CASE COMMENT

CITIBANK, N.A. v. WELLS FARGO ASIA LTD.: A THREAT TO U.S. INTERNATIONAL BANKING?

I. INTRODUCTION

Each day more than $750 billion flows across United States borders in the Eurodollar market. United States banks participate in this market with very little direct regulation, either on the state or federal level. As a result, courts encounter difficulties in resolving disputes involving the Eurodollar market.

Citibank, N.A. v. Wells Fargo Asia Ltd., the first case to reach the United States Supreme Court involving the Eurodollar market, illustrates some of the significant problems that U.S. courts have faced. Wells Fargo Asia Ltd. ("WFAL"), the Singapore branch of Wells Fargo, National Association ("Wells Fargo"), made two time deposits with Citibank/Manila, the Philippine branch of Citibank, National Association ("Citibank"). WFAL sued Citibank for Citibank/Manila's failure to repay these deposits. The agreement which created the time deposits was silent on the law that governs it, where it could be enforced, and what risks the parties assumed. WFAL claims that the action is for a simple breach of contract, but Citibank insists that an adverse decision could destroy the U.S. banking system. Both parties base their arguments on two well-established legal principles that appear to contradict each other. The only thing the parties can agree on is the fact that they had reached an agreement.

This case comment briefly describes the Eurodollar market, examines the history of this case, discusses the options which currently are before

1. Brief of the New York Clearing House Association and the Institute of International Bankers as Amicus Curiae Supporting Reversal ("Brief of the New York Clearing House") at 6, Citibank, NA v. Wells Fargo Asia Ltd., — US —, 110 S Ct 2034 (1990). Foreign readers should find this case comment to be of particular interest because the case highlights the current U.S. approach to foreign branch banking and the Eurodollar market.


3. As of year-end 1989, Citibank was the largest bank in the United States with deposits of $108 billion and total assets of $158 billion. Wells Fargo was the seventh largest U.S. bank with deposits of $36 billion and total assets of $45 billion. Polk's Bank Directory vi (North American ed, Spring 1990).
the Court of Appeals and analyzes the role of the legal system in the Eurodollar market. The comment concludes by addressing the ramifications of the decision on U.S. banking law.

II. THE EURODOLLAR MARKET

Eurocurrencies are deposits denominated in foreign currency located in a bank outside the country where the currency is issued as legal tender. Thus, a Eurodollar is a U.S. dollar denominated deposit located outside of the United States in a bank which has a resulting obligation to repay the deposit in U.S. dollars.

Eurocurrencies are traded through direct dealing and through brokers via telephone or telex. Prices are quoted with a bid/offer spread. The bid rate is the rate which will be paid on deposits and the offer rate is the rate which will be charged on loans.

In a typical interbank Eurodollar transaction such as the one between WFAL and Citibank/Manila, the depositing bank (Bank A), located either within or outside the United States, agrees to place a dollar denominated deposit with a second bank (Bank B), which is located outside of the United States. Bank B may be a foreign bank or an overseas branch of a United States bank. Bank A makes its deposit by using a wire transfer to order its correspondent bank in New York (Bank Y) to transfer funds from Bank A’s dollar account to Bank B’s correspondent bank in New York (Bank Z). Bank Z then credits Bank B’s dollar denominated account by the amount of the transfer. The transfer of funds between the correspondent banks, Y and Z, is accomplished by the use of a wire transfer through a clearing mechanism in New York City known as the Clearing House Interbank Payments System (“CHIPS”). CHIPS nets all debits and credits, and the balances are settled each day on the books of the Federal Reserve Bank of New York. Repayment is accomplished simply by reversing the entire process. The actual dollars re-

5. Wells Fargo VI, — US at —, 110 S Ct at 2037. Eurodollar deposits may be held in banks located throughout the world, not only in Europe. David Eiteman and Arthur Stonehill, Multinational Business Finance 386 (Addison-Wesley, 4th ed 1986).
7. Id.
8. Id.
10. Brief of the New York Clearing House at 6 (cited in note 1). CHIPS currently clears roughly 146,000 transactions per day with aggregate payments averaging $750 billion daily. Roughly 90 percent of all interbank Eurodollar transactions are cleared through CHIPS. Id.
11. Wells Fargo VI, — US at —, 110 S Ct at 2037.
main in the United States in the correspondent banks despite the fact that the ownership of the deposit has changed hands.

In June 1983, the month that WFAL and Citibank/Manila entered into their transaction, the gross size of the Eurocurrency market was roughly $2,056 billion in deposits. Eurodollar deposits made up approximately 80 percent of the market ($1,641 billion). Roughly 72 percent of the Eurocurrency market ($1,483 billion) was composed of interbank deposits.

III. WELLS FARGO ASIA LTD v. CITIBANK, N.A.

A. The Transaction

On June 10, 1983, Citibank/Manila contacted Astley & Pearce, an independent Asian money-broker, in order to borrow U.S. dollars. The broker then contacted WFAL and the parties' traders made arrangements for two deposits. Both of the deposits were $1 million time deposits which were to be repaid on December 9 and 10, 1983, with 10 percent interest rates. The broker then sent a report to both of the parties and a confirmation telex to WFAL. On June 14, 1983, WFAL confirmed the deposits and instructed its correspondent bank, Wells Fargo, New York, to pay the required funds to Citibank, New York, Citibank/Manila's correspondent bank. Computer-generated telexes from each party accompanied the confirmations. The confirmations and computer-generated telexes, along with a statement of Terms and Conditions sent by Citibank/Manila to WFAL, comprise the entire written agreement between the parties.

On October 15, 1983, the Philippine government issued a Memorandum to Authorized Agent Banks ("MAAB 47"). The decree stated that total foreign obligations to foreign financial institutions could not be re-
duced without the approval of the Philippine Central Bank.\textsuperscript{23} Citibank/Manila had $630 million in deposits in favor of fifty non-Philippine financial institutions that fell under the freeze.\textsuperscript{24} Roughly half of the funds had been used for loans to Philippine entities and the other half had been redeposited in the Eurocurrency interbank market.\textsuperscript{25}

\textbf{B. The Path to the Supreme Court}

After Citibank/Manila refused to repay the deposits upon maturity, WFAL brought suit against Citibank, Citibank/Manila's parent, in the district court of the Southern District of New York on February 10, 1984.\textsuperscript{26} Citibank quickly responded. On February 20, 1984, Citibank/Manila sought permission from the Philippine Central Bank to repay some of its deposits.\textsuperscript{27} In March 1984, the Philippine Central Bank gave Citibank/Manila permission to repay its deposits with its non-Philippine assets.\textsuperscript{28} As a result, WFAL received a payment of $934,000.\textsuperscript{29} Citibank/Manila continued to pay interest on the remaining sum.\textsuperscript{30} MAAB 47 did not restrain the payment of interest.\textsuperscript{31}

WFAL moved for summary judgment in December 1984.\textsuperscript{32} The district court denied the motion on the grounds that there were two issues of material fact. The first issue was the nature of sovereign risk in Eurodollar transactions.\textsuperscript{33} Sovereign risk "results from the acts of the foreign government (e.g., confiscation) in whose jurisdiction the deposits are held which prevent repayment by the foreign-based branch."\textsuperscript{34} The second issue involved the situs of the debt.\textsuperscript{35}

At trial, Citibank argued that WFAL had accepted sovereign risk and that the deposits were only payable in Manila and were governed by Philippine law.\textsuperscript{36} WFAL contended that Citibank had agreed to be liable

\begin{itemize}
\item \textsuperscript{23} Id, excerpt from Central Bank of the Philippines, Memorandum to Authorized Agent Banks No 47 (October 15, 1983).
\item \textsuperscript{24} Peter Smedresman and Andreas Lowenfeld, \textit{Eurodollars, Multinational Banks, and National Law}, 64 NYU L Rev 733, 763 (1989).
\item \textsuperscript{25} Id.
\item \textsuperscript{26} \textit{Wells Fargo Asia Ltd v Citibank, NA}, 852 F2d 657, 659 (2d Cir 1988) ("Wells Fargo V").
\item \textsuperscript{27} \textit{Wells Fargo I}, 612 F Supp at 355.
\item \textsuperscript{28} Id. Citibank/Manila's non-Philippine assets were carried on its Philippine books but deposited in banks located outside of the Philippines or invested in non-Philippine enterprises. \textit{Wells Fargo Asia Ltd v Citibank, NA}, 660 F Supp 946, 947-48 (SDNY) ("Wells Fargo II").
\item \textsuperscript{29} \textit{Wells Fargo II}, 660 F Supp at 948.
\item \textsuperscript{30} \textit{Wells Fargo I}, 612 F Supp at 355.
\item \textsuperscript{31} Smedresman and Lowenfeld, 64 NYU L Rev at 763 note 135 (cited in note 24).
\item \textsuperscript{32} Id at 766.
\item \textsuperscript{33} See \textit{Wells Fargo I}, 612 F Supp at 356-57.
\item \textsuperscript{34} Id at 353.
\item \textsuperscript{35} See id at 356-57.
\item \textsuperscript{36} \textit{Wells Fargo II}, 660 F Supp at 947.
\end{itemize}
for its Philippine obligations and that sovereign risk was irrelevant because MAAB 47 did not excuse the honoring of the deposits.\(^{37}\)

The trial court viewed WFAL's position as an invitation to decide the action under Philippine law.\(^ {38}\) The court based its decision in favor of WFAL on two conclusions it reached about Philippine law. According to the decision, Philippine law recognizes that bank branches are not separate entities apart from the home office and that a branch obligation is an obligation of the bank as a whole.\(^ {39}\) The trial court also concluded that MAAB 47 did not forbid repayment of the deposits with Citibank's worldwide assets.\(^ {40}\) Thus, Citibank could transfer funds from outside the Philippines to Manila in order to repay the deposits.\(^ {41}\)

Citibank had three defenses which the trial court addressed. The first defense, that customs and practices in international banking supported its interpretation of the agreement, was rejected on the grounds that "no relevant custom or practice was established by either party."\(^ {42}\) Citibank had tried to prove that Federal Regulation D, which exempts a foreign deposit that is payable only at a foreign branch from reserve requirements, demonstrates an understanding that deposits can be repaid only at the branch of a U.S. bank where they were made and are subject to the laws of the host country.\(^ {43}\) The trial court held that the argument was moot since it accepted the position that the deposits were payable only in Manila and were subject to Philippine law.\(^ {44}\)

In its second defense, Citibank claimed that it was protected from liability by the act of state doctrine.\(^ {45}\) Under the act of state doctrine, if a court finds that the adjudication of an action would hinder the executive branch's conduct of foreign affairs, then it should refrain from questioning the validity of the foreign state's actions.\(^ {46}\) The trial court held that the doctrine did not apply because Philippine law and policy were not offended by requiring Citibank to repay the deposits.\(^ {47}\) The court also rejected Citibank's final defense, impossibility of performance, on the grounds that Citibank could use outside assets to repay the deposits.\(^ {48}\)

\(^ {37}\) Id.
\(^ {38}\) Id.
\(^ {39}\) Id at 948-49.
\(^ {40}\) Id at 949-50.
\(^ {41}\) Id at 950.
\(^ {42}\) Id.
\(^ {43}\) Id; 12 CFR § 204.1 et seq (1986).
\(^ {44}\) Wells Fargo II, 660 F. Supp. at 950.
\(^ {45}\) See id.
\(^ {46}\) Id, citing Allied Bank International v Banco Credito Agricola de Cartago, 757 F2d 516, 520-21 (2d Cir 1985).
\(^ {47}\) Id at 950.
\(^ {48}\) Id at 951.
On appeal, Citibank attacked the trial court's decision on two fronts. First, Citibank questioned the trial court's interpretation of Philippine law because it was based on only two affidavits of Philippine lawyers totaling fewer than fourteen pages. Second, Citibank argued that even if the trial court's interpretation of Philippine law were correct, a U.S. court should not enforce it because it would conflict with U.S. law and policy. The Court of Appeals remanded the case and ordered the trial court to make supplemental findings of fact and conclusions of law.

On remand, the district court held that repayment and collection were two distinct concepts. Repayment, according to the opinion, "refers to the location where the wire transfers effectuating repayment at maturity were to occur." Collection, on the other hand, "refers to the place or places where plaintiff was entitled to look for satisfaction of its deposits in the event that Citibank should fail to make the required wire transfers at the place of repayment."

In addition, the district court held that the confirmation slips established an agreement between the parties that repayment was to occur in New York. However, the court did not find an agreement specifying where the deposits could be collected in the deposit contract. It also failed to find a provision in Philippine law which precluded or negated an agreement calling for the collection of deposits outside of Manila.

In addressing what law controls if there is no controlling Philippine law, the district court redefined the issue. The real issue, according to the district court, was "not so much about where repayment physically was to be made or where the deposits were collectible, but rather which assets Citibank [was] required to use in order to satisfy its obligations to the

49. Wells Fargo IV, 695 F Supp at 1451.
50. Smedresman and Lowenfeld, 64 NYU L Rev at 772 (cited in note 24).
51. Wells Fargo VI, — US at —, 110 S Ct at 2038; Wells Fargo Asia Ltd v Citibank, NA, 847 F2d 837 (1988) ("Wells Fargo III"). The Court of Appeals instructed the trial court to examine the following four areas:
(a) Whether the parties agreed as to where the debt would be repaid, including whether they agreed that the deposits were collectible only in Manila.
(b) If there was an agreement, what were its essential terms?
(c) Whether Philippine law (other than MAAB 47) precludes or negates an agreement between the parties to have the deposits collectible outside of Manila.
(d) If there is no controlling Philippine law referred to in (c) above, what law does control?
Wells Fargo VI, — US at —, 110 S Ct at 2038.
52. Wells Fargo IV, 695 F Supp at 1451.
53. Id.
54. Id.
55. Id at 1452.
56. Id at 1453.
57. Id.
plaintiff." The court concluded that this issue imposed the duty of determining whether Philippine or New York law controlled.

The district court held that New York law was controlling under both the New York and federal choice-of-law rules. After reviewing New York case law, the court held that under New York law a "parent bank is ultimately liable for the obligations of the foreign branch." As a result, Citibank was held liable for Citibank/Manila's deposit.

The Court of Appeals affirmed the district court's decision, but on different grounds. The Second Circuit panel began its analysis by citing a general banking principle that "a debt on deposit normally authorizes a demand for the money only at the relevant branch." It went on to note that the rule could be altered by agreement of the parties.

The court then cited three Second Circuit cases for the following rule: "If the parties agree that repayment of a deposit in a foreign bank or branch may occur at another location, they authorize demand and collection at that other location." Thus, "a debt may be collected wherever it is repayable, unless the parties have agreed otherwise." Since the district court's finding that there was a repayment agreement was not clearly erroneous, the Second Circuit panel affirmed the judgment.

C. The Supreme Court Decision

1. The Parties' Positions. Citibank's strategy had evolved by the time the action reached the Supreme Court into a four-point argument based entirely on federal law. Citibank first asserted that federal law required depositors in foreign branches of U.S. banks to assume sovereign risk. Citibank based its position on the federal regulations which govern reserve requirements (Regulation D), Federal Deposit Insurance Corporation ("FDIC") insurance, and interest rates. Since deposits payable outside of the United States are exempt from reserve requirements and

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58. Id.
59. Id.
60. Id at 1454.
61. Id.
62. Wells Fargo VI, — US at —, 110 S Ct at 2039.
63. Wells Fargo V, 852 F2d at 660; Wells Fargo VI, — US at —, 110 S Ct at 2039.
64. Wells Fargo V, 852 F2d at 660; Wells Fargo VI, — US at —, 110 S Ct at 2039.
65. Wells Fargo V, 852 F2d at 660, citing Allied Bank International v Banco Credito Agricola de Cartago, 757 F2d 516, 521-22 (2d Cir 1985); Garcia v Chase Manhattan Bank, NA, 735 F2d 645, 650-51 (2d Cir 1984); Braka v Bancomer, SNC, 762 F2d 222, 225 (2d Cir 1985).
66. Id at 661.
67. Id.
protections, Citibank argued that foreign depositors assume "whatever regulatory benefits and risks that the foreign regulatory regimes provided." 70 Citibank emphasized one Federal Reserve regulation in particular. 71 In 1970, the Federal Reserve ruled that if a U.S. bank guaranteed a deposit which was payable only outside of the United States, the deposit would be subject to the reserve requirements. 72 The regulation states in part that a "customer who makes a deposit that is payable solely at a foreign branch assumes whatever risk may exist that the foreign country might impose restrictions on withdrawals." 73 Citibank made a similar argument using interest rate regulations. 74

After identifying the federal law concerning sovereign risk, Citibank made its case for federal preemption or in the alternative, the creation of federal common law. Citibank's basic argument for preemption was that since the case arose "in the fields of foreign commerce and foreign relations where it is essential that the Nation 'speak with one voice,' a state or foreign rule that places foreign sovereign risk on Citibank must yield to the supremacy of federal law and policy." 75 The argument for federal common law was basically a reiteration of the federal preemption points. 76

Citibank's third point attempted to show the deficiencies of state and foreign law with respect to the liability of U.S. banks for foreign branch deposits. 77 Although it claimed that these laws were consistent with its views on sovereign risk, Citibank argued that the application of state and foreign laws to such transactions would have three fatal shortcomings. 78 According to Citibank, any approach which relied on state or foreign law would allow states and foreign sovereigns to adopt rules which were harmful to federal interests, would not provide the uniformity which the field required, and could spawn complex litigation which would be wasteful and inefficient. 79

70. Id at 17.
71. Id at 18-19.
73. Id.
74. Citibank Brief at 18 (cited in note 68).
75. Id at 24. Citibank claimed that imposing liability on it for sovereign risk would create disincentives for United States' banks to engage in foreign branching and U.S. foreign commerce, disrupt the federal regulatory system by creating uncertainty about the application of regulations, give economic and political leverage to foreign sovereigns, and provide the benefits of the United States market without any of its costs. Id at 25-27.
76. Id at 27-32.
77. Id at 37.
78. Id at 35.
79. Id.
Citibank's final argument concerned the routing instructions on which the Second Circuit based its collection agreement holding. It stressed the district court's finding that the parties did not have a collection agreement and noted that the Court of Appeals decision would redefine completely the term "payable only abroad."

WFAL's brief attacked Citibank's federal arguments and defended the Second Circuit judgment using the New York case law on which the district court based its opinion. WFAL argued that Congress did not preempt the local law which governed relationships between banks and their depositors. As proof, it pointed to the fact that banks' "acquisition and transfer of property, their right to sue and collect their debts, and their liability to be sued for debts, are all based on state law." WFAL argued that Citibank's preemption argument presumed that reserve requirements define particular transactions and asserted that the correct position is that it is necessary to examine the particular transaction to know whether it triggers the reserve requirements.

WFAL's brief dealt at great length with the 1970 Federal Reserve regulation. WFAL began by noting that the regulation disappeared from the books in 1980 and did not reappear until 1987. Thus the regulation was not on the books in 1983 when the parties entered into their transaction. The WFAL brief dismissed the regulation as nothing more than a recognition by the Federal Reserve that the status of reserves is to be determined by examining the agreement between the parties and by applying local law. WFAL interpreted the statement in the regulation which appeared to assign sovereign risk to the depositor as an acknowledgement that local law may allow this type of assignment.

WFAL concluded its brief by urging the Supreme Court to reject the temptation to enact federal common law. "Banking is not a field of

80. Id at 37.
81. Id at 39-40.
82. WFAL asserted that New York case law had fashioned a rule for sovereign risk. Brief for Respondent Wells Fargo Asia Ltd ("WFAL Brief") at 18, Citibank, NA v Wells Fargo Asia Ltd, — US —, 110 S Ct 2034 (1990). The rule, announced in Sokoloff v National City Bank, states that a bank deposit is not a bailment and a depositor may look to a bank and all of its assets for payment at maturity. Id, citing Sokoloff v National City Bank, 239 NY 158, 145 NE 917 (1924). The Sokoloff rule, according to WFAL, "is the norm when bank assets (rather than debts to depositors) are 'taken or frozen.'" WFAL Brief at 20.
83. Id at 30.
84. Id at 31, quoting First National Bank of Louisville v Kentucky, 76 US 353, 362 (1869).
85. Id at 33.
86. See 56 Federal Reserve Bulletin 140 (cited in note 72), and text accompanying notes 71-73 for Citibank's position on the regulation.
87. Id at 37.
88. Id at 38.
89. Id.
'unique' federal interest. The United States has promoted a dual system of local and federal regulation, rather than uniform national rules. ⁹⁰ If changes are needed, "Congress is far better equipped to debate the relative merits of the points that Citibank raises." ⁹¹

In its reply brief, Citibank challenged two of WFAL's basic assumptions. The first assumption WFAL made was that it had contracted with Citibank. ⁹² Citibank argued that the deposits were made with Citibank/Manila and that Citibank was not obligated to use its worldwide assets to pay the deposits. ⁹³ WFAL also assumed that Citibank and its Manila branch were a single entity under New York law in actions involving bank assets. ⁹⁴ Citibank claimed that it and Citibank/Manila were separate entities under New York law and that it was not liable when a foreign sovereign prevented the branch from repaying the deposits. ⁹⁵

2. The Decision. The Supreme Court vacated the Court of Appeals' judgment on grounds other than those advocated by the parties. It found that "the factual premise on which the Second Circuit relied in deciding the case contradicts the factual determinations made by the District Court, determinations that are not clearly erroneous." ⁹⁶

The Court stated that two principal theories governed the question of collection. ⁹⁷ The first theory is that the parties entered into an agreement to permit collection in New York or any place that Citibank had assets. ⁹⁸ From the facts of the case, it could be inferred that such an agreement was within the parties' contemplation. ⁹⁹ The Court concluded that the Court of Appeals relied on this theory in reaching its decision. ¹⁰⁰

The Supreme Court expressly ruled out any judgment based on the first theory. It held that the district court's finding that there was not a

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⁹⁰. Id at 43.
⁹¹. Id at 47.
⁹². Id at 2.
⁹⁴. WFAL Brief at 22-23 (cited in note 82).
⁹⁶. Wells Fargo VI, — US at —, 110 S Ct at 2039.
⁹⁷. Id.
⁹⁸. Id.
⁹⁹. Id.
¹⁰⁰. Id at 2040. In its decision, the Court of Appeals viewed collection and repayment as "interchangeable concepts" despite its conclusion that the district court's finding that the two concepts were separate was not clearly erroneous. The district court made a finding that the agreement between the parties covered repayment only, not collection. However, the Second Circuit panel based its decision on an agreement for collection. Id.
collection agreement was not clearly erroneous.\textsuperscript{101} It also held that an agreement could not be inferred from a relevant custom or practice in the international banking community.\textsuperscript{102}

Under the second theory, collection would be permitted if there was "a duty to pay in New York in any event, a duty that the law created when the parties have not contrac ted otherwise."\textsuperscript{103} The Supreme Court did not address this theory because it could not determine "from the opinion of the Court of Appeals which law it found to be controlling."\textsuperscript{104} In addition to New York law, the Second Circuit opinion had referred to general banking principles and United States law.\textsuperscript{105}

As a result, the Supreme Court remanded the case to the Second Circuit "to determine which law applies, and the content of that law."\textsuperscript{106} The Court stated that the Second Circuit panel could apply New York law, Philippine law, federal common law, or rely on the preemptive effects of federal statutes and regulations.\textsuperscript{107}

\section*{IV. AN ANALYSIS OF THE COURT OF APPEALS' OPTIONS}

\subsection*{A. New York Law}

\subsubsection{1. The Single Entity Doctrine.} Under New York law, whether Citibank is obligated to use its general assets to repay the deposits made at Citibank/Manila depends on whether WFAL entered into a deposit agreement with Citibank or with a separate entity named Citibank/Manila.\textsuperscript{108} The district court judge noted that in this case "the answer is not entirely clear."\textsuperscript{109}

As a general principle, "obligations undertaken by a corporation at a branch are obligations of the corporation as a whole."\textsuperscript{110} This general principle will be referred to as the single entity doctrine.

\begin{thebibliography}{110}
\bibitem{101} Id at 2041.
\bibitem{102} Id.
\bibitem{103} Id at 2039.
\bibitem{104} Id at 2042.
\bibitem{105} Id, citing \textit{Wells Fargo V}, 852 F2d at 660.
\bibitem{106} Id at 2042.
\bibitem{107} Id. On January 15, 1991, WFAL filed a motion for affirmance with the Second Circuit. As of the editorial deadline, the court has not ruled on this motion.
\bibitem{108} A year after this case commenced, New York amended its banking law to create a sovereign risk exception for national banks. NY Banking Law § 138 (McKinney, 1990). Under this standard, Citibank would not have been held liable for Citibank/Manila's failure to repay WFAL's deposit. See text accompanying notes 171-72.
\bibitem{109} \textit{Wells Fargo IV}, 695 F Supp at 1454.
\end{thebibliography}
In New York law, Sokoloff v. National City Bank applied the single entity doctrine to foreign branch banking. Sokoloff summarized the status of a foreign branch of a U.S. bank as follows:

[When considered with relation to the parent bank, [foreign branches] are not independent agencies; they are, what their name imports, merely branches, and are subject to the supervision and control of the parent bank, and are instrumentalities whereby the parent bank carries on its business, and are established for its own particular purposes, and their business conduct and policies are controlled by the parent bank, and their property and assets belong to the parent bank, although nominally held in the names of the particular branches. . . . Ultimate liability for a debt of a branch would rest upon the parent bank.111]

As previously stated, WFAL cited Sokoloff as the authority for its rule that a depositor may look to a bank and all of its assets for repayment at maturity when its assets are taken or frozen.112 The New York Court of Appeals has cited Sokoloff for the proposition that "the parent bank is ultimately liable for the obligations of the branch."113 However, the United States in its brief as amicus curiae supporting Citibank challenged WFAL's interpretation of Sokoloff.114 The government pointed out that Sokoloff dealt with the acts of a government which the United States did not recognize.115 Traditionally, the acts of an unrecognized government have been treated differently than a recognized government's actions.116

The United States also argued that Sokoloff "provides a remedy only for depositors who place funds with a United States bank for deposit in a foreign branch."117 The United States' final point was that "even if WFAL were a domestic depositor, it still would qualify for relief under Sokoloff only if Citibank had wrongfully refused to repay the deposit."118

Although Sokoloff is an excellent example of the single entity doctrine, it does not create a broad rule which places liability on Citibank. Citibank could be liable for a wrongful refusal to repay the deposits if it

111. Sokoloff v National City Bank, 130 Misc 66, 73, 224 NYS 102, 114 (S Ct 1927) (citation omitted), aff'd mem 223 AD 754, 227 NYS 907, aff'd 250 NY 69, 164 NE 745 (1928) ("Sokoloff").
112. See note 82.
115. Id at 25.
117. US Brief at 26 (cited in note 114). The official referee in Sokoloff stated "we are not concerned with questions of liability for transactions originating in Russia and wholly to be performed in Russia, but with a debt incurred in this State which the defendant agreed to pay on demand at its own branch in Petrograd." Sokoloff, 130 Misc at 73-74, 224 NYS at 114-15; US Brief at 26 note 20 (cited in note 114).
118. US Brief at 26 (cited in note 114).
has a duty under New York law to repay the deposits out of its worldwide assets. Such a duty would arise only if Citibank were a party to the deposit contract and promised to repay the time deposits in Manila. If Citibank and Citibank/Manila are a single entity, Citibank would have the duty to repay the deposits in Manila if Citibank/Manila could not pay using its own assets.

Sokoloff does not produce this result. The Sokoloff decisions do not rest on the principle that a home office and its foreign branches are a single entity. As the United States' brief pointed out, Sokoloff entered into a contract with the home office of National City Bank, not a foreign branch. Sokoloff did not hold that a bank and its branches are a single entity for all purposes. It held merely that "the home office of a bank is liable for deposits placed in foreign branches upon the wrongful failure of the foreign branch to return the deposit on demand." The referee in Sokoloff freely admitted that New York law treats branches in many respects as "separate corporate entities and as distinct from one another as any other bank."

2. The Separate Entity Doctrine. The separate entity doctrine is a banking law principle which traces its history in New York law to a 1919 opinion which held that a bank which accepts a deposit at a branch is not liable to return the deposit or honor the check at another branch because the branch is a separate and distinct entity. The rationale for the separate entity doctrine is that a contrary rule would force banks to keep a separate set of records at each office and impose on them the burden of checking with each office before a deposit was paid or a check was cashed. New York courts have considered the results of such a contrary rule "crippling" and "intolerable."

The current status of the separate entity doctrine is unclear. In Digtrex, Inc. v. Johnson, a federal district court judge, Whitman Knapp, held that the doctrine was no longer valid under New York law. The court based its decision on the fact that the operations of most New York banks are computerized. As a result, the administrative burden rationale for

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119. Id at 25.
121. Sokoloff, 130 Misc at 73, 224 NYS at 114.
125. Cronan v Schilling, 100 NYS2d 474, 476 (S Ct 1950).
127. Id.
the rule was "no longer persuasive." Judge Knapp is the same judge who presided over Wells Fargo.

New York courts appear to have adopted the Digitrex rationale. In Gavilanes v. Matavosian, the court applied the Digitrex rationale on finding that the plaintiffs had supplied all the information that was needed to locate an account. New York courts have placed some limits on Digitrex, however. One court ruled that Digitrex does not apply if a bank does not have high speed computers. Another court accepted the Digitrex rule, but applied the separate entity doctrine after it found that a bank was given insufficient information and did not have easy access to branch records.

The Second Circuit rejected the separate entity doctrine for national banks in First National Bank of Boston International v. Banco Nacional de Cuba. The Court of Appeals held that "federal law regards a national bank and its branches as a single entity." The court based its decision on the fact that foreign branches cannot lawfully be organized as separate corporations under the Federal Foreign Banking Law. The author of this opinion, Judge Kearse, also wrote the Second Circuit opinion in Wells Fargo.

A recent note on Wells Fargo has implied that the separate entity doctrine is not dead. The note stated that "the core precept of the doctrine—that the situs of the debt is at the branch where the deposit is carried—was not abandoned." This "situs rule" has been closely tied to the separate entity doctrine. Both the district court and the Second Circuit panel in Wells Fargo referred to the situs rule in an approving manner. Since the judges who wrote these opinions also wrote the opinions which supposedly dismantled the separate entity doctrine, the status of the doctrine appears to be unsettled.

The use of the situs rule does not necessarily serve to resuscitate the separate entity doctrine. Neither of the lower courts specifically dealt

128. Id.
133. Id.
134. Id, citing Federal Foreign Banking Law, 12 USC §§ 601, 603 (1976).
136. Id at 140.
137. See id at 140-41.
138. Wells Fargo V, 852 F2d at 660; Wells Fargo II, 660 F Supp at 947.
with the doctrine. Given the Supreme Court's inability to determine what law the Second Circuit panel used, it is difficult to link the mention of the situs rule to New York's separate entity doctrine.

The district court and the Second Circuit panel may not have recognized the close relationship between the separate entity doctrine and the situs rule. The situs rule by itself has not played a major role in Wells Fargo. The district court assumed that the deposit would be paid in Manila and this assumption was not disputed in the later installments of the case.

Since New York courts have adopted the Digitrex rationale, Citibank and Citibank/Manila are a single entity under New York law. The fact that the district court and the Second Circuit panel referred to the situs rule is not enough to resurrect the separate entity rule. As a result, Citibank's worldwide assets should be available to pay the deposit in Manila under New York law.

B. Philippine Law

Although a detailed discussion of Philippine law is beyond the scope of this case comment, the question under Philippine law, as in New York law, is whether Citibank and Citibank/Manila are a single entity. In his original opinion, the district court judge held that under Philippine law, "branches of banks are not separate legal entities apart from the bank as an institution." If the Second Circuit panel applies Philippine law, it will have to determine whether this holding is clearly erroneous.

C. Federal Law

1. Reserve Requirements. Citibank's position on the role of federal law in Wells Fargo is as follows:

If state or foreign law were construed to require the home office of a U.S. bank to repay deposits in its foreign branch that the foreign government prevents the branch from repaying, it would run afoul of federal banking statutes and policies and therefore would be displaced either as a matter of federal preemption or by application of uniform federal common law. Under either theory, the allocation of sovereign

139. Wells Fargo VI, 110 S Ct at 2042; See text accompanying notes 104-7.
140. The situs rule does apply in a variety of situations. For example, the situs rule plays a role in whether the act of state doctrine applies to a banking case. Note, The Act of State Doctrine: Resolving Debt Situs Confusion, 86 Colum L Rev 594 (1986). Neither the Second Circuit nor the Supreme Court disturbed the trial court's rejection of Citibank's act of state defense. (See text accompanying notes 45-47).
141. Wells Fargo II, 660 F Supp at 950.
142. Id at 948 (district court judge quoting plaintiff's expert witness).
risk set forth by Congress and the Federal Reserve Board and incorporated into the fabric of the Nation's banking system must prevail.\footnote{143} Citibank also argued that "federal law provides only a specific and narrowly-focused rule governing foreign sovereign risk that is necessary to further clearly established federal policies and interests."\footnote{144}

Citibank argued in its brief that the regulations governing reserve requirements and deposit insurance placed the burden of sovereign risk on WFAL.\footnote{145} Citibank based a substantial portion of its reserve requirement argument on a 1970 Federal Reserve regulation.\footnote{146} The regulation limited the exemption from reserve requirements "to deposits in foreign branches as to which the depositor is entitled, under his agreement with the bank, to demand payment only outside of the United States, regardless of special circumstances."\footnote{147} The regulation also provides that "[a] customer who makes a deposit that is payable solely at a foreign branch assumes whatever risk may exist that the foreign country might impose restrictions on withdrawals."\footnote{148} Citibank argued that the regulation was part of a federal rule which allocates sovereign risk to the depositor.\footnote{149}

Citibank's reserve requirement argument raises two questions which it does not answer adequately. First, is MAAB 47 a restriction on withdrawals? The decree can be interpreted as a freeze on certain assets rather than a restriction on withdrawals. WFAL did not receive its funds because Citibank/Manila could not use its assets and Citibank refused to use its worldwide assets. The decree did not affect WFAL's ability to withdraw or its deposit rights. It only restricted the use of certain assets which could be used to repay the deposits. A telex from the Philippine authorities which disavowed any objection to the use of Citibank's worldwide assets to discharge the deposits supports this interpretation of MAAB 47.\footnote{150} The district court concluded that MAAB 47 did not prevent the transfer of assets from outside the Philippines to Manila in order

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\footnote{143}{Citibank Brief at 21-22 (cited in note 68).}
\footnote{144}{Citibank Reply Brief at 11, note 9 (cited in note 93).}
\footnote{145}{See text accompanying notes 68-74.}
\footnote{146}{See notes 71-73.}
\footnote{147}{56 Federal Reserve Bulletin 140 at 140 (cited in note 72).}
\footnote{148}{Id.}
\footnote{149}{Citibank Brief at 18-21 (cited in note 68).}
\footnote{150}{The telex, which was dated December 14, 1984, stated: If there is a judgment by a court or an extrajudicial settlement to the effect that a foreign currency \[sic\] deposit placed with a foreign currency deposit unit ('FCDU') of the Philippine branch of a foreign bank is recoverable from a non Philippine office of such foreign bank and if such liability is satisfied from assets held outside the Philippines and does not result, directly or indirectly, in a net outflow of foreign currency from the Philippines the Central Bank of the Philippines is of the view that the satisfaction of payment of such deposit liability on these terms would not be inconsistent with [the memorandum]. Wells Fargo II, 660 F Supp at 949-50.}
to repay the deposits.\textsuperscript{151} Since the decree focused on Citibank's assets rather than WFAL's deposits, MAAB 47 is not a restriction on withdrawals. Thus, WFAL does not bear the burden of the Philippine government's actions under the 1970 Federal Reserve regulation.

Second, assuming that the deposits can be repaid only in Manila using outside assets, would repayment of the deposits offend any other federal regulations or statutes? Federal regulations and statutes which deal with reserve requirements, deposit insurance, and interest rates exempt any deposit which is payable only at an office which is located outside of the United States.\textsuperscript{152} The deposit of a foreign branch of a domestic corporation is not regarded as the "deposit of a United States resident if the funds serve a purpose in connection with its foreign or international business."\textsuperscript{153}

If WFAL's deposits can only be repaid in Manila, then they do not disturb Citibank's exemptions from reserve requirements, deposit insurance, or interest rate restrictions. The federal regulations focus on the deposits, not the assets which may be used to repay them. A decision requiring Citibank to use its worldwide assets to repay WFAL's deposits in Manila would not violate the requirement that the deposits be payable only outside the United States. As long as the deposits can only be paid outside the United States, Citibank's deposit exemptions are safe.

2. Federal Law and the Single Entity Doctrine. Federal law does not address the question of which assets a bank must use to repay deposits booked at foreign branches. However, as previously stated, the Second Circuit has held that a national bank and its branches are a single entity under federal law.\textsuperscript{154}

According to the Federal Reserve, "It is true that there is no separate corporate entity as between the parent bank and its branch. A deposit liability of a branch is, therefore, a liability of the parent bank. . . ."\textsuperscript{155} Another Federal Reserve opinion concluded:

There is nothing . . . to indicate that branches established in foreign countries are to have a separate existence and constitute separate corporations. On the contrary, it is clear that the parent bank is merely to engage in certain foreign transactions through its foreign branch.\textsuperscript{156}

\begin{itemize}
\item \textsuperscript{151} Id at 950.
\item \textsuperscript{153} 12 CFR § 204.2(t) note 12 (1990). The term "any deposit that is payable only at an office located outside the United States" has been defined as a "deposit of a person who is not a United States resident as to which the depositor is entitled, under the agreement with the institution, to demand payment only outside the United States." 12 CFR § 204.2(t) (1990).
\item \textsuperscript{154} See text accompanying notes 132-34.
\item \textsuperscript{155} 4 Federal Reserve Bulletin 1123 (1918).
\item \textsuperscript{156} 3 Federal Reserve Bulletin 198, 199 (1917).
\end{itemize}
If Citibank and Citibank/Manila are a single entity under federal law, then it should not matter which assets are used to repay WFAL's deposits. As one article noted:

Whether . . . Citibank as a whole would be hurt depends on whether one consolidates Citibank's accounts world-wide for this purpose, in which case there is no net damage, or whether the accounts are kept separately for the separate units, so that Citibank New York would have paid out against a deposit it had never received.157

3. Credit and Sovereign Risk. Citibank's position on sovereign risk reveals a very inconsistent federal policy regarding the assumption of risk by foreign branches. Throughout the action, Citibank maintained that it would guarantee Citibank/Manila's deposits against credit risk.158 Both WFAL and Citibank agreed "that in the event a third person (e.g., a bank robber) or an act of nature (e.g., flood or fire) disabled the branch bank from timely repaying deposits made with it, the main office would assume liability."159

If Citibank guarantees payment in the United States when its foreign branches are precluded from paying due to credit risk, it is in violation of the 1970 Federal Reserve regulation on which it based its reserve requirement argument.160 The regulation states that a deposit is not exempt from reserve requirements if the depositor can demand payment in the United States.161 This rule applies "regardless of special circumstances."162 If Citibank's willingness to assume liability at its main office in credit risk cases includes the possibility of repayment in the United States, its deposits are no longer exempt from reserve requirements according to the 1970 regulation.

Citibank's refusal to guarantee deposits against sovereign risk is not as broad as it appears to be on the surface. In its reply brief, Citibank states:

This is not to say, of course, that every action that a foreign sovereign takes with respect to foreign branch operations of a U.S. bank has the effect of relieving the U.S. bank from responsibility. Foreign governments can and do take a variety of regulatory actions (such as imposing taxes or reserve requirements) that do not rise to the level of restricting withdrawal of deposits from the branch. Whether a sovereign action will rise to this level in a particular case will necessarily depend upon a showing of factual restriction on withdrawal.163

158. Wells Fargo I, 612 F Supp at 353; Citibank Reply Brief at 5-6 (cited in note 93).
160. 56 Federal Reserve Bulletin at 140 (cited in note 72).
161. Id.
162. Id.
163. Citibank Reply Brief at 8 note 6 (cited in note 93).
Unfortunately, this is the only explanation Citibank gives for its position on guarantees and sovereign action. Citibank's reply brief did not explain why it viewed the Philippine asset freeze as a restriction on withdrawal.

The Federal Reserve's position on sovereign risk mirrors Citibank's. In a memorandum supporting Citibank at trial, the Federal Reserve Bank of New York stated that "as long as foreign-branch deposits remain subject to some degree of political risk, they do not serve as a substitute for United States deposits, and the exemption from reserve requirements is consistent with the efficient operation of monetary policy." 164

4. Federal Policy. The federal government does not have a coherent policy on credit and sovereign risk in international banking. The distinction which Citibank and the Federal Reserve make between sovereign risk and credit risk does not appear in the Federal Reserve regulations. 165 If the official Federal Reserve policy allows Citibank to assume some sovereign risk, how much and what types of sovereign risk may it assume? The Federal Reserve and Citibank do not provide any answers to this question.

Citibank's argument that the federal regulations and policies dealing with reserve requirements place sovereign risk on WFAL is incorrect. The Philippine decree does not clash with the Federal Reserve regulations governing reserve requirements. In addition, repayment of WFAL's deposits in Manila would not violate the exemption regulations. 166

The federal regulations and statutes on which Citibank builds its case do not, as it claims, "plainly establish a rule of federal law providing that the depositor at the foreign branch rather than the U.S. home office bears the foreign sovereign risk." 167 The shifting federal record in international banking does not provide a firm foundation for federal preemption of the field.

Citibank based its federal common law argument on the grounds that a "uniform rule of federal law is necessary here in order to effectuate federal policies and to provide a national standard governing the liability of U.S. banks to depositors in their foreign branches." 168 Given the confused state of federal policy, it is difficult to see how it can be effectuated in an efficient manner.

164. Smedresman and Lowenfeld, 64 NYU L Rev at 792 (cited in note 24) (quoting Memorandum of Law of Federal Reserve Bank of New York as Amicus Curiae at 9, Wells Fargo II, 660 F Supp 947 (SDNY 1987)).
165. Smedresman and Lowenfeld, 64 NYU L Rev at 792 (cited in note 24).
166. See text accompanying notes 152-53.
Despite the disarray in federal banking policy, Citibank's public policy arguments should not be given short shrift. Certain types of sovereign risk, such as the nationalization of foreign branches, should not be assumed by a home office and the U.S. banking system. Problems arise when a foreign sovereign's actions do not rise to the level of restricting withdrawals or confiscating assets but still trigger the U.S. deposit insurance system. For example, if a hostile foreign power implemented MAAB 47 and a U.S. bank failed when it attempted to pay off depositors at the foreign branch, the FDIC would bear the loss. Although it is doubtful that this would occur due to the high cost the foreign sovereign would pay for its actions (for example, in trade sanctions, frozen assets, and blocked World Bank loans), it raises disturbing questions about the proper way to deal with sovereign risk.

Citibank's position is flawed because federal laws and policies do not deal clearly with the risks involved in international banking. Both Citibank and the Federal Reserve state that a home office may assume liability for credit risks and certain types of sovereign risk despite regulatory language to the contrary. As a result, Citibank's federal preemption argument fails.

The lack of consistent federal banking policy also hampers Citibank's common law argument. Without a strong foundation to build on, courts would be forced to create banking law from scratch. Given the courts' track record in Wells Fargo as well as their treatment of the separate entity doctrine, courts should not try their hand at judicial legislation in banking. Congress and the Federal Reserve are better equipped to weigh the policy arguments which Citibank has raised.

Citibank's claim that states are not equipped to deal with banking is also questionable. In 1984, one year after the Wells Fargo litigation began, New York amended its statute protecting banks from sovereign risk to include national banks. The New York law states that any national bank which is located in the state and has branches in foreign countries: shall be liable for contracts to be performed at such branch office or offices and for deposits to be repaid at such branch office or offices to no greater extent than a bank, banking corporation or other organization or association for banking purposes organized and existing under the laws of such foreign country would be liable under its laws.

169. See text accompanying notes 158-64.
170. Although Citibank repeatedly referred to a federal interest in sovereign risk allocation, it never explained why neither Congress nor the Federal Reserve has adopted a statute or issued an interpretation which clearly places sovereign risk on the foreign depositor's shoulders. If sovereign risk is such a vital federal concern, why have the federal authorities failed to act on the question in the seven years Wells Fargo has been on stage?
172. Id.
If a New York national bank’s foreign branch had entered into a deposit contract which was governed by this amended New York law and was placed in Citibank/Manila’s position, the home bank would not have been held liable.

V. OBSTACLES TO AMERICAN INTERNATIONAL BANKING

Wells Fargo is not the threat to U.S. banking which Citibank has made it out to be. The fact situation in this case is highly unusual. When foreign sovereigns take action which affects ownership rights, they usually confiscate assets or nationalize deposits. A carefully crafted decision which requires repayment in Manila would not upset the current federal banking system.

Wells Fargo remains significant because it exposes a number of pitfalls for United States foreign branch banking. The first of these is the lack of a coherent federal policy on international banking. If the Federal Reserve is going to treat credit risk and sovereign risk differently, then its regulations should reflect that policy. Congress and the Federal Reserve must define their goals and set clear parameters for U.S. international banking. If the United States ever had the opportunity to negotiate an international standard for sovereign risk with the world’s banking powers, it would be at a serious disadvantage. It would have to establish clear policy goals for itself before it could even make a proposal.

Another pitfall could have been avoided by the banks themselves. For the past six years, two of the largest and most sophisticated banks in the United States have been arguing over which law governs their standardized loan agreement. If negotiable international deposits can carry a legend stipulating which law governs them, a non-negotiable deposit contract should be able to contain a choice of law stipulation. Wells Fargo is a poor precedent from a choice of law standpoint.

The third and final obstacle is the separate entity doctrine. Doctrines which are based on early twentieth century technology should not govern international banking as it enters the twenty-first century. The separate entity doctrine only clouds the debate on proper international banking policy. If foreign branches are treated as separate entities for certain transactions, it should be for solid financial and legal reasons.

VI. CONCLUSION

Citibank, N.A. v. Wells Fargo Asia Ltd. has placed the executive, legislative, and judicial branches of the U.S. government at a crossroads. Despite Citibank’s strenuous arguments to the contrary, the case reveals that

Congress and the Federal Reserve have failed to fashion a clear and concise federal policy on international banking. If U.S. banks are to compete globally, they must have a firm regulatory foundation upon which to build.

_Wells Fargo_ also has forced courts to reevaluate banking case law as well as the use of choice of law rules. Courts should not be afraid to throw away antiquated banking principles such as the separate entity doctrine. Any rule which outlasts its purpose is an impediment. In addition, courts must craft specific choice of law rules for international banking transactions. The judicial system does not have the resources to send international banking cases up and down the system in search of the right law to apply.

The United States must take the necessary steps to remain competitive in international banking. It cannot afford to rely on a patchwork of inconsistent federal policies and outdated banking case law.

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