No. ________

In The
Supreme Court of the United States

KUNG DA CHANG,

Petitioner,

v.

SHANGHAI COMMERCIAL BANK LIMITED,

Respondent.

On Petition For A Writ Of Certiorari To The Washington Supreme Court

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether recognition of a foreign-country money judgment by a United States court constitutes state action thereby invoking the protections of the Fourteenth Amendment.
2. Whether security for costs rules unconstitutionally deprive persons of their fundamental right of access to the courts.
3. Whether security for costs rules violate equal protection.
4. Whether a United States court should ever recognize a judgment obtained in a foreign proceeding that was not before an impartial tribunal or compatible with due process.

PARTIES TO THE PROCEEDINGS

The Petitioner, who is the Respondent-Appellant below, is Kung Da Chang, a Washington state resident.[1] The Respondent, who is the Petitioner-Appellee below, is Shanghai Commercial Bank Limited, a banking corporation organized and existing under the Laws of Hong Kong Special Administrative Region, the People's Republic of China.

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[1] Michelle Chen, a Washington resident and Kung Da Chang's wife, is named as a Respondent (as "Jane Doe" Chang) in the Washington State Superior Court case below, but is not a party to the appellate proceedings.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Kung Da Chang respectfully petitions the Court for a writ of certiorari to the Washington State Court of Appeals, Division I.

OPINIONS BELOW

The Washington State Court of Appeals, Division I's unpublished opinion in *Shanghai Commercial Bank Ltd. v. Kung Da Chang*, affirming summary judgment, is available at 2014 Wash. App. LEXIS 2088, and reproduced at App. 2-11.

The Washington State Superior Court's order, entered on June 7, 2013, granting Respondent's motion for summary judgment is reproduced at App. 12-17.

The Washington State Supreme Court's decision, denying Petition for Review on February 4, 2015, is reproduced at App. 1.

JURISDICTION

The Washington State Supreme Court denied the Petition for Review on February 4, 2015. This Petition is timely filed under Supreme Court Rule 13.1, and this Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment to the United States Constitution

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Fifth Amendment to the United States Constitution

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment to the United States Constitution, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Revised Code of Washington § 6.40A.030

Recognition of foreign-country judgments – Grounds for nonrecognition.

(1) Except as otherwise provided in subsections (2) and (3) of this section, a court of this state shall recognize a foreign-country judgment to which this chapter applies.

(2) A court of this state may not recognize a foreign-country judgment if:

(a) The judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law;

. . .

(3) A court of this state need not recognize a foreign-country judgment if:

. . .

(c) The judgment or the cause of action on which the judgment is based is repugnant to the public policy of this state or of the United States;

. . .

(g) The judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment; or

. . .

(h) The specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.

(4) A party resisting recognition of a foreign-country judgment has the burden of establishing that a ground for nonrecognition stated in subsection (2) or (3) of this section exists.

STATEMENT OF THE CASE

A. Introduction

This case concerns multiple issues of national and international importance.

This Court is presented with the opportunity to speak out against archaic and unnecessary security for costs statutes which unconstitutionally violate the fundamental right of access to the courts and unconstitutionally discriminate against non-residents.

This case clearly demonstrates the need for this Court to instruct the lower courts on the circumstances necessitating non-recognition by United States courts of foreign judgments obtained in proceedings conducted by incompetent and biased tribunals and in violation of due process.

In this case, a Hong Kong court ordered Petitioner Kung Da Chang to post an exorbitant cash bond of $837,000 as security for costs to proceed on his claims against two Hong Kong banks. Kung Da Chang could not post the cash bond, so his meritorious $22 Million fraud claims were dismissed. With no offsetting claims, Respondent Shanghai Commercial Bank was able to walk away with a $9 Million judgment against Kung Da Chang.

Despite the fact that Kung Da Chang and his family were forced to walk away from their $22 Million fraud claims against the Hong Kong banks and the Hong Kong court's obvious bias towards the banks, the Washington trial court and the Washington State Court of Appeals honored the $9 Million Hong Kong judgment under Washington's Uniform Foreign-Country Money Judgments Recognition Act and the Washington State Court of Appeals affirmed the ruling.

The severe injustice inflicted upon Kung Da Chang and his family in the Hong Kong court system and subsequently ratified by a court of the United States demands this Court's attention.

B. Facts of the Case

The Washington trial court recognized a Hong Kong judgment against Petitioner Kung Da Chang, a Washington resident, despite substantive and procedural due process violations, equal protection violations, and obvious lack of court impartiality during the Hong Kong proceedings.

1. Facts Leading to the Hong Kong Lawsuits

From 2004-2008, Shanghai Commercial Bank, Ltd. ("SCB") employee Daniel Chan orchestrated a fraudulent scheme upon Clark Chang that eviscerated his $22 Million portfolio and resulted in a $9 Million debt owed to SCB by Kung Da Chang.

Clark Chang is the 97-year-old father of Kung Da Chang. Daniel Chan was the long-time financial and investment advisor for Clark Chang and his companies in New York. In 2002, Clark Chang moved to Shanghai and Daniel Chan moved to Hong Kong to work for Respondent SCB.

When Daniel Chan moved to Hong Kong, he helped Clark Chang transfer his $22 Million portfolio to SCB in Hong Kong and continued managing Clark

Chang's investments and accounts. The accounts were set up in Kung Da Chang's name so that he could distribute the funds to family members upon Clark Chang's death. However, Daniel Chan looked only to Clark Chang for instructions on the accounts.

Around 2004, Daniel Chan began recommending that Clark Chang invest in various complex, high-risk investments. Daniel Chan failed to inform Clark Chang that the investments were high-risk and that they were not suitable investments for retired, unsophisticated investors like Clark Chang.

By 2007, Daniel Chan had invested more than 80% of Clark Chang's $22 Million portfolio in high-risk investments.

When the investments started to fail and Clark Chang's portfolio began to suffer ongoing losses, Daniel Chan used doctored account statements, verbal misrepresentations, and Clark Chang's misguided trust to hide the massive losses in Clark Chang's accounts.

In 2007, Daniel Chan left SCB to work for the Bank of East Asia ("BEA"). Daniel Chan facilitated the transfer of Clark Chang's accounts at SCB to BEA. Although the BEA accounts were set up in Kung Da Chang's name, only Clark Chang had authority on the accounts.

Daniel Chan subsequently arranged for Clark Chang to receive a multi-million dollar loan facility from BEA (the "BEA Loan Facility"), which was

signed by Kung Da Chang. Daniel Chan then recommended that Clark Chang use the funds to acquire additional high-risk investments. Again, Daniel Chan did not explain the investments were high-risk or that using a loan to acquire additional investments was an extremely high-risk proposal and could expose Clark Chang and Kung Da Chang to massive liabilities.

In March 2008, Daniel Chan left BEA to return to work for SCB. Daniel Chan helped Clark Chang to transfer his accounts at BEA back to SCB. Unbeknownst to Clark Chang or Kung Da Chang, Clark Chang's portfolio had suffered millions in losses and there was an outstanding balance of $15 Million on the BEA Loan Facility.

In order to transfer Clark Chang's portfolio back to SCB, Daniel Chan had to arrange for a $16 Million loan facility from SCB (the "SCB Loan Facility") to repay the BEA Loan Facility. As with the BEA Loan Facility, Kung Da Chang signed the SCB Loan Facility. Daniel Chan used Clark Chang's portfolio as the collateral for the SCB Loan Facility. At the time Clark Chang agreed to and Kung Da Chang signed the SCB Loan Facility, the value of Clark Chang's portfolio was barely enough to cover the SCB Loan Facility.

Over the next few months, Clark Chang's portfolio continued to decline substantially in value. In October 2008, SCB requested additional collateral from Clark Chang to secure the SCB Loan Facility. It

was at that time that Clark Chang first learned that Daniel Chan had hidden the true state of his accounts from him and that he had lost his entire $22 Million and owed SCB millions more.

By November 2008, the outstanding balance on the SCB Loan Facility exceeded the value of Clark Chang's portfolio by more than $5 Million. SCB demanded payment through its counsel. Because Daniel Chan's fraud and deception were the cause of SCB's losses, Clark Chang and Kung Da Chang refused to pay.

2. The Hong Kong Lawsuits and Judgments

On March 21, 2009, SCB filed High Court Action 806/2009 ("HCA 806") in Hong Kong against Kung Da Chang and Clark Chang. In its complaint, SCB alleged that Kung Da Chang and Clark Chang breached the SCB Loan Facility and sought in excess of $8.5 Million in damages.

Kung Da Chang and Clark Chang filed counterclaims in HCA 806 against SCB arising out of the fraudulent actions of Daniel Chan performed during his management of Clark Chang's investment accounts. Kung Da Chang and Clark Chang concurrently filed High Court Action 1996/2009 ("HCA 1996") against SCB and BEA and asserted the same claims they asserted against SCB in HCA 806.

On March 21, 2009, SCB also filed High Court Action 805/2009 ("HCA 805") against Grant Chang

and Ching Ho Chang, Kung Da Chang's brother and sister, for failure to pay on a $2 Million loan.[2] Grant Chang and Ching Ho Chang asserted the same claims against SCB and BEA asserted by Kung Da Chang and Clark Chang.

a. The Hong Kong Court Orders the Changs to Pay a Total of $1.2 Million in Security for Costs

Hong Kong law permits Hong Kong residents to apply for security for costs, including attorney fees, against non-resident plaintiffs and counterclaimants at any time after a claim has been filed.[3]

Since the Changs were not residents of Hong Kong, SCB and BEA applied to the Hong Kong court for an order of security for costs in HCA 805 and HCA 1996. The parties were already several months into the Hong Kong lawsuits. SCB sought nearly $1 Million in security for costs in HCA 1996 and BEA sought approximately $1.2 Million.[4]

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[2] Daniel Chan convinced Clark Chang to ask Grant Chang to allow him to use his $2 Million line of credit to cover a shortfall. Ching Ho Chang was a personal guarantor on the line of credit. Grant Chang and Ching Ho Chang agreed to allow Clark Chang to use the funds, which could not be repaid due to Clark Chang's lack of funds caused by Daniel Chan's fraud.

[3] App. 150-151 (Securities for costs rule).

[4] Although security for costs were not ordered in HCA 806, the case that resulted in the Hong Kong Judgment, the Changs' claims in HCA 806 mirrored those in HCA 1996 and would be

(Continued on following page)

The Changs advanced several arguments against imposition of security for costs and the amounts requested by SCB and BEA.[5] Despite evidence of patently excessive billings by SCB and BEA attorneys, Kung Da Chang's openness about his inability to pay security for costs, and the fact that posting security for costs would stifle Kung Da Chang's ability to prosecute and defend the claims in the lawsuits, the Hong Kong Court ordered him to post approximately $837,000 in security for costs.[6] The security for costs had to be paid in cash within 14 days.

The Chang family had already spent a total of $500,000 on legal expenses for the three cases. Kung Da Chang was unable to pay the security for costs ordered and all of Kung Da Chang's claims against SCB and BEA were dismissed. Because Kung Da Chang could not contest HCA 806 or 1996 (SCB's claim was a simple breach of contract claim), SCB was able to obtain two identical $9 Million judgments against him.

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considered compulsory counterclaims in United States District Courts. See FED. R. CIV. P. 13(a)(1).

[5] The hearings on the applications for security for costs are referred to throughout this Petition as the "Hong Kong Proceedings".

[6] The Hong Kong court ordered the Chang family to post a total of $1.2 Million in cash as security for costs. App. 168-169.

3. The Washington Trial Court Grants SCB's Motion for Summary Judgment and Recognizes the Hong Kong Judgment in Washington State

On June 20, 2012, SCB filed a petition pursuant to Section 6.40A.050 of the Revised Code of Washington seeking recognition of the Hong Kong judgment in HCA 806 (the "Hong Kong Judgment").

SCB subsequently filed a motion for summary judgment, on May 10, 2013, on the issue of whether the Hong Kong Judgment against Kung Da Chang should be recognized in Washington.[7]

Kung Da Chang argued that recognition of the Hong Kong Judgment would constitute state action and, therefore, the Washington trial court was required to ensure that the Hong Kong Proceedings were compatible with due process.

Kung Da Chang asserted that there were multiple grounds for non-recognition of the Hong Kong Judgment under Washington's Uniform Foreign-Country Money Judgments Recognition Act.[8] Kung Da Chang argued that the Hong Kong legal system's security for costs rule and the Hong Kong court's

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[7] In the same motion, SCB also sought summary judgment on the issue of whether or not the Hong Kong Judgment could be enforced against Kung Da Chang's marital community, but the Washington trial court denied that motion.

[8] WASH. REV. CODE § 6.40A.030(2)(a), (3)(c), (3)(g), and (3)(h) (2013).

application of the rule in the Hong Kong Proceedings offended substantive and procedural due process and violated equal protection. In particular, Kung Da Chang argued that security for costs rules infringe upon the fundamental right of access to the courts by imposing undue burdens upon non-resident plaintiffs.

Additionally, Kung Da Chang argued that the court should not recognize the Hong Kong Judgment because it is repugnant to Washington and United States public policies in that it denied access to the courts and favored residents over non-residents. Kung Da Chang further argued that non-recognition was proper because the Hong Kong Proceedings raised substantial doubt as to the integrity of the Hong Kong court that rendered the Hong Kong Judgment.

In its oral ruling on June 7, 2013, the Washington trial court rejected Kung Da Chang's arguments and determined the Hong Kong Judgment to be valid and enforceable.[9] The court found that the Hong Kong Proceedings did not violate due process. The court reasoned that Washington has a security for costs statute similar to the Hong Kong rule and that Kung Da Chang could have raised the ability to pay issue in the Hong Kong Proceedings.[10] The court also rejected Kung Da Chang's argument that the security for costs

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[9] App. 109-111.

[10] Washington's security for costs is found at WASH. REV. CODE § 4.84.210 (2013).

order in HCA 1996 constituted a security for costs order in HCA 806, even though Kung Da Chang's claims in those cases were identical and hearings in the three Hong Kong cases were grouped together into one hearing.

The court's oral ruling did not specifically address Kung Da Chang's other arguments.

4. The Washington State Court of Appeals, Division I Affirms the Washington Trial Court's Decision

Kung Da Chang appealed the Washington trial court's order granting summary judgment to the Washington State Court of Appeals, Division I. Kung Da Chang asserted that the Washington trial court's recognition of the Hong Kong Judgment constituted an unconstitutional taking of property in violation of the Fourteenth Amendment of the U.S. Constitution because the Hong Kong proceedings did not comply with the requirements of due process of law. Kung Da Chang raised the same arguments for non-recognition of the Hong Kong Judgment that he previously raised.

The Washington State Court of Appeals rejected Kung Da Chang's assertion that the Hong Kong security for costs rule and its application in the Hong Kong Proceedings violated due process.[11] The Court of

[11] App. 6-11.

Appeals found that Kung Da Chang had an opportunity to present evidence during the Hong Kong Proceedings as to why security for costs should not be required. The Court of Appeals also found that Kung Da Chang could have continued to defend against HCA 806.

The Court of Appeals determined that the existence of Washington's similar security for costs meant that the Hong Kong security for costs rule did not render the security for costs ordered against Kung Da Chang repugnant to public policy. The Court of Appeals further found that the Hong Kong court's reference to SCB and BEA's reputations and the need for experienced counsel did not call into question the Hong Kong court's integrity.

5. The Washington State Supreme Court Denies Kung Da Chang's Petition for Review

Kung Da Chang petitioned the Washington State Supreme Court for review of the Washington State Court of Appeals' decision. Kung Da Chang argued that the Washington trial court's recognition of the Hong Kong Judgment and the Washington State Court of Appeals' affirming decision constituted an unconstitutional taking of property in violation of the Fourteenth Amendment of the U.S. Constitution. Kung Da Chang again raised the same arguments for non-recognition of the Hong Kong Judgment that he raised in the lower courts.

The Washington State Supreme Court denied Kung Da Chang's petition for review.[12]

REASONS FOR GRANTING THE PETITION

Reason One: This Court can use this case as an opportunity to speak out against the archaic and unnecessary security for costs rules and statutes that have denied persons their fundamental right of access to the courts for decades

This case presents the Court with the opportunity to address the constitutionality of security for costs rules and statutes. While many states and foreign nations have adopted security for costs rules and statutes to assist resident defendants in recovering litigation costs from non-resident plaintiffs, this purpose has never justified violating the non-resident plaintiffs' fundamental rights to justice. Moreover, the supposed purpose for requiring security for costs was eliminated many years ago when judgments became freely transferable amongst jurisdictions.

Yet, securities for costs are still ordered and still unnecessarily and unconstitutionally infringe upon people's due process rights, particularly the fundamental right of access to the courts, and rights to equal protection. Why?

[12] App. 1.

The answer is that security for costs statutes have undergone little constitutional scrutiny. While there are federal cases in which security for costs have been addressed and upheld, the issues raised by the party opposing the order typically concerned *forum non conveniens*.[13] In each case, the opposing party failed to raise the constitutional issues Kung Da Chang has raised in this case.[14]

At least one state's security for costs statute has been constitutionally challenged and struck down. In *Patrick v. Lynden Transp.*, a non-resident of Alaska challenged that state's security for costs statute on equal protection grounds.[15] The statute requires non-resident plaintiffs to post a bond covering the opposing party's anticipated costs and attorney fees, without a reciprocal requirement for Alaska residents.[16] The Alaska State Supreme Court held:

> We conclude that a statute which restricts access to Alaska courts by means of a bond

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[13] See *Tjontveit v. Den Norske Bank ASA*, 997 F. Supp. 799 (S.D. Tex. 1998); *Mercier v. Sheraton Int'l, Inc.,* 981 F.2d 1345 (1st Cir. 1992); *Overseas Partners, Inc. v. PROGEN Musavirlik ve Yonetim Hizmetleri, Ltd Sikerti*, 15 F. Supp. 2d 47, 55 (D.C. Cir. 1998); *Nai-Chao v. Boeing Co.*, 555 F. Supp. 9, 16 (N.D. Cal. 1982), *aff'd sub nom., Cheng v. Boeing Co.,* 708 F.2d 1406 (9th Cir. 1983), *cert. denied,* 464 U.S. 1017 (1983); *Wien Air Alaska, Inc. v. Brandt*, 195 F.3d 208 (5th Cir. 1999).

[14] *Id*.

[15] *Patrick v. Lynden Transp.*, 765 P.2d 1375, 1381 (Alaska 1988).

[16] ALASKA STAT. § 09.60.060 (2014).

> requirement for only nonresident plaintiffs is not sufficiently related to the purpose of providing security for cost and attorney fee awards to defendants to withstand a challenge under the Alaska Constitution's guarantee of equal protection under the law.[17]

As mentioned above, Washington State has a security for costs statute similar to the Hong Kong security for costs rule. That statute was first enacted in 1854 and it has never been constitutionally challenged.[18]

Undoubtedly, the reason these unconstitutional statutes still exist is that they are very effective. They deny those persons who cannot afford security for costs access to the courts. If one cannot afford the security for costs, one cannot afford to challenge the constitutionality of the statute on an appeal. The Court now has the opportunity to address this glaring issue.

Although the lower courts did not apply the Hong Kong security for costs rule, they did approve of the rule and they did condone the Hong Kong court's

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[17] *Patrick v. Lynden Transp.*, 765 P.2d 1375, 1380 (Alaska 1988).

[18] There have been appeals involving WASH. REV. CODE § 4.84.210 (2013), but they did not raise any constitutional issues. See *White Coral Corp. v. Geyser Giant Clam Farms, LLC*, 145 Wn. App. 862, 189 P.3d 205 (2008) (The plaintiff merely argued that the defendant failed to produce evidence justifying a $125,000 security for costs award).

application of the rule in the Hong Kong Proceedings. However, as discussed below, recognition of a judgment is state action as such, and it was incumbent upon the lower courts to ensure that the Hong Kong court system and the Hong Kong Proceedings were compatible with due process and provided an impartial tribunal, before recognizing the Hong Kong Judgment.

Instead, the lower courts shirked their duties and violated Kung Da Chang's Fourteenth Amendment rights, causing a substantial injustice to Kung Da Chang and his family and allowing SCB to enforce a $9 Million judgment that arose because of their own employee's fraudulent actions.

A. Recognition of a foreign-country money judgment constitutes state action thereby invoking protection of the Fourteenth Amendment

Judicial action may constitute state action subject to the Fourteenth Amendment.[19] Exactly when judicial action constitutes state action is "a problem that has perplexed courts and scholars for decades".[20] However, a state court's application of a statute,

[19] *Dahl v. Akin*, 630 F.2d 277, 280 (5th Cir. 1980).

[20] *Ohno v. Yasuma*, 723 F.3d 984, 993 (9th Cir. 2013) (citing *Dahl v. Akin*, 630 F.2d 277, 280 (5th Cir. 1980)).

which is itself the product of state action, undoubtedly constitutes state action.[21]

United States federal and state courts have long recognized the judgments of foreign nations.[22] When a state court recognizes a judgment from a foreign country, it grants the foreign judgment the same legal effect as a judgment obtained in the state.[23] More importantly, the court is also giving the foreign creditor the ability to enforce the foreign judgment using the various collection mechanisms, such as seizure, attachment, and, garnishment. By recognizing the foreign judgment, the court acts jointly with the foreign creditor to deprive the debtor of his property.[24] Thus, under the Fourteenth Amendment, when recognizing a foreign judgment, courts must ensure that the underlying foreign action was compatible with due process.[25]

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[21] *Ohno v. Yasuma*, 723 F.3d 984, 993-994 (9th Cir. 2013) (The Ninth Circuit held that a California court's application of California's Uniform Foreign-Country Money Judgments Recognition Act constituted judicial state action); see also *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 932-33 (1982).

[22] See *Hilton v. Guyot*, 159 U.S. 113 (1895).

[23] See for example WASH. REV. CODE § 6.40A.060.

[24] *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 942 (1982); *Boddie v. Connecticut*, 401 U.S. 371, 380, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971).

[25] *Dahl v. Akin*, 630 F.2d 277, 280 (5th Cir. 1980) (Trial court's failure of procedural due process constituted "state action").

More than a century ago, in *Hilton v. Guyot*, this Court addressed when a foreign judgment may be recognized by United States courts in light of the principle of "comity" among foreign nations. The Court explained:

> [W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.[26]

The *Hilton* court made it clear that the foreign court must have employed procedures compatible with due process.[27]

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[26] *Hilton v. Guyot*, 159 U.S. 113, 202-203 (1895).

[27] *Hilton v. Guyot*, 159 U.S. 113, 202-206 (1895).

While the *Hilton* court provided United States courts with instructions regarding recognition of foreign judgments, the National Conference of Commissioners on Uniform State Laws (the "NCCUSL") saw the need to codify the law on recognition of foreign judgments.[28]

In 1962, the NCCUSL promulgated the Uniform Foreign Money-Judgments Recognition Act (the "1962 Uniform Act").[29] In 2005, the NCCUSL revised the 1962 Uniform Act into the Uniform Foreign-Country Money Judgments Recognition Act (the "2005 Uniform Act").[30]

Section 4 of the 1962 Uniform Act and Section 4 of the 2005 Uniform Act set forth the standards for non-recognition of foreign country judgments. The first standard for mandatory non-recognition is directly derived from this Court's ruling in *Hilton*.

> A court . . . may not recognize a foreign-country judgment if . . . [t]he judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law.[31]

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[28] App. 71.

[29] App. 71.

[30] App. 81.

[31] App. 76 and *Hilton v. Guyot*, 159 U.S. 113, 202-206 (1895).

The State of Washington adopted its version of the 2005 Uniform Act in 2009.[32] Washington's Uniform Act does not differ from the 2005 Uniform Act on non-recognition.[33] Washington's Uniform Act plainly states that Washington courts may not recognize a foreign judgment if the foreign court system does not provide procedures compatible with the requirements of due process of law.[34] Washington courts are also not required to recognize judgments where the specific proceeding was not compatible with the requirements of due process of law.[35]

The failure of the Washington State lower courts to adhere to these requirements violates procedural due process and constitutes state action.[36] State action that has denied rights protected by the Fourteenth Amendment requires this Court to "enforce the constitutional commands".[37]

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[32] WASH. REV. CODE § 6.40A, *et seq.* (2013).

[33] Compare WASH. REV. CODE § 6.40A.030 (2013) and Section 4 of the 2005 Uniform Act reproduced at App. 42-44.

[34] WASH. REV. CODE § 6.40A.030(2)(a).

[35] WASH. REV. CODE § 6.40A.030(3)(h).

[36] *Dahl v. Akin*, 630 F.2d 277, 280 (1980).

[37] *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948).

B. Security for costs rules are not compatible with due process because they deny persons their fundamental right of access to the courts and equal protection of the laws

The due process guaranteed by the Fifth and Fourteenth Amendments requires more than just fair process,[38] and the protection of liberties extends beyond just the absence of physical restraint.[39] Substantive due process prohibits government actions that infringe on fundamental rights and liberties,[40] "regardless of the fairness of the procedures used to implement them."[41] A substantive due process violation has occurred except where the infringement has been narrowly tailored to serve a compelling government interest.[42]

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[38] *Collins v. Harker Heights*, 503 U.S. 115, 112 S. Ct. 1061, 125 117 L. Ed. 2d 261 (1992).

[39] *Wash. v. Glucksberg*, 521 U.S. 702, 719, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997).

[40] *Reno v. Flores*, 507 U.S. 292, 301-302 (1993); *Glucksberg*, 521 U.S. at 720.

[41] *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

[42] *Reno,* 507 U.S. at 301-302.

1. The right of access to the courts is the most fundamental right of the People[43]

Fundamental rights and liberties are the interests of the People that are "deeply rooted in this Nation's history and tradition",[44] without which "neither liberty nor justice would exist if they were sacrificed."[45] In *Marbury v. Madison*, the United States Supreme Court stated, "No constitutional right is safe without effective access to the courts, which, under our system of government, are the ultimate interpreters and guardians of these rights."[46] When a foreign proceeding conflicts with the requirements of due process, it violates the most fundamental right of the People – access to the courts:

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each State to the citizens of all other States to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend

[43] The fundamental right of access to the courts is rooted in the First, Fifth, and Fourteenth Amendments of the United States Constitution. See *Lewis v. Casey*, 518 U.S. 343, 116 S. Ct. 2174, 2179, 135 L. Ed. 2d 606 (1996).

[44] *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977).

[45] *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937).

[46] *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803).

> upon comity between the States, but is granted and protected by the Federal Constitution.[47]

This Court must make it clear that security for costs statutes violate this most fundamental right.

2. Security for Costs Background

Security for costs statutes arose out of spite and stayed out of misperceived necessity. They first began to appear in European courts in the eighteenth century. In the European court system, the prevailing party was entitled to recover its litigation costs, including attorney fees. However, these cost judgments were not enforceable in other jurisdictions. Hence, resident defendants had no means of recovering costs from non-resident plaintiffs against whom they prevailed.[48]

For hundreds of years, the English courts had been repeatedly asked to require non-resident claimants to post sufficient security for costs in order to proceed with their claims. The English courts consistently refused because they believed requiring security

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[47] *Chambers v. Baltimore & O. R. Co.*, 207 U.S. 142, 148 (1907).

[48] John A. Gliedman, *Access to Federal Courts and Security for Costs and Fees*, 74 St. John's L. Rev. 953, 957-960 (notations omitted).

for costs placed an improper barrier to obtaining justice.[49]

Though the English courts refused, other European countries began requiring non-resident claimants to post security for costs to ensure that resident defendants could recover their litigation costs if they prevailed. Unfortunately, once English plaintiffs were being required to post security for costs in other European countries, English courts gave way to the trend and began requiring security for costs.[50]

As the American court system developed early on, many states adopted rules requiring non-resident claimants to post security for costs. Like the European courts, the American courts stayed proceedings until the security for costs had been posted.[51]

At the time the American courts were adopting security for costs rules, cost judgments were also not enforceable in outside jurisdictions.[52] Such is no longer the case. As jurisprudence on jurisdiction and foreign judgments developed, the barriers to enforceability of costs judgments in other jurisdictions disappeared.[53]

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[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); see also *Hilton v. Guyot*, 159 U.S. 113 (1895).

Regardless of the American courts' and other foreign court systems' reasons for adopting security for costs rules or statutes, those rules and statutes have always infringed upon the fundamental right of access to the courts and equal protection of the laws.

3. Securities for costs violate the fundamental right of access to the courts

Security for costs statutes require non-resident plaintiffs to post a bond to cover a defendant's potential litigation costs, including attorney's fees. Regardless of the amount of the bond imposed, security for costs rules unavoidably impact each and every non-resident plaintiff's fundamental right of access to the courts.

Even before filing a lawsuit, the non-resident plaintiff must contemplate having to post his opponent's costs and attorney fees – this on top of worrying about his own litigation costs – and the potential impact that might have on his case.

The immediate effect is two-fold: 1) if he has already filed a lawsuit, the non-resident plaintiff may be dissuaded from further pursuing justice, or, if he has not yet filed, he may be altogether dissuaded from even filing suit; and 2) the non-resident plaintiff's case is compromised because he cannot dedicate all resources towards the prosecution of his own case (and, in many cases, his defense of any counterclaims).

The hurdle of security for costs rises as the complexity of a case rises, especially when the defendant is a deep pocket entity which can drive up a plaintiff's costs through discovery, etc. With security for costs, that entity has another mechanism to stifle its opponent – incurring extensive attorney fees and then seeking a security for costs order against the non-resident plaintiff. If the resident defendant seeks security for costs mid-case, the rule can be effectively used to end the case right then.

If the non-resident plaintiff chooses to move forward, he may be forced to demonstrate that his case has merit without having had the benefit of discovery. The non-resident plaintiff must also demonstrate that he cannot afford to post the security for costs, which requires proving a negative and, in doing so, disclosing the location of assets needed to prosecute his claim, potentially subjecting them to pre-judgment attachment, etc.

If the non-resident plaintiff cannot post the security for costs ordered, the litigation may be stayed or, most likely, the claims will be dismissed altogether. Hence, as a result of the security for costs rule, the non-resident plaintiff is arbitrarily and unconstitutionally denied his fundamental right of access to the courts.

Since security for costs rules infringe upon the fundamental right of access to the courts, they are

subject to strict judicial scrutiny.[54] Few statutes survive strict scrutiny.[55] A rule will only pass strict scrutiny if it has been narrowly tailored to serve a compelling government interest.[56] The government interest must be "sufficiently compelling to place within the realm of the reasonable refusal to recognize the individual right asserted".[57]

There are only two purposes for security for costs rule that can be advanced: 1) assuring that resident party entitled to recover costs from a non-resident plaintiff can do so; and 2) dissuading frivolous lawsuits.

The second reason is clearly not a legitimate and compelling interest. If dissuading frivolous lawsuits were actually a legitimate and compelling interest, security for costs would be allowable in every case.

Access to the courts is the basis for all other rights.[58] There is no sufficiently compelling reason why a person should ever be forced to pay significant costs just for the *chance* to exercise this fundamental right. Even if a person can afford security for costs, it

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[54] *Witt v. Dep't of the Air Force*, 527 F.3d 806, 817 (9th Cir. 2008).

[55] *Id*.

[56] *Reno,* 507 U.S. at 301-302.

[57] *Glucksberg*, 521 U.S. at 760 (Souter, J., concurring).

[58] *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937).

is patently unjust that he must compromise the strength and strategies of his own case to do so.

4. Securities for costs violate equal protection

The purpose of the Equal Protection Clause is to protect persons against intentional and arbitrary discrimination by state actors.[59] It requires that all similarly situated persons be treated alike.[60] Any statute that creates a suspect classification of individuals will be subjected to strict judicial scrutiny.[61] Classifications based upon race, nationality, and/or alienage are inherently suspect.[62] Even if the classification is not deemed "suspect," any classification that affects a fundamental right will also be subjected to strict judicial scrutiny.[63]

Government action burdening the fundamental rights of one group more than that of another group subjects the classification to strict scrutiny and will

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[59] *Sunday Lake Iron Co. v. Wakefield*, 247 U.S. 350, 38 S. Ct. 495, 62 L. Ed. 1154 (1918).

[60] *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1984).

[61] *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 357 (1978); *Nielsen v. Washington State Bar Ass'n*, 90 Wn.2d 818, 820, 585 P.2d 1191 (1978).

[62] *Graham v. Richardson,* 403 U.S. 365, 371 (1971).

[63] *Bakke*, 438 U.S. 265, 357 (1978); *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967); *Nielsen*, 90 Wn.2d 818, 820 (1978).

be sustained only if the classifications are suitably tailored to serve a compelling state interest.[64] A compelling interest will only be found if the purpose and interest behind the statute are constitutionally permissible and substantial.[65]

In this case, the Hong Kong security for costs rule clearly distinguishes between residents and non-residents.[66] Resident defendants are permitted to move for security for costs against a non-resident plaintiff, but non-resident defendants cannot. As such, resident plaintiffs can freely file suit without worrying about having to post security for costs, while non-resident plaintiffs are subject to security for costs. Hong Kong's classification based on non-residency is suspect because non-residents of Hong Kong are in "a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[67] In addition, the classification is akin to one based upon nationality and alienage, which are both inherently suspect classifications.[68]

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[64] *Cleburne*, 473 U.S. at 440.

[65] *Nielsen v. State Bar Ass'n*, 90 Wn.2d 818, 820, 585 P.2d 1191 (1978).

[66] App. 150-151.

[67] *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

[68] *Graham v. Richardson,* 403 U.S. 365, 371 (1971).

As noted above, the Hong Kong security for costs rule infringes upon non-resident plaintiffs' fundamental right of access to the court. Since the rule burdens the fundamental right of one class of citizens, but not another, whether or not the classification is suspect is irrelevant. There still must be a compelling government interest to justify the infringement upon non-resident plaintiffs' fundamental right of access to the courts.

The Hong Kong security for costs rule does not comport with equal protection and the Washington trial court's recognition of the Hong Kong Judgment and the Washington State Court of Appeals' affirmation of that order violated the Fourteenth Amendment.

Reason Two: This case presents this Court an opportunity to define the standards a foreign security for costs hearing must meet to satisfy due process requirements of *Hilton*

Even if the Court determines that security for costs statutes are compatible with due process, this Court must clarify the standard procedures and other requirements a foreign security for costs hearing must entail to satisfy due process.

As noted above, this Court's decision in *Hilton* provided the basic framework for the recognition of foreign judgments by United States courts and its holding was later codified in the 1962 Uniform Act and 2005 Uniform Act. A majority of the states have

adopted the 1962 Uniform Act, the 2005 Uniform Act, or both.[69]

When it revised the 1962 Uniform Act, the NCCUSL expanded the reasons a court need not recognize a foreign judgment to include: 1) "the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment;"[70] and 2) "the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law."[71]

The additional grounds for non-recognition address what seem to be obvious mistaken omissions from the 1962 Uniform Act. Rather than just focusing on the foreign court system as a whole, the 2005 Uniform Act also provided for the application of the basic principles set out in *Hilton* – impartiality and

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[69] The 2005 Uniform Act has been introduced in four states in 2015: Arizona, Georgia, Massachusetts, and New Jersey. Sixteen states have adopted neither Act: Arkansas, Kansas, Kentucky, Louisiana, Mississippi, Nebraska, New Hampshire, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, West Virginia, Wisconsin, and Wyoming. See http://www.uniformlaws.org/Act.aspx?title=Foreign%20Money%20Judgments%20Recognition%20Act and see http://www.uniformlaws.org/Act.aspx?title=Foreign-Country%20Money%20Judgments%20Recognition%20Act.

[70] App. 44 (2005 Uniform Act, § 4(c)(7)). See WASH. REV. CODE § 6.40A.030(3)(g) (2013).

[71] App. 44. (2005 Uniform Act, § 4(c)(8)). See WASH. REV. CODE § 6.40A.030(3)(h) (2013).

compatibility with due process – to an individual proceeding or tribunal.[72] Though the standards are discretionary in the 2005 Uniform Act and WASH. REV. CODE § 6.40A.030, the fact that they concern the same issues addressed in *Hilton* demands that they should be interpreted as mandatory grounds for non-recognition.

A. The application of Hong Kong's security for costs rule in the Hong Kong Proceedings was not compatible with due process and raises questions about the integrity of the Hong Kong court

Simply because a statute is valid on its face, does not alleviate the States' obligations under the Fourteenth Amendment to ensure that each individual receives due process during the court's application of the statute.[73]

A person cannot be deprived of property without due process of law.[74] Property includes not only one's assets, but also any cause of action a person may have against another.[75] "[D]ue process requires, at a

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[72] See *Hilton v. Guyot*, 159 U.S. 113, 202-206 (1895).

[73] *Boddie v. Connecticut*, 401 U.S. 371, 380, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971).

[74] *Id.*

[75] See 11 U.S.C. § 541 – Property of the Estate. See also *Sanner v. Trustees of Sheppard and Enoch Pratt Hospital*, 278 F. Supp. 138, 142 (D. Md. 1968); *Martinez v. Fox Valley Bus Lines, Inc.*, 17 F. Supp. 576, 577 (N.D. Ill. 1936); *City of Phoenix*

(Continued on following page)

minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."[76]

The Washington trial court's and the Washington Court of Appeals' examination of the Hong Kong security for costs rule and the Hong Kong court's application of the rule demonstrates the need for this Court's guidance on when such hearings are compatible with due process and when the tribunal has shown impartiality.

Kung Da Chang's case presents the perfect example of a court depriving a person of due process by foreclosing their full, fair, and meaningful opportunity to be heard. The Hong Kong court deprived Kung Da Chang of due process twice through its application of the Hong Kong security for costs rule.

During the Hong Kong security for costs proceedings, Kung Da Chang informed the Hong Kong court that he would be unable to post any significant security for costs in the form of cash or otherwise and that posting security for costs would stifle his ability to present adequately his claims and defenses.

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v. Dickson, 40 Ariz. 403, 12 P.2d 618, 619 (1932); *Rosane v. Senger*, 112 Colo. 363, 149 P.2d 372, 375 (1944).

[76] *Boddie*, 401 U.S. at 378.

A security for costs order that impedes a claimant's ability to prosecute his claims violates due process.[77] Every security for costs order necessarily impedes a claimant's ability to prosecute his claims, as well as his ability to defend against counterclaims.

Despite Kung Da Chang's representations, the Hong Kong court imposed a $837,000 security for costs order upon Kung Da Chang.[78] Kung Da Chang had 14 days to post the security for costs in cash.[79] As result of the security for costs order, Kung Da Chang was forced to choose between posting a cash bond he could not afford, thereby stifling his ability to present his claims and defenses, or walking away from his claims.

By issuing an order that stifled Kung Da Chang's meritorious $22 Million fraud claims, the Hong Kong court denied him the opportunity to have his claims heard, in violation of due process.

The security for costs proceedings also violated due process because they were not "meaningful".[80] In awarding security for costs, courts must be fair in

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[77] See *Mann v. Levy*, 776 F. Supp. 808 (S.D.N.Y. 1991); see also *Atlanta Shipping Corp. v. Chemical Bank*, 631 F. Supp. 335 (S.D.N.Y. 1986).

[78] App. 168.

[79] App. 168.

[80] *Boddie*, 401 U.S. at 378.

exercising their discretion in light of the circumstances in the case.[81]

The Hong Kong security for costs hearing and resulting Order provide numerous examples of partiality and lack of fairness that would be found biased and unfair in any security for costs hearing.

First, despite SCB initiating the litigation and dragging Kung Da Chang into court, the Hong Kong court ordered security for costs on what would be considered ***compulsory counterclaims*** in the United States.[82] Kung Da Chang and his family's claims against SCB arose "out of the transaction or occurrence that [was] the subject matter" of SCB's claims against Kung Da Chang.[83] To force a claimant, dragged into a foreign court, to forego meritorious claims that he must file or lose them forever is clearly a violation of due process that must never be allowed.

Second, there was no requirement that the banks show that Kung Da Chang's claims were frivolous or even that they lacked merit.[84] Although Kung Da Chang presented affidavits to the Hong Kong court showing the merits of his claims, the Hong Kong court refused to conduct a mini-trial on the affidavits

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[81] *Aggarwal v. Ponce School of Medicine*, 745 F.2d 723, 727-28 (1st Cir. 1984).

[82] *Lattomus v. General Business Servs. Corp.*, 911 F.2d 723 (4th Cir. 1990).

[83] FED. R. CIV. P. 13(a)(1)(A).

[84] App. 161-162.

and said that matter was too factually and legally complex to rule upon except at the actual trial.[85] To be compatible with due process, defendants seeking security for costs must be required to show that the non-resident's claims are meritless or frivolous. Otherwise, the non-resident must risk moving forward on claims with depleted resources, thereby increasing his risk of losing.

Third, the Hong Kong court specifically remarked in its order, "Given the enormous size of the claims and counterclaims and ***the fact that the banks' reputation is at stake***, heavy involvement of experienced counsel is inevitable".[86] Apparently, though, the fact that Kung Da Chang's entire livelihood was at stake was not important. Everyone involved in litigation is concerned about their reputation and no person's or entity's reputation, should ever be the focus of a security for costs determination.

Fourth, when setting Kung Da Chang's security for costs amount, the Hong Kong court ignored Kung Da Chang's ability to pay and, instead, looked to the Chang family as a whole.[87] Clearly, the Hong Kong court was heeding the banks' advice that it should force Kung Da Chang to beg others to finance his *fundamental right to pursue justice*. There must be a firm rule that courts considering a security for costs

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[85] App. 161-162.

[86] App. 167.

[87] App. 165-166.

application shall not look any further than the opposing individual person's own available assets. The assets of his family, his friends, lenders, etc. are not his assets and to assume the funds will be available for security for costs is unfair and a clear violation of due process.

Finally, the sheer size of the security for costs order demonstrates the court's intent to be unfair to Kung Da Chang. As noted above, the mere availability of the security for costs rule is a powerful tool for defendants. It can be strategically used to deny a non-resident access to justice. Defendants can incur substantial attorney fees and then seek security for those fees at an opportune time in the case. Without some guidance from this Court on the reasonableness of the security required, courts will continue to impose exorbitant and unfair security for costs. For example, the Hong Kong court ignored evidence that the banks' billing statements submitted in support of their motions showed excessive and duplicitous billings.

Disturbingly, neither the Washington trial court nor Washington Court of Appeals saw any of these violations as issues, despite the fact that in reviewing the individual proceedings, courts are to be particularly concerned about partiality, bribery, and overall lack of fairness during the foreign proceedings.[88]

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[88] App. 52-53 (2005 Uniform Act, § 4, comment 11).

United States courts must ensure that the foreign court system and the foreign proceedings and rendering court showed impartiality and that the procedures were compatible with due process. Clearly, for this to occur, this Court must develop further standards for the state courts, and federal courts, to use to evaluate when a foreign court's actions demonstrate that it lacked impartiality and fairness or when the proceedings were incompatible with due process.

CONCLUSION

Kung Da Chang's case presents this Court with the perfect opportunity to make a statement about archaic, unnecessary, and unconstitutional security for costs statutes that have been violating people's right of access to the courts and discriminating against non-residents for decades. The Court should grant Kung Da Chang's petition.

Respectfully submitted,

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May 5, 2015

THE SUPREME COURT OF WASHINGTON

SHANGHAI COMMERCIAL BANK, Respondent, v. KUNG DA CHANG, et ux., Petitioners.	))))))))	NO. 90854-1 **ORDER** (Filed Feb. 4, 2015) C/A NO. 70526-1-I

Department II of the Court, composed of Associate Chief Justice Johnson and Justices Owens, Stephens, González and Yu, considered at its February 3, 2015, Motion Calendar, whether review should be granted pursuant to RAP 13.4(b), and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 4th day of February, 2015.

For the Court

/s/ Johnson J
ASSOCIATE CHIEF JUSTICE

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

SHANGHAI COMMERCIAL BANK LIMITED, a banking corporation organized and existing under the Laws of Hong Kong Special Administrative Region, the People's Republic of China, Respondent, v. KUNG DA CHANG and JANE DOE CHANG, husband and wife and the marital community comprised thereof, Appellants.	)	No. 70526-1-I UNPUBLISHED OPINION FILED: August 25, 2014

VERELLEN, A.C.J. – This appeal arises from the decision of the King County Superior Court granting recognition and enforcement of a foreign judgment entered by a Hong Kong trial court. Kung Da Chang fails to demonstrate that he was deprived of due process by either the Hong Kong judicial system generally or the rendering court specifically, that the judgment is repugnant to state or federal public policies, or that the judgment was rendered under circumstances raising doubts about the integrity of the rendering court. Chang fails to establish that the foreign judgment

sought to be enforced was affected by a security-for-costs order issued in a separate action. The King County Superior Court correctly determined that the foreign judgment is valid and enforceable. We affirm.

FACTS

In *Shanghai Commercial Bank Limited v. Chang Kung Da,* HCA 806/2009 (Action 806), Shanghai Commercial Bank (SCB) sought to collect on an unpaid revolving multi-currency loan that Chang obtained in March 2008 in order to facilitate the transfer of investments from the Bank of East Asia (BEA) to SCB. Chang counterclaimed against SCB, raising fraud and securities claims. Chang did not appear at trial for Action 806, but the trial court considered evidence submitted by the parties, including pleadings and witness statements. In June 2011, the Hong Kong trial court entered judgment against Chang, which totaled almost USD$9 million, exclusive of interest. Chang did not appeal.

In a parallel action before the Hong Kong trial court, *Zhang Zhatzewal, also known as Chang Chih Hwa, Clark, and Chang Kung Da v. Shanghai Commercial Bank Limited and The Bank of East Asia, Limited,* HCA 1996/2009 (Action 1996), Chang and his father, Clark Chang, as plaintiffs, asserted fraud and securities claims against SCB and BEA based on the Changs' multimillion dollar investment losses. The claims in Action 1996 are substantially similar to Chang's counterclaims in Action 806.

Prior to the resolution of these separate actions, SCB and BEA applied for security for their costs in Action 1996. The Hong Kong rules of civil procedure allow a defendant in any action to petition the court to order a nonresident plaintiff to post security for the possible costs of the litigation. Such a bond secures against a nonresident plaintiff avoiding payment of a winning defendant's attorney fees and other costs in the event that the nonresident plaintiff loses the lawsuit. The applications for costs in Action 1996 were heard over two days.[1] In determining whether to order security against the Changs, the Hong Kong court considered a variety of factors established by Hong Kong case law, including whether imposing security would stifle the plaintiffs' access to the courts. In May 2011, the Hong Kong trial court ordered the Changs to provide security for Action 1996 in the amounts of HKD$3 million[2] to secure SCB's potential costs and HKD$3.5 million to secure BEA's possible costs. Despite being warned of the consequences, the Changs failed to post the required security. As a result, the Hong Kong court dismissed the Changs' claims in Action 1996 in June 2011. Shortly thereafter, the court awarded judgment against the Changs on counterclaims asserted by SCB in Action 1996. The Changs did not appeal.

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[1] The petition for costs in Action 1996 was heard together with a petition for costs in HCA 805/2009, a third lawsuit to which Chang was not a party.

[2] This amount, HKD$3 million, equals approximately USD$387,000.

In June 2012, SCB filed a petition, pursuant to Washington's Uniform Foreign-Country Money Judgments Recognition Act (UFMJRA), chapter 6.40A RCW, in King County Superior Court seeking recognition and enforcement of the Hong Kong judgment rendered in Action 806. In King County Superior Court, Chang argued that the security for costs ordered in Action 1996 rendered the Action 806 judgment unrecognizable in Washington. Upon SCB's motion for partial summary judgment, the trial court concluded that the Action 806 judgment was recognizable and enforceable, granted partial summary judgment in favor of SCB, and entered final judgment against Chang for approximately USD$11.7 million.

Chang appeals.

DECISION

Chang contends that the trial court improperly granted partial summary judgment in favor of SCB. We disagree.

We review the trial court's summary judgment decision de novo.[3] Summary judgment is proper if the pleadings, affidavits, depositions, and admissions on file demonstrate that there is no genuine issue of material fact and that the moving party is entitled to

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[3] *Lakey v. Puget Sound Energy,* 176 Wn.2d 909, 922, 296 P.3d 860 (2013).

summary judgment as a matter of law.[4] All reasonable inferences from the evidence must be drawn in favor of the nonmoving party.[5]

The UFMJRA provides that Washington courts "shall recognize a foreign-country judgment" for money damages that is "final, conclusive, and enforceable" where rendered,[6] unless one or more of the mandatory or discretionary grounds for nonrecognition applies.[7] Chang does not argue that the foreign judgment here was not final, conclusive, or enforceable. Instead, he argues that four exceptions render the judgment unrecognizable.

First, a Washington court is prohibited from recognizing a foreign judgment if it was "rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process."[8] Second, even where the court may not have found the foreign judicial system to be defective as a whole,[9] a tribunal-specific due process concern grants Washington courts discretion to deny recognition if "[t]he specific proceeding in the foreign court leading to the judgment was not compatible

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[4] *Id.*

[5] *Id.*

[6] RCW 6.40A.020(1).

[7] RCW 6.40A.030.

[8] RCW 6.40A.030(2)(a).

[9] *See* 2005 Recognition Act § 4(c)(7), cmt. 11.

with the requirements of due process of law."[10] Third, a Washington court "need not recognize a foreign-country judgment if . . . [t]he judgment or the cause of action or claim for relief on which the judgment is based is repugnant to the public policy of [Washington] or of the United States."[11] Fourth, a Washington court is "not required to recognize a foreign-country judgment if . . . [t]he judgment was rendered in circumstances that raise a substantial doubt about the integrity of the rendering court with respect to the judgment."[12]

Chang fails to establish that any of these grounds for non-recognition apply in this case. Chang conflates Action 806 and Action 1996 and analyzes each of the exceptions by considering the Action 1996 security-for-costs order rather than the Action 806 judgment. Chang asserts that, in evaluating the proceedings in Action 806, we should consider the effect of the security-for-costs order in Action 1996 because "HCA 806 and HCA 1996 were essentially one and the same matter" and "any ruling in one matter should be considered by the Court to be a ruling in the other matter."[13] All of Chang's arguments for non-recognition of the Action 806 judgment stem from

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[10] RCW 6.40A.030(3)(h).

[11] RCW 6.40A.030(3)(c).

[12] RCW 6.40A.030(3)(g).

[13] Appellant's Br. at 18.

this premise.[14] But Chang provides no authority for this proposition, and we find no reason to make such an assumption in this case. Although a parallel proceeding, Action 1996 was a separate cause of action from Action 806.

Nevertheless, Chang asserts that material questions of fact remain regarding whether the Action 1996 security-for-costs order effectively prevented him from litigating Action 806. But even accepting Chang's factual allegations as true, he did not demonstrate that the security-for-costs order in Action 1996 actually prevented him from defending against SCB's claims in Action 806. Even if, as Chang alleges, he could not appear personally for fear that he would be imprisoned or ordered to remain in Hong Kong indefinitely, Chang does not establish that he could not continue to appear in Action 806 through counsel or that he could not submit evidence, such as witness affidavits, from outside of Hong Kong. Moreover, the issues Chang raises regarding the effect of the security-for-costs order on Action 806 should have been addressed to the Hong Kong court ordering Chang to provide security when that foreign court considered whether such an order would stifle Chang's access to the courts. For these reasons, Chang's arguments regarding the impact of the security-for-costs order are unavailing.

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[14] For example, Chang argues that Hong Kong's security-for-costs procedures deprive plaintiffs of access to the courts and discriminate against nonresidents.

Moreover, even accepting Chang's premise that the Action 1996 security-for-costs order impacted Action 806, Chang does not establish that the judgment in Action 806 should not be recognized under any of the four exceptions he relies upon.

As to the mandatory exception under RCW 6.40A.030(2)(a) and the discretionary exception under RCW 6.40A.030(3)(h), Chang points to no authority holding that a security-for-costs mechanism is incompatible with due process or other constitutional standards. He argues that the security-for-costs mechanism implicates equal protection and privileges and immunities concerns by restricting nonresident plaintiff's access to the courts. But he cites no court decision that has rejected a security-for-costs mechanism on such a theory. Chang also argues that he had no meaningful opportunity to be heard, but the hearing on the security-for-cost matter lasted for two days, and it appears that the limited materials he submitted were considered by the Hong Kong court. Chang had the opportunity to present evidence to the Hong Kong court demonstrating that he was not financially able to provide the requested security, but he did not do so. Chang also had the opportunity to appeal the security-for-costs order, and for that matter the judgment rendered in Action 806, but he did not appeal either judgment. Even after his claims were dismissed in Action 1996, Chang was given the right to be heard and to be represented in Action 806, although he chose not to exercise those rights. There

is no indication that Chang was deprived of due process.

As to the exception under RCW 6.40A.030(3)(c), the security that the Hong Kong court ordered Chang to provide is not repugnant to Washington law, as the security-for-costs mechanism in Hong Kong is substantially similar to the Washington procedure under RCW 4.84.210.[15] Although Chang vaguely asserts that Washington's security-for-costs statute may be "ripe" for a constitutional challenge, he provides no analysis or persuasive authority in support of this assertion.

As to the exception under RCW 6.40A.030(3)(g), Chang fails to establish that the security-for-costs order raises any doubt about the integrity of the Hong Kong court. He contends that the Hong Kong court gave undue deference to the interests of the banks. But, rather than demonstrating impartiality, the Hong Kong court's passing reference to the bank's concern with its reputation was merely part of the court's observation that both parties were likely to incur significant attorney fees in Action 1996 because they had a lot at stake.

Chang's arguments are not persuasive. We affirm the King County Superior Court's determination that

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[15] *See, e.g., White Coral Corp. v. Geyser Giant Clam Farms, LLC,* 145 Wn. App. 862, 867-69, 189 P.3d 205 (2008) (affirming trial court's dismissal of action upon failure of foreign plaintiff to post $125,000 security for costs for defendant's prospective attorney fees).

the Hong Kong judgment in Action 806 is recognizable and enforceable.

/s/ Verellen ACJ

WE CONCUR:

/s/ Leach, J.   /s/ Cox, J.

The Honorable Laura G. Middaugh
Hearing Date: June 7, 2013
Hearing Time: 9:00 a.m.

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

<table>
<tr>
<td>SHANGHAI COMMERCIAL BANK LIMITED, a banking corporation organized and existing under the Laws of Hong Kong Special Administrative Region, the People's Republic of China,

Petitioner,

v.

KUNG DA CHANG and "JANE DOE" CHANG, husband and wife, and the marital community comprised thereof,

Respondents.</td>
<td>No. 12-2-21293-7 SEA

~~[AMENDED PROPOSED]~~ [LGM] ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY JUDGMENT

(Filed Jun. 7, 2013)</td>
</tr>
</table>

This matter came before the Court on the Petitioner's Motion for Summary Judgment (the "Motion"). The Court, having heard oral argument and having considered the following material:

1. The Motion;

2. The Declaration of Donny Siu Keung Chiu in Support of Petitioner's Motion for Summary Judgment;

3. Respondents' Response to Petitioner's Motion to [sic] for Summary Judgment;

4. The Declaration of Frank S. Homsher in Support of Respondents' Response to Motion for Summary Judgment ("Homsher Declaration");

5. The Declaration of Lai Yee Mak in Support of Respondents' [sic] to Petitioner's Motion for Summary Judgment;

6. The Declaration of Kung-Da Chang in Support of Respondent's Response to Petitioner's Motion for Summary Judgment;

7. The Declaration of Clark Chang in Support of Respondents' Response to Motion for Summary Judgment;

8. Petitioner's Reply in Support of Motion for Summary Judgment; and

9. The Supplemental Declaration of Donny Siu Keung Chiu in Support of Petitioner's Motion for Summary Judgment, hereby **ORDERS** as follows:

Paragraphs 4-40 of the Homsher Declaration are stricken because Mr. Homsher lacks personal knowledge of his statements. Paragraphs 4-32 of the Homsher Declaration are stricken because these statements are assertions about the laws of Hong Kong, and Mr. Homsher is not qualified as an expert on Hong Kong law. Exhibits 1-5, 8, 12, 14, 16, 17, 19-24, and 26 to the Homsher Declaration are stricken because they are hearsay newspaper articles and

websites improperly offered to prove the truth of their contents. [Except, the Court does not strike information on the rates of Hong Kong lawyers.]

Petitioner's Motion for Summary judgment is **GRANTED**. The judgment rendered against respondents in Hong Kong High Court Action No. 806/2009 is entitled to recognition under Washington's Uniform Foreign-Country Money Judgments Recognition Act, RCW 6.40A. On the basis of the doctrine of *res judicata,* respondents' opposition to the final judgment in Action No. 806, and to petitioner Shanghai Commercial Bank Limited's claims against them, is denied. The judgment against respondent Kung Da Chang shall be enforced against him ~~and his marital community~~, but not against the separate property of his wife[, and the Court does not enter judgment against the community property and leaves for further proceedings whether the judgment may later be enforced against community property.]

/s/ Laura G. Middaugh
Honorable Laura G. Middaugh
King County Superior
Court Judge

Presented by:

DLA PIPER LLP (US)

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Attorneys for petitioner Shanghai Commercial Bank Limited

[Read]

/s/ John J. Tollefsen

CERTIFICATE OF SERVICE

I declare that on June 3, 2013, I caused a true and correct copy of the foregoing document to be served on the following in the manner indicated:

Frank S. Homsher, WSBA No. 26935 Tollefsen Law PLLC 2122 164th Street SW, Suite 300 Lynnwood, WA 98087-7812 Tel: 425.673.0300 Fax 425.673.0300 Email: frank@tollefsenlaw.com Attorneys for respondents	☐ Via Hand Delivery ☐ Via U.S. Mail ☐ Via Facsimile ☑ Electronically served via King County Superior Court E-Service application

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 3rd day of June, 2013.

/s/ *Stellman Keehnel*
Stellman Keehnel

The Honorable Laura G. Middaugh
Hearing Date: August 8, 2013
Without Oral Argument

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

SHANGHAI COMMERCIAL BANK LIMITED, a banking corporation organized and existing under the Laws of Hong Kong Special Administrative Region, the People's Republic of China, Petitioner, v. KUNG DA CHANG and "JANE DOE" CHANG, husband and wife, and the marital community comprised thereof, Respondents.	No. 12-2-21293-7 SEA ~~**[PROPOSED]**~~ **ORDER GRANTING PETITIONER'S MOTION FOR ENTRY OF PARTIAL FINAL JUDGMENT**

This matter came before the Court on the Petitioner's Motion for Entry of Partial Final Judgment (the "Motion"). The Court, having considered the following material:

1. The Motion;

2. The Declaration of Mary Ka Mo in Support of Petitioner's Motion for Entry of Partial Final Judgment;

[ECR Checked _______________
8/8/13 @ 12 noon
No Response or Reply on file
or received by Court]

3. ~~Respondents' Response to Petitioner's Motion for Entry of Partial Final Judgment and supporting papers;~~

4. ~~Petitioner's Reply in Support of Motion for Entry of Partial Final Judgment and supporting papers; and~~

5. The files and records of this case;

hereby **GRANTS** Petitioner's Motion for Entry of Partial Final Judgment as follows:

1. The Court expressly finds that there is no just reason for delay in entering a partial final judgment. Specifically, the Court finds that Shanghai Commercial Bank Limited has already waited over two years to collect on the judgment awarded in its favor in Hong Kong, and that further delay is without justification when the remaining issues in this litigation do not affect the enforceability of said judgment against respondent Kung Da Chang.

2. Accordingly, the Court expressly directs the entry of partial final judgment pursuant to the Judgment Summary and Judgment ~~attached hereto as Attachment 1~~ [entered + signed separately on this date]

[3. The defendant has indicated a desire to appeal this Court's decision immediately which can be accomplished if the decision is made final]

/s/ Laura G. Middaugh
Honorable Laura G. Middaugh
King County Superior
Court Judge

Presented by:

DLA PIPER LLP (US)

s/Stellman Keehnel

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Attorneys for petitioner Shanghai Commercial Bank Limited

The Honorable Laura G. Middaugh

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

SHANGHAI COMMERCIAL BANK LIMITED, a banking corporation organized and existing under the Laws of Hong Kong Special Administrative Region, the People's Republic of China, Petitioner, v. KUNG DA CHANG and "JANE DOE" CHANG, husband and wife, and the marital community comprised thereof, Respondents.	No. 12-2-21293-7 SEA **JUDGMENT SUMMARY AND JUDGMENT**

JUDGMENT SUMMARY

1. Judgment Creditors: Shanghai Commercial Bank Limited.

2. Attorneys for Judgment Creditors: Stellman Keehnel, DLA Piper LLP (US)
Katherine Heaton, DLA Piper LLP (US)
Stephen Hsieh, DLA Piper LLP (US)

3.	Judgment Debtor:	Kung Da Chang
4.	Judgment Amount:	$11,704,226.73
5.	Taxable costs and attorneys' fees:	$0
6.	**Total Judgment Amount:**	**$11,704,226.73**

7. The Total Judgment Amount shall bear interest at 12.00% per annum from the date of this Judgment.

JUDGMENT

THIS MATTER came before the Court upon petitioner Shanghai Commercial Bank Limited's Motion for Entry of Partial Final Judgment on the Court's June 7, 2013 Order Granting Petitioner's Motion for Summary Judgment, which Court found that none of the exceptions in Washington's Uniform Foreign Money-Judgments Recognition Act (RCW 6.40 et seq.) applied, and that the Hong Kong Judgment was fully recognized and enforceable in Washington State. Having been fully advised, the Court finds that:

1. As set forth in the Court's June 7, 2013 Order Granting Petitioner's Motion for Summary Judgment, petitioner Shanghai Commercial Bank Limited is entitled to a judgment in its favor against respondent Kung Da Chang in the amount of $11,704,226.73.

2. No just reason for delay in entering a partial final judgment. Specifically, the Court finds that Shanghai Commercial Bank Limited has already

waited over two years to collect on the judgment awarded in its favor in Hong Kong, and that further delay is without justification when the remaining issues in this litigation do not affect the enforceability of said judgment against respondent Kung Da Chang.

Now therefore,

IT IS HEREBY ORDERED that

Judgment is entered in favor of defendant Shanghai Commercial Bank Limited in the total judgment amount of $11,704,226.73, and such total judgment amount shall bear interest at a rate of 12% per annum until paid.

Dated this 8 day of August, 2013.

/s/ Laura G. Middaugh
Honorable Laura G. Middaugh
King County Superior Court Judge

UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT IN ALL THE STATES

at its

ANNUAL CONFERENCE MEETING IN ITS ONE-HUNDRED-AND-FOURTEENTH YEAR PITTSBURGH, PENNSYLVANIA

July 21-28, 2005

WITH PREFATORY NOTE AND COMMENTS

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By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

February 10, 2006

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UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this Uniform Foreign-Country Money Judgments Recognition Act consists of the following individuals:

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UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT

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[1] **UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT**

PREFATORY NOTE

This Act is a revision of the Uniform Foreign Money-Judgments Recognition Act of 1962. That Act codified the most prevalent common law rules with regard to the recognition of money judgments rendered in other countries. The hope was that codification by a state of its rules on the recognition of foreign-country money judgments, by satisfying reciprocity concerns of foreign courts, would make it more likely that money judgments rendered in that state would be recognized in other countries. Towards this end, the Act sets out the circumstances in which the courts in states that have adopted the Act must recognize foreign-country money judgments. It delineates a minimum of foreign-country judgments that must be recognized by the courts of adopting states, leaving those courts free to recognize other foreign-country judgments not covered by the Act under principles of comity or otherwise. Since its promulgation over forty years ago, the 1962 Act has been adopted in a majority of the states and has been in large part successful in carrying out it [sic] purpose of establishing uniform and clear standards under which state courts will enforce the foreign-country money judgments that come within its scope.

This Act continues the basic policies and approach of the 1962 Act. Its purpose is not to depart from the basic rules or approach of the 1962 Act,

which have withstood well the test of time, but rather to update the 1962 Act, to clarify its provisions, and to correct problems created by the interpretation of the provisions of that Act by the courts over the years since its promulgation. Among the more significant issues that have arisen under the 1962 Act which are addressed in this Revised Act are (1) the need to update and clarify the definitions section; (2) the need to reorganize and clarify the scope provisions, and to allocate the burden of proof with regard to establishing application of the Act; (3) the need to set out the procedure by which recognition of a foreign-country money judgment under the Act must be sought; (4) the need to clarify and, to a limited extent, expand upon the grounds for denying recognition in light of differing interpretations of those provisions in the current case law; (5) the need to expressly allocate the burden of proof with regard to the grounds for denying recognition; and (6) the need to establish a statute of limitations for recognition actions.

In the course of drafting this Act, the drafters revisited the decision made in the 1962 Act not to require reciprocity as a condition to recognition of the foreign-country money judgments covered by the Act. After much discussion, the drafters decided that the approach of the 1962 Act continues to be the wisest course with regard to this issue. While recognition of U.S. judgments continues to be problematic in a number of foreign countries, there was insufficient evidence to establish that a reciprocity requirement would have a greater effect on encouraging foreign

recognition of U.S. judgments than does the approach taken by the Act. At the same time, the certainty and uniformity provided by the approach of the 1962 Act, and continued in this Act, creates a stability in this area that facilitates international commercial transactions.

[2] UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the [Uniform Foreign-Country Money Judgments Recognition Act].

Comment

Source: This section is an updated version of Section 9 of the Uniform Foreign Money-Judgments Recognition Act of 1962.

SECTION 2. DEFINITIONS. In this [act]:

(1) "Foreign country" means a government other than:

(A) the United States;

(B) a state, district, commonwealth, territory, or insular possession of the United States; or

(C) any other government with regard to which the decision in this state as to whether to recognize a judgment of that government's courts is

initially subject to determination under the Full Faith and Credit Clause of the United States Constitution.

(2) "Foreign-country judgment" means a judgment of a court of a foreign country.

Comment

Source: This section is derived from Section 1 of the Uniform Foreign Money-Judgments Recognition Act of 1962.

1. The defined terms "foreign state" and "foreign judgment" in the 1962 Act have been changed to "foreign country" and "foreign-country judgment" in order to make it clear that the Act does not apply to recognition of sister-state judgments. Some courts have noted that the "foreign state" and "foreign judgment" definitions of the 1962 Act have caused confusion as to whether the Act should apply to sister-state judgments because "foreign state" and "foreign judgment" are terms of art generally used in connection with recognition and enforcement of [3] sister-state judgments. *See, e.g.,* Eagle Leasing v. Amandus, 476 N.W.2d 35 (S.Ct. Iowa 1991) (reversing lower court's application of UFMJRA to a sister-state judgment, but noting lower court's confusion was understandable as "foreign judgment" is term of art normally applied to sister-state judgments). *See also,* Uniform Enforcement of Foreign Judgments Act §1 (defining "foreign judgment" as the judgment of a sister state or federal court).

The 1962 Act defines a "foreign state" as "any governmental unit other than the United States, or any state, district, commonwealth, territory, insular possession thereof, or the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryuku Islands." Rather than simply updating the list in the 1962 Act's definition of "foreign state," the new definition of "foreign country" in this Act combines the "listing" approach of the 1962 Act's "foreign state" definition with a provision that defines "foreign country" in terms of whether the judgments of the particular government's courts are initially subject to the Full Faith and Credit Clause standards for determining whether those judgments will be recognized. Under this new definition, a governmental unit is a "foreign country" if it is (1) not the United States or a state, district, commonwealth, territory or insular possession of the United States; and (2) its judgments are not initially subject to Full Faith and Credit Clause standards.

The Full Faith and Credit Clause, Art. IV, section 1, provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof." Whether the judgments of a governmental unit are subject to the Full Faith and Credit Clause may be determined by judicial interpretation of the Full Faith and Credit Clause or by statute, or by a combination of these two sources. For

example, pursuant to the authority granted by the second sentence of the Full Faith and Credit Clause, Congress has passed 28 U.S.C.A. §1738, which provides *inter alia* that court records from "any State, Territory, or Possession of the United States" are entitled to full faith and credit under the Full Faith and Credit Clause. In *Stoll v. Gottlieb,* 305 U.S. 165, 170 (1938), the United States Supreme Court held that this statute also requires that full faith and credit be given to judgments of federal courts. States also have made determinations as to whether certain types of judgments are subject to the Full Faith and Credit Clause. *E.g.* Day v. Montana Dept. Of Social & Rehab. Servs., 900 P.2d 296 (Mont. 1995) (tribal court judgment not subject to Full Faith and Credit, and should be treated with same deference shown foreign-country judgments). Under the definition of "foreign country" in this Act, the determination as to whether a governmental unit's judgments are subject to full faith and credit standards should be made by reference to any relevant law, whether statutory or decisional, that is applicable "in this state."

The definition of "foreign country" in terms of those judgments not subject to Full Faith and Credit standards also has the advantage of more effectively coordinating the Act with the Uniform Enforcement of Foreign Judgments Act. That Act, which establishes a registration procedure for the enforcement of sister state and equivalent judgments, defines a "foreign judgment" as "any judgment, decree, or order of a court of the United States or of any other court

which is entitled to full faith and credit in this state." Uniform Enforcement of Foreign [4] Judgments Act, §1 (1964). By defining "foreign country" in the Recognition Act in terms of those judgments not subject to full faith and credit standards, this Act makes it clear that the Enforcement Act and the Recognition Act are mutually exclusive – if a foreign money judgment is subject to full faith and credit standards, then the Enforcement Act's registration procedure is available with regard to its enforcement; if the foreign money judgment is not subject to full faith and credit standards, then the foreign money judgment may not be enforced until recognition of it has been obtained in accordance with the provisions of the Recognition Act.

2. The definition of "foreign-country judgment" in this Act differs significantly from the 1962 Act's definition of "foreign judgment." The 1962 Act's definition served in large part as a scope provision for the Act. The part of the definition defining the scope of the Act has been moved to section 3, which is the scope section.

3. The definition of "foreign-country judgment" in this Act refers to "a judgment" of "a court" of the foreign country. The foreign-country judgment need not take a particular form – any order or decree that meets the requirements of this section and comes within the scope of the Act under Section 3 is subject to the Act. Similarly, any competent government tribunal that issues such a "judgment" comes within the term "court" for purposes of this Act. The judgment, however, must be a judgment of an adjudicative

body of the foreign country, and not the result of an alternative dispute mechanism chosen by the parties. Thus, foreign arbitral awards and agreements to arbitrate are not covered by this Act. They are governed instead by federal law, Chapter 2 of the U.S. Arbitration Act, 9 U.S.C. §§ 201-208, implementing the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards and Chapter 3 of the U.S. Arbitration Act, 9 U.S.C. §§301-307, implementing the Inter-American Convention on International Commercial Arbitration. A judgment of a foreign court confirming or setting aside an arbitral award, however, would be covered by this Act.

4. The definition of "foreign-country judgment" does not limit foreign-country judgments to those rendered in litigation between private parties. Judgments in which a governmental entity is a party also are included, and are subject to this Act if they meet the requirements of this section and are within the scope of the Act under Section 3.

SECTION 3. APPLICABILITY.

(a) Except as otherwise provided in subsection (b), this [act] applies to a foreign-country judgment to the extent that the judgment:

(1) grants or denies recovery of a sum of money; and

(2) under the law of the foreign country where rendered, is final, [5] conclusive, and enforceable.

(b) This [act] does not apply to a foreign-country judgment, even if the judgment grants or denies recovery of a sum of money, to the extent that the judgment is:

(1) a judgment for taxes;

(2) a fine or other penalty; or

(3) a judgment for divorce, support, or maintenance, or other judgment rendered in connection with domestic relations.

(c) A party seeking recognition of a foreign-country judgment has the burden of establishing that this [act] applies to the foreign-country judgment.

Comment

Source: This section is based on Section 2 of the 1962 Act. Subsection (b) contains material that was included as part of the definition of "foreign judgment" in Section 1(2) of the 1962 Act. Subsection (c) is new.

1. Like the 1962 Act, this Act sets out in subsection 3(a) two basic requirements that a foreign-country judgment must meet before it comes within the scope of this Act – the foreign-country judgment must (1) grant or deny recovery of a sum of money and (2) be final, conclusive and enforceable under the law of the foreign country where it was rendered. Subsection 3(b) then sets out three types of foreign-country judgments that are excluded from the coverage

of this Act, even though they meet the criteria of subsection 3(a) – judgments for taxes, judgments constituting fines and other penalties, and judgments in domestic relations matters. These exclusions are comparable to those contained in Section 1(2) of the 1962 Act.

2. This Act applies to a foreign-country judgment only to the extent the foreign-country judgment grants or denies recovery of a sum of money. If a foreign-country judgment both grants or denies recovery of a sum money and provides for some other form of relief, this Act would apply to the portion of the judgment that grants or denies monetary relief, but not to the portion that provides for some other form of relief. The U.S. court, however, would be left free to decide to recognize and enforce the non-monetary portion of the judgment under principles of comity or other applicable law. See Section 11.

3. In order to come within the scope of this Act, a foreign-country judgment must be final, conclusive, and enforceable under the law of the foreign country in which it was rendered. [6] This requirement contains three distinct, although inter-related concepts. A judgment is final when it is not subject to additional proceedings in the rendering court other than execution. A judgment is conclusive when it is given effect between the parties as a determination of their legal rights and obligations. A judgment is enforceable when the legal procedures of the state to ensure that the judgment debtor complies with the judgment

are available to the judgment creditor to assist in collection of the judgment.

While the first two of these requirements – finality and conclusiveness – will apply with regard to every foreign-country money judgment, the requirement of enforceability is only relevant when the judgment is one granting recovery of a sum of money. A judgment denying a sum of money obviously is not subject to enforcement procedures, as there is no monetary award to enforce. This Act, however, covers both judgments granting and those denying recovery of a sum of money. Thus, the fact that a foreign-country judgment denying recovery of a sum of money is not enforceable does not mean that such judgments are not within the scope of the Act. Instead, the requirement that the judgment be enforceable should be read to mean that, if the foreign-country judgment grants recovery of a sum of money, it must be enforceable in the foreign country in order to be within the scope of the Act.

Like the 1962 Act, subsection 3(b) requires that the determinations as to finality, conclusiveness and enforceability be made using the law of the foreign country in which the judgment was rendered. Unless the foreign-country judgment is final, conclusive, and (to the extent it grants recovery of a sum of money) enforceable in the foreign country where it was rendered, it will not be within the scope of this Act.

4. Subsection 3(b) follows the 1962 Act by excluding three categories of foreign-country money

judgments from the scope of the Act – judgments for taxes, judgments that constitute fines and penalties, and judgments in domestic relations matters. The domestic relations exclusion has been redrafted to make it clear that all judgments in domestic relations matters are excluded from the Act, not just judgments "for support" as provided in the 1962 Act. This is consistent with interpretation of the 1962 Act by the courts, which extended the "support" exclusion in the 1962 Act beyond its literal wording to exclude other money judgments in connection with domestic matters. *E.g.,* Wolff v. Wolff, 389 A.2d 413 (My. App. 1978) ("support" includes alimony).

Recognition and enforcement of domestic relations judgments traditionally has been treated differently from recognition and enforcement of other judgments. The considerations with regard to those judgments, particularly with regard to jurisdiction and finality, differ from those with regard to other money judgments. Further, national laws with regard to domestic relations vary widely, and recognition and enforcement of such judgments thus is more appropriately handled through comity than through use of this uniform Act. Finally, other statutes, such as the Uniform Interstate Family Support Act and the federal International Child Support Enforcement Act, 42 U.S.C. §659a (1996), address various aspects of the recognition and enforcement of domestic relations awards. Under Section 11 of this Act, courts are free to [7] recognize money judgments in domestic relations matters under principles of comity or otherwise,

and U.S. courts routinely enforce money judgments in domestic relations matters under comity principles.

Foreign-country judgments for taxes and judgments that constitute fines or penalties traditionally have not been recognized and enforced in U.S. courts. *See, e.g.,* Restatement Third of the Foreign Relations Law of the United States §483 (1986). Both the "revenue rule," under which the courts of one country will not enforce the revenue laws of another country, and the prohibition on enforcement of penal judgments seem to be grounded in the idea that one country does not enforce the public laws of another. *See id.* Reporters' Note 2. The exclusion of tax judgments and judgments constituting fines or penalties from the scope of the Act reflects this tradition. Under Section 11, however, courts remain free to consider whether such judgments should be recognized and enforced under comity or other principles.

A judgment for taxes is a judgment in favor of a foreign country or one of its subdivisions based on a claim for an assessment of a tax. Thus, a judgment awarding a plaintiff restitution of the purchase price paid for an item would not be considered in any part a judgment for taxes, even though one element of the recovery was the sales tax paid by the plaintiff at the time of purchase. Such a judgment would not be one designed to enforce the revenue laws of the foreign country, but rather one designed to compensate the plaintiff. Courts generally hold that the test for whether a judgment is a fine or penalty is determined by whether its purpose is remedial in nature, with its

benefits accruing to private individuals, or it is penal in nature, punishing an offense against public justice. *E.g.,* Chase Manhattan Bank, N.A. v. Hoffman, 665 F. Supp 73 (D. Mass. 1987) (finding that Belgium judgment was not penal even though the proceeding forming the basis of the suit was primarily criminal where Belgium court considered damage petition a civil remedy, the judgment did not constitute punishment for an offense against public justice of Belgium, and benefit of the judgment accrued to private judgment creditor, not Belgium). Thus, a judgment that awards compensation or restitution for the benefit of private individuals should not automatically be considered penal in nature and therefore outside the scope of the Act simply because the action is brought on behalf of the private individuals by a government entity. *Cf* U.S.-Australia Free Trade Agreement, art.14.7.2, U.S.-Austl., May 18, 2004 (providing that when government agency obtains a civil monetary judgment for purpose of providing restitution to consumers, investors, or customers who suffered economic harm due to fraud, judgment generally should not be denied recognition and enforcement on ground that it is penal or revenue in nature, or based on other foreign public law).

5. Under subsection 3(b), a foreign-country money judgment is not within the scope of this Act "to the extent" that it comes within one of the excluded categories. Therefore, if a foreign-country money judgment is only partially within one of the excluded

categories, the non-excluded portion will be subject to this Act.

6. Subsection 3(c) is new. The 1962 Act does not expressly allocate the burden of proof with regard to establishing whether a foreign-country judgment is within the scope of the Act. [8] Courts applying the 1962 Act generally have held that the burden of proof is on the person seeking recognition to establish that the judgment is final, conclusive and enforceable where rendered. *E.g.,* Mayekawa Mfg. Co. Ltd. v. Sasaki, 888 P.2d 183, 189 (Wash. App. 1995) (burden of proof on creditor to establish judgment is final, conclusive, and enforceable where rendered); Bridgeway Corp. v. Citibank, 45 F.Supp.2d 276, 285 (S.D.N.Y. 1999) (party seeking recognition must establish that there is a final judgment, conclusive and enforceable where rendered); S.C.Chimexim S.A. v. Velco Enterprises, Ltd., 36 F. Supp.2d 206, 212 (S.D.N.Y. 1999) (Plaintiff has the burden of establishing conclusive effect). Subsection (3)(c) places the burden of proof to establish whether a foreign-country judgment is within the scope of the Act on the party seeking recognition of the foreign-country judgment with regard to both subsection (a) and subsection (b).

SECTION 4. STANDARDS FOR RECOGNITION OF FOREIGN-COUNTRY JUDGMENT.

(a) Except as otherwise provided in subsections (b) and (c), a court of this state shall recognize a foreign-country judgment to which this [act] applies.

(b) A court of this state may not recognize a foreign-country judgment if:

(1) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law;

(2) the foreign court did not have personal jurisdiction over the defendant; or

(3) the foreign court did not have jurisdiction over the subject matter.

(c) A court of this state need not recognize a foreign-country judgment if:

(1) the defendant in the proceeding in the foreign court did not receive notice of the proceeding in sufficient time to enable the defendant to defend;

(2) the judgment was obtained by fraud that deprived the losing party of [9] an adequate opportunity to present its case;

(3) the judgment or the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state or of the United States;

(4) the judgment conflicts with another final and conclusive judgment;

(5) the proceeding in the foreign court was contrary to an agreement between the parties

under which the dispute in question was to be determined otherwise than by proceedings in that foreign court;

(6) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action;

(7) the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment; or

(8) the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.

(d) A party resisting recognition of a foreign-country judgment has the burden of establishing that a ground for nonrecognition stated in subsection (b) or (c) exists.

Comment

Source: This section is based on Section 4 of the 1962 Act.

1. This Section provides the standards for recognition of a foreign-country money judgment. Section 7 sets out the effect of recognition of a foreign-country money judgment under this Act.

2. Recognition of a judgment means that the forum court accepts the determination of legal rights

and obligations made by the rendering court in the foreign country. *See, e.g.* Restatement (Second) of Conflicts of Laws, Ch. 5, Topic 3, Introductory Note (recognition of foreign judgment occurs to the extent the forum court gives the judgment "the same effect with respect to the parties, the subject matter of the action and the issues involved that it has in the [10] state where it was rendered.") Recognition of a foreign-country judgment must be distinguished from enforcement of that judgment. Enforcement of the foreign-country judgment involves the application of the legal procedures of the state to ensure that the judgment debtor obeys the foreign-country judgment. Recognition of a foreign-country money judgment often is associated with enforcement of the judgment, as the judgment creditor usually seeks recognition of the foreign-country judgment primarily for the purpose of invoking the enforcement procedures of the forum state to assist the judgment creditor's collection of the judgment from the judgment debtor. Because the forum court cannot enforce the foreign-country judgment until it has determined that the judgment will be given effect, recognition is a prerequisite to enforcement of the foreign-country judgment. Recognition, however, also has significance outside the enforcement context because a foreign-country judgment also must be recognized before it can be given preclusive effect under res judicata and collateral estoppel principles. The issue of whether a foreign-country judgment will be recognized is distinct from both the issue of whether the judgment

will be enforced, and the issue of the extent to which it will be given preclusive effect.

3. Subsection 4(a) places an affirmative duty on the forum court to recognize a foreign-country money judgment unless one of the grounds for non-recognition stated in subsection (b) or (c) applies. Subsection (b) states three mandatory grounds for denying recognition to a foreign-country money judgment. If the forum court finds that one of the grounds listed in subsection (b) exists, then it must deny recognition to the foreign-country money judgment. Subsection (c) states eight nonmandatory grounds for denying recognition. The forum court has discretion to decide whether or not to refuse recognition based on one of these grounds. Subsection (d) places the burden of proof on the party resisting recognition of the foreign-country judgment to establish that one of the grounds for nonrecognition exists.

4. The mandatory grounds for nonrecognition stated in subsection (b) are identical to the mandatory grounds stated in Section 4 of the 1962 Act. The discretionary grounds stated in subsection 4(c)(1) through (6) are based on subsection 4(b)(1) through (6) of the 1962 Act. The discretionary grounds stated in subsection 4(c)(7) and (8) are new.

5. Under subsection (b)(1), the forum court must deny recognition to the foreign-country money judgment if that judgment was "rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements

of due process of law." The standard for this ground for nonrecognition "has been stated authoritatively by the Supreme Court of the United States in *Hilton v. Guyot,* 159 U.S.113, 205 (1895). As indicated in that decision, a mere difference in the procedural system is not a sufficient basis for nonrecognition. A case of serious injustice must be involved." Cmt §4, Uniform Foreign Money-Judgment Recognition Act (1962). The focus of inquiry is not whether the procedure in the rendering country is similar to U.S. procedure, but rather on the basic fairness of the foreign-country procedure. Kam-Tech Systems, Ltd. V. Yardeni, 74 A.2d 644, 649 (N.J. App. 2001) (interpreting the comparable provision in the 1962 Act); *accord,* Society of Lloyd's v. Ashenden, 233 F.3d 473 (7th Cir. 2000) (procedures need not meet all the intricacies of the complex concept [11] of due process that has emerged from U.S. case law, but rather must be fair in the broader international sense) (interpreting comparable provision in the 1962 Act). Procedural differences, such as absence of jury trial or different evidentiary rules are not sufficient to justify denying recognition under subsection (b)(1), so long as the essential elements of impartial administration and basic procedural fairness have been provided in the foreign proceeding. As the U.S. Supreme Court stated in *Hilton*:

> Where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and

> under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect then a foreign-country judgment should be recognized. *Hilton,* 159 U.S. at 202.

6. Under section 4(b)(2), the forum court must deny recognition to the foreign-country judgment if the foreign court did not have personal jurisdiction over the defendant. Section 5(a) lists six bases for personal jurisdiction that are adequate as a matter of law to establish that the foreign court had personal jurisdiction. Section 5(b) makes clear that other grounds for personal jurisdiction may be found sufficient.

7. Subsection 4(c)(2) limits the type of fraud that will serve as a ground for denying recognition to extrinsic fraud. This provision is consistent with the interpretation of the comparable provision in subsection 4(b)(2) of the 1962 Act by the courts, which have found that only extrinsic fraud – conduct of the prevailing party that deprived the losing party of an adequate opportunity to present its case – is sufficient under the 1962 Act. Examples of extrinsic fraud would be when the plaintiff deliberately had the initiating process served on the defendant at the wrong address, deliberately gave the defendant

wrong information as to the time and place of the hearing, or obtained a default judgment against the defendant based on a forged confession of judgment. When this type of fraudulent action by the plaintiff deprives the defendant of an adequate opportunity to present its case, then it provides grounds for denying recognition of the foreign-country judgment. Extrinsic fraud should be distinguished from intrinsic fraud, such as false testimony of a witness or admission of a forged document into evidence during the foreign proceeding. Intrinsic fraud does not provide a basis for denying recognition under subsection 4(c)(2), as the assertion that intrinsic fraud has occurred should be raised and dealt with in the rendering court.

8. The public policy exception in subsection 4(c)(3) is based on the public policy exception in subsection 4(b)(3) of the 1962 Act, with one difference. The public policy exception in the 1962 Act states that the relevant inquiry is whether "the [cause of action] [claim for relief] on which the judgment is based" is repugnant to public policy. Based on this "cause [12] of action" language, some courts interpreting the 1962 Act have refused to find that a public policy challenge based on something other than repugnancy of the foreign cause of action comes within this exception. *E.g.,* Southwest Livestock & Trucking Co., Inc. v. Ramon, 169 F.3d 317 (5th Cir. 1999) (refusing to deny recognition to Mexican judgment on promissory note with interest rate of 48% because cause of action to collect on promissory note does not violate public policy [sic]); Guinness PLC v.

Ward, 955 F.2d 875 (4th Cir. 1992) (challenge to recognition based on post-judgment settlement could not be asserted under public policy exception); The Society of Lloyd's v. Turner, 303 F.3d 325 (5th Cir. 2002) (rejecting argument legal standards applied to establish elements of breach of contract violated public policy because cause of action for breach of contract itself is not contrary to state public policy); *cf.* Bachchan v. India Abroad Publications, Inc., 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992) (judgment creditor argued British libel judgment should be recognized despite argument it violated First Amendment because New York recognizes a cause of action for libel). Subsection 4(c)(3) rejects this narrow focus by providing that the forum court may deny recognition if either the cause of action or the judgment itself violates public policy. *Cf.* Restatement (Third) of the Foreign Relations Law of the United States, § 482(2)(d) (1986) (containing a similarly-worded public policy exception to recognition).

Although subsection 4(c)(3) of this Act rejects the narrow focus on the cause of action under the 1962 Act, it retains the stringent test for finding a public policy violation applied by courts interpreting the 1962 Act. Under that test, a difference in law, even a marked one, is not sufficient to raise a public policy issue. Nor is it relevant that the foreign law allows a recovery that the forum state would not allow. Public policy is violated only if recognition or enforcement of the foreign-country judgment would tend clearly to injure the public health, the public morals, or the

public confidence in the administration of law, or would undermine "that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel." Hunt v. BP Exploration Co. (Libya) Ltd., 492 F. Supp. 885, 901 (N.D. Tex. 1980).

The language "or of the United States" in subsection 4(c)(3), which does not appear in the 1962 Act provision, makes it clear that the relevant public policy is that of both the State in which recognition is sought and that of the United States. This is the position taken by the vast majority of cases interpreting the 1962 public policy provision. *E.g.,* Bachchan v. India Abroad Publications, Inc., 585 N.Y.S.2d 661 (Sup.Ct. N.Y. 1992) (British libel judgment denied recognition because it violates First Amendment).

9. Subsection 4(c)(5) allows the forum court to refuse recognition of a foreign-country judgment when the parties had a valid agreement, such as a valid forum selection clause or agreement to arbitrate, providing that the relevant dispute would be resolved in a forum other than the forum issuing the foreign-country judgment. Under this provision, the forum court must find both the existence of a valid agreement and that the agreement covered the subject matter involved in the foreign litigation resulting in the foreign-country judgment.

10. Subsection 4(c)(6) authorizes the forum court to refuse recognition of a foreign-country judgment that was rendered in the foreign country solely

on the basis of personal service [13] when the forum court believes the original action should have been dismissed by the court in the foreign country on grounds of *forum non conveniens.*

11. Subsection 4(c)(7) is new. Under this subsection, the forum court may deny recognition to a foreign-country judgment if there are circumstances that raise substantial doubt about the integrity of the rendering court with respect to that judgment. It requires a showing of corruption in the particular case that had an impact on the judgment that was rendered. This provision may be contrasted with subsection 4(b)(1), which requires that the forum court refuse recognition to the foreign-country judgment if it was rendered under a judicial system that does not provide impartial tribunals. Like the comparable provision in subsection 4(a)(1) of the 1962 Act, subsection 4(b)(1) focuses on the judicial system of the foreign country as a whole, rather than on whether the particular judicial proceeding leading to the foreign-country judgment was impartial and fair. *See, e.g.,* The Society of Lloyd's v. Turner, 303 F.3d 325, 330 (5th Cir. 2002) (interpreting the 1962 Act); CIBC Mellon Trust Co. v. Mora Hotel Corp,. N.V., 743 N.Y.S.2d 408, 415 (N.Y. App. 2002) (interpreting the 1962 Act); Society of Lloyd's v. Ashenden, 233 F.3d 473, 477 (7th Cir. 2000) (interpreting the 1962 Act). On the other hand, subsection 4(c)(7) allows the court to deny recognition to the foreign-country judgment if it finds a lack of impartiality and fairness of the tribunal in the individual proceeding leading to the

foreign-country judgment. Thus, the difference is that between showing, for example, that corruption and bribery is so prevalent throughout the judicial system of the foreign country as to make that entire judicial system one that does not provide impartial tribunals versus showing that bribery of the judge in the proceeding that resulted in the particular foreign-country judgment under consideration had a sufficient impact on the ultimate judgment as to call it into question.

12. Subsection 4(c)(8) also is new. It allows the forum court to deny recognition to the foreign-country judgment if the court finds that the specific proceeding in the foreign court was not compatible with the requirements of fundamental fairness. Like subsection 4(c)(7), it can be contrasted with subsection 4(b)(1), which requires the forum court to deny recognition to the foreign-country judgment if the forum court finds that the entire judicial system in the foreign country where the foreign-country judgment was rendered does not provide procedures compatible with the requirements of fundamental fairness. While the focus of subsection 4(b)(1) is on the foreign country's judicial system as a whole, the focus of subsection 4(c)(8) is on the particular proceeding that resulted in the specific foreign-country judgment under consideration. Thus, the difference is that between showing, for example, that there has been such a breakdown of law and order in the particular foreign country that judgments are rendered on the basis of political decisions rather than the rule of law

throughout the judicial system versus a showing that for political reasons the particular party against whom the foreign-country judgment was entered was denied fundamental fairness in the particular proceedings leading to the foreign-country judgment.

Subsections 4(c)(7) and (8) both are discretionary grounds for denying recognition, while subsection 4(b)(1) is mandatory. Obviously, if the entire judicial system in the foreign country fails to satisfy the requirements of impartiality and fundamental fairness, a judgment rendered in [14] that foreign country would be so compromised that the forum court should refuse to recognize it as a matter of course. On the other hand, if the problem is evidence of a lack of integrity or fundamental fairness with regard to the particular proceeding leading to the foreign-country judgment, then there may or may not be other factors in the particular case that would cause the forum court to decide to recognize the foreign-country judgment. For example, a forum court might decide not to exercise its discretion to deny recognition despite evidence of corruption or procedural unfairness in a particular case because the party resisting recognition failed to raise the issue on appeal from the foreign-country judgment in the foreign country, and the evidence establishes that, if the party had done so, appeal would have been an adequate mechanism for correcting the transgressions of the lower court.

13. Under subsection 4(d), the party opposing recognition of the foreign-country judgment has the burden of establishing that one of the grounds for

nonrecognition set out in subsection 4(b) or (c) applies. The 1962 Act was silent as to who had the burden of proof to establish a ground for nonrecognition and courts applying the 1962 Act took different positions on the issue. *Compare* Bridgeway Corp. v. Citibank, 45 F.Supp. 2d 276, 285 (S.D.N.Y. 1999) (plaintiff has burden to show no mandatory basis under 4(a) for nonrecognition exists; defendant has burden regarding discretionary bases) *with* The Courage Co. LLC v. The ChemShare Corp., 93 S.W.3d 323, 331 (Tex. App. 2002) (party seeking to avoid recognition has burden to prove ground for nonrecognition). Because the grounds for nonrecognition in Section 4 are in the nature of defenses to recognition, the burden of proof is most appropriately allocated to the party opposing recognition of the foreign-country judgment.

SECTION 5. PERSONAL JURISDICTION.

(a) A foreign-country judgment may not be refused recognition for lack of personal jurisdiction if:

(1) the defendant was served with process personally in the foreign country;

(2) the defendant voluntarily appeared in the proceeding, other than for the purpose of protecting property seized or threatened with seizure in the proceeding or of contesting the jurisdiction of the court over the defendant;

(3) the defendant, before the commencement of the proceeding, had agreed to submit

to the jurisdiction of the foreign court with respect to the subject matter [15] involved;

(4) the defendant was domiciled in the foreign country when the proceeding was instituted or was a corporation or other form of business organization that had its principal place of business in, or was organized under the laws of, the foreign country;

(5) the defendant had a business office in the foreign country and the proceeding in the foreign court involved a [cause of action] [claim for relief] arising out of business done by the defendant through that office in the foreign country; or

(6) the defendant operated a motor vehicle or airplane in the foreign country and the proceeding involved a [cause of action] [claim for relief] arising out of that operation.

(b) The list of bases for personal jurisdiction in subsection (a) is not exclusive. The courts of this state may recognize bases of personal jurisdiction other than those listed in subsection(a) as sufficient to support a foreign-country judgment.

Comment

Source: This provision is based on Section 5 of the 1962 Act. Its substance is the same as that of Section 5 of the 1962 Act, except as noted in Comment 2 below with regard to subsection 5(a)(4).

1. Under section 4(b)(2), the forum court must deny recognition to the foreign-country judgment if the foreign court did not have personal jurisdiction over the defendant. Section 5(a) lists six bases for personal jurisdiction that are adequate as a matter of law to establish that the foreign court had personal jurisdiction. Section 5(b) makes it clear that these bases of personal jurisdiction are not exclusive. The forum court may find that the foreign court had personal jurisdiction over the defendant on some other basis.

2. Subsection 5(a)(4) of the 1962 Act provides that the foreign court had personal jurisdiction over the defendant if the defendant was "a body corporate" that "had its principal place of business, was incorporated, or had otherwise acquired corporate status, in the foreign state." Subsection 5(a)(4) of this Act extends that concept to forms of business organization other [16] than corporations.

3. Subsection 5(a)(3) provides that the foreign court has personal jurisdiction over the defendant if the defendant agreed before commencement of the proceeding leading to the foreign-country judgment to submit to the jurisdiction of the foreign court with regard to the subject matter involved. Under this provision, the forum court must find both the existence of a valid agreement to submit to the foreign court's jurisdiction and that the agreement covered the subject matter involved in the foreign litigation resulting in the foreign-country judgment.

SECTION 6. PROCEDURE FOR RECOGNITION OF FOREIGN-COUNTRY JUDGMENT.

(a) If recognition of a foreign-country judgment is sought as an original matter, the issue of recognition shall be raised by filing an action seeking recognition of the foreign-country judgment.

(b) If recognition of a foreign-country judgment is sought in a pending action, the issue of recognition may be raised by counterclaim, cross-claim, or affirmative defense.

Comment

Source: This section is new.

1. Unlike the 1962 Act, which was silent as to the proper procedure for seeking recognition of a foreign-country judgment, Section 6 of this Act expressly sets out the ways in which the issue of recognition may be raised. Under section 6, the issue of recognition always must be raised in a court proceeding. Thus, section 6 rejects decisions under the 1962 Act holding that the registration procedure found in the Uniform Enforcement of Foreign Judgments Act could be utilized with regard to recognition of a foreign-country judgment. *E.g.* Society of Lloyd's v. Ashenden, 233 F.3d 473 (7th Cir. 2000). The Enforcement Act deals solely with the *enforcement* of sister-state judgments and other judgments entitled to full faith and credit, not with the *recognition* of foreign-country judgments.

More broadly, section 6 rejects the use of any registration procedure in the context of the foreign-country judgments covered by this Act. A registration procedure represents a balance between the interest of the judgment creditor in obtaining quick and efficient recognition and enforcement of a judgment when the judgment debtor has already been provided with an opportunity to litigate the underlying issues, and the interest of the judgment debtor in being [17] provided an adequate opportunity to raise and litigate issues regarding whether the foreign-country judgment should be recognized. In the context of sister-state judgments, this balance favors use of a truncated procedure such as that found in the Enforcement Act. Recognition of sister-state judgments normally is mandated by the Full Faith and Credit Clause. Courts recognize only a very limited number of grounds for denying full faith and credit to a sister-state judgment – that the rendering court lacked jurisdiction, that the judgment was procured by fraud, that the judgment has been satisfied, or that the limitations period has expired. Thus, the judgment debtor with regard to a sister-state judgment normally does not have any grounds for opposing recognition and enforcement of the judgment. The extremely limited grounds for denying full faith and credit to a sister-state judgment reflect the fact such judgments will have been rendered by a court that is subject to the same due process limitations and the same overlap of federal statutory and constitutional law as the forum state's courts, and, to a large extent, the same body of court precedent and socio-economic

ideas as those shaping the law of the forum state. Therefore, there is a strong presumption of fairness and competence attached to a sister-state judgment that justifies use of a registration procedure.

The balance between the benefits and costs of a registration procedure is significantly different, however, in the context of recognition and enforcement of foreign-country judgments. Unlike the limited grounds for denying full faith and credit to a sister-state judgment, this Act provides a number of grounds upon which recognition of a foreign-country judgment may be denied. Determination of whether these grounds apply requires the forum court to look behind the foreign-country judgment to evaluate the law and the judicial system under which the foreign-country judgment was rendered. The existence of these grounds for nonrecognition reflects the fact there is less expectation that foreign-country courts will follow procedures comporting with U.S. notions of fundamental fairness and jurisdiction or that those courts will apply laws viewed as substantively tolerable by U.S. standards than there is with regard to sister-state courts. In some situations, there also may be suspicions of corruption or fraud in the foreign-country proceedings. These differences between sister-state judgments and foreign-country judgments provide a justification for requiring judicial involvement in the decision whether to recognize a foreign-country judgment in all cases in which that issue is raised. Although the threshold for establishing that a foreign-country judgment is not entitled to

recognition under Section 4 is high, there is a sufficiently greater likelihood that significant recognition issues will be raised so as to require a judicial proceeding.

2. This Section contemplates that the issue of recognition may be raised either as an original matter or in the context of a pending proceeding. Subsection 6(a) provides that in order to raise the issue of recognition of a foreign-country judgment as an initial matter, the party seeking recognition must file an action for recognition of the foreign-country judgment. Subsection 6(b) provides that when the recognition issue is raised in a pending proceeding, it may be raised by counterclaim, cross-claim or affirmative defense, depending on the context in which it is raised. These rules are consistent with the way the issue of recognition most often was raised in most states under the 1962 Act.

[18] 3. An action seeking recognition of a foreign-country judgment under this Section is an action on the foreign-country judgment itself, not an action on the underlying cause of action that gave rise to that judgment. The parties to an action under Section 6 may not relitigate the merits of the underlying dispute that gave rise to the foreign-country judgment.

4. While this Section sets out the ways in which the issue of recognition of a foreign-country judgment may be raised, it is not intended to create any new procedure not currently existing in the state or to

otherwise effect [sic] existing state procedural requirements. The parties to an action in which recognition of a foreign-country judgment is sought under Section 6 must comply with all state procedural rules with regard to that type of action. Nor does this Act address the question of what constitutes a sufficient basis for jurisdiction to adjudicate with regard to an action under Section 6. Courts have split over the issue of whether the presence of assets of the debtor in a state is a sufficient basis for jurisdiction in light of footnote 36 of the U.S. Supreme Court decision in Shaffer v. Heitner, 433 U.S. 186, 210 n.36 (1977). This Act takes no position on that issue.

5. In states that have adopted the Uniform Foreign-Money Claims Act, that Act will apply to the determination of the amount of a money judgment recognized under this Act.

SECTION 7. EFFECT OF RECOGNITION OF FOREIGN-COUNTRY JUDGMENT. If the court in a proceeding under Section 6 finds that the foreign-country judgment is entitled to recognition under this [act] then, to the extent that the foreign-country judgment grants or denies recovery of a sum of money, the foreign-country judgment is:

(1) conclusive between the parties to the same extent as the judgment of a sister state entitled to full faith and credit in this state would be conclusive; and

(2) enforceable in the same manner and to the same extent as a judgment rendered in this state.

Comment

Source: The substance of subsection 7(1) is based on Section 3 of the 1962 Act. Subsection 7(2) is new.

1. Section 5 of this Act sets out the standards for the recognition of foreign-country judgments within the scope of this Act, and places an affirmative duty on the forum court to [19] recognize any foreign-country judgment that meets those standards. Section 6 of this Act sets out the procedures by which the issue of recognition may be raised. This Section sets out the consequences of the decision by the forum court that the foreign-country judgment is entitled to recognition.

2. Under subsection 7(1), the first consequence of recognition of a foreign-country judgment is that it is treated as conclusive between the parties in the forum state. Section 7(1) does not attempt to establish directly the extent of that conclusiveness. Instead, it provides that the foreign-country judgment is treated as conclusive to the same extent that a judgment of a sister state that had been determined to be entitled to full faith and credit would be conclusive. This means that the foreign-country judgment generally will be given the same effect in the forum state that it has in the foreign country where it was rendered. Subsection 7(1), however, sets out the minimum effect that must be given to the foreign-country judgment once recognized. The forum court remains free to give the foreign-country judgment a greater preclusive effect in the forum state than the

judgment would have in the foreign country where it was rendered. *Cf.* Restatement (Third) of the Foreign Relations Law of the United States, § 481 cmt *c* (1986).

3. Under subsection 7(2), the second consequence of recognition of a foreign-country judgment is that, to the extent it grants a sum of money, it is enforceable in the forum state in accordance with the procedures for enforcement in the forum state and to the same extent that a judgment of the forum state would be enforceable. *Cf.* Restatement (Third) of the Foreign Relations Law of the United States §481 (1986) (judgment entitled to recognition is enforceable in accordance with the procedure for enforcement of judgments applicable where enforcement is sought). Thus, under subsection 7(2), once recognized, the foreign-country judgment has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating, or staying a judgment of a comparable court in the forum state, and can be enforced or satisfied in the same manner as such a judgment of the forum state.

SECTION 8. STAY OF PROCEEDINGS PENDING APPEAL OF FOREIGN-COUNTRY JUDGMENT. If a party establishes that an appeal from a foreign-country judgment is pending or will be taken, the court may stay any proceedings with regard to the foreign-country judgment until the appeal is concluded, the time for appeal expires, or the appellant has had sufficient time to prosecute the appeal and has failed to do so.

Comment

Source: This section is the same substantively as section 6 of the 1962 Act, except that it adds as an additional measure for the duration of the stay "the time for appeal expires."

[20] 1. Under Section 3 of this Act, a foreign-country judgment is not within the scope of this Act unless it is conclusive and enforceable where rendered. Thus, if the effect of appeal under the law of the foreign country in which the judgment was rendered is to prevent it from being conclusive or enforceable between the parties, the existence of a pending appeal in the foreign country would prevent the application of this Act. Section 8 addresses a different situation. It deals with the situation in which either (1) the party seeking a stay has demonstrated that it intends to file an appeal in the foreign country, although the appeal has not yet been filed or (2) an appeal has been filed in the foreign country, but under the law of the foreign country filing of an appeal does not affect the conclusiveness or enforceability of the judgment. Section 8 allows the forum court in those situations to determine in its discretion that a stay of proceedings is appropriate.

SECTION 9. STATUTE OF LIMITATIONS. An action to recognize a foreign-country judgment must be commenced within the earlier of the time during which the foreign-country judgment is effective in the foreign country or 15 years from the date

that the foreign-country judgment became effective in the foreign country.

Comment

Source: This Section is new. The 1962 Act did not contain a statute of limitations. Some courts applying the 1962 Act have used the state's general statute of limitations, *e.g.,* Vrozos v. Sarantopoulos, 552 N.E.2d 1053 (Ill. App. 1990) (as Recognition Act contains no statute of limitations, general five-year statute of limitations applies), while others have used the statute of limitations applicable with regard to enforcement of a domestic judgment, *e.g.,* La Societe Anonyme Goro v. Conveyor Accessories, Inc., 677 N.E. 2d 30 (Ill. App. 1997).

1. Under Section 3 of this Act, this Act only applies to foreign-country judgments that are conclusive, and if the judgment grants recovery of a sum of money, enforceable where rendered. Thus, if the period of effectiveness of the foreign-country judgment has expired in the foreign country where the judgment was rendered, the foreign-country judgment would not be subject to this Act. This means that the period of time during which a foreign-country judgment may be recognized under this Act normally is measured by the period of time during which that judgment is effective (that is, conclusive and, if applicable, enforceable) in the foreign country that rendered the judgment. If, however, the foreign-country judgment remains effective for more than

fifteen years after the date on which it became effective in the foreign country, Section 9 places an additional time limit on recognition of a foreign-country judgment. It provides that, if the foreign-country judgment remains effective between the parties for more than fifteen years, then an action to recognize the foreign-country judgment under this Act must be commenced within that fifteen year period.

[21] 2. Section 9 does not address the issue of whether a foreign-country judgment that can no longer be the basis of a recognition action under this Act because of the application of the fifteen-year limitations period in Section 9 may be used for other purposes. For example, a common rule with regard to judgments barred by a statute of limitations is that they still may be used defensively for purposes of offset and for their preclusive effect. The extent to which a foreign-country judgment with regard to which a recognition action is barred by Section 9 may be used for these or other purposes is left to the other law of the forum state.

SECTION 10. UNIFORMITY OF INTERPRETATION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

Comment

Source: This Section is substantively the same as Section 8 of the 1962 Act. The section has been rewritten to reflect current NCCUSL practice.

SECTION 11. SAVING CLAUSE. This [act] does not prevent the recognition under principles of comity or otherwise of a foreign-country judgment not within the scope of this [act].

Comment

Source: This section is based on Section 7 of the 1962 Act.

1. Section 3 of this Act provides that this Act applies only to certain foreign-country judgments that grant or deny recovery of a sum of money. The purpose of this Act is to establish the minimum standards for recognition of those judgments. Section 11 makes clear that no negative implication should be read from the fact that this Act does not provide for recognition of other foreign-country judgments. Rather, this Act simply does not address the issue of whether foreign-country judgments not within its scope under Section 3 should be recognized. Courts are free to recognize those foreign-country judgments not within the scope of this Act under common law principles of comity or other applicable law.

SECTION 12. EFFECTIVE DATE.

[(a) This [act] takes effect . . . .

[22] [(b) This [act] applies to all actions commenced on or after the effective date of this [act] in which the issue of recognition of a foreign-country judgment is raised.]

Comment

Source: Subsection 12(a) is the same as Section 11 of the 1962 Act. Subsection 12(b) is new.

1. Subsection 12(b) provides that this Act will apply to all actions in which the issue of recognition of a foreign-country judgment is raised that are commenced on or after the effective date of this Act. Thus, the application of this Act is measured not from the time the original action leading to the foreign-country judgment was commenced in the foreign country, but rather from the time the action in which the issue of recognition is raised is commenced in the forum court. Subsection 12(b) does not distinguish between whether the purpose of the action commenced in the forum court was to seek recognition as an original matter under Subsection 6(a) or was an action that was already pending when the issue of recognition was raised under Subsection 6(b).

SECTION 13. REPEAL. The following [acts] are repealed:

(a) Uniform Foreign Money-Judgments Recognition Act,

(b)

.]

Comment

Source: This Section is an updated version of Section 10 of the 1962 Act.

UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT IN ALL THE STATES

at its

ANNUAL CONFERENCE MEETING IN ITS SEVENTY-FIRST YEAR MONTEREY, CALIFORNIA JULY 30 – AUGUST 4, 1962

WITH PREFATORY NOTE AND COMMENTS

Approved by the American Bar Association
February 4, 1963

UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT

The Committee which acted for the National Conference of Commissioners on Uniform State Laws in preparing the Uniform Foreign Money-Judgments Recognition Act was as follows:

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
1155 East Sixtieth Street
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UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT

PREFATORY NOTE

In most states of the Union, the law on recognition of judgments from foreign countries is not codified. In a large number of civil law countries, grant of conclusive effect to money-judgments from foreign courts is made dependent upon reciprocity. Judgments rendered in the United States have in many instances been refused recognition abroad either because the foreign court was not satisfied that local judgments would be recognized in the American jurisdiction involved or because no certification of existence of reciprocity could be obtained from the foreign government in countries where existence of reciprocity must be certified to the courts by the government. Codification by a state of its rules on the recognition of money-judgments rendered in a foreign court will make it more likely that judgments rendered in the state will be recognized abroad.

The Act states rules that have long been applied by the majority of courts in this country. In some respects the Act may not go as far as the decisions. The Act makes clear that a court is privileged to give the judgment of the court of a foreign country greater effect than it is required to do by the provisions of the Act. In codifying what bases for assumption of personal jurisdiction will be recognized, which is an area of the law still in evolution, the Act adopts the policy of listing bases accepted generally today and preserving for the courts the right to recognize still other

bases. Because the Act is not selective and applies to judgments from any foreign court, the Act states that judgments rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law shall neither be recognized nor enforced.

The Act does not prescribe a uniform enforcement procedure. Instead, the Act provides that a judgment entitled to recognition will be enforceable in the same manner as the judgment of a court of a sister state which is entitled to full faith and credit.

In the preparation of the Act codification efforts made elsewhere have been taken into consideration, in particular, the [British] Foreign Judgments (Reciprocal Enforcement) Act of 1933 and a Model Act produced in 1960 by the International Law Association. The Canadian Commissioners on Uniformity of Legislation, engaged in a similar endeavor, have been kept informed of the progress of the work. Enactment by the states of the Union of modern uniform rules on recognition of foreign money judgments will support efforts toward improvement of the law on recognition everywhere.

UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT

[Be it enacted. . . .]

SECTION 1. [*Definitions.*] As used in this Act:

(1) "foreign state" means any governmental unit other than the United States, or any state, district, commonwealth, territory, insular possession thereof, or the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands;

(2) "foreign judgment" means any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters.

SECTION 2. [*Applicability.*] This Act applies to any foreign judgment that is final and conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal.

Comment

Where an appeal is pending or the defendant intends to appeal, the court of the enacting state has power to stay proceedings in accordance with section 6 of the Act.

SECTION 3. [*Recognition and Enforcement.*] Except as provided in section 4, a foreign judgment meeting the requirements of section 2 is conclusive between the parties to the extent that it grants or

denies recovery of a sum of money. The foreign judgment is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit.

Comment

The method of enforcement will be that of the Uniform Enforcement of Foreign Judgments Act of 1948 in a state having enacted that Act.

SECTION 4. [G*rounds for Non-Recognition.*]

(a) A foreign judgment is not conclusive if

(1) the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;

(2) the foreign court did not have personal jurisdiction over the defendant; or

(3) the foreign court did not have jurisdiction over the subject matter.

(b) A foreign judgment need not be recognized if

(1) the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend;

(2) the judgment was obtained by fraud;

(3) the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state;

(4) the judgment conflicts with another final and conclusive judgment;

(5) the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or

(6) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.

Comment

The first ground for non-recognition under subsection (a) has been stated authoritatively by the Supreme Court of the United States in *Hilton v. Guyot,* 159 U.S. 113, 205 (1895). As indicated in that decision, a mere difference in the procedural system is not a sufficient basis for non-recognition. A case of serious injustice must be involved.

The last ground for non-recognition under subsection (b) authorizes a court to refuse recognition and enforcement of a judgment rendered in a foreign country on the basis only of personal service when it believes the original action should have been dismissed by the court in the foreign country on grounds of *forum non conveniens.*

SECTION 5. [*Personal Jurisdiction.*]

(a) The foreign judgment shall not be refused recognition for lack of personal jurisdiction if

(1) the defendant was served personally in the foreign state;

(2) the defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over him;

(3) the defendant prior to the commencement of the proceedings had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved;

(4) the defendant was domiciled in the foreign state when the proceedings were instituted, or, being a body corporate had its principal place of business, was incorporated, or had otherwise acquired corporate status, in the foreign state;

(5) the defendant had a business office in the foreign state and the proceedings in the foreign court involved a [cause of action] [claim for relief] arising out of business done by the defendant through that office in the foreign state; or

(6) the defendant operated a motor vehicle or airplane in the foreign state and the proceedings involved a [cause of action] [claim for relief] arising out of such operation.

(b) The courts of this state may recognize other bases of jurisdiction.

Comment

New bases of jurisdiction have been recognized by courts in recent years. The Act does not codify all these new bases. Subsection (b) makes clear that the Act does not prevent the courts in the enacting state from recognizing foreign judgments rendered on the bases of jurisdiction not mentioned in the Act.

SECTION 6. [*Stay in Case of Appeal.*] If the defendant satisfies the court either that an appeal is pending or that he is entitled and intends to appeal from the foreign judgment, the court may stay the proceedings until the appeal has been determined or until the expiration of a period of time sufficient to enable the defendant to prosecute the appeal.

SECTION 7. [*Saving Clause.*] This Act does not prevent the recognition of a foreign judgment in situations not covered by this Act.

SECTION 8. [*Uniformity of Interpretation.*] This Act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

SECTION 9. [*Short Title.*] This Act may be cited as the Uniform Foreign Money-Judgments Recognition Act.

SECTION 10. *[Repeal.*] [The following Acts are repealed:

(1)

(2)

(3) .]

SECTION 11. [*Time of Taking Effect.*] This Act shall take effect. . . .

THE SUPERIOR COURT OF THE
STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

SHANGHAI COMMERCIAL BANK LIMITED, a banking corporation organized and existing under the Laws of Hong Kong Special Administrative Region, the People's Republic of China, Petitioner/Respondent, vs. KUNG DA CHANG and "JANE DOE" CHANG, husband and wife, and the marital community comprised thereof, Respondents/Appellants.	)	No. 12-2-21293-7 SEA Appeal No. 70526-1-I

HEARING ON MOTION FOR
SUMMARY JUDGMENT

June 7, 2013

THE HONORABLE LAURA GENE MIDDAUGH
PRESIDING

TRANSCRIBED BY: Marjorie Jackson, CETD
Reed Jackson Watkins
206.624.3005

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[3] June 7, 2013

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THE COURT: I'd prefer to have you come up here. Easier for me to listen to you than if you're far away.

MR. TOLLEFSEN: Good morning.

THE COURT: Good morning.

MR. KEEHNEL: Good morning, Your Honor.

THE COURT: Nice tie.

MR. KEEHNEL: Thank you. It's –

THE COURT: I'm not going to favor his argument just because he has a nice tie.

MR. KEEHNEL: Vincent Van Gogh would take the compliment.

THE COURT: It's very nice.

MR. KEEHNEL: I'm Stellman Keehnel with DLA Piper for the petitioner, the moving party.

MR. TOLLEFSEN: I'm John Tollefsen representing the respondent.

THE COURT: Okay.

MR. TOLLEFSEN: Sorry about my tie. I always go conservative in court.

THE COURT: It's a nice conservative tie.

Okay. So I am not going to pretend that I read every single attachment and exhibit that was provided with your papers. I did skim over them, and if something came up in [4] the brief that I felt I needed to review I went to that particular one, but I am not going to tell you that I read all – what is it? – three, four volumes of stuff that was given to me for this motion. So if there is something that you want to point out to me to look at, you need to do so and tell me where it is in these four binders for this motion.

But I think I have a pretty good understanding of the basic facts of this case, and let me tell you what I think they are and, that way, you can correct me if you think I am wrong.

Hey, Gabby?

THE BAILIFF: Yes.

THE COURT: Do I have another notepad on my desk up there?

THE BAILIFF: Umm . . .

THE COURT: Because this one doesn't have notes on here.

Thank you. Okay. So basically there were loans taken out in Hong Kong, and then there's three lawsuits. There is 806, which is the subject of this lawsuit, where Shanghai Bank sued – is it KD? Is that the abbreviation?

MR. TOLLEFSEN: Correct.

THE COURT: Chang, okay. But not his spouse, is that right?

MR. TOLLEFSEN: Correct.

THE COURT: 805, which was against Grant Chang and Ching [5] Ho Chang and then 1996 where KD and Clark Chang sued Shanghai Bank. And then there's another bank involved, too, but they're not here –

MR. KEEHNEL: Correct.

THE COURT: – dealing with this situation. We're here on the judgment that was entered in 806. And what happened is in 805 in 1996, the parties there were required to file – to file essentially a bond for the potential costs because Hong Kong is, number one, is like the English where it's [sic] loser pays attorneys' fees, and then there's a provision that if someone is out of country, they can be required to post a bond to pursue their claims.

And then in 806 there was no bond or requirement for security for costs. Judgment was entered in 806, and KD Chang did not defend in that action because the argument is he was afraid to go back to Hong Kong to defend because he was subject to a requirement that he would stay in the country, I think – I think he said arrest for failure to pay the costs that were assessed against him.

And so Shanghai Commercial Bank has filed to enforce their out-of-country judgment, and you're saying that's not fair because the judgment is not – should not equitably be enforced in this state, in this country. Is that kind of where we are?

MR. TOLLEFSEN: We have a lot more to add, but that's a [6] good start.

THE COURT: Okay.

MR. KEEHNEL: With two caveats.

THE COURT: Yes.

MR. KEEHNEL: It is true that KD Chang in 806 did not personally appear on the day of trial.

THE COURT: I know, but there were affidavits –

MR. KEEHNEL: Absolutely.

THE COURT: – and that's a lot of what these things are.

MR. KEEHNEL: So all of the material was in front of the court. And as Mr. Chiu stated, who conducted the trial, the court considered those materials.

THE COURT: Yes.

MR. KEEHNEL: The only other caveat, I don't believe there is in the record a statement by KD Chang as to the reason he didn't go back and defend under 806. There is an argument in the brief, but I don't believe Mr. KD Chang came forward to explain why he didn't show up. His lawyers had withdrawn from the case, as you saw in the record, a couple of weeks or maybe it was only a week before the trial. We're not told whether that was his failure to pay his lawyers or his lawyers just – who knows. Miscommunication issue. We don't know why. The respondents don't tell us why the lawyers didn't continue representing him and withdrew shortly before the trial, but they did, and there [7] isn't a word really in declaration testimony as to why he didn't show up for the trial.

THE COURT: Okay. Is there?

MR. TOLLEFSEN: I would have to ask some of the other people that did it. I don't know that off the top of my head.

THE COURT: Find that out for me.

MR. TOLLEFSEN: All right. And we also then, if that's the case –

THE COURT: Okay. That's just a question. I don't remember –

MR. TOLLEFSEN: I don't remember –

THE COURT: I remember reading something about it, but I don't remember whether it was argument or in a declaration, so –

MR. TOLLEFSEN: I don't remember either.

MR. KEEHNEL: Only argued.

THE COURT: And was there another factual issue that you wanted to bring up?

MR. KEEHNEL: I think that's it. On the – you know on the arrest issue, you've got to be careful about the timing. There was no judgment entered prior to the date of the 806 judgment. The 1996 judgment was entered on the same day. Ms. Mak says in her declaration that an action happened one day before entry of judgment in 806, in the 1996 case. What [8] she's referring to is the judge said, okay, KD

Chang hasn't posted his bond; therefore I'm going to dismiss his affirmative claims in that matter.

THE COURT: Yeah, right.

MR. KEEHNEL: But the judgment was not entered, and it's only the judgment that could have been a precursor to a – as Mr. Chiu explains, it's only a judgment that could be a precursor to an order of prohibition. And, therefore, this notion and probably why we don't see it in Mr. KD Chang's declaration that it was an order of prohibition that concerned him, A, there wasn't one entered, and, B, there couldn't have been one entered prior to the date that the 806 judgment was entered because the 806 judgment and the 1996 judgment, as you know from the exhibits in front of you, were entered on the identical day.

THE COURT: Okay.

MR. TOLLEFSEN: I have a lot of –

THE COURT: Factual stuff and then we'll get to argument.

MR. TOLLEFSEN: And, Your Honor, if it is true that we have neglected to put some of these facts into the declaration, just for the sake of equity, since this whole family's future is at stake here, we would ask the court to give us the unusual opportunity to supplement the declaration.

THE COURT: Is Mr. KD Chang here?

[9] MR. TOLLEFSEN: He is here right now. And Mr. Chang is right there.

THE COURT: Okay.

MR. TOLLEFSEN: And as we're – I just would like to introduce our team that worked on this. That's Frank Homsher. He's the one that spent all the time trying to understand the Hong Kong cases. This is Chris Rosfjord. He worked on the constitutional side. And Sean Alexander [sic] worked on the community property. So they're here to – they're the experts on those when we get into those issues. I'm the generalist.

THE COURT: He's going, I'm not the expert on the community property thing. Okay.

MR. TOLLEFSEN: All right, so –

MR. KEEHNEL: Before we get started, how do you want to proceed today?

THE COURT: I just, first I wanted to get the factual issues, if people wanted to point that out to me, the factual issues corrected or anything in particular added to it. And then it's –

MR. KEEHNEL: I would like to go through the facts from our perspective –

THE COURT: Okay.

MR. KEEHNEL: – which is much more than what you've seen.

[10] THE COURT: Okay. It's not just going through the facts from your perspective. It's kind of, if you need to correct anything. During your argument if there is a particular fact you want to point out to me, go ahead. I just want to make sure that I'm kind of understanding the lay of the land here.

MR. KEEHNEL: Okay. You're understanding part of it, and I'll go through the rest of it in my argument.

THE COURT: Okay. So go ahead and argue.

And let me just give you a clue, because I don't think it's fair to play hide-the-ball, even though you have beautiful arguments that are all laid out in this nice form, I'm sure. One of the issues that you need to address is if I do decide that this judgment is enforceable, or that we don't need a trial, why do you get a judgment against the wife when you didn't seek one in Shanghai?

Now, it may be that had you sought one there, the community property would have been – but why do you get a judgment against her?

MR. KEEHNEL: And to be clear, we're not seeking a judgment against the wife's separate property.

THE COURT: I understand that, but you're seeking to involve –

MR. KEEHNEL: Only against – only against the community.

THE COURT: – a party in this case that was not involved [11] in Shanghai.

MR. KEEHNEL: Well, to involve the community, you were right, and I will address that.

THE COURT: Okay.

MR. KEEHNEL: In fact, I will make that the last thing I cover and I'll make sure I cover it thoroughly.

THE COURT: Okay, go ahead.

MR. KEEHNEL: Okay. So as a preliminary matter – I guess not just preliminary, it's important here – we have moved to strike Mr. Homsher's declaration. It consists of – as the King County rules require, we made our motion in our reply brief. King County doesn't permit you to do a separate motion to strike anymore.

THE COURT: Tell that to all the lawyers that appear in front of me.

MR. KEEHNEL: So we have made the motion to strike. Mr. Homsher's declaration basically consists of documents attached which are hearsay. They were offered to prove the truth of the matter asserted and they basically consist of newspaper articles and third-party articles. Here, where he's trying to establish points of law, that doesn't cut it. What our courts say is, you're going to have to put in

the real McCoy. The real McCoy here would consist of an expert declaration on the law.

Now, Ms. Mak does that on certain procedural points, but [12] on the points that are central to Mr. KD Chang's defense today; i.e. that somehow the Hong Kong legal system is suspect, Ms. Mak doesn't say that, she didn't opine on that. And our courts have said, uniformly, if you're going to opine on an issue of foreign law, you have to have an expert on the foreign law. Mr. Homsher is a Washington admitted lawyer with no training in Hong Kong law. He's not an expert on foreign law. His declaration has to be stricken for that second reason.

And the third reason, more generically, everything he says there is not just hearsay, but it's clearly not on personal knowledge. And he doesn't know anything about the Hong Kong legal system on personal knowledge. Everything he says in there is what he has read in other books. And under the very clear case law in Washington, it's mandated that his declaration be stricken. All right. So –

THE COURT: Do you want to address that issue?

MR. TOLLEFSEN: Yes, Mr. Homsher will address that.

MR. KEEHNEL: So we're going to have – I guess we're going to have multiple argument s here.

THE COURT: That's all right. That happens.

MR. KEEHNEL: Oh, well.

MR. HOMSHER: Please present this to the court. There you go.

Your Honor, this is a spreadsheet of all the exhibits I [13] have mentioned in my declaration. I have a justification on the right for each. And you can see for the mag – for the newspaper articles, magazine articles, there's a rule that's 803(A)(20) reputations concerning boundaries or general history, these articles talk about the general history of what's happening in Hong Kong. With regard to the net worth of the banks, that's for SCB, an admission by a party opponent; for BEA, it's the commercial – public commercial representation hearsay exception.

I have several ones that I mentioned as learned treatises. Those would, at this time, maybe not be considered fully but they would be presented at trial as evidence and backed by an expert. And if there's anything I missed – I think that's mostly everything.

I do think to be added as well, is that these would be presented at trial and foundation be provided if any expert testimony is needed.

THE COURT: Well, we're not at trial. We're at a motion. If you want to have an expert, you have to have it here. If you need to have an expert you can't just say, oh, I'll get it later.

MR. HOMSHER: Yes, Your Honor.

THE COURT: This is your chance, so –

MR. HOMSHER: And then, finally, yes, I did – I did provide Hong Kong statutes from the court website, the Hong [14] Kong court websites, and some rules of professional ethics from the lawyers' website, the Hong Kong Bar Association website. Those I present speak for themselves.

Now, you can cut out all my argument if you think that's what's in there, but the exhibits should stand under these exceptions. Thank you, Your Honor.

THE COURT: Thank you. I did consider and I will consider some of what he provided. And that was basically the factual arguments, the factual issues that were presented, the hourly rates of barristers and, you know, those kinds of matters. I am considering that. I just am.

MR. KEEHNEL: Well, let me just – let me just take exception.

THE COURT: Okay.

MR. KEEHNEL: Just so I –

THE COURT: Well, you don't need to take exception anymore.

MR. KEEHNEL: I know you don't, but since I've never had a chance to respond to Mr. Homsher's argument here, I will note that is the kind of information that our courts specifically require, particularly, for example, on a fee application here. People don't just willy-nilly talk about, you know, what rates are. You wouldn't have a Seattle lawyer

coming in here and saying, these are the rates of Chicago lawyers, if it was a Chicago-related matter. It's [15] got to be a person who practices in the jurisdiction.

What he pulled was some third-party websites that talk about rates in Hong Kong. I mean, respectfully, Your Honor, you know, lawyers aren't cheap anywhere.

THE COURT: No, they aren't.

MR. KEEHNEL: But the notion that Mr. Homsher, by attaching something he found on the web, can establish what rates are in Hong Kong is violative of evidentiary rules.

THE COURT: I'm going to consider it. I'm going to –

MR. KEEHNEL: I understand.

THE COURT: And let me give you a clue about where we're going here. And you can step back because only one person gets to argue at a time. Whoever is going to be arguing the substance of this motion needs to be up here. And this is to give you a clue where you need to address your arguments, too, is, I am not convinced that because they don't allow contingency fees, because their hourly rates are high, and because they have a loser-pay system, that that means that their judgments are not entitled to be enforced in this state, in this country. England has had the barristers and whatever else you call them –

MR. KEEHNEL: Solicitors.

THE COURT: Solicitors for years. I don't think anybody has argued that we're not going to enforce English judgments in this country because of that. They have had the [16] loser-pay system, which – forever. And there are some people who argue we should adopt that in our country, too. And I don't think anybody is arguing that we should not allow England, Great Britain to come here and enforce their judgments because of that.

And the fact that rates are high, assuming that they are, which I will accept that they are, means nothing to me. I have no idea what that means in the standard of living there, so maybe they get paid a thousand dollars an hour. I think that was the highest that was quoted. I don't know what that means. It's just like saying the hourly rate here is $250. If the standard of living is – to someone in a poor country, that would be absolutely outrageous, but we would not say that it's outrageous in our country. So it didn't really provide me with information that I thought was really relevant.

And so that's an issue you're going to have to address. If you think we should not enforce Hong Kong judgments because they operate under the same system that Great Britain does, you've got a really big hurdle to make to me.

MR. TOLLEFSEN: All right.

THE COURT: And then the articles – and quite frankly, the articles about, we think this system is bad and we think that the Chinese government is going to do this, I did not consider because that is just pure speculation and pure [17] opinion. And had there been some evidence that the Chinese government was interfering with Hong Kong, I would have considered that, but not just the articles about: We can't trust China, so therefore you can't trust Hong Kong. So those I will not, I'm not considering because I think it's just pure opinion, from whoever wrote them.

MR. KEEHNEL: With that signal, I'm going to be pretty brief on the arguments regarding, let's just call it the due process issues. And then I'm going to try to jump and spend a little bit of time on whether the judgment can properly be enforced against both KD Chang's separate property and the community.

All right. So, again, this is going to be brief. Obviously, Your Honor you have done your homework and I always appreciate that. It helps me a lot. So Washington is a signator to the – an adopter of the Uniform Act, so the legislature says, and I quote from 60.40A.900, "Consideration must be given to the need to perform" – "promote uniformity." Every state that's a signator to the Uniform Act that's considered a Hong Kong judgment has said, yes, under U.S. due process standards it's enforceable.

We gave you the California case. We gave you the South Dakota case. There are federal cases, too. Obviously, the federal courts aren't bound by the Uniform Act. More importantly, no Uniform Act state has ever said a Hong Kong [18] judgment is not enforceable in the United States. And, indeed, when you think about it, there aren't that many appellate opinions. Why aren't there? Because Hong Kong judgments are enforced across the country with great uniformity, and it's only in the instance where an underlying court has questioned that the bank or whoever is enforcing the judgment has to go up on appeal.

And in every instance the appellate courts have said, yes, it's enforceable. But we just know, as a matter of common sense, there are thousands of Hong Kong judgments enforced across the United States with great regularity and –

THE COURT: Do we know there are thousands of judgments? I don't think we know that.

MR. KEEHNEL: Well, we – I happen to know that because I practice in an international law firm.

THE COURT: But I don't know because –

MR. KEEHNEL: For reported opinions –

THE COURT: – I don't think I have that in front of me.

MR. KEEHNEL: You don't have that as a fact in front of you. What you have in front of you is every reported opinion goes our way, but more important, no reported opinion or unreported opinion is contrary. There has never been an instance we know of in the United States of a Hong Kong judgment not being enforced.

[19] So as I said, we have got not only the California case, the South Dakota Supreme Court case, you have got a case out the Southern District of New York, Dragon Capital, that does the same thing. And for good reason, just as you observed. Hong Kong is derivative of the British system. It is the British system, indeed.

As a matter of fact, as Mr. Chiu explained to you in his declaration, on its highest court sit justices from Australia and Great Britain. It's an integrated system with the British system. Justices sit on each other's courts, particularly at the highest court level, as Mr. Chiu has testified. It's just a fact of how the judicial system works in Hong Kong.

So what do respondents offer to try to undermine this? They do provide a declaration of Ms. Mak. But what Ms. Mak does not do – and she would have been the logical person to do it – is to say our Hong Kong – because she practices in Hong Kong, just as Mr. Chiu does, she would have been the logical – and she defended KD Chang in the litigation up until about a week before trial. She would have been the local person to come forward and say, our system stinks,

we do not afford our people due process, do not enforce a Hong Kong judgment in the United States. She doesn't say that.

The only person who tries to say that is Mr. Homsher. And as you have just ruled, he's not a qualified expert to [20] talk about that. So what you have in front of you is the undisputed testimony of Mr. Chiu, a practicing lawyer in Hong Kong, highly qualified, litigated these cases in Hong Kong, and he explains the due process that is provided, and it is consistent with United States due process.

Now, on the security for costs issue, which is really the thrust of Respondents' defense here, let us not forget one fact: There was no security for costs in 806. Mr. KD Chang was completely free, without paying a penny into the court registry, to come in and defend, with or without a lawyer, 806, with no risk of a prohibition order, with no risk of arrest. He, because there was no judgment prior to the day a judgment was entered in 806, in any case against him in Hong Kong. And he opted for some reason, never explained in his declaration, just not to show up for trial. But as Mr. Chiu says, it doesn't really matter that he didn't show up for trial because the judge went through all of the material that was submitted. And I know you didn't have a chance to read everything, but trust me, voluminous declarations were submitted by both KD Chang and his father, explaining their side of the story. And the judge didn't buy it. The judge ruled in favor of my client, Shanghai Commercial Bank.

But even if there had been a security for costs order in 806, I think it's really outlandish to say that it would be [21] a deprivation of due process because we have exactly the same system in our state. And, indeed, recently our Supreme Court upheld a $125,000 requirement for a foreign defendant – strike that – for a foreign prosecutor of claims, plaintiff's side, you get the security of costs imposed if you're the plaintiff. It was a situation in which the contract had fee shifting, so it basically had adopted by contract the English rule, and what our court said was: $125,000, that's okay, pay it.

And in that instance, the foreign party who wanted to prosecute his claim declined to pay it, and what did the Court do? Dismissed the claims. The Court did exactly what the Hong Kong court did in 805 and 1996, letting us again not forget, 806 had no security for costs order at all. And the case number I'm referring to is the one we briefed, it's White Coral, and all that Respondents have to say about it is, well, Washington adopted that statute a long time ago.

Yes, we did adopt the statute a long time ago. And within the last ten years our state supreme court has said – in fact it's even more recent than that. It was 2008 that our supreme court upheld a $125,000 cost order that, because the plaintiff decided not to pony it up, the plaintiff, foreign plaintiff, had his claims dismissed.

So the effect of this is: We won in Hong Kong, they lost. It has res judicata effect. I will remind you

that [22] Judge Inveen, before you took over this case, Your Honor, entered her December 14 order on the res judicata point. I know you can go look it up yourself, but you're going to want to rule from the bench. I can already tell your style. And so let me just remind you what Judge Inveen said at paragraph 2 of her December 14 order. And I quote:

"Because the conclusiveness of Petitioner's Hong Kong judgment upon recognition under the Uniform Act may bar the re-litigation of those counterclaims under the doctrine of res judicata, the court hereby stays all further pleading, discovery and other proceedings whatsoever on said counterclaims pending determination of whether Respondents can meet their burden of establishing – Respondents can meet their burden of establishing that one of the grounds for nonrecognition of Petitioner's Hong Kong judgment under the Uniform Act applies here."

In short, on the counterclaims, it's a subsidiary point. I don't think it's disputed. On the subsidiary point of the res judicata effect, assuming the judgment is enforced, then there is res judicata as to the counterclaims, which were asserted in 806 in Hong Kong and dismissed as part of the judgment. The last line of the judgment says, "Mr. KD Chang's counterclaims are dismissed." That's Exhibit A to Mr. Chiu's declaration.

The only quibble with that, if there's a quibble at all, [23] is Ms. Mak says in her declaration, well, I'm not sure I recall it really that the court – the Hong

Kong court resolved the counterclaims on the merits. You know, I might characterize it not quite as a default judgment because, yeah, I understand that the materials were in front of the court, but KD Chang did not testify personally.

It wouldn't matter if it had been a default judgment under which the counterclaims were dismissed because, as this court is aware, our supreme court for, you know, forever – earliest cases reporting on this are back in 1924, it's not a disputed proposition anymore – a default judgment similarly has res judicata effect. For example, in Dolby vs. Fisher, 1 Wn.2d 181, I'm going to just put this in the record. Here's what the supreme court held:

"We can agree with Appellant that the general rule is that the plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment but to every point which properly belonged to the subject of the litigation. And this, regardless of whether the defendant appears in defense or allows the judgment to go by default."

So if there was a dispute – attempt to raise a dispute about res judicata effect, that takes care of it.

All right. So the more important issue I think that you [24] really want to hear about is: Why should we get to go after the community property?

Respondents make two points. They say you didn't sue the community in Hong Kong. Your Honor, you're correct. We couldn't have sued the community in Hong Kong because Hong Kong does not recognize community property.

THE COURT: Well, I guess my question is, assuming that I grant your motion and that you can enforce this judgment here, is it at this point proper for me to say that you can enforce against community property, or don't you, when you start attaching property, if the other side wants to object, that you raise that issue – you deal with that issue at the time of objection because the judgment is only against Mr. Chang?

MR. KEEHNEL: I think not, but I want to give credit to Respondents, because they do raise two separate points. And I've only addressed the first one so far. And so they say, do you – they raise the question, do you have to sue the community to get a judgment against the community? A, you can't sue the community in Hong Kong. Mr. Chiu says that in his declaration, but more importantly, the rule in Washington is – and this is on the last page of our reply brief, and I quote from the Manche case. It's a 1922 case so this law has been in effect in Washington for a long time. This is a Washington Supreme Court case, 1922:

[25] "A judgment rendered upon a community obligation in an action to which the wife is not a party is enforceable against the community property, so the

question is – the first question you had is, do you have to name the wife?

THE COURT: I guess my problem with this is that if you want to register your foreign judgment and enforce it here as if it was entered in Washington, your foreign judgment says nothing about Mrs. Chang.

MR. KEEHNEL: It does not.

THE COURT: So what you want me to do, basically, is to modify your foreign judgment. Now, if you were here on – because you want me to change what was entered in there –

MR. KEEHNEL: I do not want you to modify the judgment.

THE COURT: So what is it – and maybe I'm a little confused –

MR. KEEHNEL: So here's your bigger point.

THE COURT: – about what you want me to do.

MR. KEEHNEL: So we're past the notice point because Manche says you don't have to give notice to the community. You sue one of the spouses, you can still attach the community property. So let's put the notice issue aside, which is one of the points Respondents raise. You're on their second point. Their second point is just what you just said, it's in their minds and probably yours too at this point. It's the

practical question: How can I [26] transform what appears to be a separate property judgment into what you're asking for, community?

THE COURT: No, I'm not saying that it's a separate property judgment. I think it's silent, if I recall correctly, as to whether it is a community or a separate property judgment.

MR. KEEHNEL: Well –

THE COURT: So I guess the question would be, isn't that an issue that you address when you're trying to enforce your judgment?

MR. KEEHNEL: Well, we're enforcing the judgment –

THE COURT: No, collect on your judgment.

MR. KEEHNEL: No. No. Today is the day to decide that, and let me explain why. If you look at Exhibit A to Mr. Chiu's declaration, the judgment, you're only going to see Mr. KD Chang's name, right? So we know that the judgment in Hong Kong was only entered against KD Chang. That's a given. I accept that.

We also know from Mr. Chiu's supplemental declaration that Hong Kong does not recognize community property. There is no way we could have named the wife in Hong Kong as a defendant because she's not a signator on the loan documents. Mr. KD Chang is the signator on the loan documents.

Here's why today you should enforce the judgment against [27] the community: Because the rule in Washington is where there is a separate debt obligation which is the source of the judgment, you look to the law of the jurisdiction for enforceability to where the debt is incurred. Right? That's what the cases say.

THE COURT: Go ahead.

MR. KEEHNEL: That's what the cases say.

THE COURT: Let me say this. Do you all know that I was a family lawyer before I came on the bench? I was.

MR. KEEHNEL: Good.

THE COURT: Over fifteen years of practicing family law.

MR. KEEHNEL: This is going to be fun then because you're going to make sure I'm doing it right, and I am. So I'm referring to Plaintiffs' case, which they cite in their brief, Pacific Gamble. Here's the test for whose law applies to whether it gets enforced against the community, whose law.

THE COURT: Okay.

MR. KEEHNEL: Now, we're just talking about: Are we looking at Washington law or are we looking at Hong Kong law? What the supreme court says is if there is – this is at page –

THE COURT: Okay. I'm not making myself clear. I think that a judgment against one spouse is

enforceable against the community property absent certain circumstances. You [28] know, that it was for a separate tort, those kinds of things. So I do believe that it's enforceable against community property.

MR. KEEHNEL: Then the question is: Why now?

THE COURT: That's right. The question is: Isn't this an issue of, if you're given your judgment, when you try to enforce it, when you attach some property and then they come forward and they say, wait a minute, this is not community property, this is her separate property or whatever, don't you have to litigate it at that point?

MR. KEEHNEL: I don't think so because we would be back in front of the court 500 times. We are adamantly acknowledging that we can't go after her separate property. We know that because we intend to abide by Washington's rule, which is, if you're enforcing a foreign obligation in the state of Washington, you look at what the law of that foreign jurisdiction is.

Mr. Chiu has told you in his declaration, Your Honor, that we are not entitled to enforce the debt against the separate property of Mr. KD Chang's wife. All right. We're not going to try to pull a fast one over anybody. That's Hong Kong law. We're bound by Hong Kong law. We cannot enforce the judgment against the separate property of Mr. KD Chang's wife.

So rather than come back to this court 100 times, all we [29] need to do is look at the case that governs here, which is the Pacific States case, and you will see why now is the appropriate time to enter the judgment against the community because, that case, the Pacific States case, is four-square here. Here's what happened in Pacific States.

THE COURT: Hold on just a second.

MR. KEEHNEL: Go ahead.

THE COURT: Did you give me a proposed order?

MR. KEEHNEL: Yes, I did.

THE COURT: I can't find it.

MR. KEEHNEL: I will hand up my copy of it.

THE COURT: Okay.

MR. KEEHNEL: Because I'm sure my staff, who I didn't introduce, I should. Katherine Heaton, my right hand, and Stephen Hsieh, my left hand.

THE COURT: Okay. So you need to wrap up your argument.

MR. KEEHNEL: I will. Your Honor, here's what the Washington Supreme Court said in the Pacific States case. Washington Supreme Court said, okay, we have in front of us a fellow in Oregon – strike that. We have in front of us a Washington

resident who, as a separate obligation, incurred a debt which is governed by Oregon law, because the commercial property was in Oregon. It was for purchases of commercial personal property. The Court said, okay, here we are in Washington dealing with a Washington resident, we're [30] at the point of judgment. We have got a guy who has convinced us he entered into this as a separate property obligation, but since Oregon law governs here, just as here Hong Kong law governs, we have to see what would happen in Oregon.

And so the Court said, what is the rule in Oregon? And it looked at Oregon law, and what Oregon says is, just as Hong Kong says, the only way – the only thing you can't enforce against is the spouse's separate property. There is no bar against enforcing against community property, so what the Washington court said was, okay, it doesn't matter that he's a Washington resident and that we're a Washington court, we're governed here by Oregon law.

And under Oregon law, even though it's a separate obligation, we're not going to wait for the time that we're going to enforce it, we're going to deal with it while we're entering the judgment here. That's when it dealt with it. And we're going to say, under Oregon law the community is subject to the separate obligations of the husband. Why? Because community property doesn't even exist in Oregon. And in the absence of the jurisdiction acknowledging the existence of community property, the only thing that's

exempt from execution on a judgment is the wife's separate property.

That case is our case. Hong Kong doesn't have community [31] property. Hong Kong, just as Oregon, won't let a separate obligation of the husband be enforced against the separate property of the wife. And what our Washington Supreme Court said in Pacific States is, under those circumstances at the time of the entry of the judgment in Washington, you enter it against both the husband's separate property and against the community property. I do not stretch the effect of Pacific States –

THE COURT: Okay.

MR. KEEHNEL: – an iota –

THE COURT: Wrap it up.

MR. KEEHNEL: – both on timing and substance, we're entitled to judgment against the community. And I'll turn it over to Mr. Tollefsen.

MR. TOLLEFSEN: Your Honor, before I get into the details of the facts, which are very important in this case, I want to just give you an overview and I'm going to come back and argue this, the four elements of the Recognition of Foreign Judgments Statute that we're raising as defenses.

The first one is RCW 6.40A.030(2)(a), which says that you can't recognize it if it's a violation of due process. And I will connect that up with the facts.

Secondly, under 3, there's three elements. And it says "the state need not recognize," but later in this argument I will explain why that statute is wrong. Those are not [32] discretionary. Those are constitutional principles. And the three principles are, if it's repugnant to the public policy of this state or the United States.

The second one is the judgment was rendered in circumstances, that's the total of the circumstances, not the case, that raise substantial doubt about the integrity of the rendering court with respect to the judgment.

And, 3, the specific proceedings of the foreign court leading to the judgment were not compatible with due process of law. Now, the statute makes that – says that that's "need not" but it's mandatory, as we'll explain later.

The outcome of this hearing is critically important to KD Chang and his family. KD is 62 years old and retired. If the $9 million judgment is recognized, KD will lose all of his assets. He can only pay a part of the judgment so the balance, bearing interest at 12 percent, will follow him for 20 years.

MR. KEEHNEL: Now, shouldn't we stay within the record?

MR. TOLLEFSEN: This would be an outrageously unjust –

MR. KEEHNEL: None of this is in the record. Should we stay within the record?

THE COURT: Yes.

MR. KEEHNEL: This isn't in the record.

MR. TOLLEFSEN: I'm arguing. He argued –

THE COURT: No, no –

[33] MR. KEEHNEL: – the Hong Kong – I didn't object when he argued that all the Hong Kong cases in the whole country have been accepted.

THE COURT: I objected, and I said that I didn't know that was true. And that was an argument of law. Facts, you have to argue from the facts in the record.

MR. TOLLEFSEN: What is not? He's 62 years –

THE COURT: And you certainly have provided me with a lot of them.

MR. TOLLEFSEN: All I said is he's 62 year old.

THE COURT: No, and you said that he'd lose all his assets and – I don't care –

MR. TOLLEFSEN: The facts are in there that he didn't have the money to pay. That's in the Hong Kong declarations.

MR. KEEHNEL: Actually not. What's in the declarations is that the Hong Kong court asked KD Chang to come forward with proof of what his

assets were, and KD said to the court, basically: None of your business, I'm not going to tell you.

THE COURT: That was my recollection –

MR. KEEHNEL: I'm not going to tell you what I've got.

THE COURT: – that he did not disclose his assets. Did he?

MR. KEEHNEL: Correct, he did not.

[34] MR. TOLLEFSEN: Well, we also have the order that you have asked us, we have already disclosed to opposing counsel, so –

THE COURT: What?

MR. TOLLEFSEN: And it's not in front of you, but there was an order for discovery in this case on the assets.

THE COURT: Well, I know, but did he disclose?

MR. TOLLEFSEN: All right. I won't argue the assets, but it stands to reason that most people aren't going to be able to pay this, and I can make that argument.

All right. So let me go into the facts. KD's father, Clark Chang, sold his business in Taiwan in 1996. He was 79 years old at the time. He's 96 now. The money was to be available for his retirement, and the

balance remaining after his death was to be distributed as inheritance by KD to his family members.

The account was put in KD's name so that there would be no need for probate. KD was acting as trustee until his father died. KD is a resident of Washington state. A broker at Shanghai Commercial Bank, Daniel Chan, saw an opportunity to make huge commissions from Clark's money. Clark deposited 22 million into the bank, Shanghai Commercial Bank –

THE COURT: Okay. Let me say this. I'm not – I appreciate the fact that what you're representing on behalf [35] of your client is that these – Shanghai Bank and I forget the name of the other bank, and –

MR. KEEHNEL: Bank of East Asia.

THE COURT: And –

MR. KEEHNEL: BEA, Bank of East Asia.

THE COURT: Yeah, and I didn't write down the name of that person, but that they – they're bad, they took advantage of Mr. Chang and it's – you know, he should have won in Hong Kong. He should have won on his suit, his 1996 suit, whatever that number was. He should have won on the 1996 suit. He should have won on his counterclaims, and basically that's what you're telling me, is he should have won, but he couldn't win because they made him post bonds and so he wasn't able to go forward with prosecuting his claim; is that right?

MR. TOLLEFSEN: Yeah, but I'm also going to point – I can point out that it's pretty obvious when you know what an accumulator is and you know what the kind of investments the bank put him in, this stuff is obvious to the court. This is not something that's rocket science that a Hong Kong bank – judge wouldn't know. These investments make no sense. The accumulator is known "I kill you later" contract. That's what it's known in the industry. You can look that up in Wikipedia.

THE COURT: I can't look anything up in Wikipedia.

[36] MR. TOLLEFSEN: Sure you can. You can take judicial notice.

THE COURT: Of Wikipedia?

MR. TOLLEFSEN: Well, okay, don't. But anyway, that's – these are the kinds of things that I want the court to understand. This was a case on the facts that anybody that understands money will know that when a family loses $31 million in this transaction with a 96-year-old father and the son is in Washington and he's being asked to sign documents, this was obvious to a court that was trying to be fair that this needed to go to trial, the evidence needed to come in, the audiotapes of Daniel Chan making these recommendations needed to come in, and the court needed to look at the evidence.

The only defense he's going to have on a loan – and I'm going to get into why there was a loan – the

only defense he's going to have is these counterclaims, because there was a loan made and money advanced and it wasn't paid, so the only chance he has to protect the family's wealth and the money and get it back is with the counterclaims.

But if I can just go ahead and make the record, Your Honor, I hear what you're saying but I do have a duty to the client to make this record.

THE COURT: Well, sure. I mean, your record is in your papers, that – you know, so that's why I'm saying certainly [37] you can point out the facts that you want me to consider, but – and let me just say that if they're not in here I can't consider them.

MR. TOLLEFSEN: This is all in there.

THE COURT: Okay.

MR. TOLLEFSEN: It's not put in exactly these words, I'm not reading from the brief.

THE COURT: Sure, no, that's fine.

MR. TOLLEFSEN: I'm making argument to you.

THE COURT: Okay.

MR. TOLLEFSEN: All right. Well, what I was going to point out is all of – how outrageous these investments were, and that there was no – Daniel Chan didn't explain any of the risks. In fact, he represented these investments as a discounted way to

buy stock, which they're not. So if that fact was true, then the case – – or KD can make out his case.

Now, in March of 2008, Mr. Chan had gone over to BEA and most of the losses were at BEA. He comes back to BEA and he has –

THE COURT: BEA is the Bank of East Asia.

MR. TOLLEFSEN: Right.

THE COURT: They're not a party to this claim.

MR. TOLLEFSEN: They're not a party to this one. They were party to the 1996 case. Most of the losses occurred [38] there. Mr. Chan returns to Shanghai Bank as an officer, and he's going to bring Clark's account back.

Now, what they had been doing to cover up the losses, and that's in the record, is issuing statements at cost, not market value. So it looks in his statement that they still have the 22 million, but the reality is there's no market value there or there's very little. So what Daniel Chan has to do to bring the accounts back to Shanghai is he has to come up with $16 million to pay BEA to move the accounts.

Now, how is he going to do that? He comes up with this loan facility plan. And what he does is he talks the father into saying, well, you need to sign this loan facility. He could have liquidated the account at the time, but then everybody would know the

money was gone. If he had liquidated BEA at the time, it would have been zero, there would have been no judgment, all the money – but then he would have to explain to the family he's lost 22 million.

So he had it approved by the father and, of course, the son had to sign it. The son signed it because his father asked him. When you look at the loan document, it's not risky. It says that you're going to loan up to 75 percent of the assets, so on its face value, the loan of Shanghai Bank would be fully secured, we would always be covered by 25 percent additional cushion of assets. But what Daniel Chan arranged is for the money to be loaned when there were [39] no assets, and he got the money advanced and got the accounts out of BEA to cover this up, so instead of having a loan that's covered that has only 75 percent of asset value, it's totally unsecured.

Eventually Shanghai Bank wants to get paid and they bring the action, 806. The sister's action, 805, was another one of these loans where Daniel Chan had to cover up a margin call.

THE COURT: Wasn't 805 against Grant Chang and –

MR. TOLLEFSEN: Against – that's his sister.

THE COURT: Right.

MR. TOLLEFSEN: And that was another one of these loans that the bank – that Daniel Chan had them get into to cover up a margin call that they

didn't know about. And so until there was this lawsuit in Hong Kong, the family didn't know that they had been cheated out of their entire inheritance. Well, I can't say entire inheritance, that's not in the declaration – of a lot of money.

THE COURT: A lot of money would work. Go ahead.

MR. TOLLEFSEN: All right. So now they start investigating, start looking at the records. And SCB files the 806 to collect on the loan. KD counterclaimed for the fraud in the 806 case. The solicitors and barristers in Hong Kong also filed a separate case, 1996. Procedurally we don't know exactly why it was done, but BEA was named in [40] that one. Whether they couldn't do it in the counterclaim in the 806, I don't know. The – and you had the same fraud counterclaims in 805.

The judge notes in the records that you have there that the parties treated all three cases as consolidated in their arguments in Hong Kong.

THE COURT: Wasn't there a request to consolidate them? But I didn't see any order that they were consolidated.

MR. KEEHNEL: Right, there was no consolidation –

MR. TOLLEFSEN: There was no official consolidation. The judge just says the parties are treating them as consolidated.

MR. KEEHNEL: And I don't know where that is in the record. I don't believe it's in the record.

MR. TOLLEFSEN: It is in the record.

THE COURT: Where?

MR. TOLLEFSEN: We'll get it for you. Will somebody find that for her?

THE COURT: Where the judge says –

MR. HOMSHER: I don't think that's in the record.

MR. KEEHNEL: Right, it's not –

MR. TOLLEFSEN: It's in the memorandum of the summary of the case.

MR. HOMSHER: Are you talking about the security order?

MR. TOLLEFSEN: No, when you have the case summaries of [41] the court – I can find it. If you guys think of it, look for it.

Okay. There is a lot of record to know here, Your Honor.

THE COURT: I noted that. If you think it's hard for you to remember where things are, imagine how it is for me just reading it.

MR. TOLLEFSEN: Yeah, and I have been working on it for 30 days, so there you go.

Now, by the time motion for costs were filed, KD and his family had spent around 600,000 in legal fees. Defending the motion for costs alone cost them another 100,000. I want to put this in the record even though I know you're not moved by the enormous legal expense, but we haven't even got to trial.

Now, his barrister, KD's barrister requests that the court allow him to post a bond, but the court refuses. The court orders cash in 14 days. And we argue that the court showed some kind of bias toward the local banks. The statute here punishes the foreign plaintiff. And one telling comment from the court was its interest in protecting the reputation of the banks. The court had before it two banks with billions of dollars in net worth fighting a family that had lost 31 million of the family's money.

The court did not balance the equities. They didn't [42] balance the need of justice for the Chang family against the interests of the bank. In fact, the court does not even mention the Chang family when it made the decision. It only mentions the bank's needs.

When KD and his family with [sic] were hit with the cost of award of 1,220,000 payable in cash in 14 days, he had a choice to make. He had borrowed money to pay legal fees and had around 60,000 left for his support and future legal fees. He could not pay the cost bill. His legal fees had reached by this point 700,000.

MR. KEEHNEL: Your Honor, just – I don't mind Mr. Tollefsen making an emotional appeal, but none of these facts, supposed facts, are in the record. They just are not in the record.

MR. TOLLEFSEN: 60,000 isn't in the record? Or that was the information we did in the subpoena. That was the information he got this week, I'm sorry. All right, so I'll strike that.

All right. So you look at his options. He could appeal, but he would have to pay the cost of judgment of 122,000 or obtain a supersedeas bond if he appealed. There would be security for costs for the appeal and his legal fees would easily cost $100,000 in Hong Kong. So he would need probably 1-point-million [sic] dollars in cash to appeal the order for costs. And that wasn't possible. If he can't pay [43] the costs in 14 days, he can't pay the appeal.

MR. KEEHNEL: Sorry, not part of the record.

MR. TOLLEFSEN: All right. I'm going to ask to supplement, because if this isn't part of the record, this is critical for the court to understand that there's no way that they can pay these kinds of money. All the family funds or most of the family funds have been taken by this fraud.

MR. KEEHNEL: I wouldn't object so much other than the fact that the Hong Kong court actually adjudicated this by asking KD Chang to come forward

with proof of what his assets were or weren't, and he declined to do so.

MR. TOLLEFSEN: He dropped out because of these concerns, which I am trying to explain to you.

THE COURT: Okay.

MR. KEEHNEL: But it's not part of the record, John, that's my only point.

THE COURT: All right. And here is my concern, is that if he was asked to provide a list of, you know, his assets at the Hong Kong court and did not do so, then why should I be allowed to consider that now when he had the option to present it to the court?

MR. TOLLEFSEN: You're going to have to look at the totality of the facts and see whether this comes out as fair.

[44] THE COURT: Okay.

MR. TOLLEFSEN: Just let me finish this argument and see what you think.

THE COURT: Okay.

MR. TOLLEFSEN: All right. Well, you have got this enormous cost for appeal, because you have to post the costs to make the appeal. And since he could not appeal, since he could not appeal – I'm just looking at what his options are, I'm arguing what his options are.

THE COURT: Okay.

MR. TOLLEFSEN: If he can't appeal, then what's going to happen? 1996, his claims are going to be dismissed and the court is going to win – I mean, the bank is going to win a judgment on 1996, which they did, they got a $9 million judgment on 1996, same 9 million they have got in the other case. They did not elect to docket that judgment hoping that they – we couldn't raise the security for costs issue. But they would have gotten the default judgment, so if he then tried to continue with the 806 case, they would have a default judgment against him in 1996 because all his defenses are stricken.

They would argue, like they did today, that that's res judicata, that it covers all the defenses he could have raised including the defenses he's trying to raise in 806, so now his 806 case is gone. So if he cannot pay those [45] security for costs – and, Your Honor, if that's not in the record we'll have to ask you to let us get something in the record on his ability to pay, because that's what this is about. It is in the record that he asked for a bond and the court did not issue that, did not allow that. He would lose the 806 case with all these res judicata actions.

In addition he could be arrested in Hong Kong for not paying the judgment and may have – be prohibited from leaving Hong Kong. He also could not collect against BEA because 1996 is the only case that had BEA, which is the party that may have had the most culpability since most of the fraud occurred at

BEA. And so he made a decision to not go back to Hong Kong.

MR. KEEHNEL: Well, hold on a second. That is explicitly not in the record. We have not one word from Mr. KD Chang about why he didn't appear to defend the 806 case.

MR. TOLLEFSEN: Well, he didn't go back. That's a fact.

MR. KEEHNEL: It remains a mystery.

THE COURT: We know he didn't go back.

MR. TOLLEFSEN: He didn't go back. And so the result is that we've got a $31 million loss to the family. And the question is: Did he get due process? From a constitutional standpoint, is this due process under Washington and U.S. theories?

Now, we have given you a number of theories on that. I [46] just wanted to mention a couple of things. The Washington statute for securities costs is very different. It says that you can impose security for costs and, to my knowledge, the courts don't routinely do it, but if the person is outside the county, and – but it allows a bond, you can post a bond. The Washington Security For Costs statute has never been constitutionally challenged. The 2008 case mentioned, the court specifically says there was no constitutional challenge raised.

The statute is designed solely for limiting access to the courts. If you're too poor and reside – I'm making

a facial challenge now – in another county, Washington has decided that you may not bring your case. I think this is shocking. The law states that access to the courts is a fundamental constitutional right. Fundamental rights are subject to strict scrutiny. And this statute – this Washington statute would not withstand strict scrutiny.

Why hasn't there been a constitutional challenge? It's obvious. It's very effective. It denies access to the court to the poor. If you cannot pay security for costs, you don't go to court.

It also violates Washington public policy. The official policy of Washington is to promote access to justice. The Washington State Court's Access to Justice Board was established by Washington Supreme Court order in 1994.

[47] Through its justices and partners in standing it works to achieve equal access to the justice system for those facing economic and other significant barriers. Denying access to justice because of the inability to pay costs is a violation of the official policy of the state of Washington.

The Washington Security For Costs statute was enacted in 1854 while Washington was a territory and 35 years before it became a state in 1889. In 1854, woman could not vote, slavery was legal in many states, it was a federal crime to return any runaway slave. There was no 14th amendment, so federal constitutional protections did not apply to the state action. 1854 was a primitive period in legal

history. Due process did not have the same meaning as it has today.

Now, turning to the Foreign Judgment Act, the first one, the first provision we cited was that the court may not recognize if the foreign tribunal does not provide impartial tribunals for procedures compatible with the requirements of due process.

My argument is that if you were in a Washington court and you come in with this evidence and the recordings of Chan and you had this information, a Washington judge would see that there was possible merit in these counterclaims, and I don't think a Washington judge with [sic] consider – with access-to-justice considerations would deny the plaintiff the chance to present this case and this evidence to the [48] witnesses or put barriers, huge barriers in their way to protect banks that don't need the money.

The three discretionary grounds is, "If the judgment is repugnant to the public policy of this state." Well, I think just under these facts with family with this enormous loss and never get a chance to go to trial, that's repugnant.

The judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court. I know it's tough to talk about integrity, but what's the purpose of this statute that protects the Hong Kong resident defendants? It's signaling to the court that what's most important is to protect the local residents. And I think there's

enough evidence in here that the court should be suspicious of the motives.

And then we also then look at whether the specific proceedings under the statute in the foreign court were compatible with the requirements of due process of law. This is not rocket science. We do this all the time in bringing cases to trial and alleging that there was bad investment advice and all that kind of thing. That didn't happen. And I know the court has already said, well, you're not interested in this argument, but I want to make the record – sort of the $300 million –

THE COURT: I'm really not appreciating some of your [49] comments, Counsel, that I'm not interested in your argument, that I don't care –

MR. TOLLEFSEN: Well, this is a new one –

THE COURT: – that I don't care, that I'm not moved by these things. You know, what I have tried to do is to tell you after reading the extensive briefing in this matter what I believe the issues are and the questions are you need to address. And it's – you address the argument that –

MR. TOLLEFSEN: I apologize, Your Honor. That's not what I meant to say.

THE COURT: – you want to address.

MR. TOLLEFSEN: I'm just apologizing. The reason I'm saying this is I'm apologizing because

I'm going to make an argument that you addressed that you didn't think – that you said I'm not going to consider. And that's why I'm apologizing because I would just like to make the record.

THE COURT: Make your record, Counsel.

MR. TOLLEFSEN: The court system in Hong Kong is now controlled by the Communist party in Beijing. It is making every effort to make the courts of Hong Kong appear fair to keep business going. However, there have been several cases where the heavy-handed interference of the Communist party is obvious.

MR. KEEHNEL: I'm just going to say this. I do – I mean, he can make his record if he wants. All of this is [50] based on Mr. Homsher's declaration which the court has already indicated is hearsay and –

THE COURT: It is.

MR. KEEHNEL: – not properly grounded expert opinion.

THE COURT: I'm willing to consider any argument that is supported by the facts and the law as presented to me. The problem that we have is all we have is somebody who said: I have read these articles and this is what it says. That is not giving me the ability to evaluate the argument that you're making, so it's not that I'm not willing to consider an argument. It's that you have to have something to support your argument other than someone coming in

and saying, here's some articles, I read it, trust me, it's true.

MR. TOLLEFSEN: Well, the articles were attached, Your Honor.

THE COURT: I understand that, but I don't know who wrote – you know, everybody can write an article. Anybody can go out and write an article saying – there's lot of articles out there that attack our system of justice, so if somebody brings me an article that says that the way we that we do justice in the United States of America is wrong, I could say, well, there it is, it's in an article so there's factual support for that? So go ahead and make your argument, Counsel –

[51] MR. TOLLEFSEN: Well, with the constraints that we have here –

THE COURT: – but I think –

MR. TOLLEFSEN: – to prove what happened in that case, which is all over the Hong Kong press where the court was put pressure on by Beijing on the Filipino maid case, and the court then, the high court then ended up ruling against basic law so that Beijing wouldn't interfere. I can't prove it any other way but through numerous press reports all over the world and in Hong Kong.

But anyway, let's move on. I guess we can say this, though. We know that with the Communist party, they don't make things public. We will never really know what judges in Hong Kong, what kind of

political pressure they face. They have limited due process in China. It is still legal in China for the police to pick people up on the street, put them in re-education camps for four years.

All right. Let's go to the community property issue. I want to, first of all, object to their reply brief because they brought new arguments up that we had no chance to respond to. The argument that they made is wrong, though, and the only Washington case law on point is an unpublished opinion, so we can't cite that. But we didn't have a chance to respond to that, and so we would like a chance, if the Court is going to get into the community property issue –

[52] THE COURT: What's the new issue they raise?

MR. TOLLEFSEN: They raise the argument that – I forgot what –

MR. HOMSHER: Conflicts of law.

MR. TOLLEFSEN: The conflicts of law, that you have to look at the conflicts of law of the state. And the unpublished decision says, no, you don't, but we can't cite that to you. The Oregon case –

THE COURT: Kind of wonder why they publish them if you can't cite to them, don't you?

MR. TOLLEFSEN: You wonder why. It's unfair. I don't know. Lawyers read them.

MR. HOMSHER: If we had spare time we would – some of us would get on a committee and make some revisions, but that's for another day.

MR. TOLLEFSEN: But anyway, I'm an Oregon lawyer, have been for 39 years, or almost 39 years, and I can tell you the Oregon case where they say what the outcome under Oregon law, the supreme court got it wrong and they don't cite any Oregon statute or anything.

THE COURT: That was the – what was that case?

MR. KEEHNEL: Pacific States, Your Honor.

THE COURT: Pacific States.

MR. KEEHNEL: Pacific States case. So what happens under Oregon law is you look at who owns – you look at the title, [53] who owns the –

THE COURT: I'm going to interrupt you because I don't find the Pacific States case is applicable here, because what happened in Pacific States is – correct me if I'm wrong – is that whatever, whoever – the plaintiff sued the defendant and his wife. And the state – and then the court said, under Oregon law, we're applying Oregon law to whether the wife is liable for this, even though she didn't sign it, right? So the wife was sued. The wife was a named party, isn't that right?

MR. KEEHNEL: Right, but we're past the notice issue.

THE COURT: No, I think that is a substantive issue here, is that the wife was a named party.

MR. KEEHNEL: But remember –

THE COURT: So I guess what I'm saying is you probably don't need to argue that.

MR. TOLLEFSEN: All right, I won't argue that one.

MR. KEEHNEL: But remember what Manche says.

THE COURT: He gets time to finish.

MR. KEEHNEL: Okay, I'll come back, you're right.

THE COURT: And then you can come back to that.

MR. KEEHNEL: I'm sorry, you're absolutely right. You're absolutely right.

THE COURT: But I find it a substantive difference.

MR. TOLLEFSEN: What I believe – I believe the decision [54] was correct in that to understand what the property rights are you have got to look to the property. You have got to look to where the property is located, the law of where the property is located.

And also, in this case, the contract, the loan contract was signed in Washington, but Hong Kong law applies, but I don't think that this changes the community property rights which arise under Washington law.

Let me just conclude with this. Obviously this is an emotional case. And if you deny the motion for summary judgment, we proceed to trial and KD and his family get their day in court. In [sic] you grant the motion for summary judgment, they have lost.

And I would, again, ask that I can supplement the record to show the facts of the family's inability to pay the judgment and the inability to pay costs.

THE COURT: Thank you. So go ahead.

MR. KEEHNEL: I'm going to be brief except I do want to spend a couple of minutes on the community property issue. Obviously the facts as Mr. Tollefsen characterizes them about how Mr. Chan behaved vis-à-vis Mr. – the senior, Mr. Chang, we take serious issue with. Yes, anybody can say something in a statement of facts, but what the truth was about the relationship is something quite other.

As a matter of fact, we were dealing with a very [55] sophisticated investor who got regular reports and – but allegations can be allegations. Let's remind ourselves, there was no bond sought or received in 806. Let's remind ourselves there was no judgment in any case against KD Chang before the judgment in 806, so this whole notion of getting a prohibition

order is completely beside the case, and there was no consolidation of the cases. The sole declaration that's on point here on the procedural issues really is Mr. Chiu who opines. Mr. KD Chang was completely free without paying a penny to come forward and appear at the trial in June 2011 in addition to his written materials in 806. There was no impediment whatsoever. That's the expert testimony from the Hong Kong lawyer. That's what he says. It's unchallenged.

On community property, Your Honor, again, you have got the background in family law so you have – you're looking at it probably through a more complex prism than I am. You know more issues than I do. I think respondents are making two arguments there, as I said in my opening remarks. And I think you came back to the first one, in which you said this is really a substantive issue, that they didn't name the wife, but – and I'll just hand up my copy of Manche, which I read from before.

THE COURT: Just cite it to me.

MR. KEEHNEL: It is 121 Wash. 65. It's where Washington [56] really began its rule that a judgment rendered upon a community obligation in an action to which the wife is not a party is enforceable against the community property.

THE COURT: That's okay, I have it. I have Westlaw. I love this stuff.

MR. KEEHNEL: There you go. So on the notice issue as to whether the wife was in or was not in the case in the actual lawsuit in Pacific States, it is not to put too fine a point on it, under Manche, neither here nor there. It doesn't matter that she's named or not named. Manche establishes that. We're working from that foundation. The only question is –

THE COURT: Was this a community liability?

MR. KEEHNEL: The question is: Under Hong Kong law, is it community liability? And what Mr. Chiu says in his declaration is yes, under Hong Kong law, it's community liability.

THE COURT: No, isn't what he says is, under Hong Kong law, the only thing you can't collect against is separate?

MR. KEEHNEL: Is separate property.

THE COURT: He doesn't say that it's a community liability. He just addresses what you can collect against.

MR. KEEHNEL: Right. Because Hong Kong only recognizes two things: Against the husband, against the wife. That's all it recognizes.

[57] THE COURT: Okay.

MR. KEEHNEL: It's the same as Oregon. And that's why Pacific States is on point. The Washington Supreme Court looks at the law of Oregon. Oregon is exactly like Hong Kong. It only recognizes

two categories of property: Wife's separate property, husband's separate property. The notion of community property just doesn't exist according to the Washington Supreme Court in Oregon. So with the Washington Supreme Court looking at Oregon exactly as we must today look at Hong Kong, because that's the evidence in front of us, it's correct. I think you have to come out the same place that the Washington Supreme Court did in the case where it was governed by Oregon law.

And nobody is disputing here that it's Hong Kong law that applies. Nobody is disputing here what Mr. Chiu says that Hong Kong, like Oregon, only recognizes separate property, the husband's separate property of the wife. So I cannot find the principal basis to depart from what the court did in Pacific States, and that is to say even though the original judgment comes from a jurisdiction which is – doesn't recognize community property, in Washington you have to follow only the restrictions that are in the foreign jurisdiction and that means –

THE COURT: But I'm still –

MR. KEEHNEL: – we'll enforce it.

[58] THE COURT: Was that case just a collect – it wasn't just a collection case, was it?

MR. KEEHNEL: Pacific States? Pacific States?

THE COURT: Yeah, that was –

MR. KEEHNEL: Basically yes.

THE COURT: No, but it was, you owe us this money, and they sued the husband and the wife.

MR. KEEHNEL: Correct.

THE COURT: So they could have argued, we didn't owe this money. I mean, they addressed the substantive issues, not – this was not registering a foreign judgment.

MR. KEEHNEL: Correct.

THE COURT: Okay.

MR. KEEHNEL: But it was at the point of entering a judgment, just as you are today.

THE COURT: Okay, I got – all right. So you need to –

MR. KEEHNEL: I mean, all you have in front of you is –

THE COURT: – wrap it up.

MR. KEEHNEL: Right. All you have in front of you is an obligation that the Hong Kong court has recognized. The question is: How do we recognize it here? And what – I mean, just as Manche says, even though you enter the judgment against the community, the question that you raised is, well, what if we get down the road here and they dispute that something maybe doesn't fall into the community bucket [59] or something?

Well, Manche agrees that we could have future disputes, because they go on to say "though the question of the community character may later have to be determined," but that's for another day. I think what you should do today is enter it against both, and I think that's dictated by Pacific States, frankly, Your Honor.

THE COURT: Okay.

MR. KEEHNEL: Thank you.

THE COURT: All right. I don't find in the record that I have before me that there is – that there is any reason not to enforce this judgment. The fact that Hong Kong has the loser-pays rule, that they have a similar statute, that their's is actually narrower than ours because they address it only to collecting costs from people that are outside, I think, the country, and we look at it outside the county. And that it's been enforced, it hasn't been challenged. You know, that's not grounds to find that their due process laws were – that their due process rights were violated.

And one of the main concerns that I have in this case when I look at this is that Mr. Chang had the opportunity to present these arguments to the Hong Kong court. He could have come in there and said, these are our assets, these are my assets, and it's not fair, you will stifle, because they do consider that when they determine awarding costs.

[60] They do consider it and the judge addressed it and, basically, he said, I didn't get any information from Mr. Chang that I could use other than his thing, it wouldn't be fair, I wouldn't be able to proceed. And he had the opportunity to present that evidence in Hong Kong.

Had they not listened to it, it might be different, but the fact is that he had the opportunity to address that issue there and he chose, for whatever reason, not to even give them the information.

And then to come here and say that awarding the costs was because it meant I couldn't proceed with my case when he did not even give them the necessary facts for the court to determine, that cannot be a basis for finding that that – that the decision of the court violated his due process.

So I'm not taking testimony here because the time for him to take that testimony was in Hong Kong, when he was arguing that it did stifle his ability, and I think that's the word they used, at least in the translations –

MR. KEEHNEL: It is.

THE COURT: – to proceed with his case.

MR. KEEHNEL: Actually, it's not translated. Hong Kong courts operate in English.

THE COURT: Okay. In English, then. So even if I'm looking at the costs in 805 and 1996, I would not find that imposing those costs was a violation

of his due process [61] rights because he chose not to give them the factual basis to make their decision, the very decision you're asking me to make today, which is, I'll give you the factual information but I wouldn't give it to the Hong Kong court.

And that would not be a due process violation. I cannot find and I will not find that the English system of justice is – violated due process. The loser pays. The fact that they have a dual system with barristers – and thank you for getting the other word.

MR. KEEHNEL: Solicitors.

THE COURT: Solicitors. And as I said, I have no idea whether the hourly rates for them are comparable given the cost of living there to what people charge here for, you know, $500 or $600 an hour that I get from some attorneys here. So – and then it also is the fact that there is no evidence that the fact that the costs were ultimately charged against them in 805 and 1996, that that prohibited him from defending in 806 or pursuing his counterclaims.

Now, had he gone there and had it happened, we might have a different factual basis but that's not where we are. He made the decision not to defend 806 and – 806. The court did consider the evidence it had that was provided to it and made its decision. So I'm not finding that there is any reason not to enforce the Shanghai judgment against

Mr. Chang. I do not find that there is a basis to enforce [62] that judgment against his wife.

MR. KEEHNEL: On this motion?

THE COURT: On this motion. And the reason for that is that I think that it is arguable that this judgment is a community debt. Under the facts of this case, just from what I have heard and reading through it, I suppose there's an argument that it was not benefitting the community, it was done as a favor to his father. I don't know all these arguments, but she didn't have the opportunity to make those arguments when this judgment was entered, and she should have the opportunity to do that. You're asking me to make the assumption that this was a community debt, and I can't make that assumption without giving her the opportunity to argue that it wasn't. So I'm not –

MR. KEEHNEL: So where do we do that? Because she couldn't have done it in Hong Kong because you couldn't sue the wife in Hong Kong because community isn't recognized in Hong Kong.

THE COURT: You know, I'm suspecting that you get paid per hour a lot more than I do and you will be able to figure that out.

MR. KEEHNEL: I'm just thinking – I'm thinking aloud. We'll probably be back, but probably after we get – do perhaps a little discovery and have a better record.

THE COURT: And then you may have to sue her separately [63] here.

MR. KEEHNEL: I don't –

THE COURT: I don't know, either, but I'm not telling you. All I'm saying is that you asked to register a judgment. She did not have the opportunity to argue in Hong Kong that this was not a community obligation. And so what you're saying is, even if she did not have – that would violate due process, if she did not have the opportunity to argue that it's not a community obligation but I'm just going to say, well, because it was against him –

MR. KEEHNEL: But she has the opportunity now. Her opportunity was today.

THE COURT: No.

MR. KEEHNEL: We sued her.

THE COURT: I understand that, but I'm not finding, based on what I have before me, that I could find in summary judgment –

MR. KEEHNEL: All right. I'll re-think, I'll re-think.

THE COURT: – that it was –

MR. KEEHNEL: Fair enough.

THE COURT: You will have to bring that issue against her. And then, of course, if you're collecting on the judgment, she can argue that something is community property or her separate property. You do whatever you have to do, but based on what I have before me, I'm not finding that.

[64] And the point of this motion, I think, was to address whether the Shanghai – whether the Hong Kong judgment is enforceable here. I am finding that it is, but I am not finding on the basis of the record before me that it was a community obligation. So you need to enter – you need to –

MR. KEEHNEL: I think we have a form. Let me – it may go beyond because it may address the community property.

THE COURT: You can sit down and do that. You can also – these – when I go through and try to figure out to make sure that I have everything that I have, I printed out the docket and I have circled the things that I had at the time and that I considered. What I tend to do, because I want to make sure that everything that I considered is listed on the order because if someone should appeal this order, it goes up on the record that I have, is just to make sure that everything is listed. So frequently what I will do is just – if you can write it all out, if it's not written out, you can just say –

MR. KEEHNEL: I think we might have, in the amended form of order that I passed up –

THE COURT: Take a look at it.

MR. KEEHNEL: – I might have done it.

THE COURT: And you can correct it. Just make sure that everything it listed. As far as the –

[65] MR. KEEHNEL: No. During the argument, Your Honor, I passed up to you the proposed form of order.

THE COURT: Here it is.

MR. KEEHNEL: I think that may be what we can work from.

THE COURT: That's it. So take a look at that. As far as what I did or did not consider – oh, that's the protective order. As far as what I did or did not consider from the declaration, I didn't consider – and I don't – I don't know exactly what they are, but I did not – I did consider the attachments in regards to the factual statements such as the amount that was charged for lawyers there. I did not consider the opinion articles because –

MR. KEEHNEL: All right. Well –

THE COURT: As far as whether – and I just don't find there's any sufficient evidence to show that the Hong Kong courts are so controlled by China it would make them – we should not enforce their judgments. And that's not what the record before me reflects. The record reflects that they considered a heck of a lot in this case and they probably would have considered more if your client had provided it.

MR. TOLLEFSEN: May I – one thing? The way you've decided this case it's irrelevant that we didn't file his net worth because he didn't present it to the court, but may I supplement this record with a declaration showing –

THE COURT: No.

[66] MR. TOLLEFSEN: – that he didn't have the ability to pay?

THE COURT: No. No. I'm not – I don't find it's – no, you should have – if you felt it was relevant, you should have provided it, but I don't find it relevant so I'm not going to allow you to supplement something that I don't find is relevant. If this goes up to the court of appeals – I'm sure it will – and they find that it's relevant, then the issue comes back before me and we'll deal with it.

MR. TOLLEFSEN: Okay.

THE COURT: Because I have – well, no. And also the other thing is that his, just statement "I didn't have the ability to pay" is not sufficient, just as it was not sufficient for the Hong Kong court, is that he would have to have, you know, his list of his assets, his net worth at the time this was being done. I don't care what he's worth now because that's not relevant.

MR. TOLLEFSEN: Well, that's what we're asking to supplement, and you have denied that.

THE COURT: Yeah, I have, but, you know – so do your order.

MR. KEEHNEL: Your Honor, I know you put this together in a hurry. You didn't check the declaration of their procedural expert, Mak, I think you already mentioned that you considered it –

[67] THE COURT: Yes.

MR. KEEHNEL: – but you just didn't check it here, so –

THE COURT: Yeah. And what I was saying, that list is actually what I had in my hand when I checked it. And then I go back and I give that to my bailiff –

MR. KEEHNEL: All right.

THE COURT: – and say, this is what I have, go back and get me the things I don't have.

MR. KEEHNEL: I think that's the only thing that leapt out at me that you had –

THE COURT: Okay.

MR. KEEHNEL: – that we didn't. So could we take a couple minutes?

THE COURT: And I'll take a look at your –

MR. KEEHNEL: Could we take a couple minutes to do a markup?

THE COURT: Yes. I don't have another hearing until 11:00, and please do the order before you leave.

MR. KEEHNEL: You guys have your copy that I gave you?

MR. TOLLEFSEN: Do we have a copy of the proposed order?

MR. KEEHNEL: This amended form that we submitted with the reply?

MR. HSIEH: We'll have to work on this one.

MR. KEEHNEL: We'll just work with this.

THE COURT: And I'll take a look at your protective [68] order. Did I give that to you, too? And just one more thing. I have volumes of your paperwork. I tend not to take notes on documents and I don't think I did in this case, so if anyone wants their stuff back so you don't have to keep copying it, you're welcome to have it back. Otherwise, I just put it all in recycle.

MR. KEEHNEL: Okay. Why don't you rewrite that.

MR. HSIEH: There are two things we've got to do. One –

(Proceeding was concluded.)

[Certificate Omitted]

Order:	23	**SECURITY FOR COSTS**	25 of 1998	01/07/1997

Remarks:

Adaptation amendments retroactively made – see 25 of 1998 s. 2

1. Security for costs of action, etc. (O. 23, r. 1)

(1) Where, on the application of a defendant to an action or other proceeding in the Court of First Instance, it appears to the Court- (25 of 1998 s. 2)

(a) that the plaintiff is ordinarily resident out of the jurisdiction, or

(b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so, or

(c) subject to paragraph (2), that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein, or

(d) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation,

then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's

costs of the action or other proceeding as it thinks just.

(2) The Court shall not require a plaintiff to give security by reason only of paragraph (1)(c) if he satisfies the Court that the failure to state his address or the misstatement thereof was made innocently and without intention to deceive.

(3) The references in the foregoing paragraphs to a plaintiff and a defendant shall be construed as references to the person (howsoever described on the record) who is in the position of plaintiff or defendant, as the case may be, in the proceeding in question, including a proceeding on a counterclaim.

2. Manner of giving security (O. 23, r. 2)

Where an order is made requiring any party to give security for costs, the security shall be given in such manner, at such time, and on such terms (if any) as the Court may direct.

3. Saving for enactments (O. 23, r. 3)

This Order is without prejudice to the provisions of any written law which empowers the Court to require security to be given for the costs of any proceedings.

(Enacted 1988)

HCA805/2009
& HCA1996/2009

IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE

ACTION NO. 805 OF 2009

BETWEEN

SHANGHAI COMMERCIAL BANK LIMITED	Plaintiff
and	
CHANG YUAN TA GRANT	1st Defendant
CHANG CHING HO	2nd Defendant

(by Original Action)

AND BETWEEN

CHANG YUAN TA GRANT	1st Plaintiff
CHANG CHING HO	2nd Plaintiff
and	
SHANGHAI COMMERCIAL BANK LIMITED	1st Defendant
THE BANK OF EAST ASIA, LIMITED	2nd Defendant

(by Counterclaim)

AND

App. 153

ACTION NO. 1996 OF 2009

BETWEEN

ZHANG ZHATZEWAL also known as CHANG CHIH HWA, CLARK	1st Plaintiff
CHANG KUNG DA	2nd Plaintiff
and	
SHANGHAI COMMERCIAL BANK LIMITED	1st Defendant
THE BANK OF EAST ASIA, LIMITED	2nd Defendant

(HEARD TOGETHER)

Before: Hon Poon J in Chambers

Dates of Hearing: 17 February and 3 May 2011

Date of Decision: 17 May 2011

DECISION

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1. These are applications for security for costs. To put the applications in context, it is necessary to outline the underlying actions from which these applications stem.

THE ACTIONS

2. On 21 March 2009, SCB commenced HCA805/2009 against Chang Yuan Ta Grant ("Grant Chang") and his sister Chang Ching Ho ("CH Chang"), claiming against Grant Chang for outstanding banking facilities in the sum of US$2,018,930.56 advanced under a facility letter dated 27 June 2008 and CH Chang as guarantor.

3. On the same day, SCB commenced HCA806/2009 against Chang Chi Hwa Clark ("Clark Chang"), the father of Grant Chang and CH Chang, and Chang Kung Da ("KD Chang"), another son of his, for outstanding banking facilities in the sum of US$6,427,060.89 under another facility letter dated 14 March 2008. The action was discontinued against Clark Chang on 21 May 2009.

4. On 24 September 2009, Clark Chang commenced HCA1996/2009 against SCB and BEA. KD Chang joined as the 2nd plaintiff on 26 April 2010. Their amended statement of claim is extremely lengthy, setting their claims on allegations spanning between the 1980s and the end of 2008. Their pleaded case may be brief stated thus.

5. Clark Chang met SCB's officer Daniel Chan in the bank's New York branch in the 1980s. By the mid 1990s, Daniel Chan had become to all intents and purposes Clark Chang's private banking manager and financial and investment advisor, and remained in that role until late 2008. Between 2003 and 2007, on Daniel Chan's advice, Clark Chang opened and

maintained accounts at SCB in Hong Kong under the names of Iduna Inc. ("Iduna") and KD Chang, both as nominees, with Clark Chang as the real principal. Daniel Chan advised Clark Chang on what and how to trade. Furthermore, he and colleagues traded in stocks without Clark Chang's knowledge or authorization. Between April 2004 and 2007, Daniel Chan advised and/or invested on Clark Chang's behalf in numerous equity-linked notes ("ELNs").

6. Daniel Chan left SCB for BEA in 2007. On Daniel Chan's advice, Clark Chang moved his portfolio. Between March 2007 and April 2008, Clark Chang opened and maintained accounts at BEA under the name of KD Chang as nominee, with himself as the principal. Daniel Chan advised Clark Chang to take out credit facilities with BEA to invest on margin (the "BEA Facility"). He also advised and invested on Clark Chang's behalf in numerous ELNs and accumulators.

7. Daniel Chan left BEA to rejoin SCB in around March or April 2008. On Daniel Chan's advice, Clark Chang moved part of his portfolio back to SCB. He opened an account (the "New SCB Account") under the name of KD Chang as nominee, with himself as the principal. In order for Clark to transfer part of his portfolio, namely 11 ELNs, to the New SCB Account, he had to repay part of the BEA Facility. On Daniel Chan's advice, he took out credit facilities with SCB (the "SCB Facility"). SCB remitted the money directly to BEA. The 11 ELNs became security for what Clark

Chang owed on the SCB Facility. No new investment took place for the New SCB Account.

8. The market crashed in 2008. The value of the assets in the New SCB Account became insufficient to secure the SCB Facility. SCB made margin calls and, when the calls were unmet, sold the assets. But a sum remains unsatisfied.

9. Clark Chang and KD Chang alleged misrepresentations against SCB:

(1) SCB (through Daniel Chan) misrepresented from the very beginning (i.e. 2003), positively as well as by failure to give a full picture, about the nature and risks of ELNs;

(2) SCB misrepresented in March 2008 about the true value of the investments Clark Chang had made through BEA;

(3) SCB misrepresented from April to June 2008 to him that he had nothing to worry about;

(4) SCB misrepresented by its monthly account statements from April to July 2008 about the true value of the ELNs transferred from BEA to SCB;

(5) SCB misrepresented by Daniel Chan's reports between April and July 2008 about the true value of all the ELNs and accumulators in BEA and SCB.

10. They also pleaded assumption of responsibility and claims for, *inter alia:*

(1) failure to give reasonable advice in advising to invest;

(2) failure to give reasonable advice in relation to investment on margin;

(3) failure of internal controls in deducting problems;

(4) failure to give reasonable advice in advising to divest and exit;

(5) failure to explain matters;

(6) failure to disclose all material information.

11. Furthermore, Clark Chang and KD Chang alleged breach of statutory and regulatory duties.

12. They estimated the loss and damage that they had suffered loss and damage, estimated to be in excess of US$8 million without giving any particulars.

13. They alternatively sought "an assessment of damages on the basis that . . . his portfolio would have been invested in a balanced manner with the aim of conservative overall returns and low risks".

14. On 28 September 2009, Grant Chang and CH Chang filed their defence and counterclaim in HCA805/2009. They basically repeated the pleaded case of their father and brother in HCA1996/2009. By way of counterclaim, they sued SCB and BEA for

damages for misrepresentation, negligence and related claims.

15. On 5 January 2010, KD Chang filed his defence and counterclaim in HCA806/2009, which was subsequently amended on 23 March 2010. He largely repeated his allegations in the defence and counterclaim in HCA805/2009 and the statement of claim in HCA1996/2009. His counterclaim and the relief sought is identical to that in HCA1996/2009.

16. BEA and SCB denied all the allegations raised by the Changs.

THE APPLICATIONS

17. BEA now take out two applications for security:

(1) in HCA 805/2009, as 2nd defendant in the counterclaim against CH Chang for HK$4,593,190 on the ground that she is ordinarily resident out of the jurisdiction; and

(2) in HCA1996/2009, against both Clark Chang and KD Chang for HK$5,025,770 on the ground that they are ordinarily resident out of the jurisdiction and KD Chang is a mere nominal plaintiff suing for the benefit of his father.

Both applications are for costs up to and inclusive of exchange of witness statements, which, I am told, has just completed.

18. SCB also applied for security for costs against Clark Chang and KD Chang in HCA1996/2009 up to

and inclusive of trial in the sum of HK$7,773,233 on the ground that they are ordinarily resident out of the jurisdiction.

THE GUIDING PRINCIPLE

19. Order 23 rule 1(1) of the Rules of the High Court provides that where on the application of a defendant to an action or other proceedings, it appears to the Court:

> "(a) that the plaintiff is ordinarily resident out of the jurisdiction, or
>
> (b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so, or
>
> . . .
>
> then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just."

20. It is not disputed that Clark Chang, CH Chang and KD Chang are all ordinarily resident out of Hong Kong. KD Chang is also a nominal plaintiff in HCA1996/2009 insofar as BEA is concerned. It is in fact Clark Chang's pleaded case that he was the only beneficial owner of the funds in his son's account with

BEA and that his son was acting as his nominee and/or agent pursuing the action against BEA and SCB on such basis.

21. Mr Kat, counsel for the Changs, submitted that after the CJR it is no longer automatic nor is it the ordinary practice to order an overseas plaintiff to give security. The focus is now on the circumstances of the individual against whom security is sought – do they present any obstacles to the enforcement and his amenity to the jurisdiction: *Thistle Hotels Ltd v Orb Estates plc & others* [2004] 2 BCLC 174, at para.14, *per* Sonia Proudman QC, sitting as a deputy judge.

22. I do not think the law has changed after the CJR. The guiding principle remains the same. The requirements in Order 23 rule 1(1) including that in sub-rule (a) on foreign plaintiff are merely preconditions that the applicant must satisfy before the court can exercise its discretion to order security. Security cannot be ordered simply because one of the requirements are satisfied but only if, having regard to all the circumstances of the case, the court is satisfied that it is just to do so. There is no inflexible or rigid rule to order a foreign plaintiff to provide security. It is true that in some of the authorities, the courts had stated that it is the usual ordinary or general practice to require a foreign plaintiff to provide security. The courts so stated because, having regard to all the circumstances, it is ordinarily just to do so.

23. In determining if it is just to order security against a foreign plaintiff, the court takes into

account a host of factors arising from the circumstances of the case, such as those which feature here:

(1) the likelihood of the plaintiff's prospect of success in his claims;

(2) who is the "real attacker" in the action;

(3) whether the plaintiff's claim will be stifled;

(4) whether the plaintiff has assets that are readily assessable to meet an adverse costs order.

24. As to whether the circumstances of the plaintiff present any obstacles to enforcement and his amenity to the jurisdiction, as referred to in *Thistle Hotels Ltd* and relied on by Mr Kat, I think it is one of the factors rather than the only factor that the court needs to take into account, if necessary, in the overall context of the case when considering if it is just to order security.

25. I now turn to the points taken by the Changs in opposing the applications.

LIKELIHOOD OF SUCCESS

26. The Changs initially contended by way of affidavit evidence that there is a high degree of probability of success of their claims. At the hearing before me, Mr Kat, their counsel, did not press this point. He fairly accepted and in my view, rightly so, that the court cannot embark on a mini-trial on affidavit to determine, one way or the other, the merits of the

parties' contentions. They are simply too complicated, legally and factually, which can only be resolved at trial.

WHO IS THE "REAL ATTACKER"?

27. Mr Kat submitted that in both HCA805/2009 and HCA1996/2009, the Changs are in substance exercising their right to defend claims by SCB, the real attacker. He argued that the counterclaim raised by Grant Chang and CH Chang in HCA805/2009 is no more than a defence to SCB's claim. And the claim in HCA1996/2009 by Clark Chang and KD Chang is essentially a defence to and set-off against SCB's claim in HCA806/2009. No security should be ordered against them. Mr Kat did not deploy the same point against BEA.

28. In determining whether a party is to be regarded as a plaintiff against whom security for costs may be ordered, the court must examine the situation as a matter of substance and not form. Thus the fact that a party is named as plaintiff is not by itself determinative of this question. A counterclaiming defendant may in appropriate cases be required to provide security for costs: *Brand Farrar Buxbaum LLP v Samuel-Rozenbaum Diamond Ltd & Another* (No. 2) [2003] 1 HKLRD 600, *per* Ma J (as he then was) at para.17.

29. The crucial question is, having regard to the nature of the counterclaim, is it in substance put forward as a defence to the claim or is it in truth a

cross action which goes beyond operating as a mere defence: see *Hutchison Telephone (UK) Ltd v Ultimate Response Ltd* [1993] BCLC 307. Some further guidance can be gathered from what Dillon LJ said at p.316c-g:

> " I should add that there are two different types of case where a question may arise that a counterclaim put forward by a defendant is really only to be regarded as part of the defence. One is the case of equitable set-off where the defendant asserts, by his counterclaim for instance, that a sum of money is in any event due to him under some other aspect of the very agreement or transaction on which the plaintiff is suing whether the plaintiff's claim be valid or not, and there is a plea of equitable set-off of the moneys so due and claimed by counter-claim against the moneys claimed by the plaintiff in his claim, should those be held otherwise to be payable. In such a case it may be (and there are suggestions that that could be the case with the commission aspect of the present case) that quantifying the amount of the counterclaim, the sum that would be set off, is no very difficult matter. In such circumstances, it may be easy to say that in truth the set-off was the defence, the counterclaim is pleading the defence, and it would not be appropriate to grant security.
>
> The other case, where again a counterclaim may be just the automatic counter-part of the defence, is where there is a claim to

> establish that the plaintiffs are entitled to something, possibly emerely [sic] a declaration to that effect, and there is a counterclaim for the opposite declaration, which would be the automatic counterpart of the claim of the plaintiffs failing. There again it would not, I would think, normally be appropriate to order a defendant to give security for costs of such a counterclaim. But there are other circumstances which may lead to other conclusions, as for instance where, in *The Silver Fir,* there were two claims on different aspects of the one event and it was a matter of chance which party happened to be the plaintiff and, on one ground or another there was jurisdiction, be it under s 726 or because of foreign residence, to order security."

Bingham LJ said at pp.318h-319b is also useful:

> " It is, in my judgment, significant that the defendants here, in addition to pleading a very full defence, have pleaded an extensive counterclaim in which the damages claimed appear to exceed by a very substantial margin the damages claimed by the plaintiffs, in which additional substantial claims for malicious falsehood are made and in which the ambit of the action is very substantially enlarged. Like the deputy master, I have formed the view that the defendants here have clearly crossed the boundary which divides an aggressive defence from an independent counterclaim. That, of course, still leaves the discretionary question as to what is the fair order to make. To my mind,

> it is significant that the counterclaim raises far-reaching issues necessarily expensive and time consuming to explore. If the defendants' counterclaim fails, it is very doubtful if the defendants can pay the plaintiffs' costs of exploring those new issues, and it seems to me just and equitable that the plaintiffs should be secured against those costs in the event that they are successful in defeating the counterclaim."

30. I have already summarized the pleadings above. On any view, the counterclaim raised in HCA805/2009 is more than a mere defence. It is very much a cross-action on its own, which, by raising far-reaching issues, has clearly crossed the boundary dividing an aggressive defence and an independent counterclaim. What was said by Bingham LJ applies here with full force. CH Chang, as one of the counterclaiming defendants is clearly liable to provide security for SCB's costs. I also reject Mr Kat's submission that the claim by Clark Chang and KD Chang in HCA1996/2009 is a mere defence to and set-off against SCB's claim in HCA806/2009.

STIFLING

31. The next point that Mr Kat took is that if security is ordered, it will stifle his clients' claims. This applies to both SCB's and BEA's applications.

32. A claimant who alleges that an order for security will stifle the claim must adduce satisfactory evidence that he does not have the means to provide security.

Here, apart from bare assertions, none of the Changs has adduced any satisfactory proof, such as bank statements, to make good their claim. Their allegation does not sit well with the fact that they had already spent more than HK$4 million on the litigations and apparently have no difficulty in continuing with them. Nor is it consistent with Changs' allegation that there are pension funds sitting in the US that may be used to meet any costs order.

33. I reject Mr Kat's submission.

PENSION FUNDS IN THE US

34. As alluded to, the Changs alleged that they had pension funds to meet any costs order against them. They have however failed to give any particulars of the pension funds, such as the amount and where they are held. Further, in the absence of reciprocal enforcement of judgments of Hong Kong and the US, enforcement of any costs order against the Changs will mostly likely be costly and time consuming. I do not think the Changs can derive much assistance from this point.

35. Taking all the circumstances into account, I think it is just to order the Changs to provide security for both SCB's and BEA's costs.

QUANTUM

36. Finally, I come to the quantum of the security that I should order. The quantum must be reasonable in the overall circumstances.

37. I have been provided with SCB's and BEA's skeleton bills of costs and the objections raised by the Changs. I need not dwell on details. I will take a broad brush approach, having regard to the overall circumstances, which include the following matters. Complex issues of facts are involved. Some dated back to the 1980s. This must have added considerable time and effort on retrieving the relevant documents and taking instructions from the witnesses. The documentary evidence is extremely bulky. The legal issues involved are not simple. Given the enormous size of the claims and counterclaims and the fact that banks' reputation is at stake, heavy involvement of experienced counsel is inevitable.

38. Taking the matter in the round, I think up to and inclusive of the first Case Management Conference, to be held on 1 June 2011 before Chung J, security for BEA's costs in the sum of HK$3 million for HCA805/2009 and HK$3.5 million for HCA1996/2009 is reasonable. For SCB, the reasonable figure is HK$3 million.

ORDERS

39. For the above reasons, I will make the following orders.

In HCA805/2009

40. CH Chang do on or before 31 May 2011 provide security in the sum of HK$3 million for BEA's costs by way of payment into court. Until such security be given, all further proceedings against BEA by counterclaim by CH Chang be stayed. There will be liberty to apply.

In HCA1996/2009

41. Clark Chang and KD Chang do on or before 31 May 2011 provide security in the sum of HK$3.5 million for BEA's costs by way of payment into court. Until such security be given, all further proceedings in the action against BEA be stayed.

42. Clark Chang and KD Chang do on or before 31 May 2011 provide security in the sum of HK$3 million for SCB's costs by way of payment into court. Until such security be given, all further proceedings in the action against SCB be stayed.

43. There will be liberty to apply.

44. I reject the submission of Mr Manzoni, for BEA, that the court should dismiss the counterclaim against BEA in HCA805/2009 and the claim against BEA in HCA1996/2009 should the Changs fail to

provide the security as ordered. I think the matter should only be visited when default actually occurs.

45. On the costs of the applications, the parties agree that they should follow the event. I so order, and the costs of the applications should be paid to BEA and SCB in any event, to be taxed if not agreed.

(J. Poon)
Judge of the Court of First Instance
High Court

Mr Nigel Kat, instructed by Messrs Tanner De Witt, for the 2nd Plaintiff (by Counterclaim) in HCA805/2009 and the 1st and 2nd Plaintiffs in HCA1996/2009

Mr Charles Manzoni and Mr Norman Nip, instructed by Messrs Wilkinson & Grist, for the 2nd Defendant (by Counterclaim) in HCA805/2009 and the 2nd Defendant in HCA1996/2009

Mr Laurence Li, instructed by Messrs Chow, Griffiths & Chan, for the 1st Defendant in HCA1996/2009