effect by the courts of Brazil.

5. *BB Securities Assignment*

On October 16, 2008, BB Securities executed a “Disavowal of Rights and Assignment Agreement” (Assignment) with IRB. In pertinent part, the assignment provides:

1. Disavowal of Rights. [BB Securities] does not claim any ownership interest in the Note, nor any right or entitlement to any benefits thereunder and hereby specifically disclaims any such ownership interest in the Note. [BB Securities] only holds the Note in its limited capacity as custodian on behalf of [IRB].
2. Assignment. If, and to the extent, [BB Securities] is deemed to be a “Holder,” “Noteholder,” “Relevant Account Holder,” or “Relevant Note Holder” pursuant to the terms of the Note, the Terms and Conditions of the Note, Guarantee, and/or any related documents or agreements, and to thereby have the right to file any claim, take any action, or institute any proceeding to enforce, directly against the Issuer and/or Guarantor, the obligations of the Issuer and/or Guarantor to pay any amounts due in respect of the Note, then [BB Securities] hereby assigns and conveys to [IRB] that right, as well as any right, title, and/or interest [BB Securities] may have in any claims, demands, or causes of action against the Issuer and/or Guarantor arising out of or related to the Note and/or Guarantee.

Such assignment shall be made strictly on the basis that it is made without recourse and without any representations or warranties.

B. IIC's Submissions in Support of Summary Judgment

In support of its motion, IIC proffers the affidavit of Armando Luiz Rovai, an attorney admitted to the Brazilian Bar and a Professor of Law at Mackenzie University in São Paulo, Brazil. In his affidavit, Professor Rovai opined that the Guarantee is null and void under Brazilian law since at the time they signed the Guarantee, Messrs. Ohms and Pozzo did not have authorization from IIC's administrative council. Attached as exhibits to Professor Rovai's affidavit are: copies of Article 142 of Brazilian Law nº 6.404 ; the Guarantee; and Portuguese versions of minutes from IIC shareholders meetings from December 7, 1994 through November 29, 1996 and meetings of IIC's Administrative Council from January 17, 1996 through December 6, 1996.

C. IRB's Submissions in Support of Summary Judgment

In further support of its motion, IRB proffers, *inter alia*, the legal opinion dated September 24, 2006 from IIC's and Inepar Investments in-house counsel Juarês Elias Sarú (Sarú Opinion). The Sarú Opinion was issued to provide defendants with legal analysis relating to the transaction documents affiliated with the Note Program. As in the Machado Meyer Opinion, Mr. Sarú analyzed the materials pursuant to Brazilian law. After examining all of the relevant documentation, Mr. Sarú came to many of the same findings as Machado Meyer regarding the Guarantee. Namely, Mr. Sarú concluded that all of the transaction documents were properly authorized and executed, constituting legal, valid and binding obligations on IIC. He also surmised that "the Guarantee constitutes a valid and legally binding obligation" of IIC and is in full compliance with and enforceable according to Brazilian law. Mr. Sarú further opined that IIC obtained all corporate authorizations necessary to execute the Guarantee and that "[t]he choice of

New York law as the governing law of the Transaction Documents and the Notes will be recognized and given effect by the courts of Brazil.”

II. *Conclusions of Law*

It is well established that summary judgment may be granted only when it is clear that no triable issues of fact exist. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfts., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a showing requires a denial of the summary judgment motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of a material issue of fact. *Alvarez, supra*, 68 NY2d at 324; *Zuckerman, supra*, 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in a light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman, supra*, 49 NY2d at 562. Upon the completion of the court’s examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

A. *IIC’s Motion for Summary Judgment*

1. *Relevant Account Holder*

IIC has failed to meet its initial burden on its motion for summary judgment. IIC first

argues that plaintiff has no right to enforce the Guarantee since it is not a Relevant Account Holder. IIC bases this argument primarily on a holding by the Hon. Herman Chan in *IRB-Brasil Resseguros S.A. v Eldorado Trading Corp.*, Index No. 604013/06 (Sup Ct NY County Sept 26, 2008) ("*Eldorado I*"). In *Eldorado I*, a case with facts very similar to the one at bar, Justice Cahn initially denied IRB's motion for summary judgment to enforce a similar global note and guarantee. *Eldorado I* involved a \$50,000,000 Medium-Term Note Program pursuant to which IRB purchased \$15,000,000 in notes. That note program too was governed by a Fiscal Agency Agreement executed by the parties, with Chase Manhattan acting as Fiscal Agent. BB Securities acted as custodian of the notes in an account maintained at Euroclear. Originally, Justice Cahn denied summary judgment on the ground that "IRB has not submitted proof in admissible form sufficient to establish that it is the beneficial owner of the Global Note. Notably, plaintiff has proffered no affidavit from BB Securities, the holder of record on the Euroclear account, to establish IRB's status with respect to the Global Note." *Eldorado I* at pp. 7-8. Though true that Justice Cahn denied summary judgment in the first instance, IIC fails to acknowledge what occurred upon IRB's motion for renewal.

In a decision dated February 11, 2009 (*Eldorado II*), Justice Cahn granted IRB's motion to renew, and upon renewal, granted IRB's motion for summary judgment. In *Eldorado II*, Justice Cahn cited several new facts that warranted summary judgment. Namely, Justice Cahn pointed to an affidavit from Mr. Nascimento which established that BB Securities was simply the custodian of the global note and that IRB maintained any and all legal and equitable rights pertaining to the note. In similar fashion to the case at bar, as part of his affidavit, Mr. Nascimento submitted a notarized "Statement of Account for the Purpose of Filing a Claim in the Brazilian Courts," to

establish that Euroclear was holding the notes in BB Securities Euroclear Clearance Account on IRB's behalf. As here, the affidavit contained a second notarized letter showing that the account had been blocked. Justice Cahn also cited a Disavowal of Rights and Assignment agreement executed by BB Securities and IRB on October 16, 2008, as serving to clarify IRB's status with regard to the global note. After examining these documents, and citing to a provision of the parties global note containing identical language as the Global Note in this matter, Justice Cahn concluded:

As the notarized Statement of Account provided to BB Securities fulfills these requirements, it is sufficient to establish that BB Securities is the holder of the Global Note in the records of Euroclear.

Through the affidavit of Nascimento, IRB has established that BB Securities is holding the Global Note in its Euroclear account as a custodian on behalf of IRB and that IRB is the legal and equitable owner/holder of the Global Note. To further address the issue of IRB's right to maintain this action, IRB has also proffered a copy of the Assignment, pursuant to which BB Securities assigned to IRB any rights to bring this action that BB Securities might have as the holder of record on the account at Euroclear. The Assignment was properly proffered through the affidavit of Nascimento, the individual who executed it on BB Securities behalf.

As the new evidence proffered by IRB indisputably established that IRB is not only the beneficial owner of the Global Note, but the sole entity now entitled to maintain this action, the grant of summary judgment is warranted.

Eldorado II at pp. 7-8.

The principles and rationale employed by Justice Cahn in *Eldorado II*, applies with commensurate force to the case at bar. Section 3 of the Guarantee contains near identical language as its sister provision in the Global Note. When read together, these sections clearly provide that any statement issued by Euroclear pertaining to the Global Note shall serve as conclusive evidence as to the identity of the Relevant Account Holder. The Statement of Account, the January Letter and Mr. Nascimento's affidavit establish that BB Securities is merely the custodian of the Global

Note and that plaintiff maintains all legal and equitable rights to the note. Moreover, the Assignment further reinforces these rights. IIC specifically certified in the Guarantee that its obligations were binding and “owed to, and for the benefit of...successors and assigns.” In sum, IIC has not demonstrated that IRB is not the Relevant Account Holder. Rather, the evidence before the court leaves no issue of fact concerning IRB’s status as the Relevant Account Holder under the Global Note and, therefore, its right to enforce the Guarantee.

2. *Brazilian Law*

IIC further argues that the Guarantee is void under Brazilian law since it was allegedly never authorized by its board of directors. Although the Guarantee clearly calls for the application of New York law, IIC contends that New York’s choice of law principals should be applied. It argues that under such application, Brazilian law would apply.

It is well-settled in New York that courts will enforce contractual choice of law and forum selection provisions unless such enforcement “would be unreasonable, unjust, or would contravene public policy, or that the clause is invalid because of fraud or overreaching.” *Boss v Am. Express Fin. Advisors, Inc.*, 15 AD3d 306, 307-08 (1st Dept 2005), *affd* 6 NY3d 242 (2006) quoting *Koko Contr. v Continental Envtl. Asbestos Removal Corp.*, 272 AD2d 585, 586 (1st Dept 2000). As long as sufficient contacts exist between New York and the transaction, the contractual choice of law provision will apply. *Aramarine Brokerage, Inc. v OneBeacon Insur. Co.*, ___ F3d ___, 307 Fed Appx 562 (2d Cir 2009); *Int’l. Minerals & Resources, S.A. v Pappas*, 96 F3d 586, 592 (2d Cir 1996) (“New York law is unambiguous in the area of express choice of law provisions in a contract,” absent fraud or violation of public policy, New York courts will apply law selected in contract as long as sufficient contacts with transaction exist).

Further, where the validity, construction or effect of a contract involving \$250,000 or more is involved, General Obligations Law (GOL) 5-1401 mandates that a choice-of-law clause in the agreement denoting that New York law governs the parties rights and obligations, shall be given mandatory effect regardless of whether the contract has a reasonable relation to New York.

Propulsora Ixtapa Sur, S.A. De C.V. v Omni Hotels Franchising Corp., 211 AD2d 546, 548-549 (1st Dept) *lv. denied* 85 NY2d 805 (1995); *Babcock & Wilcox Co. v Control Components, Inc.*, 161 Misc 2d 636, 649 (Sup Ct, New York County, 1993)(Mazzerelli, J.); *Supply & Bldg. Co. v Estee Lauder Int'l., Inc.*, 95 Civ 8136, 2000 US Dist LEXIS 2086 (SDNY 2000) (if requirements of GOL 5-1401 are met, contract's choice of law provision binding; GOL 5-1401 codifies New York's strong public policy interest in upholding choice of law provisions in contracts). The exceptions listed in the statute are exclusive, and no exception exists for a foreign state's public policy. *Supply & Bldg. Co., id.*; *accord Lehman Bros. Commer. Corp. v Minmetals Int'l. Non-Ferrous*, 179 F Supp2d 118, 136-138 (SDNY 2000); *Sun Forest Corp. v Shvili*, 152 F Supp2d 367, 388 (SDNY 2001). In enacting this section, the legislature "sought to secure and augment [New York's] reputation as a center of international commerce." *RadioActive, J.V. v Manson*, 153 F Supp2d 462, 470 (SDNY 2001).

Here, GOL 5-1401 applies. The Agreement, Global Note and Guarantee clearly delineate New York as the choice of law, the \$250,000 threshold of the statute is met and none of the statutory exceptions apply. Moreover, New York's predilection to enforce contractual choice of law clauses, militates in favor of applying New York law. No fraud or overreaching occurred in this case, a case involving sophisticated businesses who acted on the advice of counsel. Nor would it be unreasonable, unjust or contravene public policy to apply the law of the situs the parties

specifically chose. Lastly, Smith Barney and Lehman, the companies who brokered the Notes, and Chase Manhattan Bank, the fiscal agent, were corporations whose principal places of business were in New York. This is sufficient contact between New York and the transactions to support the contractual choice of New York law.

B. IRB's Motion for Summary Judgment

1. Guarantee

On a motion for summary judgment to enforce a written guarantee, a creditor only need establish: an absolute and unconditional guarantee; the underlying debt; and the guarantor's failure to perform pursuant to the guarantee. *Bk of Amer., N.A. v Solow*, 59 AD3d 304 (1st Dept 2009); *City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 (1st Dept 1998) citing *BNY Fin. Corp. v Clare*, 172 AD2d 203 (1st Dept 1991); *Chemical Bank v Geronimo Auto Parts Corp.*, 225 AD2d 461 (1st Dept 1996). Here, plaintiff has submitted a signed copy of the Guarantee, proof of the underlying debt, as well as IIC's failure to perform. These documents serve as evidence of executed contracts between the parties, which are in default due to non-payment. In addition, the Guarantee provides that it is "unconditional and irrevocable" and waives all defenses stating that it "shall not be discharged except by complete performance of the obligations contained in the Notes and this Guarantee." See *Sterling Nat'l Bk v Biaggi*, 47 AD3d 436 (1st Dept 2008)(absolute and unconditional guarantee which waived all defenses enforced); *Red Tulip, LLC v Nieva*, 44 AD3d 204, 209-10 (1st Dept 2007) (guarantee enforced where it was absolute and unconditional and waived all defenses and counterclaims except payment of money). Plaintiff, therefore, has met its burden to enforce the Guarantee.

2. Apparent Authority

Even if the court were receptive to IIC's contention that the Guarantee was not formally approved by its board, IIC would still be bound to its terms and conditions under the doctrine of apparent authority. Apparent authority is created by "words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into the transaction." *Parlato v Equitable Life Assur. Soc'y of the United States*, 299 AD2d 108, 112 (1st Dept 2002) quoting *Hallock v State of New York*, 64 NY2d 224, 231 (1984). The agent cannot create the existence of apparent authority by his own acts, rather, there must be a factual showing that the third party relied on the agent's misrepresentation due to misleading conduct by the principal. *Id.* The third-party's reliance on an agent's apparent authority must also be reasonable. *Id.*

Here, IIC gave Mr. Bressan, a member of its board of directors and executive director of Inepar Energia, the company's power of attorney to negotiate the Note Program. He, in fact, was the chief negotiator. Mr. Bressan testified that he had authority to sign documents on Inepar Investment's behalf. He testified that as the person responsible for coordinating all of the documents, he forwarded the Guarantee to Messrs. Ohms and Pozzo, who were IIC Executive Officers and also board members, for their signatures. In addition, IIC's in-house counsel and the law firm hired by IIC, Machado Meyer, issued Opinion letters stating that the Guarantee was "legal, valid and binding," that it contained "no provision that is contrary to law or public policy in Brazil," and that the "Guarantor has obtained all authorizations, consents or approvals required." Consequently, it was certainly reasonable for IRB to rely on these acts and representations, which gave the appearance that Messrs. Ohms, Pozzo and Bressan had authority to bind IIC, in executing the Guarantee.

Finally, IIC is estopped from raising any defenses due to the express and unconditional waiver language articulated in the Guarantee. *United Orient Bank v Lee*, 223 AD2d 500 (1st Dept 1996) citing *Citibank N.A. v Plapinger*, 66 NY2d 90 (1985). Clearly this is a non-recourse guarantee where all defenses were waived. *Palm Beach Mortg. Mgmt., LLC v Red Tulip, LLC*, 18 AD3d 379, 380 (1st Dept 2005); *Gannett Co., Inc. v Tesler*, 177 AD2d 353 (1st Dept 1991).

3. *Champerty*

In opposition, IIC has failed to raise a triable issue of fact regarding either plaintiff's rights or its obligations under the Guarantee. IIC, however, argues that the Assignment is void under the doctrine of champerty. This argument is misplaced. A champertous assignment occurs where "a person without interest in another's litigation undertakes to carry on the litigation at his own expense, in whole or in part, in consideration of receiving, in the event of success, a part of the proceeds of the litigation." *Ehrlich v Rebco Ins. Exchange, Ltd.*, 225 AD2d 75, 77 (1st Dept 1996) quoting *United States v Algernon Blair, Inc.*, 795 F2d 404, 409 (5th Cir La 1986); *Richbell Info. Servs. v Jupiter Partners*, 280 AD2d 208, 215 (1st Dept 2001) (champerty precludes acquisition of claim by stranger to underlying action). The defense of champerty, which is construed narrowly, is only applicable where the assignee attains the claim with the aim and design to initiate an action or proceeding. *Red Tulip*, 44 AD3d 213 citing Judiciary Law § 489; *Richbell*, 280 AD2d at 215. The Court of Appeals has stated that to constitute a champerty, the assignment must be made with the sole purpose of litigation to the exclusion of any other implied purpose. *Red Tulip, id.* citing *Bluebird Partners v First Fid. Bank*, 94 NY2d 726, 735 (2001). New York courts uniformly hold that "the possibility that a purchaser of debt obligations will be required to resort to litigation to recover on the debt does not violate [Judiciary Law] § 489." *Red Tulip, id.*

The Assignment in this action is clearly not champertous. Plaintiff is not a stranger to this transaction. It purchased \$14,000,000 worth of notes and was a signatory to the Global Note. There is no question of fact as to IRB's rights and interest in recovering its investment in the Note Program. This conclusion is further buttressed by the fact that this litigation concerns recovery of a debt obligation.

4. *Statute of Limitations*

IIC next argues that plaintiff's claim under the Guarantee is barred by the statute of limitations. A guarantee is subject to a six year statute of limitations and begins to run when the debtor defaults on the underlying obligation. CPLR 213(2); *Gazza v United California Bank International*, 88 AD2d 968 (2d Dept 1982). The complaint states that IIC's default occurred on October 1, 2001. This action was commenced on or about December 29, 2006, within the six year period. Nonetheless, IIC contends that IRB did not obtain the right to file suit in this action until execution of the Assignment on October 16, 2008. As noted above, the Statement of Account, the January Letter and Mr. Nascimento's affidavit establish plaintiff's status as a Relevant Account Holder under the Global Note. Therefore, at the time this action was commenced, plaintiff possessed the legal and equitable rights to enforce the terms outlined in the Guarantee.¹

Additionally, IIC once again argues that the Guarantee is void under Brazilian law. Given the fact that the court previously addressed this contention and found that New York law applies, defendant's motion grounded on this issue is denied. Accordingly, it is

ORDERED that defendant Inepar S.A. Industria E Constrções' motion for summary

¹Since the court has held that plaintiff maintained all legal rights under the Guarantee to commence this action in 2006, IIC's argument regarding the purported tardiness of the Assignment is deemed moot and need not be addressed.

judgment (motion sequence 003) is denied; and it is further

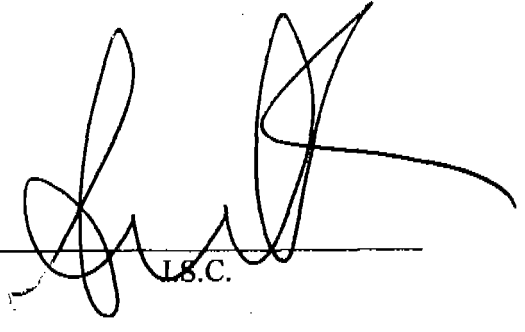
ORDERED that plaintiff IRB-Brasil Resseguros S.A.'s motion for summary judgment (motion sequence 004) is granted and the Clerk is directed to enter judgment in favor of IRB-Brasil Resseguros S.A. and against defendant Inepar S.A. Industria E Construçoes on liability only, and it is further

ORDERED that the issue of damages is referred to a Special Referee to hear and determine; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119) to arrange a date for the reference to a Special Referee; and it is further

ORDERED that the Clerk shall notify all relevant parties of the date of the hearing.

ENTER:



L.S.C.

DATE: July 31, 2009

FILED
AUG 03 2009
COUNTY CLERK'S OFFICE
NEW YORK