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International Disputes, the Execution of Foreign Arbitral Awards in the Asia Pacific and Two Case Studies

Laina Chan*

I. Introduction

The majority of matters that are arbitrated in the international arena are construction disputes involving claims for damages for breach of contract. The primary reasons for the increasing popularity of arbitration are flexibility, expertise on the arbitral panel, and the attraction of the assumed ease of enforcement in countries that are parties to the New York Convention (the Convention[1]). Not only does arbitration provide a neutral forum for parties engaging in international commerce, but the consensual nature of arbitration, the relaxation of the rules of evidence, the limited availability of cross-examination, and the exchange of written submissions means that arbitration should, hypothetically, offer a just, cheap, and quick resolution to commercial disputes. However, there is a gap between the ideals of efficient justice and the reality of problems with enforcement, especially in countries with weak rules of law.

In a perfect world, the winning party may obtain registration of the arbitral award in a Convention country and seek to enforce the judgment without further delay. Enforcement would depend on the domestic law of countries in which enforcement is sought and on the integrity of that country's government. However, skillful lawyers can derail this procedure and effectively delay enforcement of the judgment for years. Reliable data on the success of arbitration in resolving disputes and the ease with which awards are enforced is scarce. However, a recent study by PricewaterhouseCoopers into the success of the arbitration procedure has indicated that of the cases studied, 25% of cases are settled before an arbitral award is rendered, 7% are settled with a subsequent award by consent and 49% end with voluntary compliance with an arbitral award by the unsuccessful party. On the other hand, 11% of cases end in proceedings for enforcement and recognition, and 8% involved an apparent settlement or an award but were followed by litigation. These results would indicate that while arbitration often results in settlement or voluntary compliance with an award, 19% of cases result in litigation seeking to set aside the award or otherwise avoid enforcement.[2]

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1. Convention for the Recognition and Enforcement of Arbitral Awards (New York Convention) (the Convention), June 7, 1959, 21 U.S.T. 2517, art II.

2. GERRY LAGERBERG AND PROFESSOR LOUKAS MISTELIS, INTERNATIONAL ARBITRATION: CORPORATE ATTITUDES AND PRACTICES (2008), *available* at http://www.pwc.co.uk/en_UK/uk/assets/pdf/pwc-international-arbitration-2008.pdf (an empirical Study carried out by Queen Mary Law School and PricewaterhouseCoopers on international arbitration users in 2008) at 2.

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This article will look at the process of enforcement and the legislative framework for the enforcement of international arbitral awards in Australia, Singapore, Hong Kong and Indonesia using the case study of the long-running dispute between Malaysia's Astro Group and Indonesia's Lippo Group. The article will also look at how enforcement in these Asia Pacific jurisdictions differs from enforcement in the United States in the context of the *Karaha Bodas* case. Finally, the article will touch upon enforcement in New Zealand, which has been relatively straightforward.[3]

II. The Legislative Framework for International Arbitrations

Arbitrations are governed by a multiplicity of procedural rules, both those of the seat of arbitration and institutional procedural rules chosen by the parties. Not only must parties navigate this duality in order to obtain an award, but they must also tackle the procedural rules of any state in which the judgment creditor seeks to execute the award. Even where the UNCITRAL Model Law on International Commercial Arbitration (chosen by the party)[4] has been enshrined by legislation, different countries balance the competing factors of state sovereignty and party autonomy differently. The by-product of balance is that both enforcement and execution of an arbitral award can be a costly and time-consuming process.

A. Australia

In Australia, the main component of the legislative framework governing the enforcement of foreign arbitral awards is the *International Arbitration Act 1974 (Cth)*, which incorporates provisions of the Convention and the Model Law. Over the past 10 years, Australia has taken an increasingly "pro-enforcement" stance, both in terms of new legislative amendments and judicial decisions. This, however, had not always been the case.

Sections 8(5) and 8(7) of the *International Arbitration Act 1974 (Cth)* list the grounds on which an application for the enforcement of an award may be refused by the court. These are similar to the grounds listed in Arts V(1) and V(2) of the Convention. Section 8(3A), a new amendment to the *International Arbitration Act 1974 (Cth)*, now specifies that the grounds in 8(5) and 8(7) are the only grounds on which enforcement may be refused. This addition was introduced to neutralize a judgment of the Supreme Court of Queensland in *Re Resort Condominiums.*[5] Additionally, the amending act has clarified the public policy exception to enforcement in 8(7)(b), by listing two situations in which enforcement may be refused pursuant to this exception.

In *Re Resort Condominiums*,[6] the Queensland Supreme Court had to determine whether it would enforce an interim award which granted an interim injunction against an Australia company. A U.S. company and an Australian company had entered into a license agreement which

3. The Convention has been adopted in all of these countries.

4. United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration, 24 I.L.M. 1302 (1985).

5. *Re Resort Condominiums International Inc*. [1995] 1 Qd R 406 (Austl.); *see also* Explanatory Memorandum to the *International Arbitration Amendment Act* 2010 (Cth), [41].

6. *Id.*

contained an Indiana arbitration clause. After a dispute arose between the parties, the U.S. company commenced proceedings in the Indiana court for preliminary injunctive relief to prevent the Australian company from carrying out certain activities in contravention of the license agreement and also a referral to arbitration. Both of these orders were granted. The arbitrator subsequently made an interim arbitration order and award, pursuant to which injunctions were granted on the same basis as determined by the Indiana court.

The Queensland Supreme Court held that an interim order and award did not finally determine the issues submitted to arbitration and as a result, the interim order and award was unenforceable under Australia's *International Arbitration Act 1974 (Cth)*. In deciding that the Court retains a residual discretion to refuse to enforce a foreign award outside the specifically enumerated grounds set out in the *International Arbitration Act 1974 (Cth),* the Court relied upon the differences between Article V(1) of the Convention, and its sister section in the Australian *International Arbitration Act 1974 (Cth).* The Court noted the mandatory language of Article V(1) of the Convention in that "recognition and enforcement of the award may be refused . . . *only* if that party furnishes proof" that one of the grounds in the Article has been satisfied. By contrast, the drafters of 8(5) of the *International Arbitration Act 1974 (Cth)* had not included the word *only* in the section. This omission led the Court to conclude that the national courts of Australia retain a residual discretion in relation to the enforcement of international arbitral awards beyond the enumerated grounds in the *International Arbitration Act 1974 (Cth)*.

The Court also held that an interim award should not be enforced on public policy grounds, and that the arbitral tribunal's decision was not in conformity with the enforcing state's public policy. In this instance, many of the orders that were the subject of the interim award would not have been made in a Queensland court. In particular, the Court found it concerning that the interim injunction had been granted without undertakings as to damages or appropriate security. Other issues raised by the Court included possible double vexation, as well as practical difficulties in interpretation and enforcement of the interim award.

In *International Movie Group Inc. (IMG) v. Palace Entertainment Corp. Pty. Ltd.,*[7] a U.S. company (IMG) and an Australian company (Palace) entered into a series of agreements for the licensing and distribution of films in Australia. Each agreement contained a California arbitration clause. A dispute arose and was referred to arbitration in California, and an award, including damages, was rendered in favor of IMG. The form of the orders was curious. The arbitral tribunal ordered that if IMG sold or licensed a particular film in Australia or New Zealand in the future, then any net sums received by IMG from such sales would reduce the amount due to it (the May Wine Clause). IMG sought to enforce the award in Australia but Palace argued that the enforcement of the damages component should be refused on the ground that it was manifestly uncertain and therefore void. The argument was that uncertainty existed because the ultimate amount of damages to be paid may have to be adjusted by reference to future events, which had the potential to extinguish the defendant's liability. It was accepted that the May Wine Clause was uncertain.

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7. (1995) 128 FLR 458 (Austl.).

The Victorian Court held that uncertainty was a legitimate basis for refusing to enforce a foreign arbitral award, even though it was not one of the enumerated grounds under Section 8 of the *International Arbitration Act 1974 (Cth)* or under Article V of the Convention. The Victorian Court severed the uncertain part of the award, as it was satisfied that the residue allowed to stand was in no way affected by the rejected part of the award. This decision was affirmed by the Victorian Court of appeal in *ACN 006 397 413 Pty. Ltd. v. International Movie Group (Canada) Inc. and Another*.[8]

In *IMC Aviation Solutions Pty., Ltd. v. Althain Khuder, LLC*,[9] there was a dispute between Althain Khuder, LLC and IMC Mining, Inc. in relation to an iron ore mine in Mongolia. The dispute was governed by an arbitration agreement. Khuder commenced arbitration in Mongolia and was ultimately successful. The arbitral tribunal, however, ordered another entity that had not been a party to the arbitration, IMC Mining Solutions, to pay damages to Khuder on behalf of IMC Mining. In 2010, Khuder made an ex parte application to enforce the award in the Supreme Court of Victoria. Khuder was successful at first instance. At the trial, IMC Solutions had unsuccessfully applied to have the order set aside on the basis that IMC Solutions had not been a party to the relevant arbitration agreement. The trial judge found that IMC Solutions was estopped from arguing (in Australia) that it was not bound by the arbitration agreement, as it had not contested the issue in the tribunal hearing or the verification proceeding in Mongolia.[10]

On appeal, however, IMC Solutions was successful. The Court of Appeal controversially allowed the appeal on the basis that an award creditor must satisfy the Court, on a prima facie basis, that the award debtor had been a party to the arbitration agreement. Once the award creditor establishes a prima facie entitlement to an enforcement order, the award debtor may then apply to have the enforcement order set aside on the grounds set out in §§ 8(5) and (7) of the *International Arbitration Act 1974 (Cth)*. As Khuder had failed to prove on a prima facie basis that IMC Solutions had been a party to the arbitration agreement, Khuder was unable to scale the first hurdle and its application for an enforcement order was rejected.

In *Traxys v. Balaji*,[11] an arbitral award had been handed down in England. The award creditor from Luxembourg, Traxys, sought to enforce the award in Australia against the Indian award debtor, (Balaji).[12] There was no dispute between the parties as to the existence of a valid contract between them and as to a breach of the contract by Balaji. Balaji had been granted an injunction in the High Court of Kolkata in India to prevent Traxys from enforcing the award in India. However, Traxys had enjoyed some success in England, where the High Court of Justice in England had ordered the enforcement of the award. Traxys was given permission by the English Court to apply for freezing orders against Balaji in Australia by virtue of it owning shares in an Australian company. Balaji opposed this application on three grounds. First, Balaji

8. [1997] 2 VR 31 (Austl.).

9. (2011) 282 ALR 717 (Austl.).

10. It seems that the Mongolian government had attempted to confiscate the passports of the Australian lawyers acting for the award debtor IMC Solutions, which led them to their decision to leave the country and not appear at the arbitration.

11. (2012) 201 FCR 535 (Austl.).

12. *Id.*

argued that to enforce an award in Australia it must be proved that Balaji had established assets in Australia. Second, enforcing the award would have been contrary to public policy. Third, the commencement and maintenance of this proceeding was a breach of the interim injunction granted by the Indian High Court and therefore constituted a serious contempt of that Court.[13]

The Federal Court of Australia was clear in its pro-enforcement stance of international arbitral awards and rejected all three grounds of attack. Traxys was not obliged as a condition precedent of being granted any relief, to prove that Balaji had assets in Australia. First, there was nothing to this effect in the *International Arbitration Act 1974 (Cth).* Second, it was not contrary to Australian public policy to direct the entry of judgment or to make an order in terms of a foreign award in the absence of proof that the award debtor had assets in Australia. Nor was it against Australian public policy to take those steps in the face of evidence which suggests or proves that the award debtor had no assets in Australia. Third, it was not consistent with Australian public policy to decline to enforce the award simply because Balaji had pursued an appeal in India. The Court made it clear that the public policy ground of refusal to enforce an award should not be seen as a catch-all defense of last resort.[14] The Court emphasized that it is only those aspects of public policy that go to the fundamental, core questions of morality and justice in that jurisdiction which enliven this particular statutory exception to enforcement.[15] Judgment was entered in favor of Traxys and the award was enforced.

In *Amcor Packaging (Australia) Pty. Ltd. v. Baulderstone Pty Ltd.,*[16] Amcor and Baulderstone had been in negotiations for the supply by Amcor to Baulderstone of a building to house a paper machine. Amcor had been successful in acquiring the preliminary works and a Delivery Proposal Agreement had been signed. Amcor began performing the work even though a final contract had not been signed, as the parties fell into dispute. Amcor indicated that it might commence proceedings against Baulderstone, which retaliated by seeking to stay the proposed proceedings pursuant to § 8 of the *Commercial Arbitration Act 2011 (Vic)*[17] on the basis that the Delivery Proposal Agreement required disputes that arose out of, or in connection with, it to be referred to arbitration.

The Court stayed the entire proceeding even though the whole dispute did not fall within the ambit of the arbitration agreement.[18] The Court ordered that part of the proposed proceedings as between Amcor and Baulderstone be stayed pursuant to § 8 of the *Commercial Arbitra-*

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13. *Id.* at 542–43.

14. *Id.* at 560.

15. This reflects the formulation of public policy in Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie due Papier (RAKTA), 508 F.2d 969 (2d Cir. 1974).

16. [2013] FCA 253 (Austl.).

17. Australia has a federal and state system like the United States. Each of the States and Territories have their own domestic arbitration acts which seek to make commercial arbitration more attractive for the resolution of domestic commercial disputes. Apart from the Australian Capital Territory, each of the States and the Northern Territory have enacted uniform domestic arbitration acts which are based upon the UNCITRAL Model Law. Australia's *International Arbitration Act 1974 (Cth),* which governs the enforcement of international arbitral awards in Australia is similarly based upon the UNCITRAL Model Law.

18. *Supra* note 16 at ¶ 47.

tion Act 2011 (Vic).[19] The remainder of the dispute was stayed pursuant to § 23 of the *Federal Court Act 1976 (Cth)* pending the resolution of the arbitration proceedings.[20] The Court construed the arbitration agreement and gave the definition of "Dispute" as defined in the Delivery Proposal Agreement a very broad commercial interpretation.[21] Significantly, the Court held that the existence of additional matters that fell outside the scope of the arbitration agreement was not a ground for staying the arbitration.[22] The Court held that the additional matters could be resolved by the Court following the conclusion of the arbitration.[23]

In *TCL Air Conditioner (Zhongshan) Co. Ltd. v. Castel Electronic Pty. Ltd.*,[24] the Australian courts affirmed their pro-enforcement stance. TCL, a Chinese manufacturer, and Castel Electronics, an Australian distributor, were parties to an agreement for the distribution in Australia of air conditioning units manufactured in China by TCL. The agreement provided for arbitration in the event of any dispute that could not be resolved by mutual agreement. A dispute arose between the parties, as TCL had been selling air conditioning units to other distributors in contravention of the agreement with Castel. The dispute was submitted to arbitration and an award was delivered in favor of Castel. TCL sought to have the award set aside under Articles 34 and 36 of the UNCITRAL Model Law on the grounds that the arbitrators had not accorded TCL procedural fairness in connection with the making of the award.

The Court held that the "a-national independence" of the international arbitral legal order created by the Convention and the Model Law required at least two things from a national court for its efficacy. One is recognition that interference by national courts, beyond the matters identified in the Model Law as grounds for setting aside or non-enforcement would undermine the system. The other is the swift and efficient judicial enforcement and legitimate testing of grounds under Articles 34 and 36. Courts must act prudently, sparingly, and responsibly, but must also act decisively when the grounds enumerated in Articles 34 and 36 are revealed. The system of international arbitration which is enshrined in the Model Law was designed to place independence, autonomy, and authority into the hands of the arbitrators through recognition of the autonomy, independence, and free will of the contracting parties.

The Court was, however, clear that a party would not be allowed to, under the guise of a claim of a denial of natural justice, examine all the factual findings of a tribunal on the pretext that the findings had been made on the basis of no evidence.[25] Prior to reaching this conclusion, the Court had carried out a survey of whether "the no evidence rule" was part of the rules of natural justice in New Zealand, Hong Kong and Singapore and concluded that there had been no authoritative recognition of the "no evidence rule'" as part of the rules of natural jus-

19. *Id*.

20. *Id*.

21. *Id*. at ¶ 29.

22. *Supra* note 20.

23. *See also* Gujarat NRE Coke Ltd. v. Coeclerici Asia 1 (Pte) Ltd. [2013] EWHC 987 (Austl.*);* Pipeline Services WA Pty. Ltd. v. ATCO Gas Australia Pty Ltd. [2014] WASC 10 (Austl.) (further examples of the pro-enforcement approach of Australian courts. The Court also touches upon the doctrine of non-arbitrability.)

24. [2014] FCA 1214 (Austl.).

25. *Id*. at ¶¶ 54–55.

tice.[26] The Court affirmed that natural justice is comprised of two rules: the adjudicator must be disinterested and unbiased, and the parties must be given adequate notice and the option to be heard.[27]

Finally, the Court held that no international arbitral award should be set aside in Australia as being contrary to Australian public policy unless fundamental norms of justice and fairness are breached. The current position in Australia has moved away from the position taken by the Supreme Court in Queensland in *Re Resort Condominium*[28] and the Victorian Court of Appeal in *Althain Khuder.*[29]

B. Indonesia

Indonesia, a former Dutch colony, attained independence in 1945, but retained large portions of the Dutch Civil Code, which remain in place until new laws are passed to replace them. While Indonesia has ratified the Convention, the law governing enforcement of foreign awards *Arbitration Law, Law No. 30 of 1999*[30] (Arbitration Law), does not incorporate the terms of the Convention into its domestic law.[31] In a move to promote efficiency, the Arbitration Law vests the District Court of Central Jakarta with jurisdiction to issue orders of "*exequatur*" to enforce international arbitration awards, except where the Indonesian State is a party.[32] However, the Arbitration Law does require reciprocity between Indonesia and the country in which the arbitral award was rendered.[33] Furthermore, while the Arbitration Law provides for the refusal of enforcement on the grounds of "public order" ("keteriban umum" or public policy),[34] the Arbitration Law does not define the term, leaving it open to wide judicial interpretation.

Critics have noted a high rate of judicial interference with the enforcement of international arbitral awards on the grounds of public order and territorial sovereignty.[35] For example, Indonesian courts have factored public policy into enforcement of mandatory laws. Specifically, in *E.D. & F. Man (Sugar) Ltd. v. Yani Haryanto*,[36] the parties contracted for the sale of Indonesian sugar imports in circumstances where the Indonesian government required that companies hold licenses for such imports. The Indonesian buyer refused to complete the contract, and the

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26. *Id*. at ¶ 149.
27. *Id*. at ¶¶ 149–50.
28. *Re Resort Condominiums International Inc.* [1995] 1 Qd R 406 (Austl.).
29. IMC Aviation Solutions Pty. Ltd. v. Althain Khuder LLC [2011] 282 ALR 717 (Austl.)
30. Karen Mills, *Enforcement of Arbitral Awards in Indonesia*, 3 Int. A.L.R 192 (2000), www.arbitralwomen.org/files/publication/4310102632224.pdf (Mills).
31. Junita Fifi, *Experience of Practical Problems of Foreign Arbitral Awards Enforcement in Indonesia,* MqJlBLaw 369 (2008) (Fifi).
32. Mills, *supra* note 30, at 4.
33. *See id.* at 6 (stating that any plaintiff seeking to enforce an award must provide a statement from the Indonesian diplomatic mission confirming that the country of the seat of arbitration had diplomatic relations with Indonesia and is a signatory to *the Convention*).
34. Arbitration Law (Art. 66(c), No. 30/1999) (Indon.)*;* Fifi, *supra* note 31, at 369 .
35. Fifi, *supra* note 31, at 371.
36. E.D. & F. Man (Sugar) Ltd. v. Yani Haryanto, No. 271/PDT.G/1999/P/JKT/PST.

seller successfully obtained an arbitral award in London. The buyer brought an action in the District Court of Central Jakarta arguing that the original contract was void *ab initio* for violation of Indonesian public policy. The buyer argued that there had been a violation of domestic law requiring governmental authorization to import sugar. The action succeeded. The Court held that the violation of the domestic law was a violation of public policy. The buyer was also successful on appeal to the Indonesian Supreme Court.[37]

In *Perusahaan Pertambangan Minjak dan Das Bumi Negara* (Pertamina) *v. Karaha Bodas Co., LLC* (Karaha Bodas),[38] an Indonesian company wholly owned by the Indonesian government successfully prevented the enforcement of a $270 million (U.S.) award. The award had been made in Geneva, in favor of two Cayman Island subsidiaries of a U.S.-owned electric company in Indonesia that had its power project in Indonesia canceled in 1998 in the wake of the Asian Financial Crisis. Pertamina had sought unsuccessfully to have the award annulled twice in Switzerland.[39] When Karaha Bodas started seizing assets of Pertamina in the United States, Hong Kong, Singapore and Canada, Pertamina turned to its home venue in Indonesia and petitioned the Jakarta Central District Court to annul the award pursuant to Indonesian law. The Jakarta Central District Court obliged and cited public policy grounds, denial of procedural and substantive fairness, and violation of natural justice as reasons for annulling the award. The Court ruled this way despite the seat of the arbitration's location in Geneva, and not Indonesia. Nevertheless, despite the purported annulment of the award by the District Court of Central Jakarta, the award was later enforced in Hong Kong and the United States.[40]

1. Karaha Bodas in the United States

In the United States,[41] Karaha Bodas successfully sought enforcement of the award in the United States District Court for the Southern District of Texas. This decision was affirmed by the United States Court of Appeals for the Fifth Circuit.[42] An application for a writ of certiorari by the Indonesian government, appearing as amicus curiae in the Supreme Court, was also unsuccessful.[43]

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37. Mills, *supra* note 30 at 10; Pertamina Energy Trading Ltd. v. Karaha Bodas Co., LLC and Others [2007] SGCA 10.

38. Decision of the District Court of Central Jakarta No. 86/PDT.G/2002/PN/JKT/PST.

39. Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 264 F. Supp. 2d 490 (S.D. Tex. 2003).

40. Theoretically, an award can only be annulled by a court in the seat of the arbitration.

41. Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 190 F. Supp. 2d 936 (S.D. Tex. 2001) (summary judgment of the arbitral award was granted and final judgment confirming the award was entered); Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 264 F. Supp. 2d 470 (S.D. Tex. 2003) (preliminary injunction sought); Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F.3d 357, 367 (5th Cir. 2003) (subsequent appeal).

42. Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274 (5th Cir. 2004).

43. PT Pertamina (Persero), fka Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, v. Karaha Bodas Co., LLC, 543 U.S. 917 (2004).

However, in addition to seeking enforcement, Karaha Bodas had sought a preliminary injunction to prohibit Pertamina from enjoining Karaha Bodas's attempt to execute the Court's judgment, and to take steps to enforce the arbitral award in the United States or other jurisdictions. Karaha Bodas had also sought an anti-suit injunction prohibiting Pertamina from pursuing its annulment action in Indonesia. The District Court for the Southern District of Texas granted the preliminary injunction on the basis that the injunction entered against Karaha Bodas in Indonesia and the annulment proceeding pending in Indonesia threatened the District Court's jurisdiction to enforce its judgment and petitioner's rights.[44]

On appeal, the U.S. Court of Appeals for the Fifth Circuit held that the District Court had abused its discretion in granting the preliminary injunction. On that issue, the Court reversed the District Court. The Court noted that under the Convention, a court maintains the discretion to enforce an arbitral award even when nullification proceedings are occurring in the seat of the arbitration. American courts and courts of other countries have enforced awards, or permitted their enforcement, despite prior annulment in courts of primary jurisdiction. The Convention only requires awards to be binding on the parties rather than final in order for enforcement to occur in a court of secondary jurisdiction. The Court noted that the Convention does not require recognition in the rendering state before enforcement in a court of secondary jurisdiction is possible.[45] By its very structure, which allows concurrent enforcement and annulment actions as well as enforcement actions in third countries, the Convention envisages multiple proceedings that address the same substantive challenges to an arbitral award.[46]

2. Karaha Bodas in Hong Kong

In *Karaha Bodas Co., LLC* (Karaha Bodas) *v. Perusahaan Pertambangan Minyak dan Gas Bumi Negara* (Pertamina) *(No. 2),*[47] the Hong Kong High Court of First Instance rejected the argument of Pertamina, the party resisting the enforcement of the award on the grounds that the seat of the arbitration had been Indonesia, and that the arbitral award had been annulled. The Court held both as a matter of fact and of law that the seat of the arbitration had been Geneva, Switzerland.[48] During the course of the judgment, Justice Burrell considered that it would have been possible for the *lex arbitri* to differ from the seat of the arbitration. The contract between the parties had specified that the substantive law of the contract was Indonesian,

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44. *See* Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F.3d 357, 367 (5th Cir. 2003), for an overview of the procedural history.

45. *Id*.

46. *Id*.

47. [2003] 4 H.K.C. 488.

48. Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara [2003] H.K.C. 380 at [18]; *see also* Perusahaan Pertambangan Minyak dan Gas Bumi Negara v. Karaha Bodas Co. LLC (No 2) (Pertamina) [2003] 4 H.K.C. 488.

but that the seat of the arbitration would be Geneva, Switzerland. The contract was silent as to the *lex arbitri*, but Justice Burrell held that the parties could have nominated the *lex arbitri* in their contract.[49]

On appeal to the Court of Appeal, Pertamina sought leave to adduce new documentary evidence, and argued that the Arbitral Tribunal had been guilty of fraud, in that it had rewritten the agreement between the parties and that the award of damages for loss of profit in the sum of $150 million (U.S.) had been arbitrary. The argument in relation to fraud was unsuccessful. The Court of Appeal was not satisfied that Pertamina had established a prima facie case of fraud, bad faith, or lack of good faith, or a case which had a reasonable prospect of success, and it also refused leave to adduce the further documents on appeal.[50] Pertamina was then granted leave to appeal to the Court of Final Appeal.[51] However, the appeal was unsuccessful.[52] Although Karaha Bodas was ultimately triumphant in Hong Kong, the enforcement process in Hong Kong took more than six years to conclude.

C. Hong Kong

Hong Kong was one of the first jurisdictions to adopt the Model Law.[53] Hong Kong's new arbitration legislation, the *Arbitration Ordinance of 2011* (Arbitration Ordinance), makes "the fair and speedy resolution of disputes by arbitration without unnecessary expense"[54] its explicit aim under § 3(1). This objective is based on principles of minimal judicial interference and party autonomy referred to in § 3(2).

In *Paklito Investment Ltd.* (Palkito) *v. Klockner East Asia Ltd.*(Klockner),[55] the parties had entered into a sale and purchase contract, which provided for China International Economic and Trade Arbitration Commission (CIETAC) arbitration. A dispute regarding the quality and

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49. [2003] 4 H.K.C. 488, at 18. In Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 264 F. Supp. 2d 490 (S.D. Tex. 2003), the U.S. District Court for the Southern District of Texas had also found that the *lex arbitri* had been Switzerland on the basis of the general rule that the procedural law of the place of arbitration governs an arbitration. *See also* Philippines v. Philippines International Air Terminals Co., Inc. [2007] 1 SLR(R) 278, in which the Government of Philippines had entered into a construction contract with a private company. The tribunal had applied the doctrine of severability to find that the arbitration agreement was severable from the main contract which had been invalidated by the Philippine's Supreme Court. The proper law of the main contract had been designated as Philippines law in a choice of law clause. An issue for the arbitral tribunal had been the law governing the arbitration procedure and the proper law of the arbitration agreement. The tribunal had decided that the law governing the arbitration procedure and the proper law of the arbitration agreement was the law of Singapore. It had been persuaded by the fact that Singapore had been designated as the place of arbitration because it was a neutral venue for the resolution of disputes. This had outweighed the fact that the proper law of the main contract had been Philippines law, the fact that both parties were Filipino and the fact that the project was carried out entirely in the Philippines. The doctrine of severability has also been applied in New Zealand in Carr v. Gallaway Cook Allan [2014] 1 NZLR 792.

50. [2007] H.K.L.R.D. 1002, at 83–84.

51. [2008] H.K.C. 447.

52. [2008] H.K.C. 1902.

53. *See* David Sandborg, *Arbitration in Hong Kong, in* INTERNATIONAL COMMERCIAL ARBITRATION IN ASIA (Phillip J. McConnaughay & Tom Ginsburg eds., JurisNet, LLC, 2013).

54. *See* Arbitration Ordinance, (2011) Cap. 609, 2, § 3(1) (H.K.).

55. [1993] 2 H.K.L.R. 39.

quantity of the goods arose, and CIETAC appointed an expert to speak on those issues. Klockner objected to this decision. When Klockner received a copy of the report, it informed CIETAC of its intention to make submissions on the report. However, before receiving these submissions, CIETAC rendered an award in favor of Paklito. Paklito applied for enforcement of the award and Klocker opposed the application on the basis of § 44(2)(c) of the Arbitration Ordinance, namely, that it had been prevented from presenting its case to CIETAC. It also relied on the public policy defense set forth in § 44(3) of the Arbitration Ordinance.

The Court exercised its discretion to refuse the enforcement of the award. The Court rejected the public policy defense, noting that it should be construed narrowly and enforcement may be denied on this basis only where such enforcement would violate the forum state's "most basic notions of morality and justice."[56] However, the Court held that a fatal procedural irregularity had occurred during the arbitral proceedings. Klockner had been prevented from presenting its case, and had been denied a fair and equal opportunity to be heard. Klockner should have been provided with the opportunity to comment upon or adduce evidence to rebut the view of the court-appointed expert. A serious breach of due process had occurred and the enforcing court, taking heed of its own principles of fairness and due process, could not be expected to ignore such a breach.

In *Hebei Import & Export Corp v. Polytek Engineering Co. Ltd.*,[57] Polytek, a Hong Kong-based company, had sold defective equipment to Hebei, a Chinese company that had then sold the defective equipment to a third party. Hebei referred the matter to arbitration before CIETAC, and the tribunal found in its favor. Polytek applied to the People's Court in Beijing to have the award set aside but failed. Hebei was granted leave in Hong Kong to enforce the award. Polytek applied to have that order set aside, but was unsuccessful. Polytek was successful in the Court of Appeal, and Hebei then appealed to the Hong Kong Court of Final Appeal.

The main issue was whether Polytek had been unable to properly present its case, so as to result in a serious breach of natural justice, arising from the fact that the chief arbitrator and experts appointed by the tribunal at the request of Polytek had inspected the defective equipment at the user's premises in the presence of Hebei's technicians, but in the absence of Polytek's. Polytek argued that it had not received proper notice of the inspection, and had not had the opportunity to attend or to brief its own experts of the manufacturer of the equipment. Polytek also alleged that it had been denied a further hearing following the inspections even though it had been given an opportunity to make further submissions on the experts' reports and that it had been denied an opportunity to call the manufacturer to give evidence on the report's findings.[58]

In relation to each of these alleged irregularities, Polytek had not raised any objection during the course of the arbitration. Polytek also argued that the chief arbitrator was biased as a result of alleged communications with Hebei. Finally, Polytek argued that the apparent bias on

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56. *See* Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie due Papier (RAKTA), 508 F.2d 969 (1974) (reflecting the same formulation of public policy).

57. [1999] 2 H.K.C. 205.

58. *Id*. at 34.

the part of the tribunal would violate the most basic notions of justice and morality in Hong Kong.

The Court of Final Appeal held that an unsuccessful party may challenge the enforcement of awards by either applying to the courts at the seat of arbitration to set aside an award, or by waiting for the successful party to attempt to enforce the award and raising an objection at that stage. A party is not bound to elect between these two remedies. Polytek was entitled to rely upon the public policy ground in the court of enforcement. In theory, a failure to raise the public policy ground in proceedings to set aside an award cannot operate to preclude a party from resisting the enforcement of the award on that ground in the enforcing court in another jurisdiction. However, a party may be precluded by its failure to raise a point before the court of supervisory jurisdiction if it wants to raise that point later before the court of enforcement. Failure to raise such a point may amount to an estoppel or a want of bona fides, which is enough to justify the court enforcement of an award.[59]

The Court of Final Appeal rejected the challenge of Polytek, and was not satisfied that Polytek had been unable to present its case. Further, the Court held that Polytek had lost its right to complain about non-compliance with procedural issues. Any challenge to non-compliance with procedural rules should have been done during the course of the arbitration, and not concealed for later use. The Court of Final Appeal accepted that a party should have an opportunity to present its case and to vie for an award before a tribunal that was neither influenced nor seen to be influenced by private communications. Unfortunately, the failure of Polytek to object to the alleged irregularities that had occurred during the course of the arbitration gave rise to the foundation for its complaint of a violation of public policy. Consequently, the Court of Final Appeal exercised its discretion to enforce the arbitral award.

In *China Nanhai Oil Joint Service Corp. Shenzhen Branch* (China Nanhai) *v. Gee Tai Holdings Co. Ltd.* (Gee Tai),[60] Gee Tai opposed enforcement on the ground set out in § 44(2) of the Arbitration Ordinance. Gee Tai argued that the composition of the arbitral tribunal was not in accordance with the agreement of the parties. The Arbitration Agreement had provided for disputes to be submitted in Beijing. However, China Nanhai had submitted the case for arbitration in Shenzhen. CIETAC maintained separate lists of arbitrators for Beijing and Shenzhen, but the Court enforced the award despite this.

The Court held that on a true construction of the Convention, Klockner had been under a duty of good faith which it had not fulfilled and that estoppel was a fundamental principle of good faith.[61] It also ruled that the party resisting enforcement was estopped from raising this point as it had been aware that the composition of the tribunal might be wrong but had chosen to fight the case without making any formal submission to either CIETAC or the tribunal. In these circumstances, the Court did not have to exercise its discretion to refuse enforcement of the award, since Gee Tai Holdings was estopped from relying on the incorrectly constituted tri-

59. *Hebei*, [1999] 1 H.K.L.R.D. 665 (H.C.F.A) (citing Paklito Investment Ltd. v. Klockner East Asia Ltd. [1993] 2 H.K.L.R. 39, at 48–49).

60. [1994] 3 H.K.C. 375.

61. [1994] 3 H.K.C. 375, 376.

bunal. Gee Tai Holdings had gotten what it had bargained for, namely three Chinese arbitrators under CIETAC Rules.[62] It is clear that in Hong Kong, a court will only refuse enforcement of an award if the defendant's rights have been violated in a material way.[63] Relying upon technical objections will not satisfy defendants, although it will allow the defendant to delay the inevitable, as the challenge to enforcement works its way to the Court of Final Appeal.

D. Singapore

Singapore's *International Arbitration Act* (Cap. 143A, 1995) (Singapore IAA) adopts the Model Law as the foundation of its legislative framework for international arbitration, reflecting its status as a hub of international financial and commercial activity. The provisions of the Singapore IAA[64] and the Model Law,[65] which limits the potential for courts to interfere in the enforcement process, encapsulates Singapore's preference for minimal curial intervention in international arbitration.[66]

Courts in Singapore have affirmed the finality of arbitral awards in *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA*.[67] In that case, the Singapore Court of Appeal held that there is no appeal for an error of law or fact made in an arbitral decision where the seat was Singapore. Errors of law or fact do not engage the public policy of Singapore under Article 34(2)(b)(ii) of

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62. [1994] 3 H.K.C. 375 at 388.

63. *See* Pacific China Holdings Ltd. v. Grand Pacific Holdings Ltd. [2012] 3 H.K.C. 498. The Court of Appeal noted the uncontroversial approach of the Court that in an application to set aside an award pursuant to § 34C(4) of the Arbitration Ordinance, the Court was concerned with the structural integrity of the arbitration proceedings. The remedy of setting aside was not an appeal and the court would not address itself to the substantive merits of the dispute, or to the correctness of otherwise of the award, whether concerning errors of fact or law: at [7]. The Court of Appeal held that except in the most egregious cases so that one could say that a party has been denied due process, the wide discretion of arbitrators and the flexibility of the arbitral process has been confirmed by national courts which regularly reject the procedural arguments of disappointed parties: at [55]. Only a sufficiently serious error could be regarded as a violation of art 18 of art 34(2)(a)(ii) and an error would only be sufficiently serious if it had undermined due process: at [95]. A party who had had a reasonable opportunity to present its case would rarely be able to establish that he had been denied due process. How a court might exercise its discretion in any particular case would depend on the view it took of the seriousness of the breach. Some breaches might be so egregious that an award would be set aside although the result could not be different. The burden is on the applicant to show that he had or might have been prejudiced: at [106].

64. *See* International Arbitration Act, (1995) Cap. 143A, § 6(2).

65. *See* UNCITRAL, Model Law on International Commercial Arbitration, Arts. 12, 13, 16(2), 24, 34(2), June 21, 1985.

66. *See* Lih Shyng Yang & Leslie Chew, *Arbitration in Singapore, in* INTERNATIONAL COMMERCIAL ARBITRATION IN ASIA (Phillip J. McConnaughay & Tom Ginsburg eds., JurisNet, LLC, 2013).

67. *See* [2007] 1 SLR 597.

the Model Law, and cannot not be set aside under Article 34(2)(a)(iii) of the Model Law.[68] In making this finding, the Singapore Court[69] declined to follow the Supreme Court of India in *Oil & Natural Gas Corporation alt v. SAW Pipes Ltd.*,[70] where the Supreme Court of India held that an arbitral award that was inconsistent with the provisions of the *Indian Arbitration and Conciliation Act,*[71] and therefore wrong in law, was "patently illegal" and liable to be set aside on the ground that it was in conflict with Indian public policy. This error of law was contrary to Indian public policy as contemplated by the *Indian Arbitration and Conciliation Act.*[72] The Singapore Court subscribed to a narrow scope of public policy. The Court held that public policy should only operate in instances where the upholding of an arbitral award would "shock the conscience'"or is "clearly injurious to the public good or . . . wholly offensive to the ordinary reasonable and fully informed member of the public" or where it violates the forum's most basic notion of morality and justice.[73] It decided that this would be consistent with the concept of public policy, as can be ascertained from the preparatory materials to the Model Law.[74] The Court also affirmed that a negative jurisdictional ruling does not constitute an arbitral award for the purposes of Article 34 of the Model Law, as one was not a decision on the substance of the dispute.[75] The mere titling of a document as an award does not make it an award as defined by the Act.[76]

It is interesting that until the recent *Astro* decision[77] there had been some conflict in the Courts of Singapore as to whether an award debtor may resist an award, not only by bringing an action at the seat of the award, but also by fighting an application by an award creditor to enforce an award. In *Newspeed International Ltd. v. Citus Trading Pte. Ltd.*,[78] the Singapore High Court held that these options were "alternatives and not cumulative," indicating a strict approach to the finality of awards and limiting the possibility of re-litigation. In this case,[79] the High Court explained the decision of *Paklito Investment Ltd. v. Klockner East Asia Ltd.*[80] on the basis that although the court had decided that it was not necessary for the defendants to appeal to the Chinese court before seeking an order from the Hong Kong court, the defendants could

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68. *See id.* at 621[57]. Similarly, in *Government of the Republic of the Philippines v. Philippine International Air Terminals Co Inc.* [2007] 1 SLR 278, the court held that an application to set aside an award is not a review on the merits of the decision. An arbitral award is not liable to be struck down on application in the courts because of allegations that it was premised on incorrect grounds whether of fact or of law. This is by virtue of the exclusivity of the grounds for setting aside awards in Art. 34 of the Model Law, except for the narrow grounds set out in § 24 *(Singapore) IAA*. Setting aside proceedings must take place at the seat of arbitration under § 8 (*Singapore*) *IAA* (*see also* Arts. 1(2) and (6) of the Model Law).

69. *See Philippines*, 1 SLR(R) 597 at 620[56] and 621[57].

70. *See* Oil & Natural Gas Corp. alt v. SAW Pipes Ltd., A.I.R. 2003 S.C. 2629 (India).

71. *See* Indian Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India).

72. *See id*.

73. *See also* Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie due Papier (RAKTA), 508 F.2d 969 (2d Cir. 1974).

74. *See Philippines*, 1 SLR(R) 597 at 622[59].

75. *See id*. at 624[66].

76. *See id.* at 625[70].

77. *See* PT First Media TBK v. Astro Nusantara International BV & Others (2013) SGCA 57 (Singapore).

78. Newspeed Int'l Ltd. v. Citus Trading Pte. Ltd. (2003) 3 SLR 1.

79. *See id*.

80. *See* Paklito Investment Ltd. v. Klockner East Asia Ltd. (1993) 2 HKLR 39 (Hong Kong).

proceed to a Chinese court and, if unsuccessful, make a claim in the Hong Kong court.[81] It is clear that the decision of the Hong Kong Court of Final Appeal in *Karaha Bodas*[82] had not been brought to the attention of the Singapore High Court in *Newspeed*. Nevertheless, the recent *Astro*[83] decision makes it clear that the remedies are cumulative rather then alternatives.

The doctrine of non-arbitrability has also been recently dealt with in detail by the Singapore High Court in *Silica Investors Ltd. v. Tomulugen Holdings Ltd. & Others*[84] in the context of whether a minority oppression claim was arbitrable. In essence, the "non-arbitrability doctrine rests on the notion that some matters so pervasively involve public rights, or interests of third parties, which are the subjects of uniquely governmental authority, that agreements to resolve such disputes by "private" arbitration should not be given effect."[85] Examples of statute-based relief that would invariably affect third parties or the public at large can only be granted by the courts in the exercise of their powers conferred upon them by statute, including an order to wind up a company.[86]

The High Court surveyed the Courts in England,[87] Australia[88] and Canada[89] and looked at the pros of each of the approaches taken by the three jurisdictions. The Singapore High Court correctly decided that an arbitral tribunal has no power to make orders that are binding on "third parties." It is interesting that the Court construed § 12(5) of the Singapore IAA,

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81. *See* Newspeed, 3 SLR(R) 1 at 6[26].

82. *See* Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F.3d 357 at 367 (5th Cir. 2003).

83. *See* PT First Media TBK v. Astro Nusantara International BV & Others [2013] SGCA 57 (Singapore).

84. *See* Silica Investors Ltd v. Tomulugen Holdings Ltd & Others [2014] 3 SLR 815.

85. GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 768 (Kluwer Law International, 3rd Ed, 2009); *see also* Silica Investors Ltd v. Tomulugen Holdings Ltd & Others [2014] 3 SLR 815. at 842[102]–[103].

86. *See* Silica Investors Ltd v. Tomulugen Holdings Ltd & Others [2014] 3 SLR 815 at 839[94]–[95].

87. *See* Fulham Football Club (1987) Ltd. v. Richards [2011] 2 W.L.R. 1055. Here, the approach in England allows all minority oppression claims to go for arbitration. If the arbitral tribunal is of the view that a winding up or buy-out order is appropriate, then the parties can go to court to obtain the necessary orders, but if not, the award takes effect in the normal way. In the former case, the court adopts the findings and remedies proposed by the arbitrator and merely proceeds to enforce the same by making the appropriate orders, e.g., a winding up or a buy-out order or cancel or vary a resolution; *see also* Silica Investors Ltd v. Tomulugen Holdings Ltd. & Others [2014] 3 SLR 815 at 848[121(b)]. This is to be contrasted with the earlier decision of Exeter City Association Football Club Ltd. v. Football Conference Ltd. [2004] 1 WLR 2910 where the judge held that all minority oppression claims are not arbitrable and which was overruled by the later decision of Fulham Football Club (1987) Ltd. v. Richards [2012] Ch 333.

88. The position in Australia is that minority oppression claim is arbitrable, insofar as the remedies sought are inter partes and not in rem: Silica Investors Ltd v. Tomulugen Holdings Ltd & Others [2014] 3 SLR 815 at 836[75]–837[84].

89. There are two approaches in Canada. One approach is that a minority oppression claim is arbitrable and the arbitral tribunal has the power to grant all the remedies or reliefs that are available to the courts: Silica Investors Ltd. v. Tomulugen Holdings Ltd. & Others [2014] 3 SLR 815 at 838[88]–[89]; The other approach in Canada, as exemplified in ABOP LLC v. Qtrade Canada Inc. (2007) 284 DLR (5th) 171, is to adopt a two-stage approach by leaving the arbitral tribunal to make all the necessary findings of fact and whether there has been unfair prejudice or commercial unfairness and where the tribunal finds there was oppression, then the oppressed minority shareholder can carry on with the minority oppression claim before the court and it is for the court to make the appropriate orders, including the winding up: Silica Investors Ltd. v. Tomulugen Holdings Ltd. & Others [2014] 3 SLR 815 at 838[90]–[91] and 848[121(a)].

which provides that the arbitral tribunal "may award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that Court narrowly."[90] The Singapore High Court adopted the approach of New Zealand that § 12(5) of the Singapore IAA cannot be construed as conferring upon arbitral tribunals the power to grant all statute-based remedies or reliefs available to the High Court. The Singapore Court held that § 12(5) has a more limited purpose and an arbitral tribunal cannot exercise the coercive powers of the Court or make awards *in rem* or bind third parties who are not parties to the arbitration. The Singapore High Court concluded that some statutory claims may straddle the line between arbitrability and non-arbitrability depending upon the remedies that are sought.[91] In the context of minority oppression claims, the arbitrability of the remedy sought could affect the arbitrability of the claim.[92] At the end of the day, while the Singapore High Court did not lay down a general rule, the High Court was of the view that most minority oppression claims would not be arbitrable. This is a function of the fact that it is unlikely that all relevant parties, including third parties whose interests may be affected, may be parties to the arbitration and, secondly, the nature of the remedy sought.[93]

E. New Zealand

In New Zealand, *The Arbitration Act 1996* governs the enforcement of international arbitral awards. A party may apply to the High Court of New Zealand to have an arbitral award enforced like a domestic judgment in terms of the award. Section 34 of *The Arbitration Act 1996* deter-

90. The Singapore High Court adopted the approach of New Zealand which has a similar section in their legislation, that subject to the agreement of the parties, an arbitral tribunal will be able to apply any provision of any of the contracts statutes or any other relevant enactment conferring powers on the court, except so far as its application by the arbitral tribunal may be excluded by considerations of arbitrability or public policy: Silica Investors Ltd. v. Tomulugen Holdings Ltd. & Others [2014] SGHC 101 (Sing.) ¶¶ 106-107.

91. Silica Investors Ltd. v. Tomulugen Holdings Ltd. & Others [2014] SGHC 101 (Sing.) ¶¶ 112–114.

92. *Id*. at ¶ 120.

93. *Id*. at ¶¶ 140–42.

mines the circumstances in which enforcement of an arbitral award may be avoided.[94] Paragraphs (1) to (4) of Article 34 of the First Schedule of *The Arbitration Act* 1996 closely follow Article 34 of the Model Law. Paragraphs (5) and (6) were added upon the recommendation of the Law Commission. Paragraph (6) defines what constitutes a contravention of public policy. The approach to enforcement has proved to be relatively straightforward. Curiously, New Zealand courts have held, contrary to ordinary international arbitration principles that an error of law or fact may constitute a breach of natural justice and thereby is a contravention of public policy.[95]

In *Downer-Hill Joint Venture v. Government of Fiji*,[96] Downer-Hill had been engaged by the government of Fiji to carry out road maintenance in Fiji. Following the completion of the works, Downer-Hill claimed substantial amounts in additional payments owed, and initiated ICC arbitration in accordance with the relevant contract. Downer-Hill then sought to have the award set aside on four principal grounds, including conflict with public policy. The govern-

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94. Section 34 of the Arbitration Act of 1996 (N.Z.):

> Application for setting aside as exclusive recourse against arbitral award
>
> (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3).
>
> (2) An arbitral award may be set aside by the High Court only if—
>
> (a) the party making the application furnishes proof that—
>
> (i) a party to the arbitration agreement was under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it, or, failing any indication on that question, under the law of New Zealand; or
>
> (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case; or
>
> (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
>
> (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this schedule from which the parties cannot derogate, or, failing such agreement, was not in accordance with this schedule; or
>
> (b) the High Court finds that—
>
> (i) the subject matter of the dispute is not capable of settlement by arbitration under the law of New Zealand; or
>
> (ii) the award is in conflict with the public policy of New Zealand . . .
>
> (6) For the avoidance of doubt, and without limiting the generality of paragraph (2)(b)(ii), it is hereby declared that an award is in conflict with the public policy of New Zealand if—
>
> (a) the making of the award was induced or affected by fraud or corruption; or
>
> (b) a breach of the rules of natural justice occurred—
>
> (i) during the arbitral proceedings; or
>
> (ii) in connection with the making of the award.

95. *See* Downer-Hill Joint Venture v. Gov't of Fiji [2005] 1 NZLR 554 (HC).

96. *Id*.

ment of Fiji sought to have the setting aside proceedings struck out on the ground that they disclosed no reasonable cause of action and/or were time barred. The government also contended for a wide interpretation of public policy.

The High Court held contrary to ordinary principles of international arbitration principles that a serious and fundamental error of law or fact could result in an award being contrary to the public policy of New Zealand because breaches of natural justice had occurred in connection with the making of the award. However, such a threshold was high and mere mistake would not suffice. It had to be shown that the factual finding complained of was not based on any logically probative evidence. There would also need to be some element of illegality, or the enforcement of the award would have to involve injury to the public good or abuse the integrity of the court. An unsubstantiated finding of fact by itself would not be sufficient to render an award contrary to public policy. In order for an award to be set aside it must be shown that even if such a breach of natural justice had occurred the award was contrary to public policy. To warrant the intervention of the court, there must be the likelihood that the identified procedural irregularity resulted in a "substantial miscarriage of justice."[97]

New Zealand's broad approach to what constitutes a breach of public policy has been revisited and the approach narrowed in *Amaltal Corp. Ltd. v. Maruha (NZ) Corp. Ltd.*[98] In that case, Amaltal and Maruha were joint venturers under a shareholders agreement in a third company, Ceebay. Maruha was the New Zealand subsidiary of a Japanese corporation established as the vehicle for that corporation's investment in New Zealand fishing quota. A dispute arose concerning the management and ownership of Ceebay, which led to arbitration. Following the arbitration proceedings, the arbitrator directed that Amaltal transfer its shares in Ceebay to Maruha in accordance with relief provisions in the shareholders agreement. Amaltal unsuccessfully applied for leave to appeal. It also applied under Article 34 of the First Schedule to *The Arbitration Act* to have the award set aside. Counsel for Amaltal argued that the relief provisions operated as penalties, and because the common law rule against penalty clauses in contracts reflected a substantive public policy against private fines, the award, in purporting to enforce penalty provisions, was contrary to public policy.

The High Court did not accept that the broad equitable concept of public policy as applied to contracts between individuals was the same as the "weightier notion" of the public policy of New Zealand that is referred to in Article 34, which implied more in the nature of "sovereign importance." The High Court dismissed the application.

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97. *Id.* at ¶¶ 83–84.

98. [2004] 2 NZLR 614 (CA).

On appeal, the Court of Appeal discussed the legislative history of Article 34 and examined the narrow reading given to public policy in the United States,[99] England,[100] and Canada[101] in the sense that public policy covered only "fundamental principles of law and justice in substantive as well as procedural respects."[102] The Court of Appeal held that it was limited to considering for review issues that raised a "fundamental principle of law and justice" and found that the power to strike down a penalty clause is not a rule which can properly be characterized as so fundamental as to constitute "public policy" in the sense in which those words have been used in art 34 or the sources from which that article was drawn.[103]

III. The Astro Litigation—A Case Study

This case study demonstrates that a party may still avoid enforcement in countries that are ostensibly pro-arbitration and pro-enforcement. In the long running dispute between Malaysia's Astro Group and Indonesia's Lippo Group, Lippo has effectively avoided the enforcement of an award rendered from the highly respected Singapore International Arbitration Centre (SIAC) in 2009 in favor of Astro. To date, enforcement proceedings in the UK, Hong Kong, Singapore and Indonesia have failed to yield results. This is partly due to the refusal of Indonesian courts to enforce the award, transferal of assets overseas by Lippo and a challenge to the jurisdiction of the arbitral tribunal in the Singapore courts.

A. Astro v. Lippo—The Facts

The ongoing dispute between a group of Malaysian companies called Astro,[104] controlled by Ananda Krishnan, and the Lippo group, controlled by Indonesia's Riady family, arose out of a failed joint venture between Astro and Lippo's First Media. In October 2004, Astro, seeking to establish a satellite television service (known as Direct Vision) in Indonesia, suggested a joint

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99. Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969, 974 (2d Cir. 1974) where it was held that enforcement of foreign arbitral awards might be denied on the basis of that defense "only where enforcement would violate the forum state's most basic notions of morality and justice."

100. Deutsche Schachtbau und Tiefbohrgesellschaft mbH v. Shell Int'l Petroleum Co. Ltd. [1990] 1 AC 295, 315 where it was held that although considerations of public policy could never be exhaustively defined, it had to be shown that there was some element of *illegality* or that the enforcement of the award would be clearly injurious to the public good or, possibly, that it would be wholly offensive to the ordinary, reasonable and fully informed member of the public on whose behalf the power of the state are exercised.

101. Boardwalk Regency Corp. v. Maalouf (1992), 6 O.R. 3d 737, 743 (Ont. C.A.) where it was held that the common ground of all expressed reasons for imposing the doctrine of public policy was "essential morality" in that it must be "more than the morality of some persons and must run through the fabric of society to the extent that it is not consonant with the forum state's system of justice and general moral outlook to countenance the conduct, no matter how legal it may have been where it occurred."

102. Amaltal Corp. Ltd. v. Maruha (NZ) Corp. Ltd. [2004] 2 NZLR 614 (CA) at [43].

103. *Id*. at [59]. Note that this was not the approach taken in Kimberly Construction Ltd. v. Mermaid Holdings Ltd. [2004] 1 NZLR 386 (CA) 403 in which the Court held that "Public policy is capable of covering a wide variety of matters and it is neither necessary nor desirable in this case to attempt to define the circumstances in which [the relevant provision] is capable of being invoked."

104. The companies involved in this dispute are: (1) Astro Nusantara International BV, (2) Astro Nusantara Holdings BV, (3) Astro Nusantara Corporation NV, (4) Astro Multimedia NV Astro Overseas Ltd. (5) Astro All Asia Networks PLC, (6) Measat Broadcast Networks Systems Sdn Bhd, (7) All Asia Multimedia Network FZ-LLC. Astro Nusantara Int'l BV & Others v. PT Ayunda Prima Mitra & Others [2012] SGHC 212 (Sing.).

venture with Lippo due to Indonesian laws prohibiting foreign-owned and incorporated companies from entering the Indonesian telecommunications market.[105] In March 2005, the two groups executed a series of Subscription and Shareholders Agreements (the Agreements). The Agreements were subject to a series of conditions precedent that had to be fulfilled within three months before the parties would be bound to proceed with the transactions contemplated. One of these conditions precedent was the conclusion of service agreements between Astro and Lippo's First Media.[106] While the agreement contemplated the provision of services, equipment, and finance ("support services") by three Astro group companies (Suppliers),[107] these Suppliers were never made a party to the agreement.

In anticipation of the execution of service agreements,[108] the Suppliers began to provide support services to Direct Vision at the request of First Media in December 2005.[109] First Media began operations in February 2006.[110]

In the meantime a series of other deals had been struck. These included:

- the purchase by Ananda Krishnan's telco flagship company Maxis of a controlling 51% interest in Lippo's Indonesian mobile phone company Natrindo in March 2005;
- Lippo and Astro also jointly acquired Singapore's premier property and hotel company, OUE.[111]
- in April 2007 a further deal was struck in which Ananda Krishnan's Maxis, bought out Lippo's remaining 44% interest in Natrindo for $124 million (U.S.).[112]
- using assets gained from these transactions, in June 2007 Ananda Krishnan sold a 25% interest in Maxis and a 51% interest in Natrindo to Saudi Telecom, a Saudi Arabian corporation, for $3.05 billion (U.S.).[113]

By August 2007 the service agreements still had not been executed and after many failed attempts at re-negotiation the parties began to explore their exit options.[114] Despite this, the

105. Astro Nusantara Int'l BV and Others v. PT Ayunda Prima Mitra & Others [2012] SGHC 212 (Sing.) ¶ 20.

106. Astro Nusantara Int'l B.V. & Others v. PT Ayunda Prima Mitra & Others [2012] H.K.C. 402, ¶ 3 (C.F.I.).

107. These were Astro All Asia Networks PLC, Measat Broadcast Networks Systems Sdn Bhd and All Asia Multimedia Network FZ-LLC. Astro Nusantara Int'l BV & Others v. PT Ayunda Prima Mitra & Others [2012] SGHC 212 (Sing.) ¶¶ 22–23.

108. The date for the execution of these documents had been pushed back to mid-July 2009: *Id.* at ¶ 23

109. *Id.* at ¶ 24.

110. *Id.*

111. Leslie Lopez, *Astro's Troubles With Lippo Turn Ugly*, THE EDGE MALAYSIA (May 3, 2012), http://www.theedgemalaysia.com/highlights/212810-astros-troubles-with-lippo-turn-ugly.html.

112. *Id.*

113. *Id.* (Malaysian press reported that the Riady family was infuriated that they were not made a party to this Saudi deal. It has been speculated that this was to become the antecedent of the joint venture's failure, as the Riady family reportedly demanded from Astro the sum of $250 million in return for the remaining shares in their joint venture.).

114. Astro Nusantara International B.V. & Others v. PT Ayunda Prima Mitra & Others [2012] SGHC 212 at ¶ 25 (Sing.).

Suppliers continued to provide support services for First Media while threatening to withdraw these services should First Media and Astro fail to reach an agreement. Inevitably, a dispute arose between First Media and Astro, with Astro[115] arguing that its affiliates[116] were under no obligation to continue to provide funding to Direct Vision. In August 2008 the Suppliers invoiced First Media for the support services and demanded repayment of the cash advanced.[117]

Clause 17 of the Agreement between the parties required that all disputes in connection with or in relation to the joint venture be referred to arbitration.[118] Lippo, however, attempted to bring several court actions in tort in Indonesia, on the basis that there had been an oral joint venture preceding the Agreement.[119] Astro however commenced arbitration in October 2008 in Singapore. Astro sought to have the Suppliers joined to the arbitration along with declarations that there was no binding joint venture and no continuing obligation to provide support services, and injunctive relief to restrain proceedings in Indonesia.[120] In the award of May 7, 2009, pursuant to SIAC's institutional rules, the Suppliers were joined to the proceedings and injunctive relief was ordered, restraining the Indonesian proceedings.[121] In a further partial award of October 3, 2009 the Tribunal found for Astro, declaring that the Agreement was the only effective joint venture contract between the parties. The tribunal also found that the conditions precedent of the Agreement had never been fulfilled and that as there was no continuing joint venture, Astro was not obliged to continue to provide support services to First Media.[122]

In a final award on February 16, 2010 the tribunal unanimously awarded Astro $300 million (U.S.) in damages, interest and costs and dismissed the counter claims. However, the dispute did not end here.

In the latter half of 2010 Astro commenced enforcement proceedings for the SIAC Awards in Malaysia,[123] Singapore,[124] Indonesia[125] and Hong Kong[126] with some initial success.

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115. Astro Nusantara International B.V. and Astro Nusantara Holdings B.V.

116. Astro All Asia Networks PLC, Measat Broadcast Networks Systems Sdn Bhd and All Asia Multimedia Network FZ-LLC.

117. Astro Nusantara International B.V. & Others v. PT Ayunda Prima Mitra & Others [2012] SGHC 212 at ¶ 26 (Sing.).

118. *Id.* at ¶ 27.

119. *Id.* at ¶ 26.

120. *Id.* at ¶ 27.

121. Astro Nusantara International B.V. & Others v. PT Ayunda Prima Mitra & Others [2012] SGHC 212 at ¶¶ 30–31 (Sing.); Astro Nusantara International B.V. & Others v. PT Ayunda Prima Mitra & Others [2012] H.K.C 402 at ¶ 5, ¶ 17 (C.F.I.).

122. Astro Nusantara International B.V. and Others v. PT Ayunda Prima Mitra & Others [2012] SGHC 212 at ¶ 33 (Sing.).

123. *Id.* at ¶ 34.

124. *Id.* at ¶¶ 34–35

125. Astro Nusantara International B.V. & Others v. PT Ayunda Prima Mitra & Others [2010] IDMA 1404.

126. Astro Nusantara International B.V. & Others v. PT Ayunda Prima Mitra & Others [2012] H.K.C. 402 at ¶ 7 (C.F.I.).

In December 2010 judgment was entered in terms of the award in the Hong Kong High Court.[127] In March 2011, Astro, in ex parte proceedings, also obtained orders for the enforcement of the awards in Singapore.[128] However in August 2011 Lippo sought to have these enforcement orders set aside in Singapore on the grounds that there had been no valid service of the enforcement orders under Indonesian law.[129] Lippo also argued that the Suppliers had no arbitration agreement with First Media, therefore the tribunal had no jurisdiction to join these parties to the arbitration. This was in spite of the fact that First Media had not raised these objections within the limitation periods prescribed by Articles 16 and 34 of the Model Law. These grounds were rejected by the Singapore High Court in October 2012.[130] Lippo has appealed the decision.

Meanwhile, in the Hong Kong proceedings First Media and Across Asia used a series of dubious awards and judgments from Indonesia to frustrate attempts to execute the award.[131] The proceedings began because, First Media loaned $44 million (U.S.) to its parent company and controlling shareholder Across Asia.[132] Astro commenced proceedings in Hong Kong for a garnishee order (also known as a "Third Party Debt Order")[133] against Across Asia, which was granted in 2011 and required Across Asia to pay $44 million (U.S.) into the court, to be held pending the outcome of the Singapore setting aside proceedings.[134]

To combat this Lippo developed a series of tactics to delay or completely avoid the payment of money into the court. The most obvious was by appealing the garnishee order to the Hong Kong Court of Appeal in August 2012, arguing amongst other things that as the award may also be enforced in Indonesia this would lead to double payment.[135] The Court rejected this argument. Other delaying tactics were adopted which ultimately led the High Court to postpone the determination of a timetable.[136]

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127. *Id.* at ¶ 7 and ¶ 26 (Hong Kong was the domicile of parent company Across Asia Ltd., who owned a 55.1% share in First Media.).

128. Astro Nusantara International B.V. & Others v. PT Ayunda Prima Mitra & Others [2012] H.K.C.A. 351 at ¶ 6.

129. *Id*. at ¶ 6, Astro Nusantara International B.V. & Others v. PT Ayunda Prima Mitra & Others [2012] SGHC 212 at ¶ 36 (Sing.). It will become significant in 2015 in the Hong Kong Court of First Instance in Astro Nusantara International B.V. & Others v. PT Ayunda Prima Mitra & Others [2015] HKEU 330 at ¶¶ 5–7 that Lippo has never sought to have the Awards set aside in a Singaporean court acting in its supervisory capacity.

130. *See generally* Astro Nusantara International BV & Others v. PT Ayunda Prima Mitra & Others [2012] SGHC 212.

131. Astro Nusantara International BV & Others v. PT Ayunda Prima Mitra & Others [2012] H.K.C. 2070 (C.F.I.); Astro Nusantara International B.V. & Others v. PT Ayunda Prima Mitra & Others [2013] H.K.C. 332 (C.F.I.).

132. Astro Nusantara International B.V. & Others v. PT Ayunda Prima Mitra & Others [2012] H.K.C. 402 at ¶ 9 (C.F.I.).

133. Astro Nusantara International B.V. & Others v. PT Ayunda Prima Mitra & Others [2012] H.K.C. 351 at ¶ 21 (C.F.I.) (described as "a proprietary remedy which operates by way of attachment against the property of the judgment debtor, the property so attached being the chose in action which represented the garnishee's debt to the judgment debtor.").

134. Astro Nusantara International B.V. & Others v. PT Ayunda Prima Mitra & Others [2012] H.K.C. 402 at ¶ 9 (C.F.I.).

135. Astro Nusantara International B.V. & Others v. PT Ayunda Prima Mitra & Others [2012] H.K.C.A. 351.

136. Astro Nusantara International B.V. & Others v. PT Ayunda Prima Mitra & Others [2012] H.K.C. 2070 at ¶ 8 (C.F.I.).

The delaying tactics continued and thwarted the enforcement of the arbitral awards and the orders of various Hong Kong courts for many years. In spite of their reservations about the Indonesian proceedings, the Hong Kong High Court refused Astro's application for an order compelling Across Asia and First Media to appeal the Bankruptcy Order.[137]

Astro announced in September 2013 that it had also lost its appeal in enforcement proceedings in Indonesia. According to Astro's announcement the Indonesian judgment placed strong emphasis on state sovereignty, citing "public order," interference with the Indonesian judicial process, and the violation of the state and legal sovereignty of Indonesia as reasons for refusing to enforce the Singapore Awards.[138]

On October 31, 2013, the Singapore Court of Appeal, the ultimate court of appeal in Singapore, held that SIAC did not have the jurisdiction the join the suppliers to the arbitration.[139] Sunders Menon CJ held that the framework created by the Model Law allows parties to have a choice of remedies.[140] Lippo was therefore able to rely on the jurisdictional challenge as a "passive" defense even though it was raised after Astro had commenced enforcement proceedings.

On *de novo* review of the original tribunal's jurisdiction, the Court held that exercise of jurisdiction of SIAC to join the suppliers to the arbitration without the consent of Lippo had been improper.[141] While other companies in the Astro group who had been parties to the agreement were not precluded from recovery pursuant to the award, the suppliers were denied the sum that had been awarded to them by SIAC.[142]

As a result of the Singapore Court of Appeal's judgment of October 31, 2013, on 24 January 2014 Lippo was granted a stay of execution on the Garnishee Order Absolute in Hong Kong.[143] In the absence of a judgment debt to form the basis of the Garnishee Order, the Court held that was the just outcome under the circumstances. Leave to appeal from the stay of execution has been denied by both the Hong Kong High Court[144] and the Court of Appeal.[145]

On February 17, 2015, the Court of First Instance in Hong Kong afforded to the Suppliers a win.[146] Despite the judgment of the Singapore Court of Appeal[147] and the views of the

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137. *Id.* at ¶ 7.

138. Shaun Lee, *Update on Astro-Lippo Dispute: Astro's Appeal to Indonesian Supreme Court Fails*, Singapore International Arbitration Blog, http://singaporeinternationalarbitration.com/2013/09/11/update-on-astro-lippo-dispute-astros-appeal-to-indonesian-supreme-court-fails/.

139. PT First Media TBK v. Astro Nusantara International B.V. [2013] SGCA (Sing.).

140. *Id.* at ¶ 71.

141. *Id.* at ¶ 224.

142. *Id.* at ¶ 227.

143. Astro Nusantara International B.V. & Others v. PT Ayunda Prima Mitra & Others [2014] H.K.C 136 at ¶ 8 (C.F.I.).

144. Astro Nusantara International B.V. & Others v. PT Ayunda Prima Mitra & Others [2014] H.K.C.U. 727.

145. Astro Nusantara International B.V. & Others v. PT Ayunda Prima Mitra & Others [2014] H.K.C.U. 1546.

146. Astro Nusantara International B.V. & Others v. PT Ayunda Prima Mitra & Others [2015] HKEU 330.

147. *Supra* notes 129 and 139. It was significant to the Hong Kong Court of First Instance that the Awards had never been set aside in Singapore and the Awards remained in force in Singapore.

Hong Kong Court of Appeal[148] that "it [would] indeed be remarkable if, despite the Singapore Court of Appeal judgment on the invalidity of arbitration awards, Astro [would] still be able to enforce a judgment here based on the same arbitration awards that were made without jurisdiction,"[149] the Court of First Instance was persuaded that the awards should be enforced against First Media.[150] The Court did not exercise its discretion to extend the time for First Media to apply to set aside the Hong Kong Orders and Hong Kong Judgment with the consequence that they remain undisturbed. The Court also held in obiter that even if an extension of time had been granted, First Media would be precluded from relying upon § 44(2) of the Arbitration Ordinance to resist enforcement of the awards.[151]

In handing down this decision the Hong Kong Court of First Instance confirmed its pro-enforcement stance.[152] The attitude of the Court was that enforcement of a Convention award is mandatory unless a case under § 44(2) or (3) of the Arbitration Ordinance is made out.[153] In that instance, the Court has discretion to permit or refuse enforcement. Interestingly, the Court held that the fact that an arbitral award has been refused enforcement by a court in another jurisdiction, even one whose law governs the arbitration agreement or the procedures of the arbitration, is not a ground for resisting enforcement of the arbitral award in Hong Kong under the New York Convention, because different jurisdictions have different rules, laws and regulations governing enforcement of arbitral awards.[154] Whether a ground has been made out for refusing to enforce a Convention award under § 44(2) and (3) of the Ordinance is a matter governed by Hong Kong law and is to be determined by a Hong Kong Court.[155]

IV. The Lessons to Be Learned

In Australia, as well as many nations with a common law system, multiparty construction and complex commercial litigation is very time consuming, document intensive and almost prohibitively expensive for all but the most sophisticated of players. As long as there are lawyers involved in dispute resolution, there will always be opportunities to avoid and delay enforcement of Arbitral Awards and Judgments as the case may be. At the end of the day however, the lure of enforcement in Convention countries as well the promise of neutral adjudication, particularly where the alternative is adjudication in a country where the rule of law may not be respected, will always make international arbitration a viable alternative. It is suggested that the solution may lie at the precontractual stage. Players who enter into construction contracts with an international flavor should do their due diligence prior to contracting to be aware of the risks and potential exposure.

148. *Supra* note 145.

149. *Id*. at ¶ 6.

150. *Id* at ¶ 7.

151. *Id*.

152. *Id*. at ¶ 73.

153. *Id*.

154. *Id*.

155. *Id*.

One such risk is the presence and levels of corruption. Zurich Insurance has developed an iPad application called the Zurich Risk Room that looks at various macroeconomic imbalances like current account deficit, fiscal risks, government budget balance, government debt, gross national savings, inflation, trade balance as well as development indicators like brain drain, capacity for innovation, corruption, income inequality, pay and productivity, state failure and wastefulness of government spending, to allow you to make an assessment of the risk of trading with a company either based or holding assets in that country. By way of illustration, according to the Zurich Risk Room, corruption in Hong Kong is 0.06, Singapore is 0.04, Indonesia is 0.73 and Australia is 0.03.[156] Looking at these results, it should come as no surprise that enforcement of arbitral awards in Indonesia has not been a clear-cut affair in both the *Astro* and the *Karaha Bodas* cases.

In Indonesia, arbitral awards that do not involve the State may be enforced via an ex parte application. However arbitral awards that involve a State party require a court hearing as a precursor to enforcement. Although the *Astro* litigation did not involve a State party, the issue that arose was whether Indonesian courts would support arbitration in cases where simultaneous court proceedings had also been commenced in an Indonesian court by the Indonesian party. That case indicates that Indonesian courts take the view that their court processes take precedence over the arbitral process even if it is the contractually agreed mechanism for dispute resolution. This approach appears to be confirmed in the *Karaha Bodas* and the *Astro* cases. In both cases, Indonesia avoided enforcement of the arbitral awards by ostensibly enforcing its nation's public policy. Further, in Indonesia, as illustrated in the *E.D.& F. Man (Sugar) Ltd. v. Yani Haryanto*[157] case, it seems that enforcement of an award that would contravene a domestic law also constitutes a violation of Indonesia's public policy. It is no surprise therefore that Indonesian courts have been criticized for their wide judicial interpretation of what constitutes public policy, refusing enforcement on the grounds of public order, territorial sovereignty and mandatory laws.

By contrast, pro-enforcement nations like the United States, Australia, New Zealand, Hong Kong and Singapore have narrowly construed what constitutes a violation of their nation's public policy. Those nations have endorsed the view first promulgated in the United States in *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie due Papier (RAKTA)*[158] that public policy will not be violated unless the forum state's most basic notions of morality and justice are violated.

In Australia, in *TCL Air Conditioner (Zhangstan) Co. Ltd. v. Castel Electronic Pty. Ltd.,*[159] the Federal Court undertook a comprehensive review of the approach of other nation courts in the common law world and then confirmed its pro-enforcement stance. In Australia, it now seems clear that public policy would only be violated if the most basic notions of morality and

156. With 0 being the minimum and 1 being the maximum.

157. E.D. & F. Man (Sugar) Ltd. v. Yani Haryanto [1999] 271/PDT.G (Jakarta).

158. Parsons & Whittenmore Overseas Co. v. Societe Generale de L'Industrie due Papier, 508 F.2d 969 (2d Cir.1974).

159. TCL Air Conditioner (Zhangstan) Co. Ltd. v. Castel Electronic Pty Ltd. [2014] FCR 1214 (Austl.).

justice are violated. This is consistent with the approach of the Supreme Court of Hong Kong in *Paklito Investment Ltd. v. Klockner East Asia Ltd.*[160] In that case, the Supreme Court of Hong Kong rejected the public policy defense raised and held that the public policy defense would only succeed in instances where enforcement would violate the forums states "most basic notions of morality and justice."[161] Similarly, the Singapore Court of Appeal in *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA*[162] rejected the public policy defense. The Singapore High Court construed the defense narrowly and held that it would only apply in situations where enforcement would "*shock the conscience*" or would be "*wholly offensive to the ordinary reasonable and fully informed member of the public* [. . .]"[163] New Zealand has in relatively recent times, similarly come to favor this approach. In *Amaltal Corp. Ltd. v. Maruha (NZ) Corp. Ltd.,*[164] the Court of Appeal held that public policy covered only fundamental principles of law and justice in substantive and procedural aspects.

V. Conclusion

The recent cases demonstrate that except for Indonesia, strong statutory provisions inserted to promote expediency and ease of enforcement have been introduced and upheld by the Singapore, Hong Kong, New Zealand and Australian courts. Despite the strong judicial stance on enforcement, the intent of the legislation can be thwarted or at least delayed for many years by skillful lawyers using delay tactics, which exploit the appeal processes of the courts. This is a fact of life that cannot be avoided regardless of whether arbitration or court proceedings are the mechanism used for dispute resolution. Both the *Astro* and the *Karaha Bodas* cases illustrate that there can be a significant disparity between the aims of international arbitration and its costly and time-consuming reality. This is however, no different to the disparity between the ideals of just, cheap and quick justice and the realities of litigation.

It is undeniable that Singapore and Hong Kong, the financial hubs of South East Asia, have strong legal systems and little quantifiable corruption. Those countries have established that their national courts are pro-enforcement of arbitral awards and pro-arbitration. As such, a party may trade with ease with Singapore and Hong Kong, confident in the knowledge that should the parties fall into dispute, an arbitral award that arises from that dispute would be enforced in those countries in accordance with the ethos of the Convention and the Model Law.

Nevertheless, developing countries provide many opportunities for investment, and it is unrealistic to suggest that parties should not trade with developing countries. According to the 2013–2014 United Nations Report, titled "Achieving Development Results in Asia and the Pacific,"[165] the Asia Pacific region has been the most economically dynamic region in the world in recent decades. The region's share in the world economy has increased from 14% in 2000 to

160. Paklito Investment Ltd. v. Klockner East Asia Ltd. [1993] 2 H.K.L.R. 39.

161. *Id.* at ¶ 8.

162. PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA [2007] 1 SLR(R) 597 (Sing.).

163. *Id.* at ¶ 59.

164. Amaltal Corp. Ltd. v. Maruha (NZ) Corp Ltd. [2004] 2 NZLR 614 (CA).

165. U.N. Development Programme, *Achieving Development Results in Asia and the Pacific* at 9 (2013–2014).

25% in 2012, and the United Nations expects that by 2030 the region will host about two-thirds of the world's middle class.

The United Nations Development Programme, which publishes an annual Human Development Report, identified in its 2013 report[166] that by 2020, the estimated combined output of China, India and Brazil would surpass the aggregate production of the United States, Germany, United Kingdom, France, Italy and Canada.[167] The 2013 United Nations Development Programme report also states that the "rise of the South" goes well beyond those economies, as more than 40 developing countries have made greater human development gains in recent decades than what was predicted. According to the United Nations, countries such as Indonesia, Mexico, Bangladesh, Tanzania and Yemen all registered significant growth, while nations such as Afghanistan and Pakistan had some of the fastest growth rates in the world, with 3.9% and 1.7% over the past 12 years, respectively.[168]

With such levels of growth, the temptation is undeniably to exploit the economic growth in China, India and Indonesia. However, all three countries have significantly higher levels of corruption than Australia, Singapore and Hong Kong. Due diligence should therefore be done prior to investment in those countries to understand their domestic laws and policies as well as assess the risks of trading with these countries. If a party decides that it is willing to take on the risk of trading with these countries then it should put in place financial arrangements to secure payment. For example, this can be in the form of escrow accounts as well as satisfying itself that its trading partner has assets in secure and stable countries where the rule of law is a given. Another means of managing the risk is to agree that all disputes be referred to arbitration in Hong Kong or Singapore as international arbitration can provide a neutral and relatively cost effective dispute resolution forum for the parties. When functioning at its optimal levels, international arbitration and the enforcement process can offer a flexible means to achieve a just, cheap, and quick solution.

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166. U.N. Report, *The Rise of the South: Human Progress in a Diverse World* (2012–2013).

167. *Id.*

168. *Id.*

Building a Different Kind of Relationship— A Suggested Treaty Between the United States and China

Ryan Hutzler*

I. Introduction

"We've gone from being two nations with hardly any ties to speak of . . . to being thoroughly, inescapably interdependent."[1]

"We should enhance our awareness of opportunities, the win-win situation and innovation, deepen and expand bilateral economic cooperation and strive to explore new converging interests and growth points of cooperation."[2]

In 2007, Longtop Financial Technologies Ltd. became a public United States-listed Chinese company through a conventional initial public offering, and its shares began to be traded on the New York Stock Exchange.[3] In November 2010, Longtop Financial's market capitalization exceeded $2 billion.[4] However, beginning in April 2011, reports emerged that scrutinized Longtop Financial's "unconventional staffing model," alleged prior undisclosed management "misdeeds," and questioned "non-transparent" stock transactions.[5] In May 2011, Longtop Financial's CFO and outside auditor resigned when information concerning falsified financial records surfaced.[6] Soon after, securities class action lawsuits were filed in the Southern District of New York.[7]

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1. Hillary Rodham Clinton, Sec'y of State, Remarks at the U.S. Institute of Peace China Conference, U.S. DEP'T OF STATE (Mar. 7, 2012), http://iipdigital.usembassy.gov/st/english/texttrans/2012/03/201203081765.html#axzz2yE8tWzff.

2. Xi Jinping, Chinese President, Remarks at Sunnylands Summit, CHINA DAILY (June 10, 2013), http://www.chinausfocus.com/china-news/xi-obama-stress-economic-ties/.

3. *See* Compl. ¶ 22, In re Longtop Fin. Techs. Ltd. Sec. Litig., No. 1:11-cv-03658 (S.D.N.Y. May 27, 2011), ECF No. 1; Am. Consolidated Class Action Compl. ¶¶ 6, 29, In re Longtop Fin. Techs. Ltd. Sec. Litig., No. 1:11-cv-03658 (S.D.N.Y. Mar. 22, 2013), ECF No. 144.

4. Floyd Norris, *The Audacity of Chinese Frauds*, N.Y. TIMES (May 26, 2011), http://www.nytimes.com/2011/05/27/business/27norris.html?pagewanted=all&_r=0.

5. *See* Compl., *supra* note 3, ¶ 53; Am. Consolidated Class Action Compl., *supra* note 3, ¶ 44; *see also* Kevin LaCroix, *Shareholders Obtain $882 Million Default Judgment in Longtop Financial Securities Suit*, THE D&O DIARY (Nov. 20, 2013), http://www.dandodiary.com/2013/11/articles/securities-litigation/shareholders-obtain-882-million-default-judgment-in-longtop-financial-securities-suit/ (last visited Apr. 1, 2015).

6. *See* Compl., *supra* note 3, ¶ 4; Am. Consolidated Class Action Compl., *supra* note 3, ¶¶ 55–56.

7. *See* Compl., *supra* note 3, ¶ 1; Am. Consolidated Class Action Compl., *supra* note 3, ¶ 1.

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For over a year, the class action shareholders unsuccessfully attempted to serve Longtop Financial and its former CEO, Wai Chau Lin, with the summons and complaint pursuant to the Hague Convention on Service Abroad.[8] When the defendants failed to both respond to service and appear in court, the plaintiffs moved for entry of default judgment.[9] On November 14, 2013, Southern District of New York Judge Shira Scheindlin entered a default judgment order that included a damages award of $882.3 million against Longtop Financial and Lin.[10] While the sheer size of the award is impressive, the plaintiffs are now confronted with the challenge of enforcing the judgment against the company and its former CEO, neither of which have assets in the United States.[11] As such, the value of Judge Scheindlin's judgment is in question.

Judge Scheindlin's award may represent an empty victory for the class action plaintiffs for two fundamental reasons. *First*, Chinese courts do not recognize and enforce United States court judgments because neither a treaty nor reciprocity exists between the two nations.[12] *Second*, because neither Longtop Financial nor Lin has assets in the United States, the class action plaintiffs' ability to collect on Judge Scheindlin's judgment is limited.[13] Accordingly, the plaintiffs' prospect of enforcing and collecting any part of the $882.3 million is remote.[14]

When bringing suit against a Chinese company, an American entity has limited choice of forum options. Although an injured American party may initiate litigation in either the United States or China, or resort to arbitration either inside or outside of China, these choices are ineffective.[15] *First*, a Chinese court has never recognized and enforced a United States court judgment.[16] *Second*, Chinese courts do not regularly recognize and enforce arbitration decisions issued outside of China.[17] *Third*, arbitration in China is not always an efficient and effective forum to obtain legal recourse.[18] *Fourth*, despite China's ongoing reform efforts to improve judicial independence and transparency, American parties remain concerned that Chinese courts are institutionally corrupt and partial.[19] Due to these obstacles, a harmed American party that hopes to collect against a Chinese entity has few, if any, desirable forums available to commence a legal action and obtain the remedy sought.[20] As such, the current dispute resolu-

8. *See* Order Entering Default J. at 2, In re Longtop Fin. Techs. Ltd. Sec. Litig., No. 1:11-cv-03658 (S.D.N.Y. Nov. 14, 2013), ECF No. 164.

9. *See id.* at 1–3.

10. *See id.* at 3–4.

11. *See* LaCroix, *supra* note 5.

12. *See infra* Parts III.B, IV.A.

13. *See* LaCroix, *supra* note 5.

14. *See id.*

15. *See infra* Part IV.A–B.

16. *See infra* Parts III.B, IV.A.

17. *See infra* Part IV.B–C.

18. *See id.*

19. *See infra* Part II.B.

20. *See infra* Part IV.A–C.

tion system between the United States and China does not adequately serve the legal and commercial interests of American and Chinese parties.[21]

This article proposes that the United States and China execute a mutual judgment recognition and enforcement treaty to correct the shortcomings of the current dispute resolution process.[22] There is not only precedent for this proposed treaty, but also a significant benefit to signing such an arrangement. *First*, China has already established a similar narrow, neutral judgment recognition and enforcement treaty with Hong Kong.[23]

Second, some United States courts have already recognized and enforced Chinese court judgments based on the principle of international comity.[24] *Third*, litigating parties, such as the class action plaintiffs described in *In re Longtop Financial Technologies Ltd. Securities Litigation*, would benefit from universal, unfettered access to United States and Chinese courts. Therefore, to advance the growing interdependence between China and the United States, the two nations must build a "different kind of relationship," a relationship that emphasizes and mutually respects the rule of law and judicial process.[25] The proposed legal arrangement would signify the beginning of such a union.

Before proposing the judgment recognition and enforcement treaty between the United States and China, Part II of this article briefly explores the United States' relationship with China, probes the development of the rule of law and judicial system in China, and analyzes how legal reform has impacted the Chinese judiciary. Part III reviews the present judgment recognition and enforcement doctrines in both the United States and China, while Part IV addresses the problems with the current doctrine between the two countries. Finally, Part V proposes the treaty between the United States and China to resolve the challenges presented by the existing recognition and enforcement doctrine.

II. Background

To provide the framework for the proposed treaty between the United States and China, this article will initially provide some background on (A) Sino-American relations, (B) the Chinese legal system, and (C) the growth and development of the Chinese judiciary and the rule of law in China.

A. Sino-American Relations

Since the 18th century, the United States has had political and economic interests in China.[26] However, these interests were complicated on October 1, 1949, by the establishment

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21. *See id.*
22. *See infra* Part V.
23. *See infra* Part III.C.
24. *See infra* Parts III.A, IV.A.
25. Clinton, *supra* note 1.
26. *See* Dean Cheng, *The Complicated History of U.S. Relations with China*, THE HERITAGE FOUNDATION (Oct. 11, 2012), http://www.heritage.org/research/reports/2012/10/the-complicated-history-of-us-relations-with-china.

of the People's Republic of China, the rise of the Chinese Communist Party (CCP), and the United States' subsequent attempts to destabilize China during the Cold War.[27] In 1972, the two countries reestablished diplomatic relations and began normalizing economic and legal ties.[28]

Today, the relationship between China and the United States is amicable, yet tense.[29] Although the two nations have the world's largest economies and have developed a financial and trading relationship that shapes the global economy,[30] they have differing, and oftentimes opposing, views on national security and foreign policy issues.[31] As such, the two nations are neither trusted allies nor absolute rivals, but because both share extensive economic interests, they must cooperate with each other to further cross-border harmony.[32] As Secretary of State Hillary Clinton explained, "[t]oday, the web of connections linking [the United States and China] is vast and complex, and reaches into just about every aspect of our societies. Our economies are tightly entwined."[33]

B. The Legal System of the People's Republic of China

The People's Courts Law of the People's Republic of China[34] and Article 123 of China's Constitution establish Chinese courts.[35] The highest judicial organ in China, the Supreme People's Court (SPC),[36] interprets the law, issues "judicial interpretations" to clarify ambiguous legislation, oversees and administers the lower courts, and hears a limited number of cases.[37] Beneath the SPC are the Higher People's Courts at the provincial level, the Intermediate People's Courts at the prefecture or major municipality levels, and the Basic People's Courts at the county or municipal levels.[38] These three lower judicial organs are more likely to impact the daily affairs of individuals and businesses.[39]

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27. *See* Andrew J. Nathan, *U.S.-China Relations Since 1949*, ASIA FOR EDUCATORS (2009), http://afe.easia.columbia.edu/special/china_1950_us_china.htm.

28. *See id.* (President Richard Nixon visited Mainland China and signed the Shanghai Communique with Chinese Premier Zhou Enlai which initiated the process to normalize political and economic relations.).

29. *See* Cheng, *supra* note 26; *see also* Aurora Bewicke, *The Court's Duty to Conduct Independent Research into Chinese Law: A Look at Federal Rule of Civil Procedure 44.1 and Beyond*, 1 CHINESE L. & POL'Y REV. 97, 99–101 (2005).

30. *See* Cheng, *supra* note 26.

31. *See id.*

32. *See id.*

33. Clinton, *supra* note 1.

34. *See* People's Courts Law of the People's Republic of China, National People's Congress (July 1, 1979, amended Sept. 2, 1983); *see also* Eu Jin Chua, *The Laws of the People's Republic of China: An Introduction for International Investors*, 7 CHI. J. INT'L L. 133, 134 (2007).

35. *See* Chua, *supra* note 34, at 134.

36. *See* David T. Wang, *Judicial Reform in China: Improving Arbitration Award Enforcement By Establishing a Federal Court System*, 48 SANTA CLARA L. REV. 649, 650 (2008).

37. *See* Chua, *supra* note 34, at 135.

38. *See* Jian Zhou, *Judicial Intervention in International Arbitration: A Comparative Study of the Scope of the New York Convention in U.S. and Chinese Courts*, 15 PAC. RIM L. & POL'Y J. 403, 406–07 (2006).

39. *See* Chua, *supra* note 34, at 134.

Since the late 1970s, legal and political reforms in China have significantly improved the rule of law.[40] During its rapid economic growth and ongoing integration into the global marketplace, China has developed stronger legal institutions to resolve civil and administrative disputes.[41] Through this 40-year process, China reopened law schools in the 1970s and 1980s[42] and adopted, *inter alia*,[43] the Constitution of the People's Republic of China in 1982,[44] the 1991 Civil Procedure Law,[45] the 1995 Judges' Law,[46] and the several Five Year Reform Plans beginning in 1999.[47] These reforms were designed to improve the rule of law, the quality of judicial guidance, the independence of the judiciary, and the transparency of court proceedings.[48] More recently, the SPC's 2013 Judicial Reform Opinion[49] and the statements of Xi Jin-

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40. *See* Carl Minzner, *China's Turn Against Law*, HUMAN RIGHTS WATCH, 1 (Oct. 30, 2013), http://www.hrw.org/node/120218.

41. *See id*.

42. *See id*.

43. *See The Shanghai FTZ: An Opportunity to Experiment with Chinese Dispute Resolution Reforms*, SUPREME PEOPLE'S COURT MONITOR (Oct. 28, 2013), http://chinaspc.wordpress.com/2013/10/28/the-shanghai-ftz-an-opportunity-to-experiment-with-chinese-dispute-resolution-reforms/; *see also* Chua, *supra* note 34, at 137.

44. *See* Mark Moedritzer, Kay C. Whittaker and Ariel Ye, *Judgments 'Made in China' But Enforceable in the United States?: Obtaining Recognition and Enforcement in the United States of Monetary Judgments Entered in China Against U.S. Companies Doing Business Abroad*, 44 INT'L LAW. 817, 823 & n.38 (2010) (explaining that the Constitution has since been amended in 1988, 1993, 1999, and 2003 to increasingly recognize the importance of human rights, due process, and an impartial legal system).

45. *See* 1991 Civil Procedure Law (promulgated by the Seventh Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1991); *see also* 2008 Civil Procedure Law (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2007, effective Apr. 1, 2008) (amending the 1991 Civil Procedure Law to expand due process rights of litigants and to standardize trial treatment procedures).

46. *See* Law on Judges, ch. I, art. 1 (promulgated by the Standing Comm. Nat'l People's Cong., effective July 1, 1995) 1995 STANDING COMM. NAT'L CONG. GAZ. (China); *see also* Wang, *supra* note 36, at 662–63.

47. *See* Chua, *supra* note 34, at 137–38; Dr. Weixia Gu, *Judicial Review Over Arbitration in China: Assessing the Extent of the Latest Pro-Arbitration Move By the Supreme People's Court in the People's Republic of China*, 27 WIS. INT'L L.J. 221, 266 (2010); Natalie Lichtenstein, Thoughts on Rule of Law and China at Eleventh Huang Lian Memorial Lecture Stanford Center for International Development (Feb. 22, 2011).

48. *See* Randall Peerenboom, *The Future of Legal Reforms in China: A Critical Appraisal of the Decision on Comprehensively Deepening Reform*, 8–15 (Jan. 14, 2014), http://ssrn.com/abstract=2379161; *see also* Jerome A. Cohen, *Struggling for Justice: China's Courts and the Challenge of Reform*, WORLD POL. REV. (Jan. 14, 2014), http://www.worldpoliticsreview.com/articles/13495/struggling-for-justice-chinas-courts-and-the-challenge-of-reform.

49. *See The Supreme People's Court 2013 Judicial Reform Opinion: A Flash Analysis (Part I)*, SUPREME PEOPLE'S COURT MONITOR (Oct. 30, 2013), http://chinaspc.wordpress.com/2013/10/30/the-supreme-peoples-court-2013-judicial-reform-opinion-a-flash-analysis-part-1/. *See also* Cohen, *supra* note 48.

ping, the CCP General Secretary, among other CCP officials, have signaled that the CCP supports liberal judicial reforms.[50]

Despite these reform efforts, many critics argue that the relative lack of the rule of law in China still causes widespread corruption.[51] Because China's rules and regulations are generally neither consistent nor transparent, many American and Western parties believe that contracts are not easily enforced and intellectual property rights are not protected.[52] As a result, international entities remain skeptical of the Chinese legal system's credibility and competence to fairly administer judicial process.[53] Accordingly, critics argue that Chinese courts are not a proper forum to adjudicate conflicts because the judiciary contains several internal and external struc-

50. *See* Xi Jinping, Chinese President, Speech at Third Plenum, *Explanation concerning the "CCP Central Committee Resolution Concerning Some Major Issues in Comprehensively Deepening Reform"*, CHINA COPYRIGHT & MEDIA (Nov. 19, 2013), http://chinacopyrightandmedia.wordpress.com/2013/11/19/explanation-concerning-the-ccp-central-committee-resolution-concerning-some-major-issues-in-comprehensively-deepening-reform/ ("[Judicial] reform measures have an important significance for guaranteeing that judicial organs exercise judgment powers and prosecutorial powers independently and according to the law, completing operational mechanisms for judicial power in which powers and responsibilities are clear, raising the transparency and credibility of the judiciary, and guaranteeing human rights better."); *Communiqué of the 3rd Plenum of the 18th Party Congress*, CHINA COPYRIGHT & MEDIA (Nov. 12, 2013), http://chinacopyrightandmedia.wordpress.com/2013/11/12/communique-of-the-3rd-plenum-of-the-18th-party-congress/ ("The Plenum pointed out that to construct a rule of law country, we must deepen judicial structural reform, and accelerate the construction of a fair, high-efficiency and authoritative Socialist judicial system, safeguarding the people's rights and interests. Let the authority of the Constitution and the law be safeguarded, deepen administrative law enforcement structure reform, guarantee that judicial power and prosecutorial power is exercised according to the law, independently and fairly, perfect judicial guarantee systems for human rights."); Minzner, *supra* note 40. *See also* Evan Osnos, *Tiananmen Mystery: Can China Hold an Open Terror Trial?*, THE NEW YORKER (Oct. 31, 2013), http://www.newyorker.com/online/blogs/newsdesk/2013/10/tiananmen-mystery-can-china-hold-an-open-terror-trial.html (discussing openness, transparency, and fairness in the Bo Xilai trial); *See also*Tong Zhiwei, *Institutionalize the Practice of Open Trial in the Case of Bo Xilai*, CHINA US FOCUS (Sept. 4, 2013), http://www.chinausfocus.com/political-social-development/institutionalize-the-practice-of-open-trial-in-the-case-of-bo-xilai/.

51. *See* WAYNE M. MORRISON, CONG. RESEARCH SERV., RL 33534, CHINA'S ECONOMIC RISE: HISTORY, TRENDS, CHALLENGES, AND IMPLICATIONS FOR THE UNITED STATES 33 (2013). *See also* Minzner, *supra* note 40. S*ee also* Peerenboom, *supra* note 48, at 13. ("It is possible that the SPC's Fourth Five-Year Agenda will set forth a much more ambitious and detailed reform agenda. But that is unlikely.").

52. *See* MORRISON, *supra* note 51, at 33.

53. *See* Melissa S. Hung, *Obstacles to Self-Actualization in Chinese Legal Practice*, 48 SANTA CLARA L. REV. 213, 228 (2008). S*ee also* Wang, *supra* note 36, at 661. ("[A]s one Ninth Circuit judge for the U.S. Court of Appeals stated, '[j]ustice for sale is the antithesis of judicial independence.' The Chinese judiciary's dependency on local party and government agencies represents an enormous obstacle and must be overcome for the successful promotion and development of judicial independence" (citation omitted)).

tural deficiencies[54] that limit judicial independence,[55] encourage local protectionism,[56] and cause corruption.[57]

C. An Improving System

Despite the criticisms of China's legal structure, "the drawbacks to Chinese courts have been exaggerated."[58] Chinese "courts are by no means rubber stamp institutions."[59] Because there is a lack of empirical research analyzing the efficacy of Chinese courts, most conventional wisdom on China's legal system "is based on anecdotal or attitudinal evidence."[60] Furthermore, "the problems that do exist are generally surmountable."[61] Through reform efforts,[62] Chinese courts continue to decrease local protectionism and corruption, improve institutional structure and procedure, and strengthen the rule of law.[63]

China's revived legal system is young[64] and must be placed in proper perspective.[65] Reform requires time to fully develop and modifying internal rules, customs, practices, and

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54. *See* Wang, *supra* note 36, at 650–54 (arguing that internal forces, including judicial hierarchy, and external forces, including funding, budgets, promotions, bonuses, benefits, employment of children, housing, and facilities, influence court decisions).

55. *See id.* at 654 (explaining that judicial independence and autonomy are eroded by the courts' connections to the CCP because most senior judges are CCP members and judges are oftentimes appointed by the local CCP Committee and ratified by the people's congresses). *See also* Gu, *supra* note 47, at 258 (noting that Chinese courts receive political supervision from the Party Committee (*dangwei*) within the court and the Party Political and Legal Affairs Committee (*zhengfawei*) outside of the court).

56. *See* Gu, *supra* note 47, at 258−61 (explaining that because local governments must support themselves through local taxes, fees, and charges collected from local enterprises, courts are incentivized to protect local businesses, especially state-owned enterprises and government-supported businesses).

57. *See* Cohen, *supra* note 48 (explaining that "[t]he decisions of judges and the adjudication committees are often influenced by a range of factors in addition to those intrinsic to the legal merits of a case" and that "ever-present in the judicial mind is the need to 'maintain social stability'"). *See also* Wang, *supra* note 36, at 677–78.

58. William Heye, *Forum Selection for International Dispute Resolution in China—Chinese Courts vs. CIETAC*, 27 HASTINGS INT'L & COMP. L. REV. 535, 546 (2004).

59. Xin He, *Enforcing Commercial Judgments in the Pearl River Delta of China*, 57 AM. J. COMP. L. 419, 453 (2009).

60. *Id.* at 421–23 (detailing how 66 economic and commercial cases were litigated at a Basic Level court in the Pearl River Delta in Guangdong province and surmising that Chinese courts are "much better than has been generally described"). *See id.* at 450 ("These results are not unique; indeed, many recent empirical studies in urban China [including in Beijing and Shanghai have] come to similar conclusions.").

61. *See* Heye, *supra* note 58, at 546.

62. *See supra* Part II.B.

63. *See* Heye, *supra* note 58, at 546.

64. *See* Hung, *supra* note 53, at 239.

65. *See* Dan Harris, *Doing Business in China. Not That Bad.*, CHINA L. BLOG (Oct. 18, 2013), http://www.chinalawblog.com/2013/10/doing-business-in-china-not-that-bad.html ("Westerners too often compare China to from whence we come, rather than to other countries closer to where China is socioeconomically. This causes China to seem worse than it is, and also tends to exaggerate the difficulties . . . in China. . . . In comparing China to other emerging market countries, . . . China's legal system is actually more advanced and less corrupt than just about any other emerging market system.").

attitudes is difficult.[66] Although the CCP may be hesitant to relinquish all control of the judiciary, there are realistic intermediary stages between complete judicial dependence and full independence.[67] A middle ground may sufficiently afford greater liberty to the legal system, promulgate the rule of law, and restore faith in the objectiveness of Chinese legal process.[68]

III. Current Judgment Recognition and Enforcement Doctrines

Before analyzing the judgment recognition and enforcement doctrine between the two nations, it is necessary to provide some context, as (A) the United States and (B) China each has its own laws and principles.

A. United States Doctrine

Under the Constitution, United States states and territories must provide full faith and credit to a sister state court's judgment.[69] However, the Constitution does not require United States courts to recognize or enforce judgments decided by a foreign court.[70] The United States has not signed any bilateral treaties or multilateral international conventions that compel the reciprocal recognition and enforcement of judgments, decrees, or orders rendered by foreign courts.[71] Although neither a constitutional basis nor federal statute requires a foreign judgment to receive full faith and credit, United States courts liberally, and relatively uniformly, recognize and enforce foreign judgments.[72]

A party that seeks to recognize a foreign judgment in the United States must file suit before a United States court of competent jurisdiction, and the court will determine whether to enforce the foreign judgment.[73] Although parties may seek recognition and enforcement of a foreign monetary judgment in state or federal court, state substantive law and a variety of federal doctrines, including comity, reciprocity, and res judicata, apply.[74] Based on these principles, United States courts have developed a judgment recognition and enforcement doctrine in accordance with (1) the common law and (2) the Model Acts.

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66. *See* Hung, *supra* note 53, at 239. S*ee also* Stanley Lubman, *Quashing Expectations for Rule of Law in China*, WALL ST. J. (Jan. 17, 2014, 11:03AM), http://blogs.wsj.com/chinarealtime/2014/01/17/quashing-expectations-for-rule-of-law-in-china/. ("The legal history of Western Europe and the United States reminds us of how many centuries were required to establish today's imperfect rule of law.")

67. *See* Hung, *supra* note 53, at 239.

68. *See id.* at 239, 242.

69. *See* U.S. Const. art. IV § 1.

70. *See* Christopher A. Whytock and Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444, 1462 (2011).

71. *See* Moedritzer et al., *supra* note 44, at 818 (explaining that the United States is not a member to any international judgment recognition and enforcement treaty because foreign courts perceive United States monetary judgments as excessive and object to the breadth of extraterritorial jurisdiction asserted by United States courts).

72. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 481–88, Introductory Note (1987); *see also* Moedritzer et al., *supra* note 44, at 818.

73. *See* Moedritzer et al., *supra* note 44, at 818.

74. *See id. See also* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

1. The Common Law

Twenty United States jurisdictions apply the common law principles of comity to determine whether to recognize and enforce a foreign court's judgment.[75] In its seminal case *Hilton v. Guyot*,[76] the Supreme Court treated the recognition and enforcement of foreign judgments as a matter of "comity of nations" and concluded that comity required the enforcement of a foreign state's judgment on the basis of reciprocity.[77] The Court reasoned that "where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, . . . the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh."[78]

Under the common law, United States courts may also enforce foreign judgments without requiring reciprocity.[79] The reciprocity requirement is often viewed as unfair because the judgment holder would otherwise be punished for her national government's judgment recognition and enforcement policy.[80] Furthermore, mandating reciprocity may hinder the effort to compel other nations to enforce United States court judgments.[81]

Although the common law allows United States courts to enforce foreign judgments without requiring reciprocity, the foreign court must have (1) had proper jurisdiction over the defendant, (2) provided the defendant with adequate notice of the proceedings, (3) conducted proceedings without fraud, and (4) afforded the defendant an opportunity to be heard in an impartial proceeding with fair procedures that were not contrary to the public policy of the enforcing court's jurisdiction.[82] These common law principles that underlie the Constitution's full faith and credit clause generally guarantee that foreign judgments are enforceable in the United States if there are no jurisdictional bars.[83]

2. The Model Acts

In 1962, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Foreign Money-Judgments Recognition Act (UFMJRA) to codify the common

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75. *See* Moedritzer et al., *supra* note 44, at 821.

76. Hilton v. Guyot, 159 U.S. 113 (1895).

77. *Id.* at 163–64, 228.

78. *Id.* at 202–03.

79. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 cmt. D (1987) (asserting that United States courts have largely abandoned the requirement of reciprocity); *see also* Peter Trooboff, *International Law: Judgments Enforcement*, NAT'L L.J., Nov. 19, 2007.

80. *See* Margaret A. Dale, *Recognition & Enforcement of Judgments: Overview of U.S. Law*, PROSKAUER ON INT'L LITIG. & ARB., ch. 18(I)(B)(3).

81. *See id.*

82. *See Hilton*, 159 U.S. at 202–03; *see also, e.g.*, Int'l Transactions, Ltd. v. Embotelladora Agral Regiomontana, S.A., 347 F.3d 589, 593–97 (5th Cir. 2003); Ackerman v. Levine, 788 F.2d 830, 841 (2d Cir. 1986); Koster v. Automark Indus., Inc., 640 F.2d 77, 78–79 (7th Cir. 1981); Kohn v. Am. Metal Climax, Inc., 458 F.2d 255, 303–05 (3d Cir.), *cert. denied*, 409 U.S. 874 (1972); Mata v. Am. Life Ins. Co., 771 F. Supp. 1375, 1381 (D. Del. 1991).

83. *See* Dale, *supra* note 80, ch. 18(I)(B)(3).

law principles of comity.[84] At that time, foreign courts did not commonly recognize judgments issued in United States courts because the international legal community feared that United States courts would not consistently recognize foreign judgments.[85] To resolve this concern, the UFMJRA holds all foreign judgments to the same standards, i.e., final and conclusive foreign monetary judgments are entitled to recognition.[86] Although the American legal community hoped that the UFMJRA would compel foreign courts to recognize United States judgments,[87] states have the autonomy to adopt the UFMJRA or to apply their own common law principles of comity to enforce a foreign judgment.[88] Therefore, some substantive differences between state recognition and enforcement practices remain.[89] As of April 2014, 33 states and territories have adopted the UFMJRA.[90]

Under the UFMJRA, a United States court may complete a limited review of a foreign judgment to determine whether the decree is entitled to recognition and enforcement.[91] The UFMJRA allows United States courts to deny recognition on both mandatory and discretionary grounds.[92] The UFMJRA's mandatory grounds for non-recognition provide that a foreign judgment will not be recognized if the foreign court did not have either personal jurisdiction or subject matter jurisdiction or did not provide the defendant due process of law.[93] The UFMJRA further grants United States courts with the discretion to deny enforcement of a monetary judgment where (1) the defendant did not receive adequate notice of the action in the foreign court to enable the defendant to defend the action, (2) the judgment was obtained by fraud, (3) the cause of action on which the judgment is based is repugnant to the state's public policy, (4) there is a conflict with another final and conclusive judgment, (5) the parties had agreed to another form of dispute resolution, or (6) the foreign court was a seriously inconvenient forum.[94]

In 2005, the National Conference of Commissioners revised the UFMJRA with the Uniform Foreign-Country Money Judgments Recognition Act (UFCMJRA).[95] The UFCMJRA

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84. *See* UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT (1986) (UFMJRA).

85. *See* Dale, *supra* note 80, ch. 18(II)(A).

86. *See* UFMJRA, 13 U.L.A. 149; *see also* Dale, *supra* note 80, ch. 18(II)(C)(1).

87. *See* Dale, *supra* note 80, ch. 18(II)(A).

88. *See* UFMJRA § 10 (explaining that even if a United States court does not recognize a foreign judgment under the UFMJRA, it expressly provides that such a conclusion does not preclude the court from recognizing the judgment under the general principles of comity).

89. *See* Arthur Anyuan Yuan, *Enforcing and Collecting Money Judgments in China from a U.S. Judgment Creditor's Perspective*, 36 GEO. WASH. INT'L L. REV. 757, 781 (2004).

90. *See Legislative Fact Sheet—Foreign Money Judgments Recognition Act*, THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, *available at* http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Foreign Money Judgments Recognition Act.

91. *See* UFMJRA §§ 3, 4.

92. *See id.*

93. *See id.* § 3(a)(1)–(3); *see also* Soc'y of Lloyd's v. Ashenden, 233 F.3d 473, 476–77 (7th Cir. 2000) (holding that the due process exception in Illinois's UFMJRA is a systemic, non-case-specific ground for non-enforcement).

94. *See* UFMJRA § 4(b)(1)–(6); *see also* UFMJRA, 13 U.L.A. pt. 2, at 59 (2002).

95. *See* UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT, 13 U.L.A. pt. 2, at 18 (Supp. 2011).

attempted to clarify some ambiguity in its predecessor's provisions and provide additional guidance to states that had previously adopted the UFMJRA.[96] Despite its new provisions, many states had already become familiar with the application of the UFMJRA, and as of April 2014, only 22 states have adopted the UFCMJRA.[97]

Although neither UFMJRA nor UFCMJRA provides a uniform enforcement procedure, each explains that a foreign judgment entitled to recognition will be enforced in the same manner as a judgment from a sister state and is entitled to full faith and credit.[98] In states that have adopted either the UFMJRA or UFCMJRA, enforcement is pursuant to the Uniform Enforcement of Foreign Judgments Act of 1948 (UEFJA).[99]

B. China Doctrine

Chinese law is clear and straightforward with regard to judgment recognition and enforcement: Chinese courts neither recognize nor enforce a foreign court's judgment unless a treaty or reciprocity exists.[100] Articles 265 and 266 of the Civil Procedure Law of the People's Republic of China (CPL)[101] and the Supreme People's Court's Opinion on the Application of the Civil Procedure Law of the People's Republic of China (Opinion on CPL)[102] provide the foundation for China's recognition and enforcement of foreign judgments doctrine. Collectively, these documents establish that pursuant to either a bilateral treaty or reciprocity, China will provide full faith and credit to a foreign judgment, subject to internationally accepted and uncontested conditions.[103]

CPL article 265 allows either the party holding a foreign judgment or the foreign court that rendered the judgment to request that the competent people's court, typically an Interme-

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96. *See* Moedritzer et al., *supra* note 44, at 819; *see also* UFCMJRA § 4(b)(1)–(3) (The UFCMJRA has the same three mandatory exceptions as the UFMJRA.); UFCMJRA § 4(c)(7)–(8), 10 U.L.A., pt. II (Supp. 2007) (The UFCMJRA substantially includes the same six discretionary grounds for non-enforcement, in addition to two others that allow non-enforcement on case-specific grounds: "the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment" and "the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.").

97. *See Legislative Fact Sheet—Foreign-Country Money Judgments Recognition Act*, THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, http://www.uniformlaws.org/LegislativeFactSheet.aspx?title= Foreign-Country Money Judgments Recognition Act.

98. *See* UFMJRA § 7; *see also* UFCMJRA § 7.

99. *See* Uniform Enforcement of Foreign Judgments Act, Prefatory Note, 13 pt. I U.L.A. 156, 156–57 (2002); *see also Legislative Fact Sheet—Enforcement of Foreign Judgments Act*, THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, http://www.uniformlaws.org/LegislativeFactSheet.aspx?title= Enforcement of Foreign Judgments Act (noting that every United States jurisdiction has adopted the UEFJA except California, Vermont, and Puerto Rico).

100. *See* Dan Harris, *Enforcing China Court Judgments Overseas. Yeah, It's Possible.*, CHINA L. BLOG (Mar. 8, 2014), http://www.chinalawblog.com/2014/03/enforcing-china-court-judgments-overseas-yeah-its-possible.html; Dan Harris, *How to Sue a Chinese Company. Part III. Litigation Strategies and Enforcing Judgments.*, CHINA L. BLOG (Nov. 10, 2010), http://www.chinalawblog.com/2010/11/litigation_strategies_us_companies_hold.html.

101. *See* Civil Procedure Law of the People's Republic of China (Apr. 9, 1991).

102. *See* Opinion on the Application on the Civil Procedure Law of the People's Republic of China (Dec. 1, 1992).

103. *See* CPL, arts. 265–66; *see also infra* Part IV.A (explaining why China and the United States lack reciprocity).

diate People's Court, recognize and enforce the judgment.[104] Neither the CPL nor the Opinion on CPL explicitly indicate the proper venue for such a petition, but, in practice, a petition is routinely brought where the judgment debtor resides or where the judgment debtor's property is located.[105]

Article 266 of the CPL provides that a Chinese court's recognition and enforcement of a foreign judgment is subject to conditions. *First*, the foreign judgment must be legally effective, i.e., a Chinese court will not review a judgment pending appeal.[106] *Second*, the foreign judgment must be legally effective in China and may not contravene the basic principles of Chinese law, i.e., the foreign judgment may not violate Chinese sovereignty, security, or social and public interest.[107] *Third*, China requires that the request to recognize and enforce a foreign judgment must be directed to the proper Intermediate People's Court through either the channels of a signed treaty between China and the foreign country[108] or mutual reciprocity.[109] If neither a treaty nor reciprocity exists between a foreign nation and China, diplomatic channels should be exploited to encourage a Chinese court to recognize and enforce the foreign judgment.[110] If the requested people's court will not recognize and enforce the judgment, a foreign party must reinitiate the legal proceedings in the competent people's court to obtain a judgment on the merits.[111]

Although China has signed bilateral mutual recognition and enforcement treaties with more than 30 countries,[112] the nation has not executed treaties with its most important trading partners, including the United States and Japan.[113] Generally, China is reluctant to establish international treaties to recognize and enforce court judgments because the CCP fears that foreign courts will attach state assets when a state-owned enterprise (SOE) is found liable, especially when such a company is subject to punitive damages.[114]

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104. *See* CPL, arts. 265–66.

105. *See id.* arts. 22, 265–66.

106. *See id.* art. 266.

107. *See id.*

108. *See* Wenliang Zhang, *Recognition and Enforcement of Foreign Judgments in China: A Call for Special Attention to Both the "Due Service Requirement" and the "Principle of Reciprocity"*, 12 CHINESE J. INT'L L. ¶ 22 (2013).

109. *See* CPL, art. 265–66; Opinion on CPL, art. 319; *see also* Zhang, *supra* note 108, ¶ 12.

110. *See* CPL, art. 261.

111. *See* Opinion on CPL, art. 318.

112. *See* Brian Burke, *Enforcement of Litigation Judgments—Enforcement of Judgments Rendered by Mainland Chinese Courts in Other Countries*, 1 CORPORATE COUNSEL'S GUIDE TO DOING BUSINESS IN CHINA § 25:29 (3d ed. 2012) (Although not a signatory to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, China has signed bilateral treaties on the recognition and enforcement of foreign court decisions and orders with over 30 counties, including France, Singapore, Greece, Russia, Spain, and Australia.).

113. *See* Tim Meng, *Enforcement of Foreign Judgments in 28 Jurisdictions Worldwide: China*, GETTING THE DEAL THROUGH, 2013, at 36.

114. *See id.*

1. China's Mutual Judgment Recognition and Enforcement Treaties

As mentioned above, China has executed mutual judgment recognition and enforcement treaties with over 30 nations.[115] These treaties, particularly China's arrangements with (1) Hong Kong and (2) Macau, are significant, as each can serve as a blueprint for China's mutual judgment recognition and enforcement treaty with the United States.

a. China-Hong Kong Treaty

On July 14, 2006, Mainland China and Hong Kong signed a landmark mutual judgment recognition and enforcement treaty.[116] When this treaty became effective on August 1, 2008, Hong Kong was the first common law jurisdiction to execute a judicial assistance treaty with Mainland China.[117] This treaty allows parties of each nation to voluntarily submit to a court in either Mainland China or Hong Kong as the exclusive forum to resolve commercial disputes, with the assurance that the judgment will be recognized and enforced in the other country.[118]

However, this treaty is limited in scope. The treaty only applies to legally enforceable final money judgments in commercial cases granted by specified courts in Mainland China or Hong Kong pursuant to a valid, written exclusive choice of court agreement.[119] The treaty does not cover provisional remedies, including property preservation or injunctions,[120] or non-commercial contracts, including employment and matrimonial contracts.[121] Furthermore, the treaty incorporates several safeguards against the enforcement of judgments that violate public policy, are obtained by fraud, or are invalid pursuant to an unlawful choice of court agreement.[122]

b. China-Macau Treaty

Similar to its legal arrangement with Hong Kong, China has executed a mutual recognition and enforcement treaty with Macau.[123] Effective since April 1, 2006, China's treaty with

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115. *See supra* Part III.B.

116. *See* Arrangement of the Supreme People's Court between the Courts of the Mainland and the Hong Kong Special Administrative Region on Mutual Recognition and Enforcement of Judgments of Civil and Commercial Cases under the Jurisdiction as Agreed to by the Parties Concerned, China-Hong Kong, July 14, 2006 (Hong Kong Arrangement).

117. *See* Pan Lidong & Maarten Roos, *China—First Steps towards Recognition and Enforcement of Foreign Awards*, STEAMSHIP MUTUAL (Feb. 2007), http://www.steamshipmutual.com/publications/Articles/HKChinaRecog0107.asp.

118. *See* Hong Kong Arrangement art. 2.

119. *See id.* arts. 1–3.

120. *See* Lidong & Roos, *supra* note 117.

121. *See* Hong Kong Arrangement art. 3, *supra* note 116; *see also* Cedric Lam & Janet Wong, *Sue in Hong Kong and Collect in China*, DORSEY & WHITNEY LLP (July 2008), http://www.dorsey.com/hongkong_china_lam_wong_0708/.

122. *See* Hong Kong Arrangement art. 9.

123. *See* Arrangement of Mainland and Macao Special Administrative Region on Mutual Recognition and Execution of Civil and Commercial Adjudication, China-Macau, Mar. 21, 2006 (Macau Arrangement).

Macau has a larger scope than its arrangement with Hong Kong.[124] For example, the Macau treaty does not require an exclusive choice of jurisdiction.[125] Also unlike the Hong Kong treaty, China's arrangement with Macau covers judgments in labor disputes as well as judgments for civil damages resulting from criminal proceedings.[126]

IV. Addressing the Problem: The Shortcomings and Obstacles Surrounding the Current Recognition and Enforcement Doctrine Between the United States and China

As Judge Posner explained, "[t]he process of collecting a judgment is not meant to require a second lawsuit, . . . thus converting every successful multination suit for damages into two suits."[127] However, under the current judgment recognition doctrine between the United States and China, obstacles exist, and litigating parties' only recourse to enforce a judgment from a court in the other nation is just that—a second lawsuit. In light of Judge Posner's advice, the following Parts argue that (A) the current judgment recognition doctrine between the United States and China is ineffective, (B) challenges and shortcomings continue to plague arbitration, and (C) a formal mutual judgment recognition and enforcement treaty between the United States and China is necessary.

A. The Current Judgment Recognition and Enforcement Relationship Between the United States and China Is Ineffective

As Part III explains, under both the common law and Model Acts, United States courts are willing to recognize and enforce foreign judgments even without reciprocity. Other nations however, including China, are wary to enforce judgments without reciprocity.[128] Some United States courts enforce judgments not only rendered by Chinese courts but also in favor of Chinese parties litigated in the United States against American entities.[129]

Three recent litigations illustrate, at a minimum, the general presumption that United States courts are fair and impartial to Chinese courts and parties' litigation interests. First, in the seminal 2009 case *Hubei Gezhouba Sanlian Industrial Co. v. Robinson Helicopter Co.*,[130] the

124. *See id.*; *see also* Donald Clarke, *Mainland-Macao Agreement on Recognition and Enforcement of Judgments*, CHINESE LAW PROF BLOG (Mar. 22, 2006), http://lawprofessors.typepad.com/china_law_prof_blog/2006/03/new_mainland_ma.html.

125. *See* Macau Arrangement art. 3.

126. *See id.* art. 1.

127. Soc'y of Lloyd's v. Ashenden, 233 F.3d 473, 477 (7th Cir. 2000).

128. *See* Yuan, *supra* note 89, at 780.

129. *See, e.g.*, Universal Consol. Cos. v. Bank of China, 35 F.3d 243, 247 (6th Cir. 1994) (denying the United States party's request for a jury trial against the Bank of China in a dispute on a letter of credit); Coutinho Caro & Co. v. Marcus Trading Inc., No. 3:95-cv-2362, 2000 WL 435566, at *13 (D. Conn. Mar. 14, 2000) (refusing to entertain the United States party's request to vacate an arbitral award rendered by a Chinese tribunal); Miller & Co. v. China Nat'l Minerals Imp. & Exp. Corp., No. 91 C 2460, 1991 WL 171268, at *8 (N.D. Ill. Aug. 27, 1991) (dismissing the United States plaintiff's motion to dismiss against the Chinese defendant).

130. Hubei Gezhouba Sanlian Indus. Co. v. Robinson Helicopter Co., No. 2:06-cv-01798, 2009 WL 2190187 (C.D. Cal. July 22, 2009).

Central District of California, following the state's UFMJRA, upheld a judgment against the American party, Robinson Helicopter, issued by a Chinese court.[131] In *Robinson Helicopter*, the Central District of California affirmed the Chinese court's $6.5 million judgment because Robinson Helicopter had stipulated (1) to personal jurisdiction in an appropriate Chinese court, (2) to toll the statute of limitations, and (3) to agree to any final judgment rendered in China.[132] In the second case, *Fusion Co. v. Jebao Electrical Appliance Co.*[133] in 2011, the Superior Court of the State of Washington in and for King County affirmed the American plaintiff's judgment that was initially awarded by Zhuhai City Intermediate Court of Guangdong Province.[134] Suit was initiated to recover payments from a defective product, and the court awarded the plaintiff the principal judgment amount in addition to interest pursuant to both Washington's UFCMJRA[135] and the common law principles of comity.[136] In a third case in 2013, *Folex Golf Industries, Inc. v. China Shipbuilding Industry, Corp.*,[137] the Central District of California upheld a Chinese court's judgment on the grounds of international comity "to promote justice between individuals and to produce a friendly intercourse between other sovereignties."[138] The court reasoned that, "absent equitable or legal grounds for non-enforcement, a foreign judgment should be recognized as a matter of international comity."[139] These judgments demonstrate that United States courts not only will enforce Chinese decisions that are "final, conclusive, and enforceable,"[140] but also will find that Chinese courts provide a fair, effective forum.

As referred to in Part III, China's CPL requires either a treaty or reciprocity between China and a foreign nation as a precondition to recognize and enforce a foreign judgment, including a judgment from the United States.[141] Neither arrangement currently exists between the United States and China.[142] Therefore, although United States courts have enforced—and likely will continue to enforce—Chinese judgments,[143] and despite the ongoing growth and maturity of

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131. *Id.* at *1–2 (The plaintiff claimed that Robinson Helicopter had designed and manufactured a helicopter that crashed into the Yangtze River in China. In its Complaint against Robinson Helicopter, the plaintiff alleged damages based on the theories of negligence, strict liability, and breach of implied warranty.).

132. *Id.* at *1.

133. Fusion Co. v. Jebao Elec. Appliance Co., No. 11-2-15510-2SEA (Wash. Sup. Ct. Apr. 28, 2011).

134. *See* Compl. at 2–3, Fusion Co. v. Jebao Elec. Appliance Co., No. 11-2-15510-2SEA (Wash. Sup. Ct. Dec. 21, 2010); J. Summ. at 1–2, Fusion Co. v. Jebao Elec. Appliance Co., No. 11-2-15510-2SEA (Wash. Sup. Ct. Apr. 28, 2011).

135. Codified at RCW 6.40A *et seq.*

136. *See* Compl., *supra* note 134, at 3–5; J. Summ., *supra* note 134, at 1–2.

137. Folex Golf Indus., Inc. v. China Shipbuilding Indus., Corp., No. 09-cv-2248, 2013 WL 1953628 (C.D. Cal. May 9, 2013).

138. *Id.* at *4.

139. *Id.*

140. *See* Hubei Gezhouba Sanlian Indus. Co. v. Robinson Helicopter Co., No. 2:06-cv-01798, 2009 WL 2190187, at *5 (C.D. Cal. July 22, 2009).

141. *See supra* Part III.B.

142. *See id.*

143. *See* Dan Harris, *US Courts For Chinese Litigants. The Year In Review.*, CHINA L. BLOG (Jan. 1, 2012), http://www.chinalawblog.com/2012/01/us_courts_for_chinese_litigants_the_year_in_review.html.

Chinese courts and the rule of law in China, the United States and China still lack reciprocity.[144]

While Chinese courts are part of the larger political system governed by a centralized government, with local officials acting as agents of the central government, United States courts act independently.[145] Again, as explained in Part III, United States courts' enforcement of foreign judgments is governed by state law, and there are more than 50 independent jurisdictions within the United States.[146] Although the Model Acts have helped to unify the recognition and enforcement doctrine in the United States, some substantive differences between state practices remain because each state has not uniformly adopted the Model Acts.[147] As such, an American creditor, similar to those class action plaintiffs in *In re Longtop Financial Technologies Ltd. Securities Litigation*, would be unable to explain to a Chinese court that a Chinese judgment would be universally enforced across American jurisdictions, and the people's court would not find reciprocity.[148]

As such, even if a United States plaintiff obtains a monetary judgment in a United States court against a Chinese entity, the judgment is valueless until that injured party receives financial compensation.[149] Although the American creditor could enforce the judgment if the Chinese party has assets in the United States or in another country that routinely enforces United States judgments,[150] among a select few other means to collect,[151] Chinese companies rarely

144. *See* Stephanie Glynn, *Toxic Toys and Dangerous Drywall: Holding Foreign Manufacturers Liable for Defective Products—The Fund Concept*, 26 EMORY INT'L L. REV. 317, 344 (2012); *see also* Dan Harris, *China Contracts: The Dispute Resolution Clause.*, CHINA L. BLOG (Oct. 15, 2013), http://www.chinalawblog.com/2013/10/china-contracts-the-dispute-resolution-clause.html.

145. *See* Yuan, *supra* note 89, at 781.

146. *See supra* Part III.A.2.

147. *See id.*

148. *See* Yuan, *supra* note 89, at 781.

149. *See* Glynn, *supra* note 144, at 344.

150. *See* Dan Harris, *Suing Chinese Companies In US Courts. The Pros And The Cons.*, CHINA L. BLOG (June 27, 2011), http://www.chinalawblog.com/2011/06/suing_chinese_companies_in_us_courts_the_pros_and_the_cons.html (explaining that an American creditor can collect on a United States judgment in Canada, South Korea, or England if the Chinese party has assets in that country because courts in those nations will enforce United States judgments).

151. *See id.* (explaining that suing a Chinese company in the United States is prudent in the following situations: "[t]he Chinese company does business with United States companies that do not pay the entire amount upfront for the Chinese companies [sic] goods or services [and] it may be possible to use the U.S. court judgment to seize funds owed by the United States companies to the Chinese company; [t]he Chinese company has plans to come to the United States and your judgment against it will put a real crimp in that; or [y]ou are the defendant in a case and there are legal benefits (like sharing the liability) or even psychological benefits to being able to tell the court or the jury that you served the Chinese company but it has chosen not to show up"); *see also* Dan Harris, *How to Collect On A U.S. Judgment Against A Chinese Company.*, CHINA L. BLOG (Aug. 17, 2010), http://www.chinalawblog.com/2010/08/how_to_collect_on_a_us_judgment_against_a_chinese_company.html (listing additional methods through which to collect on a United States court judgment against a Chinese company that does not have hard assets in the United States: "[i]f [the Chinese company] has vessels, seize those. . . . ; [i]f there are US companies that owe [or will owe the Chinese company] money, go after that money; . . . [t]ake the judgment to Hong Kong and use it to get a summary judgment against the Chinese company there; . . . [w]rite a letter to the defendant, in Chinese, letting them know all of the problems you intend to inflict on it if it doesn't pay").

have assets outside of China.[152] Because CPL article 267 mandates the presence of a treaty or de facto reciprocity to enforce a foreign judgment in China, and neither exists between the United States and China, the American creditor would be precluded from recovery.[153]

B. Challenges and Shortcomings Continue to Plague Arbitration

Although litigating in China is advantageous because its courts are best equipped to enforce a judgment, foreign parties conducting business in China remain skeptical.[154] One foreign manager experienced in Chinese dispute resolution explained that "[i]f I have to resort to the Chinese courts system, I know that I have already lost my case."[155] Due to these ongoing concerns surrounding the Chinese judiciary,[156] parties often prefer arbitration as the contractually specified means to resolve a dispute.

Arbitration offers advantages to litigation, including, *inter alia*, speed, confidentiality, flexibility, autonomy, neutrality, technical expertise, and relatively low cost.[157] Arbitration is especially effective when a foreign party must merely calculate damages to be collected in China.[158] Also, because both China and the United States are signatories to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), arbitration provides parties with enforcement advantages.[159] The New York Convention requires Chinese courts to enforce awards from an arbitration in the United States or any other signatory nation to the Convention.[160] The SPC has mandated that lower courts may not refuse to enforce foreign arbitration awards without first consulting with the SPC, further emphasizing China's intention to comply with the "pro-enforcement bias of the New York Convention."[161]

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152. *See* Glynn, *supra* note 144, at 344; *see also Leveling the Playing Field and Protecting Americans: Holding Foreign Manufacturers Accountable: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Judiciary Comm.*, 111th Cong. 4 (2009) (statement of Louise Ellen Teitz, Professor of Law, Roger Williams University School of Law); Dan Harris, *China Contracts. Arbitration Versus Litigation. It's Complicated.*, CHINA L. BLOG (Feb. 24, 2014), http://www.chinalawblog.com/2014/02/china-contracts-arbitration-versus-litigation-its-complicated.html.

153. *See* Glynn, *supra* note 144, at 344; Donald C. Clarke, *The Enforcement of United States Court Judgments in China: A Research Note* 1–2 (Geo. Wash. Univ. L. Sch., Working Paper No. 236, 2004), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=943922; *see also* Harris, *supra* note 144.

154. *See* Harris, *supra* note 152.

155. Roy F. Drow, *Resolving Commercial Dispute in China: Foreign Firms and the Roles of Contract Law*, 14 NW. J. INT'L L. & BUS. 161, 182 (1993).

156. *See supra* Part II.B.3.

157. *See* Marcus Wang, *Dancing with the Dragon: What U.S. Parties Should Know About Chinese Law When Drafting a Contractual Dispute Resolution Clause*, 29 NW. J. INT'L L. & BUS. 309, 316 (2009); *see also* Zhou, *supra* note 38, at 403.

158. Dan Harris, *China Arbitration. When, Why, Why Not, And Where.*, CHINA L. BLOG (Aug. 31, 2008), http://www.chinalawblog.com/2008/08/china_arbitration_to_be_or_not.html.

159. *See* Wang, *supra* note 157, at 316.

160. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. III, June 10, 1958, 1959 U.N.T.S. 3.

161. Wang, *supra* note 157, at 316.

Despite the attractions of arbitration, drafting contracts that provide exclusively for arbitration, either within or outside of China, to resolve all disputes is often a mistake.[162] Because arbitration has its shortcomings, litigation can be preferable.

First, when arbitration is required, a foreign plaintiff has no access to the effective prejudgment remedies available from the Chinese legal system. When damage to a foreign party is immediate and irreparable, pursuing litigation allows a foreign party to quickly and forcibly achieve a desired result within China, e.g., seize the assets of a Chinese entity or obtain an injunction when a Chinese party infringes product or engages in intellectual property violations.[163] For example, in *Eli Lilly & Co. v. Huang*, a case involving a trade secret dispute, Shanghai's No. 1 Intermediate Court quickly issued an interlocutory injunction prohibiting the defendant, Huang, from disclosing, using, or allowing third parties to use any trade secrets contained within the confidential documents that he downloaded from Eli Lilly's server without authorization.[164] Whereas Chinese law allows such interim court relief, arbitration is slow, cumbersome, and expensive because an arbitration award must be subsequently enforced by a Chinese court.[165]

Second, although China is a signatory to the New York Convention, Chinese courts, along with other Asian nations, including Indonesia and Thailand, do not have a strong record of enforcing foreign arbitration awards, i.e., an award submitted by an arbitral entity outside of Mainland China.[166] Chinese courts view foreign arbitration awards as an affront to jurisdictional sovereignty and invariably ignore these arbitration orders.[167] Chinese courts often reject a foreign arbitral award simply by not writing an opinion that explicitly declines to adopt the foreign arbitration award.[168] Furthermore, even if the Chinese court were to recognize the arbitration award, enforcement can be slow and inefficient.[169] Also, Chinese courts rarely enforce foreign default arbitration awards obtained where the Chinese party fails to contest the arbitration.[170] As such, if the Chinese entity has all of its assets in China and merely refuses to participate in the foreign arbitration, it likely will never have to comply with the arbitration award.[171]

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162. *See* Dan Harris, *Chinese Litigation: This Is the Way (Uh Huh) We Like It*, CHINA L. BLOG (Aug. 20, 2008), http://www.chinalawblog.com/2008/08/why_we_love_chinese_litigation.html.

163. *See* Dan Harris, *How to Write a China Contract. Arbitration Versus Litigation. Part II. Trade Secrets.* CHINA L. BLOG (Sept. 6, 2013), http://www.chinalawblog.com/2013/09/how-to-write-a-china-contract-arbitration-versus-litigation-part-ii-trade-secrets-baby.html; *see also* Harris, *supra* note 158 ("Much of the time, the biggest risk to the American company is that the Chinese company will run away with the American company's IP or just keep manufacturing and selling the American company's product after the American company wants it to stop. No matter how you slice it, it is going to be faster and easier to get injunctive relief or an injunction equivalent from a Chinese court than from a foreign or even a domestic arbitration panel.").

164. *See* Harris, *supra* note 163.

165. *See* Harris, *supra* note 162.

166. *See* Dan Harris & Steve Dickinson, *Litigating In China. Don't Lock Yourself Out.*, CHINA L. BLOG (Dec. 21, 2010), http://www.chinalawblog.com/2010/12/litigating_in_china_dont_lock_yourself_out.html.

167. *See* Steve Dickinson, *The Three Rules For Your China Contract*, CHINA L. BLOG (Apr. 24, 2013), http://www.chinalawblog.com/2013/04/the-three-rules-for-your-china-contract.html.

168. *See* Harris, *supra* note 163.

169. *See* Harris, *supra* note 152.

170. *See* Harris & Dickinson, *supra* note 166.

171. *See id.*

Third, while parties may submit to arbitration in Mainland China to avoid the problems of enforcing a foreign arbitral award, this option is flawed as well. Although the China International Economic and Trade Arbitration Commission (CIETAC) has emerged as a leading arbitral unit and has resolved over 1,000 matters each year since 2007,[172] it has been criticized for its lack of transparency, perceived bias against foreign parties, and overly expensive and time-consuming process.[173] Even more troubling, in early 2012, CIETAC issued new arbitration rules that strengthened the power of CIETAC's Beijing office (CIETAC Beijing) considerably.[174] CIETAC Shanghai and CIETAC South China strongly opposed the new rules and each declared its independence from CIETAC Beijing in mid-2012.[175] In response, CIETAC Beijing opened up new offices in Shanghai and Shenzhen (the location of the former CIETAC South China), even though the former CIETAC Shanghai and CIETAC South China continue to operate independently.[176] Accordingly, contracting parties face the daunting task of determining and stipulating to the institution that is entitled to arbitrate a potential dispute.[177] Because Article 18 of China's Arbitration Law explains that an arbitration agreement shall be null and void if it "contains no or unclear provisions concerning the matters for arbitration or the arbitration commission," a dispute resolution clause stipulating to binding arbitration in CIETAC Shanghai may be fatally vague under Chinese law.[178] Similarly, arbitral units are uncertain as to whether they have proper jurisdiction.[179]

C. A Mutual Judgment Recognition and Enforcement Treaty Between the United States and China Is Necessary

The primary purpose of a recognition and enforcement doctrine is to avoid the unnecessary costs of relitigation, thereby establishing a more reliable, efficient process. This purpose advances the more fundamental goals of preventing wasteful duplication of proceedings, protecting successful plaintiffs from defendants' harassing or evasive tactics to avoid satisfying a judgment, and precluding conflicting judgments.[180] The proposed treaty would not only counteract the problems of the current litigation and arbitration forums available to contracting Chinese and American parties,[181] but also benefit American and Chinese entities by both encouraging transacting parties to freely bargain for a specific court's jurisdiction and facilitating international commerce and investment.

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172. *See About Us: Statistics*, CHINA INT'L ECON. AND TRADE ARB. COMM'N, http://www.cietac.org/index.cms.

173. *See* Bryant Yuan Fu Yang and Diane Chen Dai, *Tipping the Scale to Bring a Balanced Approach: Evidence Disclosure in Chinese International Arbitration*, 17 PAC. RIM L. & POL'Y J. 41, 46 (2008).

174. *See* Dan Harris, *Will the Real CIETAC Please Stand Up?*, CHINA L. BLOG (May 21, 2013), http://www.chinalawblog.com/2013/05/will-the-real-cietac-shanghai-please-stand-up.html.

175. *See id.*

176. *See id.*

177. *See id.*

178. *Id.*

179. *See id.*

180. *See* Whytock & Robertson, *supra* note 70, at 1462–63.

181. *See supra* Part IV.A-B.

The proposed treaty is likely to achieve its intended purpose. *First*, although the United States has never executed a bilateral recognition and enforcement treaty, China's rapid economic development has already led to a substantial increase in commercial relations with the United States.[182] The United States should sign the proposed treaty to secure beneficial economic interests, as American and Chinese parties will continue to transact, and thereby litigate, at elevated rates.[183] *Second*, although Chinese courts do not strictly follow the enforcement obligations under the New York Convention,[184] China is a modern country with an increasingly refined legal system.[185] The World Bank has ranked Chinese courts 19th worldwide in contract enforcement, based on time required, cost, and complexity of procedures.[186] Because the proposed treaty requires contracting parties to voluntarily submit to courts of a specific jurisdiction as the exclusive dispute resolution forum, parties should be confident that both Chinese and United States courts would adhere to bilateral obligations. As such, to comply with Judge Posner's advice, to safeguard parties' litigation interests, and to encourage transactions between American and Chinese entities, the United States and China should execute the proposed treaty to mutually recognize and enforce judgments.

V. The Solution: The Arrangement Between the United States and Mainland China for the Mutual Recognition and Enforcement of Court Judgments

This article proposes an Arrangement between the United States and China, similar to China's treaty with Hong Kong, to mutually recognize and enforce court judgments. In short, the Arrangement would treat jurisdiction choices as binding arbitration agreements that require parties to submit to a specific court's jurisdiction through a forum selection clause.[187] The proposed treaty should follow China's legal relationship with Hong Kong because, unlike Macao law, which is broadly based on Portuguese civil law,[188] both the United States and Hong Kong follow the common law.[189] Additionally, this proposed legal relationship is preferential as it provides the recognizing court with the flexibility and discretion to not enforce judgments that do not conform to universally accepted procedural and public policy safeguards.[190]

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182. *See* MORRISON, *supra* note 51, at 1 (China is already the United States' second-largest trading partner, its third-largest export market, and its largest source of imports.).

183. *See id.* (explaining that economists forecast that China will overtake the United States as the world's largest economy within the next five years).

184. *See supra* Part IV.B.

185. *See supra* Part II.

186. *See Enforcing Contracts*, THE WORLD BANK GROUP, http://www.doingbusiness.org/data/exploretopics/enforcing-contracts.

187. *See* Dan Harris, *Enforcing Foreign Judgments in China—Let's Sue Twice*, CHINA L. BLOG (Mar. 25, 2006), http://www.chinalawblog.com/2006/03/enforcing_foreign_judgments_in.html.

188. *See* Civil Code of the Macao Special Administrative Region of the People's Republic of China, Decree-Law No. 39/99/M, Aug. 3, 1999.

189. *See* XIANGANG JIBEN FA art. 8 (H.K.) ("[T]he common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.").

190. *See infra* Part V.F.

Such an Arrangement is realistic and valuable because it would likely benefit American and Chinese parties' commercial interests, as the proposed treaty represents a natural step to integrate the United States and China's legal systems. *First*, American parties would benefit from this treaty, as the Arrangement would support American entities that remain concerned with litigating in Chinese courts. As mentioned above, litigation in China remains tenuous at times and does not efficiently resolve all disputes, despite improvements in the judicial system.[191] Similarly ineffective is resorting to arbitration to settle all disputes.[192] Therefore, American parties would benefit from the opportunity to transact for litigation in United States courts, knowing that a United States judgment would be enforced against a Chinese party by a court in China. *Second*, Chinese parties would support the proposed treaty. At times, similar to American entities, Chinese parties may benefit legally or financially from bargaining for a particular court's jurisdiction. The proposed treaty would, again, serve as a reliable and cost-effective tool to further transactions. Additionally, a United States-listed Chinese company may benefit from submitting to jurisdiction in the United States to make investing in the corporation more attractive.[193] In such a situation, American investors, among others, may pay a premium for stock because they could bring suit in United States courts, i.e., investors would receive piece of mind. As such, the proposed Arrangement could entice foreign investors to China and maintain the country's dramatic economic growth.

A. Purpose and General Scope of the Arrangement

The purpose of the Arrangement is to foster cooperative commercial interests and to further develop economic relations between the United States and China. The proposed Arrangement would permit the mutual enforcement of final[194] monetary judgments and injunctive relief in civil and commercial cases arising from a written exclusive jurisdiction agreement entered into on or after the effective date of the Arrangement. Similar to China's treaty with Hong Kong, judgments must be submitted for enforcement within a finite time period[195] to promote a fair, efficient process. Although a more expansive treaty, similar to that between China and Macau, would also achieve the Arrangement's goal, such a treaty may not be favorable to the United States, as American parties still remain concerned with the fundamental institutional, structural, and procedural fairness of Chinese courts.[196]

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191. *See supra* Part IV.A.

192. *See supra* Part IV.B.

193. *See, e.g.*, In re Longtop Fin. Techs. Ltd. Sec. Litig., No. 1:11-cv-03658 (S.D.N.Y.).

194. *See* Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreement between Parties Concerned, 2006 Cap. 319, art. 6 (In practice, proving finality requires the enforcing party to submit, to the enforcing court, a certificate issued by the court rendering the judgment that the judgment is final and enforceable in the original forum.).

195. *See id.* art. 8 (If at least one of the parties is an individual, the applicable limitations period is one year. Where both parties are legal persons, the judgment creditor must enforce the judgment within six months.).

196. *See supra* Part II.B–C.

B. Commercial and Civil Matters

The Arrangement would apply only to judgments issued pursuant to civil and commercial contractual disputes. Similar to China's treaty with Hong Kong, disputes arising from employment agreements or agreements entered into by natural persons for "personal consumption, family matters and non-commercial purposes" would be excluded.[197] Again, this Arrangement would be considerably narrower in scope than the treaty between China and Macau,[198] as it represents a natural and incremental first step to support joint American and Chinese economic and legal interests.

C. Judgments Rendered

The proposed Arrangement would cover the enforcement of not only monetary judgments, but also prejudgment remedies and injunctions. Although China's treaty with Hong Kong only includes enforcement of monetary judgments, this Arrangement would cover preliminary relief as well.[199] Due to the overwhelming number of transactions that include intellectual property rights and trade secrets, allowing Chinese and American parties to quickly and efficiently submit and enforce prejudgment matters in courts of each other's jurisdiction would further endorse the purpose of the Arrangement. Although only foreign monetary judgments are generally recognized in China, injunctive relief can be enforced in both intellectual property infringement matters and cases relating to an individual's reputation.[200] As such, preliminary judgments for specific performance, injunctive relief, and asset preservation would be subject to reciprocal enforcement under the Arrangement.

D. Express Consent and Exclusive Jurisdiction

The Arrangement would only apply to judgments rendered pursuant to a choice of court agreement. Similar to the treaty between Hong Kong and China, the proposed Arrangement would require each party's express consent to the choice of forum provision.[201] Express consent could be obtained either before or after a dispute arises. Although parties may find it difficult to agree on a forum once litigation is imminent, the proposed treaty would not foreclose United States or Chinese court recognition and enforcement of the other court's judgment should the parties expressly agree on the forum. Therefore, this would allow the Arrangement to encompass tort claims, including personal injury and product liability claims as in the *Robinson Helicopter* litigation, where the parties expressly stipulated to, or transacted for, a specific forum.[202] Additionally, this treaty would allow plaintiffs in a securities suit against a United States-listed Chinese company to collect in China on a United States judgment.[203]

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197. Arrangement on Reciprocal Recognition, *supra* note 194 at art. 3.

198. *See supra* Part III.C.2; *see also* Clarke, *supra* note 124.

199. *See* Arrangement on Reciprocal Recognition, *supra* note 194 at art. 2.

200. *See* Meng, *supra* 113, at 36–37.

201. *See* Arrangement on Reciprocal Recognition, *supra* note 194 at art. 3.

202. *See* Hubei Gezhouba Sanlian Indus. Co. v. Robinson Helicopter Co., No. 2:06-cv-01798, 2009 WL 2190187, at *4 (C.D. Cal. July 22, 2009).

203. *See, e.g.*, In re Longtop Fin. Techs. Ltd. Sec. Litig., No. 1:11-cv-03658 (S.D.N.Y.).

The transacting parties must provide, in writing, for the courts of either China or the United States to have exclusive jurisdiction to litigate any dispute under the contract.[204] As such, the treaty would not apply where the parties have expressly provided for a "non-exclusive" choice of court provision. For example, the treaty would not apply when parties have negotiated for varying forums and tribunals for different types of legal claims, i.e., whereby parties agree that one party may only bring proceedings in the United States while the other party may only bring claims in China. This would ensure that contract negotiations remain transparent and that contract drafting remains precise. Although the choice of court agreement must be in written form, some flexibility would be provided, as "in writing" would include both a formal agreement in addition to an exchange of correspondence.[205]

E. Applicable Court Jurisdictions and Application for Enforcement

The proposed Arrangement would cover all United States federal courts. Although including all United States courts, both state and federal, would promote the parties' autonomy and freedom of choice, similar to contracting for various arbitration bodies, it would likely be difficult to compel state courts to follow this treaty. Therefore, limiting parties to United States federal courts, that may have more experience and expertise litigating disputes between international parties, may be more realistic. This would also be comparable to those Hong Kong courts covered by China's treaty with Hong Kong.[206]

The Supreme People's Court, the Higher People's Court, the Intermediate People's Court, and those Basic People's Courts listed in the Appendix to China's arrangement with Hong Kong would represent the covered Chinese courts.[207]

Under the proposed Arrangement, the enforcing party would submit a Chinese court judgment to the United States federal district court of competent jurisdiction. An application to enforce a United States judgment would be submitted to the Intermediate People's Court of the place of the judgment debtor's domicile or usual residence or of the place where it has assets.[208]

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204. *See* Arrangement on Reciprocal Recognition, *supra* note 194 at art. 3.

205. *See id.*

206. *See Panel of Administration of Justice and Legal Services, Background Brief Prepared by the Legislative Council Secretariat for the Meeting on 27 February 2006: Reciprocal Enforcement of Judgments in Commercial Matters Between the Hong Kong Special Administrative Region and the Mainland, Ref: CB2/PL/AJLS, LC Paper No. CB(2)1202/05-06(01)*, LEGISLATIVE COUNCIL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA (Oct. 2005), http://www.legco.gov.hk/yr05-06/english/panels/ajls/papers/aj0227cb2-1202-1e.pdf (While negotiating its treaty with China, the Hong Kong Legislative Council explained the following: "For the purposes of the HKSAR courts, we propose that the arrangement should cover judgments given in the District Court and above (amounting to $50,000 or above generally) and will effectively exclude those given by the Small Claim Tribunal. The reasons for so limiting the scope of HKSAR judgments covered by the arrangement are to bring practical benefits to the parties concerned and to ensure that these practical benefits are proportional to the efforts and resources required for the enforcement of judgments under the proposed arrangement.").

207. *See* Arrangement on Reciprocal Recognition, *supra* note 194 at art. 2.

208. *See id.* art. 4.

F. Safeguards

The proposed Arrangement would allow a party to appeal the decision to enforce the original court's judgment.[209] Additionally, the treaty does not require automatic enforcement of a foreign court's judgment. The Arrangement would incorporate several procedural safeguards to ensure compliance with due process and public policy. Accordingly, enforcement could be refused if:[210]

- The choice of court provision is invalid under the law of the original court, unless the original court determined that the forum selection clause was valid;
- The judgment has already been fully satisfied;
- The enforcing court has exclusive jurisdiction over the litigation;
- The judgment is unenforceable in the recognizing court's jurisdiction;
- In a default judgment, the party that failed to appear either was not summoned pursuant to the law of the original court or was not provided with sufficient time to prepare its defense;
- The judgment was obtained by fraud;
- Another court judgment or arbitral award concerning the same merits has already been recognized and enforced;
- Enforcing the judgment would be contrary to either the social and public interests of China, where enforcement is sought in China, or the public policy of the United States, where enforcement is sought in the United States; or
- The judgment is not final and effective under the law of the original court.

* * *

This proposed Arrangement would not resolve all of the conflicts that are bound to impact American and Chinese parties. However, because the United States and China continue to become more intertwined and dependent economically, the nations should harmonize legal doctrines to better serve shared interests. An initial step to begin this standardization is to execute the proposed mutual recognition and enforcement treaty.[211]

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209. *See id.* art. 12.

210. *See id.* arts. 9–10.

211. Representatives of the SPC and CCP, for China, and, *inter alia*, the Department of Justice, Senate Judiciary Committee, House Judiciary Committee, and federal court judges, for the United States, may serve as adequate delegations to negotiate and execute this proposed treaty.

VI. Conclusion

The United States and China, as world leaders and integral members of the global order, should meet the challenges of the economic environment by expanding cooperation and comity. The two nations already share a rich economic and political history and can further magnify shared interests using legal doctrine to support future growth and collaboration. Despite the significant differences between the United States and China's legal systems, the nations should execute the proposed Arrangement to support the international business community. The Arrangement provides a fair, reliable, and neutral basis for American and Chinese parties and courts to seamlessly develop and promote the rule of law.

If the *In re Longtop Financial Technologies Ltd. Securities Litigation* is an indication of future legal matters, the current judgment recognition and enforcement doctrine between the United States and China must be modified to protect injured parties. At present, United States court judgments are not and will not be enforced in China, as the countries lack both reciprocity and a formal treaty. Litigating parties must rely on arbitration or Chinese courts to obtain and enforce a judgment. However, these options have significant shortcomings, especially where a party only has assets in China. As this article illustrates, the proposed Arrangement would provide litigants with the opportunity to freely contract for the jurisdiction in which to resolve disputes, with the added assurance that the rendered judgment would be enforced. The Arrangement would not only fill a gap in the ever-important legal relationship between China and the United States, but also benefit both American and Chinese transacting parties' commercial interests.

Kiobel v. Royal Dutch Petroleum Co.

133 S. Ct. 1659 (2013)

The Supreme Court of the United States held that the principles underlying the presumption against extraterritoriality constrain courts exercising their power under the Alien Tort Statute and that the statute did not apply to violations of the law of nations occurring within the territory of a sovereign other than the United States.

I. Holding

In the recent case *Kiobel v. Royal Dutch Petroleum Co.*,[1] the Supreme Court of the United States granted certiorari and, after oral argument, ordered supplemental briefing on whether and under what circumstances courts may recognize a cause of action under the Alien Tort Statute (ATS)[2] for violations of the law of nations occurring within the territory of a sovereign other than the United States. In an opinion by Chief Justice John Roberts, the Court concluded that the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the ATS rebuts that presumption.[3]

II. Facts and Procedure

Under the authority of the Alien Tort Statute,[4] Nigerian nationals residing in the United States after being granted political asylum filed a suit in United States federal court against Dutch, British, and Nigerian corporations, alleging that the corporations aided and abetted the Nigerian government in committing violations of the law of nations in Nigeria.[5]

Petitioners were residents of Ogoniland, Nigeria, a small area of 250 square miles located in the Niger Delta, with a population of about half a million people. The respondents included Royal Dutch Petroleum Company (RDPC) and Shell Transport and Trading Company, P.L.C. (STTC), which were holding companies incorporated in the Netherlands and England, respectively. Their joint subsidiary, respondent Shell Petroleum Development Company of Nigeria, Ltd. (SPDC), was incorporated in Nigeria. SPDC engaged in oil exploration and production in Ogoniland, Nigeria. According to petitioners, after concerned residents of Ogoniland began protesting the environmental effects of SPDC's practices, respondents enlisted the Nigerian government to violently suppress the demonstrations. Petitioners alleged that, throughout the

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1. Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659 (2013). *See also* Kristin Lee, *Recent Decision, Kiobel v. Royal Dutch Petroleum Co.*, 27 N.Y. INT'L L. REV., No. 1, 65 (2014).
2. 28 U.S.C. § 1350.
3. Each of Justices Kennedy, Alito, and Breyer issued a concurring opinion. Justice Thomas joined Justice Alito's concurring opinion, and Justices Ginsburg, Sotomayor, and Kagan joined Justice Breyer's opinion.
4. *See* 28 U.S.C. § 1350.
5. *Kiobel*, 133 S. Ct. at 1662.

early 1990s, the Nigerian military and police forces attacked Ogoni villages, beating, raping, arresting and killing residents and looting or destroying property.[6]

Petitioners further alleged that respondents aided and abetted these atrocities by, among other things, providing the Nigerian forces with food, transportation, and compensation, as well as by allowing the Nigerian military to use respondents' property as a staging ground for attacks.[7]

III. Discussion

Although the lower courts focused on whether the plaintiffs stated a cause of action under the ATS, the Supreme Court considered only the narrower question in the supplemental briefs, namely whether and under what circumstances courts may recognize a cause of action under the ATS for violations of the law of nations occurring within the territory of a sovereign other than the United States. The ATS provides that U.S. "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[8]

A. Petitioners' Allegations and Arguments

According to petitioners, respondents violated the law of nations by aiding and abetting the Nigerian government in committing (1) extrajudicial killings; (2) crimes against humanity; (3) torture and cruel treatment; (4) arbitrary arrest and detention; (5) violations of the rights to life, liberty, security, and association; (6) forced exile; and (7) property destruction.

Petitioners argue that the ATS provides jurisdiction over civil actions for "torts" that are in violation of the law of nations. They claim that, in using the word "tort," the First Congress "necessarily meant to provide for jurisdiction over extraterritorial transitory torts that could arise on foreign soil." For support, they cite the common-law doctrine that allowed courts to assume jurisdiction over such "transitory torts," including actions for personal injury, arising abroad.[9]

B. Respondents' Allegations and Arguments

Respondents argue that the ATS does not reach conduct occurring in the territory of a foreign sovereign. They rely primarily on a canon of statutory interpretation known as the presumption against extraterritorial application. That canon provides that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none,"[10] and reflects the "presump-

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6. *Id*. at 1662–63.

7. *Id*. at 1662.

8. 28 U.S.C. § 1350.

9. *See* Mostyn v. Fabrigas, 1 Cowp. 161, 177, 98 Eng. Rep. 1021, 1030 (1774) (Mansfield, L.) ("[A]ll actions of a transitory nature that arise abroad may be laid as happening in an English county").

10. *Kiobel*, 133 S. Ct. at 1664 (quoting Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 255 (2010)).

tion that United States law governs domestically but does not rule the world.[11] This presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord."[12]

C. District and Circuit Court Decisions

The District Court dismissed the first, fifth, sixth, and seventh claims, reasoning that the facts alleged to support those claims did not give rise to a violation of the law of nations. The court denied respondents' motion to dismiss with respect to the remaining claims, but certified its order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).[13] The Second Circuit dismissed the entire complaint, reasoning that the law of nations does not recognize corporate liability. The Supreme Court affirmed the judgment of the Second Circuit.[14]

D. The ATS

The ATS is "strictly jurisdictional."[15] The law allows federal courts to recognize certain causes of action based on sufficiently definite norms of international law. The principles underlying the presumption against extraterritorial application serve to similarly constrain the courts when considering causes of action that may be brought under the ATS.[16]

1. Civil Action by an Alien for a Tort

In interpreting the ATS, the Court reasoned that nothing in the statute's text suggests that Congress, in enacting the law, intended it to have "extraterritorial reach" with regard to potential causes of action that could be brought under the statute.[17] The ATS covers actions by aliens for violations of the law of nations, but that does not imply extraterritorial reach—such violations affecting aliens can occur either within or outside the United States. Nor does the fact that the text reaches "*any* civil action" suggest application to torts committed abroad; it is well established that generic terms like "any" or "every" do not rebut the presumption against extraterritoriality.[18]

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11. *Id.* at 1664 (quoting Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454 (2007)).
12. *Id.* at 1661 (quoting E.E.O.C. v. Arabian Am. Oil Corp., 499 U.S. 244, 248 (1991)).
13. *Id.* at 1663.
14. *Id.*
15. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) ("The fact that the ATS was placed in § 9 of the Judiciary Act, a statute otherwise exclusively concerned with federal-court jurisdiction, is itself support for its strictly jurisdictional nature.").
16. *Kiobel*, 133 S. Ct. at 1664.
17. *Id.* at 1665.
18. *Id.*

2. Torts Committed in Violation of the Law of Nations or a Treaty of the United States

Petitioners argue that the ATS provides jurisdiction over civil actions for "torts" in violation of the law of nations. They claim that, in using that word, the First Congress "necessarily meant to provide for jurisdiction over extraterritorial transitory torts that could arise on foreign soil."[19] For support, they cite the common-law doctrine that allowed courts to assume jurisdiction over such "transitory torts," including actions for personal injury, arising abroad.[20]

E. Implications of Broad Application of ATS—"a Reach Too Far"

Corporations are often present in many countries and it would "reach too far" to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required.[21]

Justice Kennedy, in concurring with the majority, argued that the Court was wise "to leave open a number of significant questions regarding the reach and interpretation" of the ATS.[22] Given the array of "detailed statutory scheme[s]" from Congress to address human rights abuses, should a case arise that is covered neither by the *Kiobel* decision nor the statutory schemes, the Court may find it necessary to explore further the extraterritorial reach of the ATS.[23]

Justice Alito wrote a concurring opinion as well, in which Justice Thomas joined, advocating for a "broader standard."[24] In order for the ATS to apply extraterritorially, the Justices agreed, the human rights violations must be sufficiently forceful as to "displace the presumption," and must meet the *Sosa* test for "definiteness and acceptance among the nations."[25]

In his concurring opinion, Justice Breyer, with whom Justices Ginsburg, Sotomayor, and Kagan joined, agreed with the majority's conclusion, but not the reasoning. Justice Breyer argued that the majority did not need to invoke the presumption against extraterritoriality. Instead, based on principles of foreign relations, Justice Breyer would find jurisdiction under the ATS "where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American interest."[26] Such an American interest included preventing the United States from becoming a "safe harbor" for human rights abusers.[27]

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19. *Id.* at 1665.
20. *Id.* at 1669.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 1670.
25. *Id.*; *see Sosa*, 542 U.S. 692.
26. *Kiobel*, 133 S. Ct. at 1671.
27. *Id.*

Justice Breyer discussed the Court's opinion in *Sosa*, arguing that the ATS framework is limited to claims "that are similar in character and specificity to piracy."[28] That framework, then, left the *Kiobel* Court with the question of how far the ATS can reach when violations of safe conduct, infringement on the rights of ambassadors and piracy take place abroad.[29] Justice Breyer argued that the ATS was enacted with a focus on foreign, not domestic, matters, thus the presumption against extraterritoriality is incorrect.[30] Instead, focusing on the three categories of offenses reachable by the ATS, Justice Breyer advocated for a broader definition of "piracy," to include those who commit torture and genocide.

The ATS, according to Justice Breyer, has a jurisdictional scope limited to circumstances that affect distinct American interests – particularly, not being a safe harbor for the world's pirates.[31] Justice Breyer examined different treaties to which the United Sates is a party, congressional statutes allowing a United States court to prosecute foreign nationals for acts committed abroad, and practices of different countries that allow foreign nationals to be prosecuted.[32]

Justice Breyer went on to reason, though, that RDPC and STTC's "*only* presence in the United States consists of an office in New York City (actually owned by a separate but affiliated company) that helps to explain their business to potential investors."[33] Further, Justice Breyer argues that if the New York office were a sufficient basis for asserting general jurisdiction, "it would be farfetched to believe, based solely upon the defendants' *minimal and indirect American presence*, that this legal action helps to vindicate a distinct American interest, such as in not providing a safe harbor for an "enemy of all mankind."[34]

IV. Conclusion

It is true, as the Court explains, that corporations are often present in many countries and, in some cases their presence produces indirect investments resulting from complex (and often tenuous) ownership structures. While this decision may well serve to produce an unfortunate result, that of insulating many corporations from liability for atrocities from which they may have benefited, the matter at issue here is one of jurisdiction. As previously discussed, RDPC and STTC were holding companies incorporated in the Netherlands and England, respectively, and their joint subsidiary SPDC, incorporated in Nigeria, engaged in oil exploration and production in Ogoniland, Nigeria. Justice Breyer's concurring opinion explains that "[t]heir *only* presence in the United States consists of an office in New York City (actually owned by a separate but affiliated company) that helps to explain their business to potential investors."[35] This assertion by the Court does not appear to be factually correct. A review of "The History of

28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 1677 (emphasis added).
34. *Id.* at 1677–78 (emphasis added).
35. *Id.* at 1677 (emphasis added).

Shell Oil Company" (Shell History) on a company web site[36] discloses that, in 1912, the "Royal Dutch/Shell Group" founded the American Gasoline Company to sell gasoline along the Pacific Coast, and Roxanna Petroleum to buy oil product properties in Oklahoma.[37] Based on RDPC's iteration of its history, the Court's characterization of the corporation's presence in the United States is inconsistent. The Shell History goes on the state that between 1988 and 1991 "Shell installed the Bullwinkle platform in the Gulf of Mexico," and notably, in 1991, "permanent production facilities were installed in Bullwinkle." As discussed above, the atrocities that plaintiffs allege were said to have occurred during the early 1990s.[38]

According to Justice Kennedy, a minimal and indirect American presence is insufficient to narrow the reach of the ATS with regard to conduct occurring in a foreign sovereign's territory. Although the majority opinion is unclear, it seems to indicate that, in the alternative, a substantial and direct American presence would serve to narrow the reach of the ATS and would serve as "sufficient force to displace the presumption against extraterritorial application."[39] The Court did not fully explore RDPC and STTC's presence in the United States, and whether the presence of permanent production facilities located in the Gulf of Mexico in American territory and the two companies' historic presence in the United States would change the outcome of the application of the ATS. It is possible that the Court would reach the same result even in consideration of these additional facts; however, given the seriousness of the allegations presented by plaintiff's, of beatings, rape and killing of Ogoni residents, and looting and destruction of property, a more through examination of the facts (even if not presented in the plaintiff's briefs) is warranted to ensure proper application of the law.

Moya Ball

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36. www.shell.us/aboutshell/who-we-are-2013/history.html.

37. *Id*.

38. *Kiobel*, 133 S. Ct. at 1664.

39. *Id*. at 1669.

R.B. v. K.G.

45 Misc. 3d 951, 993 N.Y.S.2d 869 (Family Ct., N.Y. Co. 2014)

The Family Court in New York County, New York held that the petitioner father, pursuant to the Hague Convention on Civil Aspects of International Child Abduction, and its implementing statute, the International Child Abduction Remedies Act (ICARA), successfully carried the burden of proving that the respondent mother wrongfully retained their children in New York and that they should be returned to Israel, their country of habitual residence.

I. Holding

In the recent case, *R.B. v. K.G.*,[1] Judge Hoffman of the Family Court in New York County, New York concluded that Mr. B. successfully carried the burden of proving that Ms. G. wrongfully retained their children in New York and that they should be returned to Israel, their country of habitual residence.[2] Judge Hoffman granted Mr. B.'s petition seeking return of his two minor children pursuant to the Hague Convention on Civil Aspects of International Child Abduction (Hague Abduction Convention)[3] and its implementing statute, the International Child Abduction Remedies Act (ICARA).[4] The court concluded that the retention was wrongful because Mr. B.'s custody rights were breached under the law of the state, Israel, in which the children were habitually resident immediately before the retention,[5] and he exercised his custody rights at the time of the retention.[6] Additionally, the court found Ms. G.'s two defenses based on Articles 12 and 13 of the Convention[7] inapplicable, because Mr. B. filed the petition within one year of the wrongful removal or retention of the children[8] and the children do not "object" to being returned to Israel within the contemplation of the particular provision of the Convention and ICARA.[9]

II. Facts and Procedure

The court set forth its findings of fact in the parties' petitions filed pursuant to the Hague Abduction Convention. The petitioner-father R.B. and respondent-mother K.G. were born and raised in Israel and were married in March 1999.[10] They had two children, daughter M.B.

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1. 45 Misc. 3d 951, 993 N.Y.S.2d 869 (Family Ct., N.Y. Co. 2014).
2. *Id.* at 886–87.
3. 19 I.L.M. 1501.
4. *Id.*; 42 U.S.C. § 11601.
5. *R.B.*, 993 N.Y.S.2d at 886.
6. *R.B.*, 993 N.Y.S.2d at 882.
7. *Id.* at 880.
8. *Id.* at 882.
9. *Id.* at 886.
10. *Id.* at 872.

(13 years old) and son G.B. (10 years old), both born in Israel and living there until August 4-5, 2012.[11] The parents and children lived in Israel together as a family until just before the parents' divorce in 2007.[12] Shortly after their divorce, the parties mediated the August 12, 2007 Property Relations and Divorce Agreement (Agreement), which had significant ramifications for the proceedings here, and was incorporated, but not merged, into a September 2007 judgment of divorce from a Family Court in Haifa, Israel.[13] The Agreement set forth that Ms. G. would have primary residential custody of the children and that both parents would be guardians to the children within the meaning of Israeli custody law.[14] The Agreement stated that "[a]ny matter of substance relating to the fate of the Children shall be subject to consultation between both parents who will reach a joint decision on the matter," and that, "every dispute shall be settled by way of negotiations, in the absence of the Children and by way of a settlement agreement, to the extent possible."[15] If no settlement was reached, paragraph 8.5 of the Agreement stated, "authority to settle the disputes is granted solely to the Haifa Family Court."[16] Among other provisions, paragraph 3.5 of the Agreement importantly stated that the children "shall not leave Israel except upon the joint consent of the Husband and Wife," though either could not withhold approval where it would be required for a trip abroad for Mr. B., Ms. G, or their relatives for a period up to one and a half months.[17] Both parents testified that, after the divorce, Mr. B. fully exercised his parenting and custodial rights in Israel and the children were closely bonded to both parents.[18]

According to the Ms. G.'s testimony, she notified Mr. B. that she wanted to spend at least a year in the United States with the children, so that she could study and so that the children would have an opportunity to learn English.[19] Mr. B. ultimately agreed to permit the children to accompany the mother to the United States for a one-year period of August 2012 to August 2013.[20] His most recent proposed written agreement, dated June 2012 and designated as an addendum to the 2007 Agreement, included a few key terms, such as a statement that the mother wished to travel to the U.S. for one year with the children, among other proposed modifications concerning child support, visitation arrangements, and financial issues.[21] Importantly, Mr. B.'s proposed agreement stated in Section D that the children "may leave the country *temporarily and not for the purpose of permanent residence*, starting August 2012 until August 2013, *during which they will continue to be Israel citizens and residents*."[22] The proposed agreement document also stipulated that failure to return the children to Israel no later than August 3, 2013 "shall be considered kidnapping under the Hague Convention, *unless the Parties agree*

11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 873.
15. *Id.* (quoting the parents' 2007 mediated Agreement).
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 873–74.
22. *Id.* at 874 (emphasis in original).

otherwise in writing."[23] Furthermore, it stated that any extension of the return date of the children to Israel could be granted only upon prior written consent by the father and then would be submitted to the Haifa Family Court, and that the "*Haifa Family Court is the sole and unique authority for deliberating on matters relating to the Minors, including failure to return them to Israel*" on August 3, 2013.[24] For reasons not clear, the parties never signed the agreement, though they testified that the mother made certain proposed modifications that focused primarily on the financial issues in the document.[25] Nonetheless, Mr. B. testified to the court that even if the parties could not agree on the financial issues, he did not want to interfere with the children's chance of a year in the U.S. to learn English and regardless, the children would be returned within one year.[26]

As of the date the court set forth its opinion, Ms. G. had not yet returned the children to Israel, testifying that the children were now well-established and thriving in New York City, and that she and the children wanted to remain there, and suggested that Ms. B could visit the children liberally in New York and that the children could visit him in Israel if their visa permitted.[27] The court conducted an *in camera* interview with each of the children in the presence of the children's attorney, and the interviews confirmed that they preferred to remain in the United States.[28] Their visa permitted them to remain the U.S. for as long as Ms. G. retains her visa.[29] Ms. G. had become a visiting Fellow at Columbia University School of Law and, though it is not a degree program and she did not or does not work at or for Columbia, she is essentially a student there.[30] She emphasized that it was in the best interest of the children to remain in the U.S. and the children's attorney supported the preference of her clients as well, while Mr. B. argued that it was not in their best interest to remain in the U.S. and that their retention violated his rights as a father and deprived him and the children of the benefits of the close relationship they enjoyed in Israel in violation of his and their rights.[31]

While the children were in New York, Mr. B. had tried, if not always successfully, to speak with the children about three times per week.[32] He visited the children in October 2012 and in March 2013, with the mother paying his round-trip airfare both times.[33] During the March 2013 visit, Ms. G. raised for the first time the issue of them staying in New York for a second year and Mr. B. opposed any such possible extension.[34] In an email exchange, Mr. B. did eventually state that he would be willing to let the children stay with her for another year if Ms. G. agreed to certain provisions, but Ms. G. argued that his demands were unreasonable. He then

23. *Id.* (emphasis in original).
24. *Id.* (emphasis in original).
25. *Id.*
26. *Id.*
27. *Id.* at 875.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 875.
33. *Id.*
34. *Id.*

retracted his conditional agreement and said that he wanted the children to return to Israel in August 2013 according to their agreement.[35]

Mr. B. filed a request in January 2014 to the present court to register the Israeli divorce/custody order in New York and to enforce that order by directing the mother to return the children home to Israel.[36] Ms. G. had testified that the father had agreed to the second year based primarily upon a conversation he had with their daughter, M., who was then 11 years old.[37] Ms. G. filed an objection to the out-of-state custody order on February 11, 2014, asserting that the August 12, 2007 agreement had been re-negotiated and modified by the parties and that she had performed under the modified agreement.[38] On February 14, the court held that Ms. G. had not proffered any basis pursuant to statute to object to the registration of the order and held that it was proper to register the Israeli order.[39] Following the registration, Mr. B. re-filed the petition at issue on March 3, 2014, seeking enforcement of the Israeli custody order and the return of the children to Israel, based in part upon the requirements of the Hague Abduction Convention.[40]

On May 5, 2014, Ms. G. filed an answer and cross-petition to enforce and modify an order and for contempt of court, and she stated that the parties modified the 2007 Israel order in 2012 and again in 2013.[41] She conceded that the parties agreed in 2012 on the children staying with her for one year, but that they both agreed in 2013 that the children would stay with her in New York through the summer of 2014 as well.[42] She contended that it was in the best interest of the children for them to stay with her in New York since they had new roots and opportunities there, and that the father's relationship with the children would suffer irreversibly if the children were returned to Israel, because they would know that the father petitioned to have them returned against their wishes.[43] Ms. G. asked the court to modify the Israeli custody order to permit her to relocate permanently to New York with the children and for other relief. The court raised the jurisdictional issues attendant to her cross-petition and afforded the opportunity for the parties to address that issue.[44] On June 11, 2014, the court on its own motion dismissed the mother's cross-petition for lack of jurisdiction and the court adjourned the hearings until August 5, 2014 for a final pretrial conference, marked final against respondent.[45] The trial began on August 6, 2014 and continued on August 12, and the court con-

35. *Id.*
36. *Id.* at 878.
37. *Id.* at 877.
38. *Id.* at 878.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*

ducted the two *in camera* interviews on August 18, 2014.[46] The parties submitted post trial memoranda and the court then issued its decision/order.[47]

III. Discussion

A. The Applicable Standards of the Hague Abduction Convention and ICARA

The Hague Convention on the Civil Aspects of International Child Abduction (Hague Abduction Convention or Convention) was aimed at protecting "children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access.'"[48] The Convention drafters "were particularly concerned by the practice in which a family member would remove a child to jurisdictions more favorable to his or her custody claims in order to obtain a right of custody from the authorities of the country to which the child had been taken."[49] Thus, the Convention provides for the "prompt return of children wrongfully removed to or retained in any Contracting State."[50] The Convention was not planned to undertake any particular custody dispute, which would emphasize the best interest of a child, but instead was drafted to resolve whether or not a child should be returned to his or her country of habitual residence where any custody dispute may properly be resolved.[51]

Congress passed the International Child Abduction Remedies Act (ICARA) in order to implement the Convention in the United States.[52] According to ICARA, a person seeking to initiate judicial proceedings under the Convention may do so by commencing a civil action or proceeding in federal or state court "in the place where the child is located at the time the petition is filed."[53] To prevail, a petitioner must establish by a preponderance of the evidence that "the child has been wrongfully removed or retained within the meaning of the Convention. . . . "[54] To determine whether or not the removal or retention was wrongful, the trial court must determine whether or not the removal or retention breached petitioner's custody rights under the law of the State in which the child was habitually resident immediately before the removal or retention.[55] If that is the case, then the trial court has to determine whether or not the petitioner was exercising his custody rights at the time of the removal or retention, or would have been exercising those rights but for the removal or retention.[56]

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46. *Id.*
47. *Id.*
48. Glitter v. Glitter, 396 F.3d 124, 129 (2d Cir. 2005) (quoting Hague Abduction Convention Preamble).
49. Mota v. Castillo, 692 F.3d 108, 112 (2d Cir. 2012).
50. Hague Abduction Convention, Art. 1).
51. 42 U.S.C. § 11601(b)(4); *see also Mota,* 692 F.3d 108.
52. 42 U.S.C. § 11601(b)(1).
53. 42 U.S.C. § 11601(b)(3).
54. 42 U.S.C. § 11603(c)(1)(A).
55. *R.B.*, 993 N.Y.S.2d at 879.
56. Hague Abduction Convention, Art. 3.

The Hague Abduction Convention and ICARA do not define "habitual residence." The determination of habitual residence is thus fact-intensive and depends on the most recent "settled intent" shared by those entitled to fix the children's residence.[57] The court should focus on the latest time the parents shared an intention,[58] In making this determination, courts review the parents' actions and declarations, since that normally controls the habitual residence of the children.[59]

If the parent did not file a Hague Abduction Convention petition until more than one year elapsed from a wrongful removal or retention, courts look at a second prong with respect to "habitual residence": whether the evidence "unequivocally points to the conclusion that the child has acclimatized to the new location and thus has acquired a new habitual residence, notwithstanding any conflict with the parents' latest shared intent."[60] Courts decline to find that the changed intention of one parent alters the child's habitual residence if "the child's initial translocation from an established habitual residence was clearly intended to be of a specific, delimited period."[61] The court here found that, because Mr. B. timely filed his petitions, it does not need to review this second prong of the habitual residence test. [62]

If the petitioner prevails in a return proceeding, the court ordinarily must return the child.[63] Mr. B. seeks an award of costs and legal fees associated with this proceeding, and under Art. 26 of the Hague Abduction Convention, a successful petitioner shall be awarded "necessary expenses," including attorney's fees.[64] ICARA shifts the burden onto an unsuccessful respondent in a return proceeding to demonstrate why an award of necessary expenses would be "clearly inappropriate," and a prevailing petitioner is presumptively entitled to necessary costs, subject to the equitable discretion of the trial court.[65]

1. Exceptions or Defenses under the Hague Abduction Convention

If a petitioner establishes a wrongful removal or retention, the court may still dismiss the petition if the respondent establishes by a preponderance of the evidence one or more exceptions to a return order set forth in Articles 12 and 13 of the Convention.[66] Because of the purposes of the Hague Abduction Convention and ICARA, the court must narrowly construe any such defenses or exceptions to a return order. [67] Even if a respondent establishes her defense or defenses, the court has the discretion to order the children's return to Israel.[68] The court may

57. *Glitter*, 396 F.3d at 131–32.

58. *Glitter*, 396 F.3d at 133; *see also* Hoffmann v. Sender, 716 F.3d 282, 291–92 (2d Cir. 2013).

59. *Hoffman*, 716 F.3d at 291.

60. *Id.* at 293; *see also Glitter,* 396 F.3d at 134.

61. Mozes v. Mozes, 239 F.3d 1067, 1071 (9th Cir. 2001)).

62. *R.B.*, 993 N.Y.S.2d at 880.

63. Hague Abduction Convention, Art. 12.

64. *R.B.,* 993 N.Y.S.2d at 880.

65. 42 U.S.C. § 11607(b)(3).

66. 42 U.S.C. § 11603(e)(2).

67. 42 U.S.C. § 11601(a)(4).

68. *R.B.*, 993 N.Y.S.2d at 880–81 (citing Haimdas v. Haimdas, 720 F. Supp. 2d 183, 204 (E.D.N.Y. 2010)).

consider the views of the children, but it is not required to accede to them, because a key purpose of the Convention was to return children who have been wrongfully removed or retained.[69]

Under Article 12 of the Convention, Ms. G. asserted that, if the court did find that there was a wrongful retention or removal, then she had established the defense that more than one year had elapsed between the wrongful removal or retention and the date of the filing of the petition, and that she had demonstrated that the children were "now settled in [their] new environment."[70] To determine whether or not the children are well-settled in New York, the court must focus on whether there is "substantial evidence of the child's significant connections to the new country."[71] Courts consider various factors, such as the children's age, the stability of their new residence, the children's relationships in the new residence, and the children's ties to their country of habitual residence.[72] However, the court must also base its decision on a determination of whether there came a point at which the children became so settled in their new environment that repatriation might not be in their best interest.[73]

Under Article 13 of the Convention, Ms. G. proffers her second defense or exception to a return order, that the children "object" to being returned to Israel and that the children have "attained an age and degree of maturity at which it is appropriate to take account of [their] views."[74] There is no bright line rule regarding the age of the child and so it must be determined on a case-by-case basis.[75] The court must also examine whether there has been undue influence upon the children.[76] The court here did not find undue influence, as based on trial evidence and its *in camera* interviews with the children. Judge Hoffman reports that they spoke freely and were able to articulate the basis for their preferences and he also looked at the reasons for the children's wishes or preferences in addition to their age and level of maturity.[77] Courts have held that if the children's wishes are the sole basis supporting a repatriation determination, then a stricter standard will be applied.[78]

B. Sufficiency of the Allegations

1. The Initial Agreement Between the Parents

Looking to the initial agreement between the parents and other evidence, Judge Hoffman found the mother's first defense under Article 12 of the Convention unsuccessful and that Mr.

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69. *See Glitter*, 396 F.3d 124; *Haimdas*, 720 F. Supp. 2d 183.

70. *R.B.*, 993 N.Y.S.2d at 880 (quoting Hague Abduction Convention, Art. 12).

71. *Id.* (quoting Public Notice 957, Hague Abduction Convention; Text and Legal Analysis, 51 Fed.Reg. 10494, 10509 (Mar. 26, 1986)).

72. Blondin v. Dubois, 238 F.3d 153, 164 (2d Cir. 2001).

73. *R.B.*, 993 N.Y.S.2d at 880.

74. *Id.* (quoting Hague Abduction Convention, Art. 13).

75. De Silva v. Pitts, 481 F.3d 1279, 1286 (10th Cir. 2007).

76. Hague Int'l Hague Abduction Convention: Text and Legal Analysis, *supra*.

77. *R.B.*, 993 N.Y.S.2d at 880.

78. *Id.* 881 (citing Tsai-Yi Yang v. Fu-Chiang Tsui, 499 F.3d 259, 280 (3d Cir. 2007)).

B. established a prima facie case of wrongful retention of the children. While the parties did not actually sign the agreement permitting the mother to take the children to the United States before they actually left Israel in August 2012, the parties did indeed come to an understanding that the mother could take the children to New York for one year.[79]

The court came to this conclusion in part by weighing the parents' testimonies, finding the father's testimony to be more trustworthy than that of the mother, because he answered questions in a consistent, straightforward, and literal manner and also readily conceded facts that were not to his advantage.[80] Mr. B. testified on the witness stand that he agreed to have the mother take the children to New York for one year from August 2012 to August 2013, even though he and Ms. G. could not agree on the financial aspects of the agreement, because he wanted the children to learn English.[81] The court found Ms. G. to be less credible, because of material inconsistencies in her sworn statements and testimony. Despite her later statements and testimony, Ms. G.'s early sworn statements aver that the parties initially agreed to a one-year stay in the United States and the parties effectively ratified the document in part by having the mother pay for the Mr. B.'s visits with the children in New York and making adjustments in child support obligations.[82] The court noted that the negotiations between the parents in this initial agreement focused on financial issues, rather than on whether or not the children could leave for one year.[83]

Judge Hoffman found the parties' understanding that the mother could take the children for one year from August 2012 to August 2013 particularly significant in two ways for the court's ultimate analysis. First, there was no initial wrongful removal of the children from Israel, since both parties agreed to the one-year removal even though they did not sign a document. Second, because both Mr. B. and Ms. G. agreed on the one-year removal, Ms. G.'s first defense under Article 12 of the Hague Abduction Convention cannot be successful. The claim by the mother and the attorney for the children that the father did not file the instant petitions within one year of the wrong removal or retention cannot prevail, because Mr. B. filed the proceedings in early 2014, which was within one year of the alleged wrongful retention of the children in August 2013.[84] Because of this, the court did not analyze whether or not the children were well settled in their new environment and should not be returned.[85]

The court concluded that the retention of the children in the United States after the initial year of August 2012 to August 2013 was wrongful, because Mr. B. had never consented to the children staying for a second year, citing the email exchanges between the parties and the father's more credible testimony.[86] The period of wrongful retention began when Mr. B., the non-custodial parent, clearly communicated his desire to regain his custody rights and

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 882.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

demanded return of the children.[87] In spring 2013, the father demanded return of the children in August 2013, and after not receiving an affirmative response from Ms. G., the father offered to allow the children to stay in New York for a second, final year provided that Ms. G. agreed to certain conditions, but Ms. G. did not meet those conditions and there was, consequently, no meeting of the minds for a second year.[88]

Ms. G.'s testimony and statements did not find favor with the court, as she could not point to a specific time or instance in which Mr. G consented to a second year but appeared to have inconsistent bases for her alleged understanding.[89] She at one point stated that she founded her understanding on a conversation Mr. B. had with their daughter M., who was then 11 years old.[90] She later stated that she assumed that Mr. G would consent to a second year once he saw how happy the children were in the United States.[91] She also later stated that she did not feel that she needed his permission pursuant to their divorce agreement.[92] Thus, the court found her statements inconsistent and contradictory and that she had apparently manipulated the children in making them believe that Mr. B. would allow them to stay in New York.[93]

As a result, the family court rejected the mother's first defense or exception under Article 12 of the Convention, as it found that the mother's wrongful retention of the children in New York impaired and prejudiced the father's rights of access to his children, in direct contravention of a long negotiated agreement incorporated into the 2007 Israeli divorce agreement, and that the father was exercising his custody rights at all times.[94] The father had also timely filed his petitions much less than one year following the mother's wrongful August 2013 retention of the children in the United States.[95]

2. The *In Camera* Interviews With the Children and "Objection" Within the Meaning of the Convention and ICARA

In considering the defense under Article 13 of the Convention, often known as the "wishes of the children" defense, courts focus not so much on the wishes as on a valid "objection" to returning to the place of habitual residence.[96] Noting that "wishes," "preferences," and "objections" are substantively different from one another when viewed concurrently with the purposes of the Hague Abduction Convention and ICARA,[97] the court stated that an objection

87. *Id.* (citing Karkkainen v. Kovalchuk, 445 F.3d 280 (3d Cir. 2006); Slagenweit v. Slagenweit, 841 F. Supp. 264, 270 (N.D. Iowa 1993)).

88. *R.B.*, 993 N.Y.S.2d at 882–83.

89. *Id.* at 883.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 883–84.

95. *Id.* at 884.

96. *Id.*

97. *Id.*

within the meaning of the Convention and ICARA refers to a more substantial basis, such as fear of physical, emotional, or psychological harm, or some substantive basis other than the children enjoying the activities in which they are engaged or liking their new friends in their new environment or the opportunities that new environment presents.[98]

Judge Hoffman noted that courts in such proceedings are not to "determine whether a child is happy where it currently is, but whether one parent is seeking unilaterally to alter the status quo with regard to the primary locus of the child's residence."[99] He further notes that one of the purposes of the Convention is for courts in a child's new environment not to make best interest custody determinations, as that would effectively usurp the role of the courts in the child's place of habitual residence.[100] He likewise notes the distinction between a Hague Abduction Convention petition and a child custody proceeding, stating that the former is more like a provisional remedy that directs the return of a child wrongfully retained in a country—with the merits of the child custody aspect reserved for the courts in the child's country of habitual residence.[101]

With these considerations in mind, the court analyzed the *in camera* interviews with the children, M. and G. The court considered the children to be forthcoming[102] and confirmed what the parents had agreed on about the children's success in New York.[103] The children indicated that they wished to remain in New York at least for the time being, that they probably wanted to attend college in the United States, and that the mother had told G., who enjoys soccer, that he could be a professional soccer player and would be able to play soccer in college if he remained in the United States.[104] The children also spoke about significant friendships that they had in Israel and M. also explained that, after finishing high school, she would want to serve in the Israeli Defense Force for three years.[105] While the court found that M. was particularly mature for her age, it did not find that G. demonstrated the level of maturity necessary to make a life-changing decision to remain in the United States.[106] In any case, the court concluded that an intent expressed by a 10-year-old does not carry particular weight, especially given the basis of this intent.[107]

The court held that it is not the purpose of the Convention to make best interest custody determinations, especially in this case, in which the Israeli court made the initial child custody determination and the parents entered into a long-negotiated settlement, which stipulated that

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98. *Id.* at 886 (citing Gonzalez Locicero v. Nazor Lurashi, 321 F. Supp. 2d 295, 298 (D.P.R.2004)).

99. *Id.* (quoting Mozes v. Mozes, 239 F.3d 1067, 1079 (9th Cir. 2001)).

100. *Id.* (citing Hazbun Escaf v. Rodriguez, 200 F. Supp. 2d 603, 610–11, 615 (E.D. Va.), *aff'd sub nom.* Escaf v. Rodriguez, 52 Fed. Appx. 207 (4th Cir. 2002)).

101. *Id.* (citing Redmond v. Redmond, 724 F.3d 729, 737 (7th Cir. 2012)).

102. *Id.* at 884.

103. *Id.*

104. *Id.*

105. *Id.* at 885.

106. *Id.* at 884.

107. *Id.*

only Israeli courts could modify that agreement.[108] Notably, the court also held that, were it to find that the children "object" to repatriation in Israel within the meaning of the Convention, it would exercise its discretion to order the return of the children to Israel, and that if the Israeli Family Court believes it is in the children's best interest to remain in or revisit the United States, it has the power to modify its custody order.[109]

3. Attorney's Fees and Costs Necessary to Petition

With the court finding that Mr. B. carried his burden of proving that Ms. G. wrongfully retained the children in New York after August 2013 and that there was no viable defense to an order directing the return of the children, the court ordered that Ms. G. return the children to Israel promptly, no later than 30 days from the date of the order. As the father sought reimbursement for attorney's fees and costs necessary to his petitions for return of the children, the court, in ordering return of the children, was required to award the party enforcing his custodial rights necessary expenses, including fees, unless the mother would be able to show that an award of necessary expenses would be "clearly inappropriate."[110] Granting the father's application, the court scheduled an evidentiary hearing to determine the issue of fees and costs.[111]

IV. Conclusion

Mr. B. successfully carried the burden of proving that Ms. G. wrongfully retained their children in New York and Judge Hoffman properly granted his petition to return the two children to Israel pursuant to the Hague Convention on Civil Aspects of International Child Abduction, and its implementing statute, the International Child Abduction Remedies Act (ICARA). Mr. B.'s custody rights were clearly breached under the law of Israel and he had exercised his custody rights at all times. The court was precise and comprehensive in rejecting Ms. G.'s two defenses based on Articles 12 and 13 of the Convention, because Mr. B. had filed his petition within a year of the wrongful removal of the child in August 2013. Furthermore, the children certainly did not "object" to being returned within the meaning of the Convention and ICARA, However, the court still holds the discretion to return the children, even finding proper objection, as it is the purpose of the Hague Abduction Convention to allow the courts in the child's place of habitual residence to assess the best interest custody determination. One may wonder whether it is particularly prudent for a court ever to use its discretion to return children when a proper objection exists; such an act would illustrate a favoring of comity above the well-being of children. Still, the discretion to do so might indeed be for the overall well-being of children, because one could argue that the courts in the child's place of habitual residence would be in the optimal position to make best interest custody determinations.

Daliya Poulose

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108. *Id.* at 886.

109. *Id.*

110. *Id.* at 887 (quoting 42 U.S.C. § 11607(b)(3); Ozaltin v. Ozaltin, 708 F.3d 355, 375 (2d Cir. 2013)).

111. *Id.*

Georges v. United Nations

2015 WL 129657 (S.D.N.Y. Jan. 9, 2015)

The U.S.D.C. for the Southern District of New York held that, under the Convention on Privileges and Immunities of the United Nations, the UN and MINUSTAH (Haiti) were entitled to absolute immunity from suit and the Secretary–General and the former Under-Secretary-General for MINUSTAH were entitled to diplomatic immunity.

I. Holding

The U.S. District Court for the Southern District of New York held that the United Nations (UN) and United Nations Stabilization Mission in Haiti (MINUSTAH) enjoyed absolute immunity, under the Convention on Privileges and Immunities of the United Nations (CPIUN),[1] from suit in an action alleging that UN personnel were responsible for a cholera epidemic in Haiti, absent a showing that the UN had expressly waived its immunity.[2] The UN's failure to provide any mode of settlement for the claims at issue did not constitute an exception to the express grant of absolute immunity. Accordingly, the plaintiffs' request for affirmation of service or service through alternative means was denied as moot.[3]

II. Facts and Procedure

This putative class action lawsuit emanates from a cholera epidemic that erupted in Haiti in October 2010.[4] Plaintiffs Delama Georges, Alius Joseph, Lisette Paul, Felicia Paule and Jean Rony Silfort are citizens of either the United States or Haiti.[5] They claim that they or their relatives were killed or made ill by the cholera epidemic as a result of the negligent, reckless, and tortious conduct of the UN and its subsidiary, the United Nations Stabilization Mission in Haiti.[6]

The United Nations is an intergovernmental organization founded in 1945. Through international cooperation, the UN's objectives include peacekeeping,[7] promoting human

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1. Convention on Privileges and Immunities of the United Nations, Feb. 13 1946, *entered into force with respect to the United States* Apr. 29, 1970, 21 U.S.T. 1941, 1 U.N.T.S. 16 (CPIUN).
2. Georges v. United Nations, 2015 WL 129657 (S.D.N.Y. Jan. 9, 2015).
3. *Id.* at *5.
4. *See* Inst. for Justice & Democracy in Haiti, "Cholera Accountability," http://www. ijdh.org/cholera/.
5. It should be noted at the outset that the following facts taken from the Complaint were assumed to be true for the purposes of this motion. *See Georges*, 2015 WL 129657, at *5 n.1.
6. Complaint at ¶ 2, Georges v. United Nations, 2015 WL 129657 (S.D.N.Y. 2015) (No. 13 CV 7146). The acronym stands for "Mission des Nations Unies pour la stabilisation en Haïti"; *see also id.* at ¶¶ 5, 59. The plaintiffs allege that in October 2010, the defendants deployed over 1,000 UN personnel from Nepal to Haiti without screening them for cholera, a disease that is endemic in Nepal and with which some of the personnel were infected.
7. U.N. Charter art. 1, para. 1. "To maintain international peace and security . . ." *Id.*

rights[8] and providing humanitarian assistance.[9] The United Nations' principal place of business is New York.[10] In February 2004, the UN established MINUSTAH to stabilize Haiti after President Jean-Bertrand Aristide was cast into exile.[11]

On January 12, 2010, a 7.0 magnitude earthquake struck the island of Haiti, killing over 220,000 people, displacing an additional 1.5 million people, and devastating the country's already fragile infrastructure.[12] A week later, the Security Council authorized an increase to the force levels of MINUSTAH to support recovery efforts in the country.[13] As part of these efforts, the United Nations and MINUSTAH deployed 1,075 troops from Nepal to Haiti to assist with the crisis.[14] In the months preceding the deployment, Nepalese authorities reported a surge in cholera cases, namely *El Tor cholera*.[15] Plaintiffs alleged that one or more of the MINUSTAH soldiers contracted cholera and were not screened or tested for the infection prior to deployment to Haiti.[16] Plaintiffs further alleged that Defendants stationed a majority of these soldiers at a base situated on the banks of the Meille Tributary System, which flows into Haiti's primary source of drinking water, the Arbonite River.[17] Plaintiffs contended that, as a result of Defendants' discharge of raw sewage into the tributary, cholera contaminated the water supply and led to an outbreak in Haiti in 2011.[18]

Plaintiffs alleged that under the CPIUN the UN is expressly required to provide modes of settlement for third-party private law claims.[19] The Status of Forces Agreement (SOFA) expressly requires the UN to establish a standing claims commission to address claims for harm.[20]Specifically, Plaintiffs contended that Defendants should have established a mechanism in which those who were injured or lost family members to the cholera outbreak could seek redress and their refusal to do so violated the CPIUN and the SOFA.[21]

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8. *Id.* at art. 1, para. 2. "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace." *Id.*

9. *Id.* at art. 1, para. 3. "To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character." *Id.*

10. Compl. ¶ 19.

11. MINUSTAH was established by Security Council Resolution 1542. *See* S.C. Res. 1542, U.N. Doc. S/RES/1542 (Apr. 30, 2004), http://www.un.org/en/peacekeeping/missions/ minustah/; *see also* Paul Farmer, "Who Removed Aristide?," http://www.lrb.co.uk/v26/n08/paul-farmer/who-removed-aristide.

12. Compl. ¶ 41–42.

13. S.C. Res. 1908, U.N. Doc. S/RES/1908 (Jan. 19, 2010), http://www.security councilreport.org/atf/cf/%7 B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Haiti%20SRE S%201908.pdf.

14. Compl. ¶ 59.

15. *Id.* ¶ 60; *see also* Martin Enserink, *Haiti's Outbreak Is Latest in Cholera's New Global Assault*, SCI., Nov. 5, 2010, Vol. 330, www.sciencemag.org.; http://izt.ciens.ucv.ve/ecologia/Archivos/ECO_POB%202010/ECOPO6_ 2010/ Enserink%202010.pdf).

16. Compl. ¶ 63–64.

17. *Id.* ¶ 71.

18. *Georges*, 2015 WL 129657 at *1.

19. Compl. ¶ 11.

20. *Id.*

21. *Georges*, 2015 WL 129657 at *1.

Plaintiffs could not personally serve the complaint and moved the court to affirm that service had been made or to permit alternative service of process.[22] The UN did not respond to Plaintiffs' motion; instead, the United States filed a "Statement of Interest" contending that Defendants were immune from Plaintiffs' suit and the court lacked subject matter jurisdiction over the action.[23] Accordingly, Defendants requested the complaint be dismissed.[24]

III. Discussion

A. Legal Standard

Under Federal Rule of Civil Procedure 12(h)(3), a case must be dismissed if the court "determines at any time that it lacks subject matter jurisdiction."[25] A court is deprived of subject matter jurisdiction over a case where the defendant is immune from suit.[26] In determining subject matter jurisdiction, the court may refer to evidence outside the pleadings and accept as true all factual allegations alleged in the complaint.[27] Any ambiguities and inferences must be construed in favor of the plaintiff.[28] The party asserting subject matter jurisdiction must prove through a preponderance of evidence that it exists.[29]

B. Immunity from Suit of the United Nations and MINUSTAH

The United Nations possesses a form of legal immunity in which it is not susceptible to lawsuits.[30] The CPIUN provides that the UN and its members "enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity."[31] Although the CPIUN is not a legislative enactment, it is treated as "self-executing" and must be enforced.[32] Therefore, under the CPIUN, the only way the UN is subject to a suit is if "it has expressly waived its immunity."[33] Here, Judge Oetken explained, neither party asserted

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22. *Id.* at *2.
23. *Id.*
24. *Id.*
25. *Id.; see also* Cave v. E. Meadow Union Free Sch. Dist., 514 F.3d 240, 250 (2d Cir. 2008) (enunciating the rule that "if a court perceives at any stage of the proceedings that it lacks subject matter jurisdiction, then it must take proper notice of the defect by dismissing the action").
26. *Georges*, 2015 WL 129657 at *2.
27. *Id.*
28. Aurecchione v. Schoolman Transp. Sys., Inc., 426 F.3d 635, 638 (2d Cir. 2005) (quoting Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000).
29. *Georges*, 2015 WL 129657 at *2 (citing *Makarova*, 201 F.3d at 113).
30. The UN Charter states that the UN "shall enjoy in the territory of each of its Member such privileges and immunities as are necessary for the fulfillment of its purposes." U.N. Charter art. 105, para. 1.
31. CPIUN art. II, § 2.
32. *Georges*, 2015 WL 129657 at *2; *see also* Brzak v. United Nations, 597 F.3d 107, 111–12 (2d Cir. 2010) (explaining that when the United States acceded to the CPIUN in 1970 through the President's ratification and advice and consent of the Senate, it was affirming that it was "in a position under its own law to give effect" to the CPIUN's terms at that time).
33. *Id.* (quoting CPIUN art. II § 2).

that the United Nations expressly waived its immunity.[34] To the contrary, the UN argued that it repeatedly asserted its immunity.[35]

Alternatively, the plaintiffs argued that the UN is not entitled to the CPIUN's absolute grant of immunity, because the UN breached its obligations under § 29 of the CPIUN. Specifically, pursuant to § 29 of the CPIUN, the United Nations must make "provisions for appropriate modes of settlement of . . . disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party."[36] Since the UN failed to provide the plaintiffs with such a mode of settlement, the plaintiffs argued the UN was not entitled to the protections and immunities of the CPIUN.[37] Judge Oetkin explained that, under the Second Circuit's holding in *Brzak v. United Nations*, this argument is barred.[38] In *Brzak*, the Second Circuit stated that such an interpretation would undermine the CPIUN's "express waiver" requirement.[39] Similarly, to construe the UN's failure to provide a dispute resolution mechanism as a waiver in this case would contravene the unequivocal, absolute grant of immunity bestowed upon the United Nations.[40]

Judge Oetkin went on to underscore that nothing in the text of the CPIUN suggests that the UN's failure to comply with § 29 operates as an exception to § 2's express waiver requirement.[41] When juxtaposed, these sections appear to be two independent and separate provisions that do not even refer to each another. This is demonstrated by the fact that § 29 does not expressly limit the UN's grant of immunity in the event it fails to provide a mode of settlement. Lastly, Judge Oetkin examined the CPIUN's drafting history, which indicated that a dispute mechanism is not required in order for the UN to claim immunity.[42]

Judge Oetkin acknowledged that § 29 does use mandatory language when it states that the UN "*shall* make provisions for appropriate modes of settlement of . . . dispute. . . ."[43] However, this could not be read to supersede the grant of "immunity from every form of legal process" in § 2 as construed by the Second Circuit.[44]

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34. *Georges*, 2015 WL 129657 at *3.

35. *Id.* (citing Statement of Interest at 6, in which the defendants declare: "In this case, there has been no express waiver. To the contrary, the UN has repeatedly asserted its immunity").

36. CPIUN art. VIII, § 29(a).

37. *Georges*, 2015 WL 129657, at *3.

38. *Id.* (citing *Brzak*, 597 F.3d 107).

39. *Brzak*, 597 F.3d at 112 ("Although the plaintiffs argue that purported inadequacies with the United Nations' internal dispute resolution mechanism indicate a waiver of immunity, crediting this argument would read the word 'expressly' out of the CPIUN").

40. *Georges*, 2015 WL 129657 at *3.

41. *Id*.

42. *Id.*; *see also* Tachiona v. United States, 386 F.3d 205, 216 (2d Cir. 2004). "Treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the *written* words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Id.*

43. *See* CPIUN art. II, §2 (emphasis added).

44. *Georges*, 2015 WL 129657 *4.

The last step in examining the language of a treaty is that deference is given to the Executive Branch.[45] The court found the United States' interpretation that the only exception to the CPIUN's grant of immunity is an express waiver by the UN to be reasonable in light of the reasons provided above.[46] Accordingly, because an express waiver was absent in this case, the court held that both the UN and MINUSTAH are immune from suit.[47]

C. Immunity from Suit of Ban Ki-moon and Edmond Mulet

With respect to Ban Ki-moon and Edmond Mulet, the UN Secretary-General and former Under-Secretary-General for MINUSTAH, the court held they are immune from Plaintiffs' suit by virtue of their current diplomatic positions.[48] The court relied on the UN Charter, the CPIUN and the Vienna Convention on Diplomatic Relations (VCDR)[49] which, as applied to the Defendants here, all provided for immunity. The UN Charter provides that "officials of the organization" enjoy the privileges and immunities necessary for "the independent exercise of their functions in connection with the organization."[50] Specifically, the CPIUN provides that "the Secretary-General and all Assistant Secretaries-General" are bestowed "the privileges and immunities . . . accorded to diplomatic envoys, in accordance with international law."[51] Lastly, the Vienna Convention on Diplomatic Relations states that current diplomatic agents "enjoy immunity from [the] civil and administrative jurisdiction" of the United States.[52] Thus, the suits against both Ban Ki-moon and Edmond Mulet were dismissed.[53]

IV. Conclusion

The U.S. District Court for the Southern District of New York dismissed the claims against Defendants pursuant to Rule 12(h)(3) for lack of subject-matter jurisdiction. Plaintiffs' request for affirmation of service or service through alternative means was denied as moot, because the case was dismissed for the reasons mentioned above.

Generally, Judge Oetkin and the Southern District of New York decided the correct outcome. For an international organization to operate effectively, the United Nations needs to be

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45. *Tachiona*, 386 F.3d at 216. "In construing treaty language, '[r]espect is ordinarily due the reasonable views of the Executive Branch.'" *Id.*; *see also* Swarna v. Al-Awadi, 622 F.3d 123, 133 (stating, "[W]hile the interpretation of a treaty is a question of law for the courts, given the nature of the document and the unique relationships it implicates, the 'Executive Branch's interpretation of a treaty is entitled to great weight.'") (quoting Abbott v. Abbott, 560 U.S. 1 (2010)).

46. *Tachiona*, 386 F.3d at 216.

47. *Id.*

48. *Id.*

49. CPIUN art. V, sec. 19.

50. U.N. Charter art. 105, para 2.

51. CPIUN art. V, sec. 19.

52. VCDR art. 31, Apr. 18, 1961, *entered into force with respect to the United States* Dec. 13, 1972, 23 U.S.T. 3227. Under the Vienna Convention there are three exceptions when immunity does not apply, however, they are not present in this case.

53. *See* 22 U.S.C. § 254d (requiring a district court to dismiss "[a]ny action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the Vienna Convention on Diplomatic Relations . . . or under any other laws extending diplomatic privileges and immunities").

able to assert various immunities in court systems around the world. However, this does not mean that the United Nations should also be exempt from providing remedies or modes of settlement to those it injures. If the United Nations is responsible for such a cholera outbreak in Haiti, it should at least provide a forum in which victims can be heard and potentially seek redress. Unfortunately, because the United Nations did not waive its immunity and chose not to provide such a dispute resolution mechanism for the victims, the outcome in this case seems to demonstrate that immunity means impunity for the United Nations.

Christina I. Bello

Hausler v. JP Morgan Chase Bank, N.A.

770 F.3d 207 (2d Cir. 2014)

The U.S. Court of Appeals for the Second Circuit determines that Cuba, in order for an electronic funds transfer to be attachable under The Terrorism Risk Insurance Act of 2002, must have a property interest in the funds.

I. Holding

Recently, in *Hausler v. JP Morgan Chase Bank, N.A.*,[1] the U.S. Court of Appeals for the Second Circuit concluded that, under § 201 of the Terrorism Risk Insurance Act of 2002 (TRIA),[2] Cuba did not have any property interest in electronic funds transfers (EFTs) that were blocked by garnishee banks.[3] The court found that for an EFT to be determined to be blocked property of Cuba under TRIA, Cuba itself must have transmitted the EFT directly to the bank by which the EFT is held pursuant to the block.[4] The court concluded that the EFTs were not subject to attachment while in the possession of an intermediary bank.[5] Therefore, the court's holding reversed and remanded the decision of the Southern District of New York, which had held that Cuba had a sufficient property interest in the EFTs for plaintiffs to execute upon them.[6]

II. Facts and Procedure

The appellees in this case are the "family members and estate representatives" of an American citizen, Bobby Fuller, who was "arrested and executed by Cuban government forces" on October 16, 1960.[7] In 2005, the appellees had sued "Cuba and others" under the Foreign Sovereign Immunities Act (FSIA),[8] in the Eleventh Judicial District, Miami-Dade County, Florida.[9] Cuba never appeared and, after conducting a hearing, the Florida state court then awarded the appellees "$400,000,000 in combined compensatory and punitive damages."[10] Cuba did not appeal this judgment, and the judgment remains unsatisfied.[11]

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1. Hausler v. JP Morgan Chase Bank, N.A., 770 F.3d 207 (2d Cir. 2014).
2. 28 U.S.C. § 1610.
3. *Hausler*, 770 F.3d at 212.
4. *Id*.
5. *Id*.
6. *Id*. at 211–12.
7. *Id*. at 210.
8. 28 U.S.C. § 1602.
9. *Hausler*, 770 F.3d at 210.
10. *Id*.; *see also* Hausler v. JP Morgan Chase Bank, N.A., 845 F. Supp. 2d 553 (S.D.N.Y. 2012).
11. *Id*.

The appellees sought, in the Florida state courts, writs of garnishment on United States companies that were alleged to have been indebted to Cuba.[12] The garnishees removed these writs to the U.S. District Court for the Southern District of Florida, arguing that "federal subject matter jurisdiction existed under 18 U.S.C. §§ 1330, 1332,[13] and TRIA."[14] The appellees sought a full faith and credit determination for the Florida state judgment in the U.S. District Court for the Southern District of Florida, which was granted on August 20, 2008.[15] The judgment was then registered in the U.S. District Court for the Southern District of New York.[16] The Florida garnishment proceedings were "(1) ultimately transferred to the Southern District of New York and consolidated with the actions there or (2) dismissed without prejudice to be pursued in the Southern District of New York along with the transferred and consolidated actions."[17]

The appellees then filed three petitions against the garnishee banks for the value of the EFTs.[18] These banks moved to dismiss the appellees' third petition, on the basis that Cuba had no property interest in the EFTs.[19] The district court denied the motion, holding that "TRIA preempted state law with respect to which entities had a property interest in mid-stream EFTs and that Cuba had a sufficient property interest in the EFTs for [appellees] to execute upon them."[20]

The appellees moved for summary judgment on all three pleadings. The banks and adverse claimant respondents (ACRs) (who claim to have an interest in the blocked EFTs superior to the appellees) cross-moved for summary judgment.[21] The district court granted summary judgment in the appellees' favor.[22] This appeal followed.

On appeal, the garnishee banks and ACRs argued that the "blocked EFTs are not attachable assets of Cuba under TRIA."[23] The threshold question for this court was to determine "'whether EFTs are . . . property' of a particular party."[24]

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12. *Id*.
13. 18 U.S.C. §§ 1330, 1332 are both federal statutes defining the court's jurisdiction over foreign states.
14. *Hausler*, 770 F.3d at 210.
15. *Id*.
16. *Id*.
17. *Id*.
18. *Id*.
19. *Id*.
20. *Id*. at 211.
21. *Id*.
22. *Id*.
23. *Id*.
24. *Id*. (quoting Calderon-Cardona v. Bank of New York Mellon, 770 F.3d 993, 1000 (2d Cir. 2014)).

III. Discussion

A. § 201 of the Terrorism Risk Insurance Act of 2002

The relevant part of TRIA states that:

> Notwithstanding any other provision of law . . . and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 App. U.S.C. 5 (b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370 (a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701–1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605 (a)(7) (as in effect before the enactment of section 1605A) or section 1605A.[25]

In a typical case under FSIA,[26] the act would "immunize a foreign state from the jurisdiction of the courts of the United States."[27] However, the above-mentioned excerpt from TRIA authorizes an "attachment of property of terrorist parties and that of their agencies or instrumentalities to satisfy certain judgments against them."[28] As the opinion in *Hausler* noted, there was as an exception in the Act, where Congress "did not define the 'type of property interests that may be subject to attachment under' TRIA."[29] Since Congress did not provide a definition of the type of property that may be attached, the court must look to state law to define the "rights the judgment debtor has in the property the [creditor] seeks to reach."[30]

B. *Calderon-Cardona*

In *Calderon-Cardona v. Bank of New York Mellon*, the petitioners were family members and estate representatives of two American citizens who were victims of a terrorist attack in Israel.[31] Petitioners filed suit against North Korea, alleging that it provided material support to the terrorists.[32] The district court entered judgment for the petitioners, awarding them com-

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25. 28 U.S.C. § 1610(f)(1)(A). This statute involves the general exceptions to the jurisdictional immunity of a foreign state. 28 U.S.C. § 1605.
26. 28 U.S.C. § 1602.
27. *Hausler*, 770 F.3d at 211 (quoting 28 U.S.C. § 1602).
28. *Id*.
29. *Id*. (quoting Calderon-Cardona v. Bank of New York Mellon, 770 F.3d 993 (2d Cir. 2014)).
30. *Id*.
31. *Calderon-Cardona*, 770 F.3d at 996.
32. *Id*.

pensatory damages in the amount of $78 million and punitive damages in the amount of $300 million, which went unsatisfied.[33]

The court noted that Congress had not defined the type of property interests that may be subject to attachment under FSIA.[34] Because of the absence of a definition of the property rights in the text of FSIA, the court held that it must look to state law to define the rights the debtor has in the property the creditor seeks to reach.[35] The court explained that "under New York Law 'EFTs are neither the property of the originator nor the beneficiary while briefly in the possession of an intermediary bank.'"[36] The court further noted that "the only entity with a property interest in the stopped EFT is the entity that passed the EFT on to the bank where it presently rests."[37]

The court in *Calderon-Cardona* concluded that the record contained "little to no evidence of whether the entities that transmitted the EFTs to the respondent banks were agencies or instrumentalities of North Korea."[38] Therefore, the court held that "the EFTs cannot be attached pursuant to TRIA."[39]

In the present case, for the EFT to be considered a blocked asset of Cuba under TRIA, Cuba must have transmitted the EFT directly to the bank where the EFT is held pursuant to the block.[40] However, it is undisputed that "no Cuban entity transmitted any of the blocked EFTs" directly to the blocking bank.[41] Therefore, since neither Cuba nor its agents have a property interest in the EFTs that are blocked at the banks, they are not attachable under TRIA.[42]

IV. Conclusion

The court in *Hausler* applied *Calderon-Cardona* to distinguish whether or not the EFTs were attachable, because of the lack of a definition of property in TRIA.[43] The court distinguished the two cases and determined that, because neither Cuba nor any Cuban entity transmitted the EFTs in this case directly to the garnishee banks, there was no property interest.[44] Unlike *Calderon-Cardona,* the EFTs in *Hausler* were never transmitted by Cuba or its entities,[45] so there is no property interest, and "no terrorist party or agency or instrumentality thereof has

33. *Id*. at 997.

34. *Id*. at 1001.

35. *Id*.

36. *Id.* (quoting Shipping Corp. of India Ltd v. Jaldhi Overseas Pte Ltd., 585 F.3d 58 (2d Cir. 2009)).

37. *Hausler*, 770 F.3d at 212.

38. *Calderon-Cardona*, 770 F.3d at 1002.

39. *Id*.

40. *Hausler*, 770 F.3d at 212.

41. *Id*.

42. *Id*.

43. *Id*.

44. *Id*.

45. *Id*.

a property interest in the EFTs, and they are not attachable under TRIA."[46] Therefore, the court reversed and remanded the district court's judgment, which was in favor of the appellees.[47] Because of this holding, in order for an EFT to be a blocked asset of a country under TRIA, either the country itself or an agency or instrumentality of that country must have transmitted the EFT directly to the bank where it is being held and blocked.[48]

Daniel A. Gili

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46. *Hausler* at 212.
47. *Id.*
48. *Id.*

Rana v. Islam

305 F.R.D. 53, 2015 WL 81977 (S.D.N.Y. Jan. 6, 2015)

The U.S.D.C. for the Southern District of New York held that the plaintiff's claims could survive husband-wife defendants' motions to dismiss. The plaintiff, a national of Bangladesh, could proceed with his federal claims, alleging violations of the Trafficking Victims Protection Reauthorization Act and the Fair Labor Standards Act, and New York state law, which were brought in federal court under supplemental jurisdiction.

I. Holding

In the recent case *Rana v. Islam*,[1] the court held plaintiff-employee Rana's actions were sufficiently specific as to the time, place, and nature of the alleged misrepresentations of the defendants to satisfy his claim of fraud. Second, the court possessed subject matter jurisdiction over the claim. Third, the hiring of the plaintiff by the defendants was not found to be in keeping with the defendant Islam's consular function and as such was not entitled to immunity; as defendant did not act as an agent of Bangladesh. Fourth, the defendant employers had actual notice of their employee's pending suit against them and mailing a summons and complaint to defendants' attorney was considered by the court to constitute sufficient service.

II. Facts

The plaintiff, Mashud Parves Rana, brought suit against his former employers, Monirul Islam and his wife, Fahima Tahsina Prova. The plaintiff, a citizen of Bangladesh, was granted an A-3 visa, which allowed him admission into the United States.[2] Monirul Islam, one of the defendants, was employed in the capacity of Consul General of the Consulate General of Bangladesh in New York City.[3] The defendants employed the plaintiff at their New York City apartment in the capacity of domestic help. The plaintiff alleges that "in the summer of 2012 defendants 'knowingly and willfully lured [him] from Bangladesh' to the United States with various promises: (1) plaintiff would receive a salary of $3,000 per month, (2) plaintiff would have free time every day to do as he pleased once his daily work was finished, (3) defendants would make sure plaintiff's visa remained current."[4] Since these are all well-pleaded facts, the court assumes they are true for the purposes of these motions.

Plaintiff flew to New York around the second week of September 2012 to begin working for defendants.[5] Once plaintiff began working, defendants "obtained his forced labor and invol-

1. Rana v. Islam, 2015 WL 81977 (S.D.N.Y. Jan. 6, 2015).
2. *Id*. at *1 (citing Compl. ¶ 9).
3. *Id*.
4. *Id*. (citing Compl. ¶¶ 2, 28, 34–35).
5. *Id.* at *1.

untary services through 'physical threats, coercion, isolation, physical restraint, physical force, [and] threats to [his] life.'"[6] Defendant Islam used the plaintiff's now-expired visa as a means of exploiting him, to the extent that the plaintiff claimed defendant Islam told him that if he escaped, the police would "find him and kill him because Mr. Rana [plaintiff] did not have a passport."[7]

When the plaintiff asked the defendant about receiving compensation for his labor, Islam allegedly said, "I brought you to America, that is enough."[8] The plaintiff contended that he "never had a day off" in nearly 19 months of employment with the defendants.[9]

The defendant required plaintiff to work at events sponsored by the Bangladesh Consulate, in the capacity of "busboy and server at monthly community events."[10] Therefore, between allegations of working round the clock and the amount of domestic responsibilities the defendants expected the plaintiff to perform daily, defendants essentially enslaved the plaintiff.

About February 2014, defendant Islam informed the plaintiff that Islam would be relocating to Morocco and the plaintiff must come with the family.[11] The plaintiff alleged he overheard defendants speaking about why the plaintiff must relocate with the family, which was due in large part to how the defendant Islam's reputation would be affected if people found out about how he was treating Rana.[12]

In the beginning of March 2014, after defendants prevented Rana from speaking with a relative in New York,[13] the plaintiff "fled the defendants' apartment 'with the clothes on his back and a few personal effects.'"[14]

III. Procedural History

The plaintiff brought suit in federal court, alleging violations of the Trafficking Victims Protection Reauthorization Act,[15] the Fair Labor Standards Act,[16] the New York State Labor Law § 190 *et seq*.,[17] and state claims, which were brought in federal court pursuant to supplemental jurisdiction, including "breach of contract, fraudulent misrepresentation, unjust enrich-

6. *Id.* at *2 (quoting Compl. ¶ 39.)
7. *Id.* at *2 (quoting Compl. ¶ 48).
8. *Id.* at *2 (quoting Compl. ¶ 63).
9. *Id.* at *2 (quoting Compl. ¶ 52).
10. *Id.* at *2 (quoting Compl. ¶ 42).
11. *Id.* at *2 (quoting Compl. ¶ 64).
12. *Id.* at *2 (quoting Compl. ¶ 65).
13. *Id.* at *2 (Compl. ¶¶ 67–69).
14. *Id.* at *2 (quoting Compl. ¶ 70).
15. 18 U.S.C. §§ 1589 *et seq*.
16. 29 U.S.C. §§ 201 *et seq*.
17. *Rana*, 2015 WL 81977 at 1.

ment, quantum meruit, conversion, trespass to chattels, false imprisonment, and assault and battery."[18]

In response to these claims, the defendants made motions to dismiss under four assertions. The first motion to dismiss was brought under Federal Rule of Civil Procedure 12(b)(6) (FRCP) to dismiss the plaintiff's claim of fraudulent misrepresentation for failure to state a claim upon which relief can be granted.[19] The second motion to dismiss was brought under FRCP 12(b)(1) for lack of subject matter jurisdiction.[20] Third, the defendants moved to dismiss based on defendant's alleged consular immunity.[21] Last, the defendants moved to dismiss for insufficient service of process under FRCP 12(b)(5).[22]

One of the issues this case turns on is whether service on the defendants was proper. The plaintiff made three good faith attempts to serve defendants through the use of a process server, who attempted to serve the defendants at their apartment each time. In the first attempt, the process server went to the defendants' apartment, located at 60 West 57th Street. In that instance, the server identified himself to the concierge, who, after contacting the defendants in their apartment, refused the server access past the lobby.[23] The next day the server attempted once against to complete service on the defendants. At the time he arrived in the lobby, the concierge was not there, so the server went up to the defendants' apartment to complete service personally. When he knocked on the door, "even though 'voices were coming from the apartment,' no one answered."[24]

The day after the defendants claim they were not present in New York State, the process server returned to the building. On that third occasion, the process server again spoke with the concierge and identified himself and his intention.[25] After the concierge attempted to reach the defendants, there was no answer and the concierge denied access to the defendants' apartment.[26] Thereafter, the process server followed the appropriate procedure and "left two copies of the summons and complaint with Raden [the concierge], who said he would give them to defendants."[27] The concierge left the documents in the mailbox of the defendants. The process server also mailed two copies of the summons and complaint to the defendants' apartment.[28] It was brought to the attention of the concierge soon thereafter, on or about March 24, that the defendants were no longer residing in the building after that date.

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18. *Id.* at 1.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 3 (quoting Decl. of Raymond Hollingsworth ¶ 5).
24. *Id* at 3 (quoting Decl. of Raymond Hollingsworth ¶ 6).
25. *Id.* at 3.
26. *Id.*
27. *Id.* at 3 (quoting Decl. of Raymond Hollingsworth ¶ 10).
28. *Id.* at 3 (quoting Decl. of Raymond Hollingsworth ¶ 11).

IV. Discussion

A. Motion to Dismiss the Fraudulent Misrepresentation Claim for Failure to State a Claim for Relief

As discussed earlier, the defendants moved to dismiss this claim of fraudulent misrepresentation, based on the assertion that the plaintiff failed to state a claim "with sufficient particularity."[29] The plaintiff amended his complaint to pursue only a claim of fraudulent misrepresentation against defendant Prova and to drop his claim against defendant Islam.[30]

When the court evaluates a motion to dismiss brought under FRCP 12(b)(6), "the court accepts the truth of the facts alleged in the complaint and draws all reasonable inferences in the plaintiff's favor."[31] Under New York law, a claim for fraudulent misrepresentation must meet four criteria:

> (1) the defendant made a material false representation, (2) the defendant intended to defraud the plaintiff thereby, (3) the plaintiff reasonably relied upon the representation, and (4) the plaintiff suffered damage as a result of such reliance.[32]

Therefore, in taking the above elements that must be met to sufficiently pursue a claim of fraudulent misrepresentation, the court concluded that the plaintiff sufficiently pled his claim.

Plaintiff claimed that defendant Prova told him "he would enjoy all of the rights and privileges of Americans in the United States," she would "renew Mr. Rana's visa in the United States," and "Rana would have some free time to himself every day when he completed his job duties."[33] Therefore, these allegations meet the standard set forth in Rule 9(b) in regards to sufficient specificity. While defendant Prova disputed those allegations, arguing that the plaintiff's time frame was too vague, case law holds that "a complaint need only apprise a defendant of the 'general time period' of any alleged misstatements to meet the requirements of Rule 9(b)."[34] Therefore, the court found that the approximate time period was to be liberally applied.[35] Plaintiff alleged that the misrepresentations were made in Dhaka approximately during the middle of June, and since the plaintiff came to America in the middle of September, the statements fell within an appropriate time period.[36] Additionally, the plaintiff contended that after he visited the American Embassy in Dhaka approximately in July 2012 to get a visa, "Prova 'informed Mr. Rana directly that she and Defendant Islam would pay him $3,000 per

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29. *Id*. at 3.

30. *Id*. at 3.

31. *Id.* at 3 (citing Wilson v. Merrill Lynch & Co. Inc., 671 F.3d 120, 128 (2d Cir. 2011)).

32. *Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co. of N.Y.*, 375 F.3d 168 (2d Cir. 2004).

33. *Rana,* 2015 WL 81977 at 4, citing Compl. ¶ 20, 21, 28.

34. Harris v. Wells, 757 F.Supp. 171, 173 (D. Conn. 1991) (internal citations omitted).

35. Internet Law Library, Inc. v. Southridge Capital Mgmt., LLC, 223 F. Supp. 2d 474, 481 (S.D.N.Y. 2002) (holding that a two-month time period was sufficiently specific).

36. *Rana,* 2015 WL 81977 at 4.

month.'"[37] The court concluded, based on the above, that "these allegations are sufficiently specific to enable defendants to submit an answer and prepare for trial."[38]

The court additionally concluded, based on the aforementioned facts, "Rana has also pled sufficient facts to give rise to the required intent to defraud."[39] The plaintiff alleged "Prova demanded that he sign documents without explaining their contents or giving him time to read them."[40] As discussed earlier, the plaintiff included allegations of the defendants' cruel and inhumane treatment, which included deprivation of his passport and visa, lack of any monetary compensation, and threats, which at times escalated to physical violence.[41]

Therefore, "taken together and assumed for purposes of this motion to be true, these allegations support the requisite inference that Prova intended to defraud Rana."[42] As a result, the court found the plaintiff's allegations satisfactory to withstand Rule 9(b) and as such "defendants' motion to dismiss plaintiff's claim against Prova for fraudulent misrepresentation is denied."[43]

B. Motion to Dismiss the Complaint for Lack of Subject Matter Jurisdiction

Both defendants moved to dismiss the complaint against them for lack of subject matter jurisdiction, claiming immunity by "virtue of consular immunity."[44] In a motion to dismiss pursuant to FRCP 12(b)(1), "the party invoking federal jurisdiction bears the burden of establishing that jurisdiction exists."[45] Both parties were in agreement that the plaintiff's claims arose under a federal question, including 28 U.S.C. § 1331, 29 U.S.C. §§ 201 *et seq*., and 18 U.S.C. § 1595(a), and as such the federal court had jurisdiction and supplemental jurisdiction under 28 U.S.C. § 1367(a).[46] The defendants did not contest the federal nature of these claims; however, they argued, "this Court lacks subject matter jurisdiction because they are shielded by consular immunity."[47]

C. Consular Immunity

Defendant Islam contended that he was entitled to consular immunity in this action. The principal document to refer to in order to qualify this assertion is the Vienna Convention on

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37. *Id*. at 4 (citing Compl. ¶¶ 31–32, 34).
38. *Id*. at 4 (internal citations omitted).
39. *Id*. at 5.
40. *Id.* at 5 (citing Compl. ¶¶ 23, 27).
41. *Id*. at 5.
42. *Id.* (internal citations omitted).
43. *Id*.
44. *Id*. (defendants move for a dismissal based on FRCP 12(b)(1)).
45. Sharkey v. Quarantillo, 541 F.3d 75, 82 (2d Cir. 2008) (internal citations omitted).
46. *Rana,* 2015 WL 81977 at 6 (citing Compl. ¶ 5, 6).
47. *Id*. at 6 (quoting Defs' Mem. in Supp. of Mot. to Dismiss (Defs' Mem.) at 4–5).

Consular Relations (VCCR).[48] However, for this document to apply, the individual claiming relief under it must have been acting in the course of his or her consular duties. Therefore, "when he was Consul General of the Consulate General of Bangladesh in New York, Defendant Islam was unquestionably a 'consular officer' within the meaning of Article 43 of the VCCR."[49] Therefore, if this court found that defendant was acting within his duties, then consular immunity would apply.

In order to decide whether the defendant was protected by consular immunity, the court applied a two-part inquiry.[50] The first step involved the court's determination regarding "whether the official's actions 'implicated some consular function.'"[51] The second prong of the inquiry required that "acts for which the consular officials seek immunity must be 'performed in the exercise of the consular functions' in question."[52] In addition to "twelve specific consular functions," the VCCR contains a catchall provision that seeks to include any other actions of an individual, acting on behalf of his or her consular responsibilities, that are not prohibited in the state in which they are residing.[53]

In taking the above two-part inquiry and definitions of consular functions into consideration, the court held that "defendants' employment of Rana was not a consular function within the meaning of the VCCR."[54] The court cited two cases, *Park v. Shin*[55] and *Swarna v. Al-Awadi*.[56] *Park* held "that a consular official's employment of a '*personal* domestic servant' is not a consular function."[57] Additionally, *Swarna* rejected the notion that "'residual' diplomatic immunity—that is, immunity for past acts performed in the receiving state that the diplomat continues to enjoy even after he has left that country—shields a diplomat from causes of action arising out of the employment of a domestic worker."[58] Here, the court determined, "residual diplomatic immunity is virtually identical to that for consular immunity."[59] Therefore, "*Swarna* thus teaches that consular immunity cannot shield a consular officer from claims arising out of his or her employment of a personal domestic worker."[60]

Three facts present in both *Park* and *Swarna* were identical to the case at bar and used to determine whether consular immunity applied. The first fact was that "plaintiffs in both cases were issued visas specifically intended for personal employees of diplomats or consular offi-

48. *See* Vienna Convention on Consular Relations (VCCR) art. 43(1), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

49. *Rana,* 2015 WL 81977 at 6.

50. Ford v. Clement, 834 F. Supp. 72, 75 (S.D.N.Y. 1993) (internal citations omitted).

51. *Id.*

52. *Id.*

53. *Rana,* 2015 WL 81977 at 6.

54. *Id.* at 7.

55. Park v. Shin, 313 F.3d 1138 (9th Cir. 2002).

56. Swarna v. Al-Awadi, 622 F.3d 123 (2d Cir. 2010).

57. *Id.* at 7 (citing *Park*, 313 F.3d at 1142.)

58. *Rana,* 2015 WL 81977 at 7 (citing *Swarna,* 622 F.3d at 137–40).

59. *Id.* at 7.

60. *Id.*

cers."[61] The second fact is that "the defendants in *Park* and *Swarna* paid for the domestic workers' services out of their own personal funds."[62] The third fact is that "in both *Park* and *Swarna*, the plaintiffs spent 'the bulk' of their time cooking and cleaning for the defendants and caring for their children."[63]

The court found similarities to both *Park* and *Swarna* and as such applied each of the three facts discussed above to the facts in the present case. First, plaintiff Rana was issued the same type of visa as the plaintiff in *Park*. Second, the defendants in both *Park* and *Swarna* used their own money to employ the workers, as was similarly the case here, because defendant Prova alluded to the fact that she would be personally responsible for paying plaintiff. Third, the domestic workers in both *Park* and *Swarna* spent most, if not all, of their time in the realm of cooking and childcare, as did Rana.[64]

The defendants fervently stood by their assertion that they were protected by consular immunity in this suit "because their employment of Rana was 'incidental' to Islam's post as Consul General of Bangladesh."[65] Defendants contended that not only was Rana employed in the course of Islam's consular post, but also Rana carried out domestic services at the Bangladesh Consulate, and, as a result, defendants should be entitled to consular immunity.[66]

The court addressed the similar arguments brought forth in *Park*, where the defendants, also a consular officer and his wife, attempted to assert their consular immunity. There, tHE defendants argued the necessity of domestic help so that the consular officer could fully carry out his duties to the country, which the Ninth Circuit rejected.[67] Additionally, the defendants in *Park* argued that because the domestic worker they employed carried out his duties while the defendants had guests of the consulate in their home, it was therefore a consular function and as such the defendants were immune.[68] The Ninth Circuit again rejected the defendants' argument, holding that "the plaintiff's work for the Consulate was merely incidental to her regular employment as the defendants' personal domestic servant."[69]

In looking to the persuasive authority from the Ninth Circuit's decision in *Park*, the court here concluded that Rana's employment was not a consular function. The defendants "have not alleged that their employment of Rana required consular authorization or approval" and "nothing in the record suggests that Rana's occasional work in the Bangladesh Consulate was anything more than incidental to his regular employment in defendants' household."[70] Therefore,

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61. *Id.* (citing *Swarna,* 622 F.3d at 138; *Park,* 834 F. Supp. at 1142–43).
62. *Id.* at 7 (citing *Swarna,* 622 F.3d at 128; *Park,* 313 F.3d at 1143).
63. *Id.* (citing *Swarna,* 622 F.3d at 138; *Park,* 313 F.3d at 1143).
64. *Id.* at 7.
65. *Id.* at 8 (citing Defs.' Mem. at 5).
66. *Id.* at 8.
67. *Park,* 313 F.3d at 1142.
68. *Id.*
69. *Id.* at 1143.
70. *Rana,* 2015 WL 81977 at 8.

the court concluded that, because defendant Prova's claim of immunity was tied directly to her husband's claim, neither would be entitled to the protection of consular immunity.[71]

The court next addressed whether subject matter jurisdiction over the claim would still exist "because the alleged circumstances of Rana's employment would trigger an exception to the immunity provision of the VCCR."[72] The exception in the VCCR "provides that immunity from jurisdiction in a civil action does not apply when the 'action arises out of a contract concluded by a consular officer or a consular employee in which he did not contract expressly or impliedly as an agent of the sending State.'"[73] Here, Rana's claims for relief directly stem from the contract between him and the defendant.[74] The facts "also clearly show that Islam was not acting as an agent of the State of Bangladesh when he contracted to employ Rana."[75] As such, the court rightfully concluded that the defendants were not entitled to the protection of consular immunity and therefore "to the extent their motion to dismiss is premised on a lack of subject matter jurisdiction, it is denied."[76]

D. Motion to Dismiss for Insufficient Service of Process

In addition to their motion to dismiss based on failure to state a claim and lack of subject matter jurisdiction, the defendants moved to dismiss based on insufficient service of process under FRCP 12(b)(5).[77] First, "in resolving a motion to dismiss a litigation for insufficient service of process, 'a court must look to matters outside the complaint to determine whether it has jurisdiction.'"[78] Under FRCP 4(e)(2)(b), "service may be accomplished by 'leaving a copy of the summons and complaint at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there.'"[79] In addition, "a process server's affidavit of service constitutes prima facie evidence of proper service pursuant to Rule 4(e) and section 308(2) of the C.P.L.R."[80] Here, the issue was whether defendants' known residence, located at 57th Street, constituted "dwelling or usual place of abode" in accordance with Rule 4(e)(2)(b). The defendants alleged that the concierge of their building, Raden, "does not reside in the building" and furthermore, "the apartment was not their 'dwelling or usual place of abode' on the morning of March 24, 2014."[81]

Case law from the same district holds "an apartment building's concierge can satisfy the person 'of suitable age and discretion' requirement, and it is irrelevant whether or not the con-

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71. *Id*. at 9.

72. *Id*.

73. VCCR Art. 43(2)(b).

74. *Rana,* 2015 WL 81977 at 9–10.

75. *Id.* at 9.

76. *Id*.

77. *Id*.

78. Darden v. Daimler Chrysler N. Am. Holding Corp., 191 F. Supp. 2d 382, 287 (S.D.N.Y. 2002).

79. *Rana,* 2015 WL 81977 at 10.

80. Old Republic Ins. Co. v. Pac. Fin. Servs. of Am. Inc., 301 F.3d 54, 57 (2d Cir. 2002).

81. *Rana,* 2015 WL 81977 at 10.

cierge lives in the building."[82] Here, "the propriety of service turns on whether the 57th Street apartment was defendants' 'dwelling or usual place of abode' for the purposes of 4(e) on the morning of March 24."[83] The process server provided the court with a sworn affidavit of completed service, which would ordinarily be "prima facie evidence of proper service";[84] however, the defendants contested the validity of the apartment building being their "dwelling or usual place of abode."[85]

The court acknowledged that, while the contested language has never been officially defined, the Second Circuit "has recognized that 'a person can have two or more dwelling houses or usual places of abode, provided each contains sufficient indicia of permanence.'"[86] The court pointed to factors that may point to indicia of permanence, including belongings kept at the dwelling, mail, ownership of the dwelling, and the frequency of use.[87] While the plaintiff contended that the apartment was the defendants' dwelling or usual place of abode, he "submitted no evidence that defendants kept belongings in the apartment or received mail at the address *on that date*."[88] Additionally, the plaintiff had not provided other indicia that would sufficiently show the defendants "owned or rented the apartment."[89]

To the contrary, the defendants had provided the court with sufficient proof to raise an issue of fact as to whether the 57th Street apartment was their dwelling or usual place of abode. As evidence, defendant Islam submitted affidavits supporting his allegation that he was traveling to Morocco the day before the date in question, they arrived in Morocco on the date in question, and movers were beginning to move the defendant and his family's belongings out of the apartment the first week of March.[90] Perhaps the most persuasive evidence the defendant provided to the court WAs the fact that "the current Consul General of the Consulate General of Bangladesh now lives in the same 57th Street apartment that he and Prova occupied prior to March 24, 2014," meaning that the apartment was used by consulates in the capacity of their employment.[91] Therefore, the court found that the defendants provided sufficient evidence to create a question of fact regarding their 57th Street apartment.

The court also looked to whether an individual intends to return to the place in question. Here, the plaintiff had also failed "to provide any evidence that defendants intend to return to the United States or continue to make use of the 57th Street apartment."[92] Here, "it appears that the Consulate General of Bangladesh, not defendants, leased the 57th apartment."[93] The

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82. 131 Main St. Assocs. v. Manko, 897 F. Supp. 1507, 1525 (S.D.N.Y. 1995).
83. *Rana,* 2015 WL 81977 at 10.
84. *Id.*
85. *Id.*
86. Nat'l Dev. Co. v. Triad Holding Corp., 930 F.2d 253, 257 (2d Cir. 1991).
87. F.D.I.C. v. Scotto, No. 97-CV-1631, 1998 WL 357324, *3 (S.D.N.Y. 1998).
88. *Rana,* 2015 WL 81977 at 11.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*

court therefore concludes that the facts presented by both sides "strongly suggest that defendants had no intention of returning to the 57th Street apartment when they left the country on March 23, 2014."[94]

The plaintiff fervently argued that, since the defendants had actual notice, the court should conclude that service was proper on behalf of the plaintiff.[95] In support of that contention, the plaintiff cited to two cases, *Dunn v. Burns*[96] and *Karlsson v. Rabinowitz.*[97] In both cases, the respective courts involved found that service was proper upon the individuals involved, even when each defendant had permanently moved from the place of service before service was executed.[98] However, the court found the plaintiff's argument to be flawed, given that there were extenuating circumstances present in each of these cases that made them distinguishable from the facts at bar.[99] The court concluded that, unlike the two cases on which plaintiff relied, here "there is no evidence that any family member continued to reside in the 57th Street apartment after March 23."[100] Therefore, "the court cannot determine, on this record, that service was proper pursuant to Rule 4(e) or New York law."[101]

Although the court would normally require a hearing to determine whether service was sufficient, here "a finding of defective service is not fatal to this action."[102] The court relied on precedent set by the Second Circuit, which held "Rule 4 of the Federal Rules is to be construed liberally 'to further the purpose of finding personal jurisdiction in cases in which the party has received actual notice.'"[103] The earlier decision rendered by the Second Circuit went on to state "incomplete or improper service will lead the court to dismiss the action *unless it appears that proper service may still be obtained*."[104] Here, defendants did have actual knowledge of the pending suit. Defendant Islam publicly acknowledged the suit to various members of the press, and admitted in his affidavit that he knew a complaint had been sent to the 57th Street apartment.[105]

The court determined that service could still be properly effectuated on defendants. Here, the court pointed out that the plaintiff could serve the defendants pursuant to any of the internationally recognized methods. As such, the court concluded that, because service could still be carried out upon the defendants, their motion to dismiss based on insufficient service of process was correctly denied.

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94. *Id.*

95. *Id*. at 11.

96. Dunn v. Burns, 42 A.D.3d 884 (4th Dep't 2007).

97. Karlsson v. Rabinowitz, 318 F.2d 666 (4th Cir. 1963).

98. *Rana,* 2015 WL 81977 at 11.

99. *Id*. at 12.

100. *Id*.

101. *Id*.

102. *Id*.

103. Romandette v. Weetabix Co., Inc., 807 F.2d 309, 311 (2d Cir. 1986).

104. *Id*.

105. *Rana,* 2015 WL 81977 at 12.

The court agreed with the plaintiff, who requested the court "order service on the attorneys who represent defendants in this action."[106] Under Rule 4(f)(3), this method is acceptable, because "it is not prohibited by international agreement."[107] The district court has the ultimate decision in whether to allow such alternative methods of service, and, in this case, "court-directed service on defendants' attorneys pursuant to Rule 4(f)(3), without first requiring Rana to attempt service in Morocco, is appropriate."[108]

V. Conclusion

The court was proper in dismissing the defendants' three motions to dismiss. The court found the plaintiff "(1) has pled his fraud claim with sufficient specificity, (2) defendants are not immune from this suit, and (3) proper service may still be obtained."[109] The way in which proper service can be obtained is for plaintiff to serve upon defendants' lawyers a copy of the summons and complaint, which will be sufficient to put the party on notice of the suit. Here, the plaintiff "made three good-faith attempts at service on March 21 and 22 while Islam and Prova still resided in the 57th Street apartment, and on March 24, one day after they flew to Morocco."[110] Therefore, the plaintiff can proceed with his suit against defendants.

Rana v. Islam shines light on the working conditions of domestic workers, specifically those employed by individuals in the capacity of a consular representative.[111] To begin, bringing suit as a foreign worker without citizenship against a presumed high powered individual is intimidating. The victims of these unfair and illegal working conditions are unlikely to be well versed in American law, and as such, may believe threats coming from their employers as to what could happen if they were to report them. For example, in the case at bar, defendant Islam's frequent threats that the police would find and kill plaintiff Rana if he escaped or reported his conditions were presumed to be true by the plaintiff, because he had no knowledge to the contrary.

Unfortunately, potential solutions remain difficult, as many of the foreign workers who are entrapped probably lack the knowledge of how to remedy the situation. Individuals who exploit such human labor know how to prey on an individual who would not have the capacity to report such wrongdoings or be too fearful to do so. As we have seen here, the shield of consular immunity has the potential to be misused as a buffer of protection for individuals willing to take advantage of their protection against the laws of the land in which they are residing, and push the limits of their behavior, whether through illegal employment practices or otherwise.

Here, consular immunity did not protect defendant Islam and his wife Prova from the plaintiff's suit. However, had the plaintiff been employed in the scope of the defendant's actions as consular representative, the defendants might have been able to assert their immunity

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106. *Id.* at 13.

107. *Id.*

108. *Id.* at 14.

109. *Id.*

110. *Id.*

111. *See also* Christopher Matthews, *Indian Diplomat Indicted in New York*, Wall St. J., Jan. 9, 2014, http://www.wsj.com/articles/SB10001424052702303848104579310912803441496.

successfully and not be prosecuted for their egregious actions. Therefore, perhaps consular immunity should be limited so as to allow domestic workers in the employ of consulates to bring causes of action against their employers. No individual should be able to hide behind a shield of protection when exploiting another individual in the way that the defendants did in this case.

Lauren E. Russo

Golden Horn Shipping Co. Ltd. v. Volans Shipping Co. Ltd.

2014 WL 5778535 (S.D.N.Y. Nov. 6, 2014)

The U.S.D.C. for the Eastern District of New York denied the defendant's motion to vacate the attachment of $3.9 million from the defendant's bank account in New York, pursuant to Supplemental Rule E(4) of the Federal Rules of Civil Procedure, because the company controlling the bank account was properly found to be the corporate alter ego of the defendant, a European company.

I. Holding

In the recent case *Golden Horn Shipping Co. Ltd. v. Volans Shipping Co. Ltd.*, Judge Oetken of the U.S. District Court for the Southern District of New York concluded that Plaintiff Golden Horn established a prima facie case that Defendant Volans Shipping Co. is the alter ego of co-Defendant Norvik Banka, and that the $3,960,963.20 from Norvik's correspondent bank account in New York belongs to Norvik, not its customers.[1] Judge Oetken therefore denied Norvik's motion to vacate the attachment of $3,960,963.20 from Norvik's bank account in New York, pursuant to Supplemental Rule E(4) of the Federal Rules of Civil Procedure.[2]

II. Facts and Procedure

According to the complaint, the parties began negotiating a deal in the summer of 2013 that would allow Golden Horn to charter the Vessel owned by a Belizean subsidiary of Norvik Banka named Volans.[3] Over the course of negotiating, the parties reached an agreement whereby a bareboat charter would be entered into between Golden Horn and Volans.[4] The purpose of this charter was to allow Golden Horn to use the Vessel owned by Volans to transport frozen fish in the sea of Okhotsk and the Bering Sea.[5] In exchange for use of the Vessel, Volans would receive $47,917 per month, plus insurance.[6]

Volans failed to deliver the Vessel to Golden Horn upon the specified delivery date.[7] It cited serious mechanical issues as the reason for its failure to deliver the Vessel.[8] In response, Golden Horn agreed to multiple extensions of the original delivery deadline.[9] Golden Horn did so while it was under the impression that the Vessel was undergoing repairs at a shipyard in

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1. Golden Horn Shipping Co. v. Volans Shipping Co., 2014 WL 5778535, 1 (S.D.N.Y. Nov. 6, 2014).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* at 1.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*

Lithuania.[10] However, by the beginning of 2014, Norvik informed Golden Horn that it had delivered the Vessel to another shipping company.[11]

After learning of Norvik's delivery of the Vessel to another shipping company, Golden Horn prepared to file suit.[12] Pursuant to Supplemental Rule B of the Federal Rules of Civil Procedure, Golden Horn served a writ of attachment on Deutsche Bank in Manhattan for $3,960,963.20 located in Norvik's correspondent account.[13] Golden Horn then proceeded to file suit for admiralty action against Volans and Norvik in the U.S. District Court for the Southern District of New York.[14] Defendant Norvik then moved to vacate the attachment of the $3,960,963.20, claiming that, under Supplemental Rule E(4), the plaintiff had failed to establish (A) a valid prima facie admiralty claim against the defendant and (B) that the defendant's property may be found within the district.[15]

III. Discussion

A. Legal Standard

In order to make a valid attachment under Rule B, a plaintiff must show that: "(1) it has a valid prima facie admiralty claim against the defendant; (2) the defendant cannot be found within the district; (3) the defendant's property may be found within the district; and (4) there is no statutory or maritime law bar to the attachment."[16] Defendant Norvik was challenging only the first and third requirements and conceded that all other requirements have been met.[17]

When an attachment pursuant to Rule E(4) is challenged by a defendant, the plaintiff typically bears the burden of establishing that the requirements of Rule B have been satisfied. If a plaintiff fails to sustain his burden of showing that he has satisfied the requirements of Rules B and E, then the district court may vacate an attachment.[18] However, in Second Circuit admiralty actions, a proper verified complaint is all that is required to satisfy Rule B and to prevail against a Rule E(4) motion to vacate.[19] Thus, a plaintiff in an admiralty action, such as Golden Horn, does not have the same burden to present evidence to verify its complaint.[20] The court may still, however, hear and consider preliminary evidence presented by the parties on the matter of an attachment under Rule E(4).[21]

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10. *Id*.
11. *Id*.
12. *Id*.
13. *Id*.
14. *Id*.
15. *Id*.
16. *Id*. (quoting Blue Whale Corp. v. Grand China Shipping Dev. Co., 722 F.3d 488, 493 (2d Cir. 2013)).
17. *Id*.
18. Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd., 460 F.3d 434, 445 (2d Cir. 2006).
19. Transportes Navieros y Terrestres, S.A. de D.V. v. Fairmount Heavy Transp. N.V., 2007 WL 1989309, *4 (S.D.N.Y. July 6, 2007).
20. *Golden Horn Shipping*, 2014 WL 5778535, at 2.
21. *Id*.

1. Valid Prima Facie Admiralty Claim Against the Defendant

Defendant Norvik challenged the attachment of its funds in the Deutsche Bank on the grounds that Golden Horn has failed to establish that Volans, the company Golden Horn had actually contracted with, was the alter ego, or a corporate subsidiary, of Norvik.[22]

In the United States, federal common law provides the basis for a plaintiff's attempts to hold a parent company liable in an admiralty case.[23] It is only under extraordinary circumstances that a corporate entity is liable for the actions of a separate, related entity. Under the doctrine of limited liability, a process commonly referred to as piercing the corporate veil can establish such circumstances.[24] In the Second Circuit, piercing the corporate veil can be done in two ways: (1) the plaintiff can show that the defendant used its alter ego in a way to perpetrate a fraud; or (2) it can show that the defendant has so dominated and disregarded its alter ego's corporate form that the alter ego was actually carrying on the controlling party's business instead of its own.[25] Golden Horn alleges only the second sort of claim against Norvik and Volans.[26]

Veil piercing determinations are, by their very nature, fact specific inquiries that differ within the circumstances of each case.[27] Thus, an alter ego inquiry must be made in consideration of the totality of the facts, with several relevant factors to be taken into account.[28] These factors include, among others, a disregard for corporate formalities; intermingling of funds; an overlap in ownerships, officers, directors, and personnel; and the degree of business discretion shown by the allegedly dominated corporation.[29]

In the Second Circuit, plaintiffs in maritime cases often succeed in piercing the corporate veil in motions to vacate an attachment.[30] This is because it is recognized as a frequent occurrence for companies involved in the business of shipping cargo to operate a single vessel through a separate corporation wholly owned by the parent company.[31]

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22. *Id*. at 1.
23. Lauritzen v. Larsen, 345 U.S. 571 (1953).
24. *Golden Horn Shipping*, 2014 WL 5778535 at 2.
25. *Id*.
26. *Id*.
27. *Id*.
28. *Id*. Relevant factors include: (1) disregard of corporate formalities; (2) inadequate capitalization; (3) intermingling of funds; (4) overlap in ownership, officers, directors, and personnel; (5) common office space, address and telephone numbers of corporate entities; (6) the degree of business discretion shown by the allegedly dominated corporation; (7) whether the dealings between the entities are at arm's length; (8) whether the corporations are treated as independent profit centers; (9) payment or guaranty of the corporation's debts by the dominating entity, and (10) intermingling of property between the entities.
29. *Id*.
30. *Id*.
31. *Id*.

2. Defendant's Property May Be Found Within the District

Defendant Norvik challenged the third requirement of the attachment, which requires that a defendant's property may be found within the district in which the plaintiff filed suit, by arguing that the money in the Deutsche Bank account does not belong to Norvik.[32] Defendants instead assert that the money is located in an account Norvik maintains only for the benefit of its banking customers.[33] Thus, Norvik argued that, because the money belongs to its customers and not to Norvik, it cannot be attached as Norvik's property in this action.[34]

Unlike the question whether a plaintiff has made a prima facie maritime case, which is governed by federal common law, the issue of whether a given property interest is attachable is instead governed by state law.[35] According to New York state law, courts are given the equitable discretion to vacate an attachment to a correspondent account.[36] Therefore, a court may decide to vacate such an attachment if it believes there is good reason, such as existing evidence that the correspondent account's funds belong to customers rather than to the corporation involved in the dispute.[37]

B. Sufficiency of Allegations

1. Volans Is Norvik's Alter Ego

The court held that Volans is the alter ago of Norvik for the purpose of a Rule E(4) attachment. Golden Horn introduced several facts in support of its verified complaint. These included the fact that Norvik owns 100% of the stock of Volans; Volans lacks any dedicated office space; Norvik prepares Volans's financial statements and audited financial reports; and Norvik states that Volans is operated under the control of Norvik.[38] Furthermore, all of Volans's major business operations with Golden Horn, such as negotiations, charter execution, correspondence, and invoice generation, were handled by senior Norvik attorneys.[39]

Norvik offered multiple arguments to rebut these allegations. It contended that Volans was not wholly owned by Norvik, but instead was owned by two separate funds, identified as the Investment Fund and the Sub Funds.[40] Norvik also argued that allowing certain business operations to be handled by Norvik on Volans's behalf, such as power of attorney for certain Norvik personnel, was simply a part of normal corporate formalities.[41] In addition, Norvik

32. *Id.* at 1.
33. *Id.* at 3.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 4.
39. *Id.* at 5.
40. *Id.*
41. *Id.*

claimED it is normal for Volans to lack dedicated office space, as it would "not be unusual for a single ship entity to not have any dedicated office space."[42]

In weighing the arguments of both sides, the court held that Volans was the alter ago of Norvik for the purpose of a Rule E(4) attachment.[43] The court reasoned that, while Volans was not owned directly by Norvik, the two stock funds controlled by Norvik (the Investment Fund and Sub Funds) owned 100% percent of the stock to Volans and were not used for any other purpose. The court was also not convinced that Volans was granting such extraordinary rights to Norvik simply as an act of observing corporate formalities; instead, the court saw this as a blatant disregard of typical corporate formalities.[44] Furthermore, while the court recognized that it is not unusual for a single ship entity not to have any dedicated office space, it is also not unusual for a court to find that single ship entities were also alter egos of their parent companies.[45] For these reasons, among others, the court concluded that Volans was Norvik's alter ego.[46]

2. The Funds in the Deutsche Bank Account Belonged to Norvik, Not Its Banking Customers

The court concluded that the $3,960,963.20 from the defendant's Deutsche Bank account in New York was the property of Norvik, not that of its banking customers.[47] In rendering its decision, the court did not reference any evidence provided by Golden Horn in support of its complaint; it did, however, address multiple arguments made by Norvik. First, Norvik turned to *Cargill Financial Services International v. Bank Finance & Credit Ltd.*, claiming the court here asserted that New York law holds "that a foreign account holder's interest in correspondent account credits is sufficient to justify vacatur of an attachment of those credits with respect to a claim against the foreign bank (not the customers)."[48] However, the court clarified that *Cargill* does not state that New York law holds that any interest in a correspondent bank account does not belong to the corresponding bank.[49] Instead, the court explained that the First Department simply held that New York courts have equitable discretion to vacate an attachment against a correspondent account.[50]

Norvik also requested that the court exercise its equitable discretion to vacate the attachment; however, the court stated it was provided with no good reason to do so.[51] The court instead referenced *Toisa Ltd. v. Pt. Transamudra Usaha Sejahtera*, which held that "correspondent bank accounts are the property of the correspondents' customers where there is evidence

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42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 5.
46. *Id.*
47. *Id.* at 3.
48. Cargill Fin. Serv. Int'l v. Bank Fin. & Credit Ltd., 70 A.D.3d 456, 896 N.Y.S.2d 317 (1st Dep't 2010).
49. *Golden Horn Shipping*, 2014 WL 5778535 at 3.
50. *Id.*
51. *Id.*

that the money has not yet been credited to those customers in their home bank accounts."[52] This would mean that Norvik would have to show that the funds in its Deutsche Bank account belonged to its customers in some other way. The fact that the money was there simply for the purpose of facilitating transfers, as Norvik contends, is not enough.[53] No reason was provided to suggest the money was credited to any of Norvik's customers, so the court concluded the money was in fact Norvik's, and therefore subject to attachment.[54]

IV. Conclusion

Golden Horn clearly made a proper attachment under Supplemental Rule B, and Norvik failed to raise any sustainable claim to vacate the attachment under Supplemental Rule E(4). Based on prior relevant case law, the court properly concluded that Volans is clearly a subsidiary shipping company of Norvik.

Perhaps the court could have discussed an analysis of the choice-of-law provisions from *Lauritzen v. Larsen*,[55] as the location of the actual vessel and the residence of the defendant are both in European jurisdictions. In *Lauritzen*, the Supreme Court held that Danish law applied to a tortious act that occurred on board a Danish vessel, even though the vessel had arguable ties to the U.S.[56] The *Golden Horn* court, however, turned instead to *Blue Whale Corp. v. Grand China Shipping Development*, in which the Second Circuit had already determined that U.S. federal common law governs a plaintiff's attempt to hold a parent company liable in an admiralty case.[57] Therefore, whether Volans was an alter ego of Norvik and thus susceptible to a prima facie admiralty claim was properly determined under U.S. federal law.

Furthermore, the court also correctly concluded that the funds in the Deutsche Bank account belongED to Norvik and made the proper choice in refusing to vacate the attachment in its equitable discretion. Unlike the situation in *Toisa*, there was no real evidence that Norvik was holding the funds simply for later credit to its customers. Instead, the money was there to aid in facilitating transfer between customers. This is a clear difference of purpose and therefore the discretion given to the defendant in *Toisa* was properly withheld from Norvik.

Since this case's holding seems to be in line with prior relevant admiralty case law regarding Rule B and Rule E attachments, it is unlikely that it will create any divergence in such actions; it will likely instead be cited in support of the current condition of the law.

Robert J. Burney

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52. *Id.* (citing Toisa Ltd. v. Pt. Transamudra Usaha Sejahtera, 13–CV–01407–JMF [Dkt. No. 28]) (S.D.N.Y. Sept. 20, 2013).

53. *Id.*

54. *Id.*

55. *Lauritzen*, 345 U.S. at 571.

56. *Id.*

57. *Blue Whale Corp.*, 722 F.3d at 496.