04-4997-bk(L)

04-4999-bk (CON)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

AGENCY FOR DEPOSIT INSURANCE REHABILITATION BANKRUPTCY AND LIQUIDATION OF BANKS AS BANKRUPTCY ADMINISTRATOR OF JUGOBANKA A.D., BEOGRAD, AGENCY FOR DEPOSIT INSURANCE REHABILITATION BANKRUPTCY AND LIQUIDATION OF BANKS AS BANKRUPTCY ADMINISTRATOR OF BEOGRADSKA BANKA A.D., BEOGRAD,

Debtor-Appellee,

—against—

SUPERINTENDENT OF BANKS OF THE STATE OF NEW YORK,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF *AMICUS CURIAE* INTERNATIONAL SWAPS AND DERIVATIVES ASSOCIATION, INC. AND THE FOREIGN EXCHANGE COMMITTEE IN SUPPORT OF THE BRIEF FOR APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

PRELIMINARY STATEMENT 5

ARGUMENT 7

A. **WHEN TITLE TO THE ASSETS OF NEW YORK BANK BRANCHES AND AGENCIES IS VESTED IN THE SUPERINTENDENT, THE ELEVENTH AMENDMENT PREVENTS A § 304 PETITION AGAINST HER** 7

B. **THE NYBL CONTAINS A COMPREHENSIVE FRAMEWORK FOR THE ADMINISTRATION OF ASSETS WITHIN THE SUPERINTENDENT'S POSSESSION THAT INCORPORATES MULTIBRANCH CLOSE-OUT NETTING** 10

1. **Multibranch Close-out Netting Is Crucial To Efficient Functioning Of Derivatives and Foreign Exchange Activities In The Event Of A Bank Insolvency** 11

2. **The NYBL's Protections For Multibranch Close-Out Netting Provide Legal Certainty Upon Which Derivatives And Foreign Exchange Activities Depend; This Certainty Is Called Into Question By The District Court's Decision** 13

C. **SOVEREIGN IMMUNITY PROTECTIONS ADHERE TO CONGRESSIONAL DESIRE TO PROVIDE DERIVATIVES AND FOREIGN EXCHANGE ACTIVITIES WITH NECESSARY LEGAL CERTAINTY** 17

D. **ALLOWING § 304 PROCEEDINGS LEADS TO UNCERTAINTY IN DERIVATIVES AND FOREIGN EXCHANGE ACTIVITIES** 20

1. **Section 304 Proceedings May Cause Undue Delay In Close-out Netting** 20

2. **§ 560 Does Not Resolve The Problems Posed To The Derivatives And Foreign Exchange Industry By The Availability Of § 304 Relief** 22

E. **THE SUPERINTENDENT IS PROTECTED BY SOVEREIGN IMMUNITY** 23

CONCLUSION 25

TABLE OF AUTHORITIES

CASES

In re Agency for Deposit Insurance, Rehabilitation, Bankruptcy and Liquidation of Banks, as Bankruptcy Administrator of Jugobanka A.D., Beograd and Beogradska Banka A.D., Beograd,
313 B.R. 561 (2004) ..... passim

In re Baldwin-United Corp.,
770 F.2d 328 (2d Cir. 1985) 7

In re Board of Directors of Compania General de Combustibles S.A.,
269 B.R. 104 (Bankr. S.D.N.Y., 2001)..... 22

In re City of Bridgeport,
128 B.R. 30 (Bankr. D. Conn. 1991)..... 5

Celotex Corp. v. Edwards,
514 U.S. 300 (1995)..... 21

Florida Dept. of State v. Treasure Salvors, Inc.,
458 U.S. 670 (1982)..... 6, 8, 9

Idaho v. Coeur d'Alene Tribe of Idaho,
521 U.S. 261 (1997)..... 9

In re Koreag, Contole et Revision S.A.,
961 F.2d 341 (2d Cir. 1992) 8, 24

Pennhurst State Sch. & Hosp. v. Halderman,
465 U.S. 89 (1984)..... 7

Pratt v. Ventas, Inc.,
365 F.3d 514 (6th Cir. 2004) 21

In re State of New York,
256 U.S. 503 (1921)..... 6, 9

Teachers Ins. and Annuity Ass'n of Am. v. Butler,
803 F.2d 61 (2nd Cir. 1986) 21

Thrifty Oil Co. v. Bank of Am. Nat'l Trust & Savings Ass'n (In re Thrifty Oil Co.),
249 B.R. 537 (S.D. Cal. 2000)..... 19

Ex parte Young,
209 U.S. 123 (1908)..... 6, 9

STATUTES AND LEGISLATIVE MATERIALS

U.S. Const. amend. XI ..... passim

11 U.S.C. § 101 (2004) 2, 20

11 U.S.C. § 304 (2004) ..... passim

11 U.S.C. § 560 (2004) 18, 20, 21, 22

12 U.S.C. § 1811 (2004) 2

12 U.S.C. § 1821 (2004) 17

Bankr. R. 7065 21

136 Cong. Rec. H2282 (daily ed. May 15, 1990) 19

H.R. Rep. No. 101-484 (1990), reprinted in 1990 U.S.C.C.A.N. 223..... 18, 19

Financial Instututions Reform, Recovery and Enforcement Act of 1989, Act of Aug. 9, 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989) 17

N.Y. Banking Law § 1 (2004)..... 2

N.Y. Banking Law § 606(4)(a) (2004) 8, 9

N.Y. Banking Law §§ 618-a-620 (2004) 13, 14

MISCELLANEOUS

Oliver Ireland, Statement before the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, U.S. House of Representatives (Mar. 18, 1999), in 85 Fed. Res. Bull. 5 at 310 (1999) 13, 17, 21

Dep't of the Treasury and Bd. of Governors of the Fed. Reserve Sys., Subsidiary Requirement Study (December 1992) 16

International Swaps and Derivatives Association, Inc., "Status of Netting Opinions," available at http://www.isda.org/docproj/stat_of_net_opin.html, (last visited Dec. 10, 2004.) 23

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The International Swaps and Derivatives Association, Inc. ("ISDA") and the Foreign Exchange Committee (the "FXC") submit this amicus curiae brief in support of the request of appellant Superintendent of Banks of the State of New York (the "Superintendent") to reverse the memorandum order of the United States District Court for the Southern District of New York (Rakoff, J.) (the "District Court") entered on August 13, 2004, which is available at 313 B.R. 561 (S.D.N.Y. 2004) (the "Memorandum Order").

STATEMENT OF INTEREST

ISDA is a not-for-profit corporation and the global trade association representing leading participants in the privately negotiated derivatives industry, a business which includes interest rate, currency, commodity, credit and equity swaps, as well as related products such as caps, collars, floors and swaptions. ISDA was chartered in 1985, and today numbers over 600 member institutions from 46 countries on six continents. These members include most of the world's major institutions that deal in, and leading end-users of, privately negotiated derivatives, as well as associated service providers and consultants. Since its inception, ISDA has pioneered efforts to identify and reduce the sources of risk in the derivatives and risk management business. Among its most notable accomplishments are: developing the ISDA Masters (as defined below); publishing a wide range of related documentation materials and instruments covering a variety

of transaction types; obtaining legal opinions from 43 jurisdictions (available only to ISDA members) on the enforceability of netting; securing recognition of the risk-reducing effects of netting in determining capital requirements; supporting the passage of legislation ensuring the enforceability of netting in various jurisdictions, including under the New York Banking Law (N.Y. Banking Law § 1 et seq. (McKinney 2004), the "NYBL"), the Federal Deposit Insurance Act (12 U.S.C. § 1811 et seq. (2004), the "FDIA") and the Bankruptcy Code (11 U.S.C. § 101 et seq. (2004), the "Code"); promoting sound risk management practices; and advancing the understanding and treatment of derivatives and risk management from public policy and regulatory capital perspectives.

The FXC, which is sponsored by but independent of the Federal Reserve Bank of New York, includes representatives of leading international commercial banks, investment banks, and other financial institutions who participate actively in the foreign exchange markets. The FXC's objectives include: providing a forum for discussing technical and market issues in the foreign exchange and related international markets; serving as a channel of communication between those markets and the official sector in the United States; enhancing knowledge and understanding of the foreign exchange and related international markets; and fostering improvements in the quality of risk management in these markets. Supported by the Financial Markets Lawyers

Group, a committee of lawyers working at major international financial institutions, the FXC has published foreign exchange industry documentation including the International Foreign Exchange and Options Master Agreement, the International Foreign Exchange Master Agreement, and the International Currency Options Market Master Agreement (together, the "FXC Masters" and each, a "FXC Master").

Privately negotiated derivatives and foreign exchange transactions are used by banks, securities firms, corporations, governments, government-sponsored enterprises and other institutions to manage the risks associated with traditional financial activities. Such transactions are frequently documented under master agreements published by ISDA and the FXC, which are standard forms of agreement entered into by parties that wish to conduct one or more transactions with each other. The most commonly used forms for derivatives and foreign exchange transactions are the ISDA Master Agreements (as published and copyrighted by ISDA in 1992 and 2002, each an "ISDA Master" and together, the "ISDA Masters" and, together with the FXC Masters, the "ISDA and FXC Masters"). The FXC Masters published in 1997 also are widely used for and tailored to foreign exchange transactions. The ISDA and FXC Masters offer uniform terms with respect to, among other things, the mechanics of termination, including the netting of obligations across multiple branches upon termination.

Parties that have entered into an ISDA Master or FXC Master may then enter into transactions over time, each transaction being governed by and becoming a part of the relevant ISDA Master or FXC Master.[1]

In view of their role in the development of the legal infrastructure for use of privately negotiated derivatives and foreign exchange transactions, ISDA and the FXC are uniquely positioned to comment on the substantial effects that the District Court's decision is likely to have on those activities. This case involves the ability of the Superintendent to administer the assets to which she has title according to the provisions of state law specifically designed to protect creditors of the New York branch or agency of a foreign bank in the event of that foreign bank's insolvency. In addition to providing for "ring-fencing,"[2] the NYBL incorporates specific statutory protections for multibranch close-out netting under agreements like the ISDA and FXC Masters in an insolvency proceeding for a New

[1] It has been estimated that there are many tens of thousands of executed ISDA Masters in place now governing many trillions of dollars of notional amount of transactions. See International Swaps and Derivatives Association, Inc., "ISDA Margin Survey 2004," available at http://www.isda.org/c_and_a/pdf/ISDA-Margin-Survey-2004.pdf, (last visited Dec. 10, 2004); International Swaps and Derivatives Association, Inc., "ISDA 2004 Mid-Year Market Survey," available at http://www.isda.org/statistics/recent.html#2004mid, (last visited Dec. 10, 2004.) The notional amount is the theoretical value or quantity that is assigned to a derivatives or foreign exchange transaction and on which the calculation of payments or delivery amounts is based.

[2] Ring fencing is the process by which the assets of a non-U.S. bank that are located in New York are collected and applied to satisfy in the first instance creditors with claims against the New York branch.

York branch or agency of a non-U.S. bank.[3] These protections for multibranch close-out netting provide important legal assurances to parties entering into master agreements with counterparties that include New York branches and agencies of non-U.S. banks.

ISDA and the FXC have a substantial interest in ensuring parties' expectations that, upon termination of their master agreements, local law is properly applied in a manner that encourages sound risk management practices and market stability for the benefit of all market participants. Moreover, as one of the supporters of the 1993 amendments to the NYBL, which amendments specifically incorporated the multibranch netting mechanism, ISDA is particularly well-suited to assist the court in understanding the settled expectations of market participants when entering into ISDA Masters with New York branches and agencies of foreign banks.

PRELIMINARY STATEMENT

If, as the Memorandum Order contemplates, § 304 relief is available to foreign representatives of insolvent non-U.S. banks when the Superintendent has taken title to such bank's New York assets, material delay would be threatened in

[3] Multibranch close-out netting is the process by which, upon the early termination of a master agreement, parties reduce all the termination amounts for all transactions under such a master agreement to a single net number due to or from one of the parties, regardless of the branch through which any or all the transactions are booked.

terminating ISDA and FXC Masters. 11 U.S.C. § 304. The gridlock caused by such delay will increase systemic risk in the international capital markets by impairing liquidity.

In the Memorandum Order, the District Court assumed that the State had no property interest in the assets in question. 313 B.R. 561 at 564. In doing so, the District Court ignored the fact that, under New York law, title to the assets of the New York agencies of two failed Yugoslavian banks had vested in the Superintendent. As such, the federal court could not summon the State, or an arm thereof, before it in any federal proceeding, including one under § 304, to divest the State of its property interest. See Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. 670, 699-700 (1982). See also In re State of New York, 256 U.S. 503 (1921) (holding that an action otherwise barred as an in personam action against the State cannot be maintained through the seizure of property owned by the State.) When the Superintendent acted properly under mandatory state law, there is no "continuing violation of federal law" under the doctrine of Ex parte Young, 209 U.S. 123, 156 (1908). 313 B.R. 561 at 564. In the instant case, the Eleventh Amendment is a bar to the use of § 304 against the Superintendent in federal court to obtain relief with respect to assets, title to which has vested in the Superintendent.

Over the past two decades, specific protections have been built into the Code, the FDIA and the NYBL that allow close-out netting upon the insolvency of an entity subject to those laws. ISDA and the FXC have a substantial interest in seeing that these protections are enforced in a predictable and timely manner. In the event of the insolvency of a foreign parent bank, parties to ISDA and FXC Masters that include that bank's New York branch or agency will immediately try to calculate their exposure and adjust their positions accordingly. It is crucial to the international capital markets that this can be done with certainty and speed. The inability of such parties to terminate and net out their obligations will immediately increase uncertainty in the marketplace and could threaten market liquidity.

ARGUMENT

A. WHEN TITLE TO THE ASSETS OF NEW YORK BANK BRANCHES AND AGENCIES IS VESTED IN THE SUPERINTENDENT, THE ELEVENTH AMENDMENT PREVENTS A § 304 PETITION AGAINST HER

When acting in her official capacity, the Superintendent is an arm of the State of New York and, as such, entitled to enjoy sovereign immunity. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 101-102 (1984); In re Baldwin-United Corp., 770 F.2d 328, 340 (2d Cir. 1985). When the Superintendent takes possession of the assets of the New York branch or agency of a non-U.S. bank, title to those assets vest in her by operation of state law. N.Y. Banking Law

§ 606(4)(a).[4] The Eleventh Amendment bars suits against a state seeking to obtain assets lawfully owned by such state. See Treasure Salvors, 458 U.S. at 699-700. Section 304 is thus not available to a foreign representative who asks the bankruptcy court to dispossess the Superintendent of such assets.

The District Court's statement that the Superintendent was trying to "interfer[e] with the restraint and possible transfer under § 304 of property of the failed banks" ignores the fact that, at such a point in time, the assets were in fact the property of the Superintendent under state law. 313 B.R. 561 at 564; 11 U.S.C. § 304. The District Court's assertion that "the Superintendent has no property interest" in those assets is incorrect. 313 B.R. 561 at 564. In a § 304 proceeding, a Bankruptcy Court applies local law in order to determine the threshold issue of whether the particular property at issue was part of the foreign insolvency estate. In re: Koreag, Controle et Revision S.A., 961 F.2d 341, 349 (2d Cir. 1992) (because the legal source of property interest is antecedent to bankruptcy administration, bankruptcy courts should apply local law to determine ownership of property before turning it over pursuant to § 304.) With respect to the assets of the New York agencies of the failed Yugoslav banks in this case, the local law to be applied

[4] That section reads, in relevant part, "The superintendent may . . . forthwith take possession of the business and property in this state of any foreign banking corporation . . . that is in liquidation at its domicile or elsewhere . . . . Title to such business and property shall vest by operation of law in the superintendent and his

is that of New York. As explained above, New York law specifically vests title to such assets in the Superintendent as soon as she takes possession of them under NYBL § 606(4)(a). N.Y. Banking Law § 606(4)(a).

A federal court may not summon the State, or an arm thereof, before it in a § 304 proceeding or other proceeding to divest the State of its property interest. See Treasure Salvors, 458 U.S. at 699-700. See also In re State of New York, 256 U.S. 503. When the Superintendent acted properly under mandatory state law, there was no "continuing violation of federal law" under the doctrine of Ex parte Young, 209 U.S. 123 at 156. 313 B.R. 561 at 564. Moreover, New York has a very real and substantial interest in seeing that the assets of insolvent bank branches and agencies within its jurisdiction—title to which had already vested in the Superintendent—are administered according to the comprehensive New York bank insolvency laws that are specially designed to deal with the unique interests that bank creditors need to have addressed in the context of such insolvencies.[5]

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or her successors forthwith upon taking possession." N.Y. Banking Law § 606(4)(a).

[5] See also Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 578-580 (1997) (principal opinion) (it is "necess[ary to] consider[], when determining the applicability of the Eleventh Amendment [and the Ex parte Young exception thereto], the real affront to a State of allowing a suit to proceed. . . . [Decisions invoking Ex parte Young should] reflect the real interest of States consistent with the clarity and certainty appropriate to the Eleventh Amendment's jurisdictional inquiry.")

B. THE NYBL CONTAINS A COMPREHENSIVE FRAMEWORK FOR THE ADMINISTRATION OF ASSETS WITHIN THE SUPERINTENDENT'S POSSESSION THAT INCORPORATES MULTIBRANCH CLOSE-OUT NETTING

By vesting title to an insolvent branch's or agency's assets in the Superintendent, the NYBL creates the legal framework through which special protections can be applied for the benefit of creditors (wherever they are located) of New York branches and agencies of insolvent non-U.S. banks. The NYBL's "ring-fencing" approach permits the Superintendent to control the assets of the bank located in New York, thereby maximizing the possibility of satisfying the claims of the creditors of the New York branch or agency. Ring-fencing is one way that state insolvency laws deal with local bank assets in a way that is efficient and fair to creditors. Another important technique to achieve this goal is multibranch close-out netting for master agreements such as the ISDA and FXC Masters. If the NYBL's protections for multibranch netting can be called into question by any foreign representative of a non-U.S. bank with a New York branch or agency by obtaining § 304 relief, the resulting delay that counterparties must face in assessing their exposure will reduce legal certainty and increase risk in the international capital markets.

1. Multibranch Close-out Netting Is Crucial To Efficient Functioning Of Derivatives and Foreign Exchange Activities In The Event Of A Bank Insolvency

To minimize legal uncertainty, multibranch close-out netting provisions attempt to define contractually the nature and location of assets in a cross-border insolvency proceeding.

If the insolvency of an international bank should occur, its counterparties would immediately try to calculate their credit exposures to the insolvent bank. For those counterparties that had extended credit to only one branch of the insolvent bank, the calculation would be reasonably straightforward. For those counterparties, however, that had entered into credit transactions with various branches of the insolvent bank, the calculation would be more complex and more likely to give rise to uncertainties. A counterparty that had extended credit to various branches of an insolvent bank is likely to face questions about which credit exposures would be honored and the extent to which amounts due to one branch of the insolvent bank could be set off against amounts due from another branch.

Under the ISDA and FXC Masters, parties enter into multiple transactions, each calling for payments to or from one or both of the parties over time. Each of these transactions is in certain respects economically independent of the other, but all are subject to the master agreement that contains bilateral close-out netting provisions. Termination of all transactions under a master agreement

generally occurs following certain events of default, including a party's insolvency. Following termination of all transactions, a termination amount is calculated for each transaction or group of transactions. These amounts represent the lost value to one of the parties for terminating the transactions prior to their intended maturity. The bilateral close-out netting provisions then call for the netting (i.e., set-off) of all the termination amounts for all transactions. The bilateral close-out netting provisions thereby reduce all the termination amounts to a single net number due to or from one of the parties.

Multibranch close-out netting provisions operate in the same way as such bilateral close-out netting provisions, except that they permit the netting or setting off of all termination amounts due to or from all the predesignated branches of a multibranch party. The intent of the multibranch close-out netting provisions is to reduce all of the termination amounts for all transactions to a single net number due to or from one of the parties, regardless of the branch through which any or all of the transactions are booked.

In testimony before the House Subcommittee on Commercial and Administrative Law on March 18, 1999, Oliver Ireland, Associate General Counsel of the Board of Governors of the Federal Reserve System, stated that the right to close-out:

> is critical to the management of market risk by financial market participants. The value of most financial market contracts is volatile[,

> which volatility]. . . can create significant market risk to the contracting parties. Many end users of these contracts have entered into them for hedging purposes . . . . Termination of the contract allows the nondefaulting party to rehedge the position in order to control that market risk. By providing for termination of contracts on default, nondefaulting parties can remove uncertainty as to whether the contract will be performed, fix the value of the contract at that point, and proceed to rehedge themselves against market risk. If this process were stayed . . . , the delay would expose the nondefaulting party to potentially serious market risks during the pendency of this decision process.

Oliver Ireland, Statement before the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, U.S. House of Representatives (Mar. 18, 1999), in 85 Fed. Res. Bull. 5 at 310 (1999).

2. The NYBL's Protections For Multibranch Close-Out Netting Provide Legal Certainty Upon Which Derivatives And Foreign Exchange Activities Depend; This Certainty Is Called Into Question By The District Court's Decision

In 1993, the NYBL was amended to incorporate specific statutory protections for multibranch close-out netting in an insolvency proceeding for a New York branch or agency of a non-U.S. bank. Sections 618-a through 620 of the NYBL were explicitly designed to deal with the issue of privately negotiated derivatives and foreign exchange transactions in the context of an international bankruptcy of a non-U.S. bank with a branch or agency in New York. N.Y. Banking Law §§ 618-a—620. Section 618-a, for example, reads:

> Notwithstanding any other provision contained in this subdivision, in liquidating a branch or agency of a foreign banking corporation, the superintendent shall not assume or repudiate any qualified financial

> contract that the branch or agency entered into which is subject to a multi-branch netting agreement or arrangement that provides for netting present or future payment obligations or payment entitlements (including termination or close-out values relating to the obligations or entitlements) among the parties to the contract and agreement or arrangement and the superintendent shall not be required to assume or repudiate any other qualified financial contract that the branch or agency entered into.

N.Y. Banking Law § 618-a(1)(c). The NYBL defines the term "qualified financial contract" to mean "any securities contract, commodity contract, forward contract (including spot and forward foreign exchange), repurchase agreement, swap agreement, and any similar agreement, . . . and any master agreements for such agreements . . . ." N.Y. Banking Law § 618-a(2)(e)(i). Because this definition includes, among others, swap agreements and similar agreements, as well as spot and forward foreign exchange, the various types of transactions typically entered into under the ISDA and FXC Masters would be subject to § 618-a. Provisions such as this allow the netting out of multibranch exposures under the ISDA and FXC Masters with speed and certainty.

Under the NYBL, following termination of a multibranch master agreement that is a qualified financial contract, the single net termination amount is calculated on both a global and New York-only basis. The global net amount is the amount owed by or to the non-U.S. bank as a whole if all transactions across all branches subject to the multibranch netting agreement are considered (the "Global Net Payment Obligation" or the "Global Net Payment Entitlement"). The New

York or local net amount is the amount owed by or to the non-U.S. bank after netting only the transactions entered into by the New York branch or agency (the "Branch/Agency Net Payment Obligation" or "Branch/Agency Net Payment Entitlement"). The Superintendent, as receiver of the branch, is only liable to pay to a non-defaulting counterparty the lesser of the Global Net Payment Obligation and the Branch/Agency Net Payment Obligation. Likewise, when a counterparty owes a net amount pursuant to a repudiated or terminated qualified financial contract, the Superintendent may demand from the counterparty a payment for the lesser of the Global Net Payment Entitlement and the Branch/Agency Net Payment Entitlement. Any amounts to be collected or paid by the counterparty are reduced by amounts that have been collected or paid in other jurisdictions pursuant to the same qualified financial contract, thereby foreclosing the potential for double recovery or payment.

The NYBL thus reduces the legal risks associated with entering into transactions with different branches. It also reduces the potential credit risk that could arise if the non-defaulting party was owed a termination amount across all transactions, but was forced to pay a termination amount under only the transactions that were ring-fenced by an insolvency official in a branch jurisdiction.

In situations where title to local assets vests in the Superintendent under the NYBL, these amendments to the NYBL have provided important legal assurances to parties entering into master agreements with counterparties that include New York branches and agencies of non-U.S. banks. The potential availability of § 304 relief to administrators in foreign insolvency proceedings of non-U.S. banks with New York branches or agencies, which availability will result from the District Court's decision, will thwart the purpose of the NYBL's protections and impose a dangerous amount of delay and uncertainty on the need to terminate master agreements quickly in the global capital markets.[6] Moreover, as stated by Oliver Ireland,

> the right to terminate or close out . . . protects the markets from systemic problems of "domino failures." Further, absent termination and closeout rights, the inability of market participants to control their market risk is likely to lead them to reduce their market risk exposure, potentially drying up market liquidity and preventing the affected markets from serving their essential risk-management, credit-intermediation, and capital-raising functions.

[6] One route that market participants could take in response to the District Court's decision would be to require that counterparties who are New York-based agencies or branches of foreign banks convert into subsidiaries. This, however, would have its own range of detrimental effects. See Dep't of the Treasury and Bd. of Governors of the Fed. Reserve Sys., Subsidiary Requirement Study (December 1992), at 2 ("If the United States were to require that foreign banks conduct their U.S. operations in subsidiaries, the availability of credit in the United States market could be reduced, perhaps substantially. For example, the participation of foreign banks in lending syndicates, trade finance, and transactions in foreign exchange, swaps and other products would be restricted by the increase in costs and by their inability to access their worldwide capital base.")

85 Fed. Res. Bull. 5 at 310 (1999).

C. SOVEREIGN IMMUNITY PROTECTIONS ADHERE TO CONGRESSIONAL DESIRE TO PROVIDE DERIVATIVES AND FOREIGN EXCHANGE ACTIVITIES WITH NECESSARY LEGAL CERTAINTY

Congress has specifically recognized that legal certainty is crucial to the stability of the international capital markets and to U.S. leadership in those markets.

In 1989, Congress passed the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (Act of Aug. 9, 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989), "FIRREA"), which amended the FDIA specifically to incorporate protections for netting upon the early termination of contracts such as the ISDA and FXC Masters. As amended, the FDIA provides that, in the case of a receivership, subject to certain limitations, a party to a qualified financial contract will be entitled to exercise any right to "net out any termination value, payment amount or other transfer obligation arising under or in connection with [one] or more [qualified financial contracts]." 12 U.S.C. § 1821(e)(8)(A). As under the NYBL, the FDIA defines "qualified financial contract" to include "swap agreements," and "swap agreement" is in turn defined to include the wide range of derivatives and foreign exchange transactions that would typically be entered into under the ISDA and FXC Masters. 12 U.S.C. §1821(e)(8)(D)(vi). This is just one

example of Congress acting to specifically build protections for netting into bank insolvency laws.

In 1990, Congress once again evidenced such intent when it amended the Code itself. Section 560 of the Code preserves the contractual right of a counterparty to terminate a "swap agreement" and net out any termination or payment amounts owed to it thereunder in the event that the other party becomes insolvent. 11 U.S.C. § 560.[7] Section 560's legislative history demonstrates that the primary policy goal underlying its passage was legal certainty with regard to privately negotiated derivatives and foreign exchange contracts under the Code in order to protect the stability of the financial markets. The House Report on § 560 states that its purpose "is to ensure that the swap and forward contract financial markets are not destabilized by uncertainties regarding the treatment of their financial instruments under the Bankruptcy Code." H.R. Rep. No. 101-484 (1990), reprinted in 1990 U.S.C.C.A.N. 233. Congress noted that "financial markets can change significantly in a matter of days, or even hours" and thus intended to pass

[7] Section 560 reads: "The exercise of any contractual right of any swap participant to cause the termination of a swap agreement because of a condition of the kind specified in section 365(e)(1) of this title or to offset or net out any termination values or payment amounts arising under or in connection with any swap agreement shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by order of a court or administrative agency in any proceeding under this title. As used in this section, the term 'contractual right' includes a right, whether or not evidenced in writing, arising under common law, under law merchant, or by reason of normal business practice." 11 U.S.C. § 560.

legislation to allow the close-out of swaps to be "resolved promptly and with finality" in cases of bankruptcy. Id. See also 136 Cong. Rec. H2282 (daily ed. May 15, 1990) (remarks of Rep. Brooks) (Legislatures "have been faced with a number of situations where Congress has concluded that certain rapid, high-volume financial transactions warrant special bankruptcy treatment so as not to disrupt international capital markets.") The court in Thrifty Oil Co. v. Bank of Am. Nat'l Trust & Savings Ass'n (In re Thrifty Oil Co.), stated that:

> The House Judiciary Committee Report confirms that Congress enacted the Swap Amendments to ensure that the swap markets "are not destabilized by uncertainties regarding the treatment of their financial instruments under the Bankruptcy Code." H.R.Rep. No. 101-484, at 1 (1990), reprinted in 1990 U.S.C.C.A.N. 223, 223; accord 136 Cong. Rec. H2281, 2283 (daily ed. May 15, 1990) (remarks of Rep. Fish) ("The swap market serves essential functions today—including reducing vulnerability to fluctuations in exchange and interest rates. Explicit Bankruptcy Code references to swap agreements will remove ambiguities that undermine the swap market."); 136 Cong. Rec. S7535 (remarks of Sen. DeConcini) ("The effect of the swap provisions will be to provide certainty for swap transactions and thereby stabilize domestic markets by allowing the terms of the swap agreement to apply notwithstanding the bankruptcy filing.").

249 B.R. 537, 547 (S.D. Cal. 2000).

When, in 1993, the New York State legislature amended the NYBL as described above, it was following in the footsteps of Congress, which had already twice amended federal insolvency laws to protect close-out netting. Further, in 1994, Congress again amended the Code to clarify that the close-out netting

protections in § 560 of the Code extend to spot foreign exchange agreements. See 11 U.S.C. § 101(53B). In this light, the use of § 304 relief in this case to circumvent the NYBL, including its multibranch netting provisions, is counter to a settled understanding in the marketplace as to how non-U.S. bank insolvencies are intended to work in the United States.

D. ALLOWING § 304 PROCEEDINGS LEADS TO UNCERTAINTY IN DERIVATIVES AND FOREIGN EXCHANGE ACTIVITIES

As explained above, creditors of a New York branch or agency of an insolvent non-U.S. bank currently may net out their obligations under an ISDA Master or FXC Master with that branch or agency across transactions and across branches immediately upon the termination of the relevant master agreement. If, as the District Court's decision contemplates, § 304 relief is available to foreign representatives of insolvent non-U.S. banks when the Superintendent has taken title to such bank's New York assets, material delay would be threatened. The gridlock caused by such delay will increase systemic risk in the international capital markets by impairing liquidity.

1. Section 304 Proceedings May Cause Undue Delay In Close-out Netting

Typically, when a foreign representative files a petition under § 304, the representative will simultaneously request a temporary restraining order that will prevent the disposition of assets located in the United States. This temporary

restraining order lasts for up to ten days, Bankr. R. 7065, at which point the foreign representative will typically attempt to obtain a preliminary injunction that will last until the bankruptcy court has come to a decision on the merits of the § 304 petition. While such temporary restraining order and preliminary injunction are in place, a creditor who had entered into a master agreement with the insolvent bank would not be able to net out its obligations and close out the transactions. This is notwithstanding § 560's protection of close-out netting under the Code, because federal court injunctions cannot be collaterally attacked. See Celotex Corp. v. Edwards, 514 U.S. 300, 313 (1995). See also Teachers Ins. and Annuity Ass'n of Am. v. Butler, 803 F.2d 61, 67 (2nd Cir. 1986); Pratt v. Ventas, Inc., 365 F.3d 514 (6th Cir. 2004). Such a creditor would thus have to request relief from the judge who granted the temporary restraining order or preliminary injunction and, if such relief were denied in the first instance, appeal such denial. This process takes time and is antithetical to the settled expectations of parties to an ISDA or FXC Master who count on the ability to terminate and net out obligations under such agreements immediately upon a counterparty's insolvency. As discussed above, Oliver Ireland has stated that this type of delay and uncertainty has the potential to "dry[] up market liquidity and prevent[] the affected markets from serving their essential risk-management, credit-intermediation, and capital-raising functions." 85 Fed. Res. Bull. 5 at 310 (1999).

2. § 560 Does Not Resolve The Problems Posed To The Derivatives And Foreign Exchange Industry By The Availability Of § 304 Relief

One recent example of how § 304 relief can lead to uncertainty and delay in respect of netting is the decision in In re Board of Directors of Compania General de Combustibles S.A., ("CGC"), in which the bankruptcy court granted a preliminary injunction that prevented the netting out of obligations under a derivatives agreement while the § 304 petition was pending.[8] 269 B.R. 104 (Bankr. S.D.N.Y., 2001). Even though ISDA and the FXC believe that (1) CGC was incorrect as to its failure to apply § 560 and (2) even if CGC's finding as to § 560 was correct, it would be limited to situations where the foreign jurisdiction had no netting regime in place, CGC is nonetheless instructive as to how netting may significantly be delayed through the use of § 304 relief by the foreign representative of the insolvent bank's estate. Thus, even in those 43 jurisdictions where ISDA has obtained legal opinions as to the enforceability of close-out

[8] Notwithstanding § 560's plain language that "[t]he exercise of any contractual right of any swap participant to . . . net out any termination values . . . shall not be stayed, avoided, or otherwise limited by operation of any provisions of this title or by order of a court or administrative agency in any proceeding under this title," 11 U.S.C. § 560 (emphasis added), the CGC court found that § 560 does not apply so as to allow netting when the insolvency laws applicable in the foreign proceeding do not permit netting on a comparable basis to the Code. 269 B.R. 104 at 112-113.

netting under the ISDA Masters,[9] and in those 34 jurisdictions where the FXC has obtained legal opinions as to the enforceability of close-out netting under the FXC Masters,[10] the § 304 proceeding could still delay creditors' ability to close-out transactions under master agreements. If such delay were to become a routine aspect of winding up New York branches and agencies of non-U.S. banks, the legal certainty upon which global derivatives and foreign exchange activities depend would be threatened and systemic risk would increase.

E. THE SUPERINTENDENT IS PROTECTED BY SOVEREIGN IMMUNITY

Financial institutions that enter into privately negotiated derivatives and foreign exchange contracts with each other fully contemplate the possibility that their counterparty will go bankrupt. The master agreements they use specifically provide for fast and certain methods to close-out all transactions thereunder upon such an insolvency. In turn, the users of these master agreements specifically rely on the legal certainty provided by the web of laws that govern bank insolvencies with respect to the availability and speed of close-out netting in the jurisdictions in which the counterparties and their assets are located. The

[9] See International Swaps and Derivatives Association, Inc., "Status of Netting Opinions," available at http://www.isda.org/docproj/stat_of_net_opin.html, (last visited Dec. 10, 2004.)

[10] See the Financial Markets Lawyers Group, "FMLG – Combined Legal Opinions," available at http://www.ny.frb.org/fmlg/opinions.html, (last visited Dec. 14, 2004.)

availability of § 304 relief to an insolvent non-U.S. bank with a New York branch or agency, notwithstanding the vesting of title in the Superintendent of such bank's New York assets, could severely impede the smooth and efficient functioning of derivatives activities and thus could significantly increase systemic risk.

The Memorandum Order, unfortunately, does not reflect these settled expectations of parties to derivatives and foreign exchange master agreements that deal with New York bank branches and agencies of non-U.S. banks as counterparties. ISDA and the FXC urge this Court to reverse the District Court's decision, both to achieve a correct result in the instant case and to avoid the uncertainties that would well result by subjecting a non-U.S. bank's New York assets held by the Superintendent to the possibility of a § 304 order.

New York has a clear and substantial interest in overseeing the administration of bank assets in the possession of the Superintendent. In arguing that there was no violation of the Eleventh Amendment under the doctrine of Ex parte Young, the District Court "[a]ssum[ed] that Section 304 extends to [the banks' branches'] property." 313 B.R. 561 at 564. Title to that property, however, had already vested by operation of New York law, which law is controlling for determining ownership of property for purposes of § 304 under In re: Koreag. 961 F.2d 341. By virtue of the Eleventh Amendment, § 304 relief thus cannot reach that property. As such, this court should uphold the Superintendent's claim of

sovereign immunity under the Eleventh Amendment and reverse the District Court's decision.

CONCLUSION

For the foregoing reasons, amici curiae the International Swaps and Derivatives Association, Inc. and the Foreign Exchange Committee respectfully request that this Court reverse the Memorandum Order of the District Court and affirm the decision of the Bankruptcy Court.

Dated: New York, New York
December 16, 2004

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AGENCY FOR DEPOSIT INSURANCE REHABILITATION BANKRUPTCY AND LIQUIDATION OF BANKS AS BANKRUPTCY ADMINISTRATOR OF JUGOBANKA A.D., BEOGRAD AND BEOGRADSKA BANKA A.D., BEOGRAD, Debtor-Appellee, -against- SUPERINTENDENT OF BANKS OF THE STATE OF NEW YORK, Appellant.	No. 04-4997-bk On Appeal from the United States District Court for the Southern District of New York Index No.: 03-CV-9320(JSR)

MEMORANDUM IN SUPPORT OF
MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The International Swaps and Derivatives Association, Inc. ("ISDA") and the Foreign Exchange Committee (the "FXC") respectfully move for leave to file the attached brief amicus curiae in support of the Brief of Appellant, filed on December 9, 2004 by appellant Superintendent of Banks of the State of New York ("Superintendent"), requesting a reversal of the memorandum order of the United States District Court for the Southern District of New York, which is available at 313 B.R. 561 (S.D.N.Y. 2004) (the "Memorandum Order").

ISDA is a not-for-profit corporation and the global trade association representing leading participants in the privately negotiated derivatives industry, a business which includes interest rate, currency, commodity, credit and equity swaps, as well as related products such as caps, collars, floors and swaptions. ISDA was chartered in 1985, and today numbers over 600 member institutions from 46 countries on six continents. These members include most of the world's major institutions that deal in, and leading end-users of, privately negotiated derivatives, as well as associated service providers and consultants. Since its inception, ISDA has pioneered efforts to identify and reduce the sources of risk in the derivatives and risk management business. Among its most notable accomplishments are: developing the ISDA Master Agreements (as published and copyrighted by ISDA in 1992 and 2002, each an "ISDA Master" and together, the "ISDA Masters"); publishing a wide range of related documentation materials and instruments covering a variety of transaction types; obtaining legal opinions from 43 jurisdictions (available only to ISDA members) on the enforceability of netting; securing recognition of the risk-reducing effects of netting in determining capital requirements; supporting the passage of legislation ensuring the enforceability of netting in various jurisdictions, including under the New York Banking Law (N.Y. Banking Law § 1 et seq. (McKinney 2004), the "NYBL"), the Federal Deposit Insurance Act (12 U.S.C. §1811 et seq. (2004)) and the U.S. Bankruptcy Code (11

U.S.C. § 101 et seq. (2004), the "Code"); promoting sound risk management practices; and advancing the understanding and treatment of derivatives and risk management from public policy and regulatory capital perspectives.

The FXC, which is sponsored by but independent of the Federal Reserve Bank of New York, includes representatives of leading international commercial banks, investment banks, and other financial institutions who participate actively in the foreign exchange markets. The FXC's objectives include: providing a forum for discussing technical and market issues in the foreign exchange and related international markets; serving as a channel of communication between those markets and the official sector in the United States; enhancing knowledge and understanding of the foreign exchange and related international markets; and fostering improvements in the quality of risk management in these markets. Supported by the Financial Markets Lawyers Group, a committee of lawyers working at major international financial institutions, the FXC has published foreign exchange industry documentation including the International Foreign Exchange and Options Master Agreement, the International Foreign Exchange Master Agreement, and the International Currency Options Market Master Agreement (together, the "FXC Masters").

The Superintendent seeks to reverse the Memorandum Order of the United States District Court for the Southern District of New York (Rakoff, J.) (the

"District Court") entered on August 13, 2004. ISDA and the FXC are neutral and independent parties with respect to the dispute between debtor-appellee Agency for Deposit Insurance Rehabilitation Bankruptcy and Liquidation of Banks as Bankruptcy Administrator of Jugobanka A.D., Beograd and Beogradska Banka A.D., Beograd, and appellant Superintendent. However, ISDA and the FXC respectfully submit that the District Court wrongly interpreted the reach of § 304 of the Code, 11 U.S.C. § 304, in rendering its judgment denying the Superintendent's Eleventh Amendment claim. ISDA and the FXC believe that the District Court's decision may cause derivatives and foreign exchange market participants to lose confidence in their ability to pursue their rights under the ISDA Masters and FXC Masters when entered into with New York branches and agencies of non-U.S. banks, thus producing risk and uncertainty in the international capital markets. ISDA and the FXC have a substantial interest in ensuring that the netting provisions of bank insolvency laws are properly applied in a manner that encourages sound risk management practices and market stability. As a participant in the creation of the 1993 amendments to the NYBL, ISDA is especially suited to offer guidance as to the role such provisions play in the overall bank insolvency scheme at issue here.

This Court and other courts routinely accept and consider amicus curiae submissions from parties such as ISDA and the FXC who are neutral and

independent, and who have an expert view on, and a legitimate interest in, the subject matter of a dispute before the Court. See, e.g., Jin v. Metro. Life Ins. Co., 310 F.3d 84 (2d Cir. 2002) (considering amicus brief of National Employment Lawyers Association/New York on appeal of Title VII claim); Strougo v. Scudder, 96 Civ. 2136, 1997 WL 473566 (S.D.N.Y. Aug. 18, 1997) (permitting the Investment Company Institute to participate as amicus curiae where the policy arguments it advanced might "illuminate the legal issues presented by [the] motion"); In re City of Bridgeport, 128 B.R. 30 (Bankr. D. Conn. 1991) (granting amicus curiae status to neutral organization that could "contribute a different and useful perspective" to the issue).

For the foregoing reasons, ISDA and the FXC respectfully submit that their Motion for Leave to File a Brief Amicus Curiae should be granted.

Dated: New York, New York
December 16, 2004

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AGENCY FOR DEPOSIT INSURANCE REHABILITATION BANKRUPTCY AND LIQUIDATION OF BANKS AS BANKRUPTCY ADMINISTRATOR OF JUGOBANKA A.D., BEOGRAD AND BEOGRADSKA BANKA A.D., BEOGRAD, Debtor-Appellee, -against- SUPERINTENDENT OF BANKS OF THE STATE OF NEW YORK, Appellant.	No. 04-4997-bk On Appeal from the United States District Court for the Southern District of New York Index No.: 03-CV-9320(JSR)

AFFIRMATION OF MICHAEL S. FELDBERG

I, Michael S. Feldberg, affirm under penalty of perjury under the laws of the United States as follows:

1. I am a partner at Allen & Overy LLP, counsel to the International Swaps and Derivatives Association, Inc. ("ISDA") and the Foreign Exchange Committee (the "FXC").

2. I submit this Motion for Leave to File a Brief Amicus Curiae together with a copy of the Brief Amicus Curiae in Support of the Appellant on behalf of ISDA and the FXC.

Dated: New York, New York
December 16, 2004

Michael S. Feldberg (MF 3974)

RULE 32(A)(7)(C) CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I certify that the foregoing contains 6074 words, not including table of contents, table of authorities or this certificate, and complies with the type-volume limitation set forth in Rules 29(d) and 32(a)(7)(B)(i).

Dated: New York, New York
December 16, 2004

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CERTIFICATE OF SERVICE

The undersigned hereby certifies, under penalty of perjury, that on December 16, 2004 a copy of the foregoing International Swaps and Derivatives Association, Inc.'s and the Foreign Exchange Committee's Brief Amicus Curiae was served by fax and two copies were served by first class mail upon:

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December 16, 2004

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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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MOTION INFORMATION STATEMENT

Docket Number(s): 04-4997-bk(L)

Motion for: leave to file a brief amicus curiae

Set forth below precise, complete statement of relief sought:

leave to file a brief amicus curiae in support of appellant

Caption [use short title]

AGENCY FOR DEPOSIT INSURANCE REHABILITATION BANKRUPTCY AND LIQUIDATION OF BANKS AS BANKRUPTCY ADMINISTRATOR OF JUGOBANKA A.D., BEOGRAD AND BEOGRADSKA BANKA A.D., BEOGRAD

Debtor-Appellee

-against-

SUPERINTENDENT OF BANKS OF THE STATE OF NEW YORK,

Appellant.

MOVING PARTY: Amicus Curiae International Swaps and Derivatives Association, Inc., and the Foreign Exchange Committee

☐ Plaintiff ☐ Defendant

☐ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: AGENCY FOR DEPOSIT INSURANCE REHABILITATION BANKRUPTCY AND LIQUIDATION OF BANKS AS BANKRUPTCY ADMINISTRATOR OF JUGOBANKA A.D., BEOGRAD AND BEOGRADSKA BANKA A.D.

MOVING ATTORNEY: Michael S. Feldberg (MF 3974)

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Court-Judge/Agency appealed from: United States District Court for the Southern District of New York (J. Rakoff)

Please check appropriate boxes:

Has consent of opposing counsel:

A. been sought? ☑ Yes ☐ No

B. been obtained? ☐ Yes ☑ No

Is oral argument requested? ☐ Yes ☑ No

(requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No

If yes, enter date _____

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this Court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

_____

_____

Signature of Moving Attorney:

_____ Date: 12-16-04

Has service been effected? ☑ Yes ☐ No

[Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is GRANTED DENIED.

FOR THE COURT:

ROSEANN B. MacKECHNIE, Clerk of Court

Date: _____ By: _____

Form T-1080 (Revised 10/31/02).