



NEW YORK INTERNATIONAL LAW REVIEW

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Recent Decisions

- Arial Technologies, LLC v. Aerophile S.A.*** 1
The U.S.D.C. for the S.D. of N.Y. granted both French manufacturer defendants' motions because plaintiffs failed to rebut the presumptive enforceability of the forum-selection clause in contract with first defendant; and the court did not have in personam jurisdiction.
- Balintulo v. Ford Motor Co.*** 9
The U.S. Ct. of Appeals for the 2nd Cir. held Plaintiffs, who were victims of South African apartheid, had failed to allege sufficient conduct to establish that co-Defendant automobile and software manufacturers were guilty of aiding and abetting any violations of customary international law.
- Eastman Kodak Co. v. Asia Optical Co., Inc.*** 17
The U.S.D.C. for the S.D. of N.Y. held that the anti-suit injunction requested by Plaintiff was appropriate against Defendant pursuant to the test set out in *China Trade* for determining when an anti-suit injunction is appropriate.
- F. TV Ltd. v. Bell Media Inc.*** 25
The F. Dist. Ct. for the S.D. of N.Y. held that there was sufficient evidence to support Defendant's motion to dismiss Plaintiff's claims based on a lack of jurisdiction. The court determined that there were not strong enough ties between defendant, Bell Media, Inc., a Canadian corporation, and the State of N.Y.
- In re the Matter of D.A.*** 31
The U.S.D.C. for the E.D. of N.Y. held that Respondent was not required to return her minor son, D.A., to Greece based upon the court's finding that the age and maturity exception of Art. 13 of the Hague Child-Abduction Convention was satisfied by D.A.'s mature demeanor and his reasoning for remaining in the U.S.
- Mees v. Buijer*** 39
The U.S. Court of Appeals for the 2nd Cir. held that the U.S.D.C. for the S.D. of N.Y. erred in its decision not to grant appellant, a Netherlands corporation, application to compel discovery to bring suit against appellee, because appellant is not required to show that discovery would be necessary for success or in commencing foreign litigation to satisfy the statute's "for use" requirement.
- Moreno v. Basilio Pena*** 47
The U.S.D.C. for the S.D. of N.Y. denied petition brought by the Plaintiff for the return of her child to the Dominican Republic pursuant to the Hague Convention on the Civil Aspects of International Child Abduction. The court held that Plaintiff failed to establish a prima facie case that her child had been wrongfully removed in the U.S. by Defendant.
- NS United Kaiun Kaisha, Ltd. v. Cogent Fibre Inc.*** 55
The U.S.D.C. for the S.D. of N.Y. granted Plaintiff, a Japanese corporation, petition for a confirmation of an arbitration award and denied the defendant's cross motion to vacate the award because the arbitration panel was correct in finding that mitigation efforts were reasonable, did not overstep its boundaries by awarding attorney's fees.
- O.Y. v. A.G.*** 63
The N.Y.S. Sup. Ct. for Westchester Co. held that a marital agreement executed in Egypt in accordance with Islamic law was unenforceable because the defendant provided insufficient evidence as to the agreement's validity. The Court further held that as a matter of law a postnuptial agreement is a settlement agreement, not an opt-out agreement.
- Vringo, Inc. v. ZTE Corporation*** 69
A preliminary injunction was sought to prevent defendant Chinese corporation from using confidential information, which was protected by a non-disclosure agreement, in pending antitrust and patent litigation. The U.S.D.C. for the S.D. of N.Y. held that a preliminary injunction was reasonable against defendant corporation.



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Arial Technologies, LLC v. Aerophile S.A.

No. 14 CV 4435, 2015 WL 1501115 (S.D.N.Y. Mar. 31, 2015)

The United States District Court for the Southern District of New York granted both French manufacturer defendants’ motions to dismiss because: (1) plaintiffs failed to rebut the presumptive enforceability of the forum-selection clause in the contract with the first defendant; and (2) the court did not have *in personam* jurisdiction over the second defendant.

I. Holding

In the recent case, *Arial Technologies, LLC v. Aerophile S.A.*,¹ Chief Judge Preska of the United States District Court for the Southern District of New York granted both Aerophile S.A.’s (“Aerophile”) and Aerophile Orlando, LLC’s (“Orlando”) motions to dismiss. First, the court held that Arial Technologies, LLC (“Arial”) could not rebut the presumptive enforceability of the forum-selection clause in its contract with Aerophile, according to the standard outlined in *Phillips v. Audio Active Ltd.*² Second, the court held that Arial failed to make a *prima facie* showing of *in personam* jurisdiction over Orlando.³ In doing so, the court rejected the existence not only of general jurisdiction under N.Y. C.P.L.R. § 301,⁴ but also that of specific jurisdiction under § 302.⁵

II. Facts and Procedure

In late April 2005, Arial, a Delaware company operating a helium balloon ride at the San Diego Zoo, contracted with Aerophile, a French manufacturer of tethered balloons, for the sale, installation, and maintenance of a passenger helium balloon at the zoo.⁶ Under the contract, Aerophile could not directly or indirectly solicit business with the zoo and was prohibited from operating any other passenger balloon within a 250-mile radius of the zoo.⁷

Further, under §§ 10.3 and 10.5 of the contract, the parties included both forum-selection and choice-of-law clauses.⁸ Under § 10.3, the parties agreed that disputes regarding the “interpretation or performance” of the contract would, first, be submitted to French conciliation (mediation).⁹ If conciliation failed, either party, under this section, could then file suit in the courts of Senlis, France, which would have “exclusive jurisdiction.”¹⁰ For vendor insurance

1. *Arial Technologies, LLC v. Aerophile S.A.*, No. 14 CV 4435, 2015 WL 1501115 (S.D.N.Y. Mar. 31, 2015).

2. 494 F.3d 378, 383 (2d Cir. 2007).

3. *Arial*, 2015 WL 1501115, at *6–7.

4. *Id.* at *7. (Arial never alleged that Orlando had any employees, property, or office in New York.)

5. *Id.* (Not a single transaction or contact connected Orlando to New York.)

6. *Id.* at *1.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

issues, § 10.5 states that the parties submitted to litigation in Paris, France.¹¹ And finally, § 10.5 also states that “all other legal matters” would be litigated in New York.¹²

In 2011, Ariel alleged that the zoo’s balloon became inoperable.¹³ When Aerophile came to inspect the balloon, Aerophile offered to enter into a joint venture with Ariel at the zoo.¹⁴ No agreement was reached, but Aerophile separately began to negotiate directly with the zoo, in violation of its contract with Ariel.¹⁵ Subsequently, the zoo did not renew its contract with Ariel, and without the renewal, Ariel defaulted on loans.¹⁶ As a result of the default, the balloon equipment and materials were foreclosed on.¹⁷

In August 2012, Ariel brought suit in New York County Supreme Court against Aerophile and its Florida affiliate, Orlando, alleging breach of contract for negotiating with the zoo, as well as for both fraud and tortious interference.¹⁸ Ariel also sought a restraining order to prevent Aerophile from operating a balloon in San Diego.¹⁹ The court dismissed the case.²⁰ Looking to the contract’s forum-selection clause, Judge Oing reasoned that the parties had failed to fulfill its condition precedent of first submitting to French conciliation.²¹

The following year, on November 8, 2013, the parties submitted to conciliation—but to no avail.²² Thus, that same day, Aerophile filed an action in French court, moving for a declaratory judgment that the contract was no longer in force.²³ In July 2014, Ariel’s counsel confirmed that Aerophile’s papers had been received.²⁴ Accordingly, the court set November 4, 2014, as a date for Ariel to respond.²⁵

On June 19, 2014, Ariel filed the suit in the instant case, alleging virtually the same claims it asserted in state court.²⁶ On August 11, both Aerophile and Orlando responded.²⁷ Aerophile moved to dismiss under both Federal Rule of Civil Procedure 12(b)(6) and *forum non conveniens*, arguing that the French courts had exclusive jurisdiction over the issues alleged.²⁸

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at *2.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

Orlando moved to dismiss the complaint under Rule 12(b)(2), arguing that the court lacked *in personam* jurisdiction over it.²⁹

III. Discussion

A. The Forum-Selection and Choice-of-Law Clauses

1. Forum Selection and the Phillips Standard

In its recent landmark decision, *Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas*,³⁰ the Supreme Court held that *forum non conveniens* is the “appropriate way to enforce a forum-selection clause pointing to a state or foreign forum”—not Rule 12(b).³¹ Subsequently, in *Martinez v. Bloomberg LP*,³² the United States Court of Appeals for the Second Circuit concluded from *Atlantic Marine*’s reasoning that the Supreme Court’s holding “does not appear to alter the materials on which a district court may rely in granting a motion to dismiss based on a forum-selection clause.”³³ The Second Circuit in *Martinez* thus applied the usually applicable test outlined in *Phillips*³⁴ to determine whether a forum-selection clause is presumptively enforceable.

Looking to both *Atlantic Marine* and *Martinez*, Judge Preska found that the *Phillips* test was applicable to make the same determination.³⁵ Under the test, the court must consider three factors: (1) “whether the clause was reasonably communicated to the party resisting enforcement; (2) whether the clause is mandatory or permissive, i.e., ... whether the parties are *required* to bring any dispute to the designated forum or simply *permitted* to do so; and (3) whether the claims and parties involved in the suit are subject to the forum selection clause.”³⁶ If these three criteria are met, the forum-selection clause is presumptively enforceable.³⁷ This presumption can be overcome only by “making a sufficiently strong showing that ‘enforcement would be unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching.’”³⁸

29. *Id.*

30. 134 S. Ct. 568 (2013).

31. *Id.* at 580.

32. 740 F.3d 211 (2d Cir. 2014).

33. *Id.* at 216.

34. 494 F.3d at 383 ((1) “whether the clause was reasonably communicated to the party resisting enforcement; (2) whether the clause is mandatory or permissive, i.e., ... whether the parties are *required* to bring any dispute to the designated forum or simply *permitted* to do so; and (3) whether the claims and parties involved in the suit are subject to the forum selection clause.”).

35. *Arial*, 2015 WL 1501115, at *2.

36. *Id.* (quoting *Phillips*, 494 F.3d at 383) (internal quotations omitted) (emphasis in original).

37. *Id.*

38. *Phillips*, 494 F.3d at 383–84 (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972)).

2. The Choice-of-Law Clause

Before applying the standard, however, Judge Preska, in accordance with both *Phillips* and *Martinez*, considered the parties' choice-of-law clause.³⁹ When the parties to a dispute over a forum-selection clause have also included a choice-of-law clause in their agreement, the court is called upon to answer a preliminary question: In assessing the forum-selection clause's enforceability, should the court apply the law the parties chose, or apply *lex fori*, the law of the jurisdiction in which the case is brought?⁴⁰ Following the same Second Circuit precedent, Judge Preska enunciated the general rule: where the parties agree to apply a foreign law for interpretation, the foreign law applies to factors (2) and (3) of the *Phillips* test; but due to strong federal policies in favor of protecting the parties in contract enforcement, factor (4) of the test, which addresses enforceability, is governed by the *lex fori*.⁴¹

But this general rule can be broken—and Judge Preska did so here.⁴² Judge Preska reasoned that, despite this rule, “nothing prevents the parties ... from choosing *not* to rely on any distinctive features of [the selected law] and [instead to] apply general contract-law principles and federal precedent to discern the meaning and scope of the forum clause.”⁴³ Thus, in the instant case, she continued, although the parties agreed to abide by French law for interpretation, neither party relied on French law in interpreting the primary passage at issue, § 10.3.⁴⁴ Accordingly, she concluded that she would apply both general contract law and federal precedent to interpret § 10.3.⁴⁵

3. Applying Phillips

Once the court settled which law to apply, all three *Phillips* factors were easily satisfied. First, § 10.3 was “reasonably communicated” under factor (1) of the test, because it appeared on the face of the contract, which *Arial* signed.⁴⁶ Second, in determining whether the clause was either “mandatory” or “permissive” under factor (2), the court asked whether the clause (a) “confer[red] exclusive jurisdiction on the designated forum” or (b) “incorporate[d] obligatory venue language.”⁴⁷ Judge Preska found the clause “unquestionably” mandatory, because the parties used the word “shall” twice—first, to state that the parties “shall” be referred to a French conciliator, and second, that the Senlis courts “shall” have exclusive jurisdiction if conciliation

39. *Arial*, 2015 WL 1501115, at *3.

40. See Kevin M. Clermont, *Governing Law on Forum-Selection Agreements*, 66 HASTINGS L.J. 643, 652–53 (2015); see also *Martinez*, 740 F.3d at 217.

41. See *Martinez*, 740 F.3d at 218; see also Clermont, *supra* note 40, at 655 (“[a]pplying *lex fori*, rather than the chosen law, to the forum-selection clause closes the door to abusive clauses: the parties could be bootstrapping the forum-selection clause into enforceability by choosing a very permissive law, and the stronger party could be forcing the weaker party into an unfair forum applying unfair law”).

42. *Arial*, 2015 WL 1501115, at *3.

43. *Id.* (quoting *Phillips*, 494 F.3d at 386 (internal quotations omitted) (emphasis added)).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at *4 (quoting *Phillips*, 494 F.3d at 386 (internal quotations omitted)).

fails.⁴⁸ The court found that this language clearly expressed both exclusive jurisdiction and obligatory venue.⁴⁹

Finally, Judge Preska concluded that both parties were “subject to” the forum-selection clause.⁵⁰ She reasoned that neither party disputed that the instant case concerned the “interpretation or performance” of the contract. She continued that when their New York State action was dismissed, the parties did not dispute the court’s finding that French conciliation was a condition precedent.⁵¹ Thus, the court concluded that both parties were subject to the forum-selection clause, and accordingly, that the clause was presumptively enforceable.⁵²

Arial failed to rebut this presumption.⁵³ In fact, of the four possible arguments it could have adopted,⁵⁴ Arial alleged only one. Arial asserted that it “would be difficult . . . to summon witnesses to a French court.”⁵⁵ But the court in *Phillips* expressly held that where litigation is simply “costly or difficult,” this is not a sufficient rebuttal.⁵⁶ Absent a showing that litigation would be “impossible” or that Arial would be subject to a hardship “[un]foreseeable” when it agreed to litigate in France, no rebuttal can be found.⁵⁷

4. Applying General Principles of Contract Law

General principles of contract law did not change Judge Preska’s mind. Arial argued that the parties included § 10.5 in a later draft of the contract with the intent of effectively eliminating § 10.3 altogether.⁵⁸ Arial asserts that § 10.5—which states (1) that disputes as to insurance shall be litigated in Paris, France, and (2) that all other matters be litigated in New York—was meant to abrogate § 10.3.⁵⁹ Judge Preska rejected this assertion.⁶⁰ Instead, she accepted Aerophile’s trifurcated reading of the contract, where § 10.5’s language merely builds upon that of § 10.3.⁶¹ Absent probative extrinsic evidence showing that the parties intended anything else,

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at *4–5.

54. *See id.* at *4.

55. *Id.* at *5.

56. *Phillips*, 494 F.3d at 392–93.

57. *Arial*, 2015 WL 1501115, at *5 (quoting *Phillips*, 494 F.3d at 393 (internal quotations omitted)).

58. *Id.*

59. *Id.*

60. *Id.* at 6.

61. *Id.* (“(1) disputes related to the ‘interpretation or performance’ of the contract are to be litigated in the Senlis courts, ‘which shall have exclusive jurisdiction’ [§ 10.3]; (2) if any ‘insurance issues’ arise, jurisdiction for those disputes ‘shall be Paris—France’ [§ 10.5]; and (3) if any ‘other legal matters’ arise, jurisdiction ‘shall be New York USA’” [§ 10.5]).

the court concluded that Arial's reading was improper, granting Aerophile's motion to dismiss.⁶²

B. *In Personam* Jurisdiction

Arial also sued Orlando, an American affiliate of Aerophile's located in Florida, alleging the same claims as those made against Aerophile.⁶³ Orlando moved to dismiss under Rule 12(b)(2) on the grounds that the court did not have *in personam* jurisdiction over Orlando.⁶⁴ Applying traditional federal case law, Judge Preska granted the motion.⁶⁵

To make a *prima facie* showing of jurisdiction under federal law, courts first look to the state's long-arm statute; if it applies, then the court considers whether exercising jurisdiction over the defendant comports with due process.⁶⁶

New York permits both general and specific jurisdiction.⁶⁷ First, a court may exercise general jurisdiction under N.Y. C.P.L.R. § 301 when the defendant's "contacts show a continuous, permanent and substantial activity in New York."⁶⁸ To make this determination, the Second Circuit in *Landoil Resources Corp. v. Alexander & Alexander Services, Inc.* has held that courts should take a more pragmatic approach than merely counting the defendant's contacts.⁶⁹ Rather, some relevant factors to consider are whether the party has an office in the state, solicits business in the state, has bank accounts or other property in the state, or has employees or agents in the state.⁷⁰ Second, a court may exercise specific jurisdiction under § 302 when the defendant is "subject to the action before the court."⁷¹ For example, the Southern District of New York has held that "transact[ing] business with New York," "contract[ing] anywhere to supply goods or services in New York," and "commit[ing] a tort in New York" are activities that subject the defendant to specific jurisdiction.⁷²

Applying this framework, Judge Preska granted Orlando's motion.⁷³ She found not only that Orlando was not a party to the contract at issue—only Aerophile was—but also, that even if it were, Orlando had no relevant contacts whatsoever with New York.⁷⁴ Thus, the court lacked personal jurisdiction over Orlando.⁷⁵

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at *7.

66. *Id.*

67. See CPLR 301–302.

68. *Landoil Res. Corp. v. Alexander & Alexander Serv., Inc.*, 918 F.2d 1039, 1043 (2d Cir. 1990).

69. *Id.*

70. *Arial*, 2015 WL 1501115, at *7 (citing *Landoil*, 918 F.2d at 1043).

71. *Id.* (citing *TAGC Mgmt., LLC v. Lehman*, 842 F. Supp. 2d 575, 581 (S.D.N.Y. 2012)).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

IV. Conclusion

Despite Judge Preska's logical conclusions in *Arial*, the potential for judicial overreaching in future cases clearly emerges. Instead of abiding by what was contained within the four corners of the contract between *Arial* and *Aerophile*—that the parties wished to apply *French* law for issues of interpretation—Judge Preska took an extra step. Relying on *Phillips*, she disregarded this explicit term, considering it void, because the parties submitted papers that did not contain analyses regarding French law. If future courts are so quick to disregard the law the parties chose to use, the possibilities could be endless. Courts could invalidate all sorts of contracts unless the parties made a special effort to make absolutely clear that what they had already explicitly agreed to was indeed truly what they wanted. Placing this much power in the hands of the judge departs from focusing on the intentions of the contracting parties, and accordingly, violates traditional freedom of contract theory.⁷⁶

J. Raymond Mechmann, III

76. See, e.g., Mo Zhang, *Rethinking Contractual Choice of Law: An Analysis of Relation Syndrome*, 44 STETSON L. REV. 831, 840 (2015) (discussing the importance of party autonomy and freedom of contract when enforcing a choice-of-law clause).

Balintulo v. Ford Motor Co.

796 F.3d 160 (2d Cir. 2015)

The United States Court of Appeals for the Second Circuit held that the Plaintiffs, who were victims of South African apartheid, had failed to allege sufficient conduct to establish that co-Defendant automobile and software manufacturers were guilty of aiding and abetting any violations of customary international law and also that IBM's knowledge of aiding apartheid was insufficient to establish the required "purposeful" mens rea for aiding and abetting, thereby failing to rebut the presumption against extraterritoriality under 28 U.S.C. § 1350.

I. Introduction

The claim in *Balintulo v. Ford Motor Co.*¹ was brought under the Alien Tort Statute (ATS).² The ATS was first enacted in 1789,³ but found new life in the 1980s in use by the Second Circuit as a means of granting jurisdiction over cases concerning international human rights violations.⁴ The ATS states that "[t]he 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."⁵ The substantive claim concerned the conduct of subsidiaries of the defendant corporations, Ford and IBM, under a theory of agency.⁶ The Defendants were accused of aiding and abetting violations of the "law of nations,"⁷ also known as "customary international law."⁸ A presumption has been developed against extraterritoriality in the case law regarding the ATS, in that it cannot be used to bring claims for tortious conduct that occurred outside of the United States.⁹ However, this presumption can be rebutted under an analysis that first looks to the relevant conduct of the defendant, either direct or in aiding and abetting a violation of the law of nations, and then asks whether that conduct "touches and concerns" the United States in a manner that would supplant the presumption against extraterritoriality and whether the conduct supports a valid claim so as to establish jurisdiction.¹⁰ Here, the court

1. *Balintulo v. Ford Motor Co.*, 796 F.3d 160 (2d Cir. 2015).

2. 28 U.S.C. § 1350.

3. See Debra A. Harvey, *The Alien Tort Statute: International Human Rights Watchdog or Simply 'Historical Trivia'?*, 21 J. MARSHALL L. REV. 341, 342 (1988).

4. See *id.* at 347–48.

5. *Id.*

6. See *Balintulo*, 796 F.3d at 163.

7. See *id.*

8. See *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 237 n. 2 (2d Cir. 2003) ("In the context of the [ATS], we have consistently used the term 'customary international law' as a synonym for the term 'law of nations.'").

9. See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1668–69 (2013) (*Kiobel II*) (holding that "Nothing about this historical context suggests that Congress also intended federal common law under the ATS to provide a cause of action for conduct occurring in the territory of another sovereign."). See also Moya Ball, Recent Decision, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), 28 N.Y. INT'L L. REV. 55 (2015); Kristen Lee, Recent Decision, *Kiobel v. Royal Dutch Petroleum Co.*, 27 N.Y. INT'L L. REV. 65 (2014).

10. See *Mastafa v. Chevron Corp.*, 770 F.3d 170, 186 (2d Cir. 2014).

held that the Plaintiffs had failed to allege facts sufficient to rebut the presumption of extraterritoriality.¹¹

II. Background

This case is the latest in a long and complex line of litigation brought by the Plaintiffs under the ATS against a number of corporations for their alleged roles in aiding and abetting violations of the law of nations in South Africa during the apartheid era.¹² The claims were originally brought against dozens of corporations, among them a large number of multinationals, such as Daimler.¹³ Over time, most of the Defendants filed motions to dismiss, which were granted, or were dropped from the Plaintiffs' amended complaints.¹⁴ This subsequently left Ford Motor Company (Ford) and International Business Machines Corp (IBM) as the two remaining Defendants.¹⁵

The relevant procedural history to this case started in April 2009, when the District Court for the Southern District of New York held that the Plaintiffs' claims against IBM and Ford were valid and could therefore be pursued.¹⁶ The lower court determined that the claims were valid based upon a theory of agency,¹⁷ making the parent companies potentially responsible for the conduct of their subsidiaries^{18, 19} in the era of South African apartheid.²⁰ IBM and Ford then sought a writ of mandamus, which was denied by the Second Circuit (*Balintulo I*).²¹ In that same decision, the Second Circuit remanded the case to the District Court and rejected the Plaintiffs' vicarious liability theory on the grounds of *Kiobel II*,²² which was decided while this case was pending, because the Plaintiffs failed to allege that any of the conduct relevant to their claim occurred within the United States.²³

11. See *Balintulo*, 796 F.3d at 163.

12. See *id.*

13. See *id.* at 163 n.2.

14. See *id.*

15. See *id.*

16. See *South African Apartheid Litigation*, 617 F. Supp. 2d 228, 298 (S.D.N.Y. 2009) (holding that, following the dismissal of other claims, the claims against IBM and Ford remained).

17. See *id.* at 273.

18. See *id.* at 274–75 (“the allegations against Ford are sufficient to allow the case against it to proceed on an agency theory.”)

19. See *id.* at 275 (holding that specific allegations against the South African IBM subsidiary supported a broader allegation of vicarious liability with regards to the parent company IBM).

20. See *Balintulo*, 796 F.3d at 163.

21. See *Balintulo v. Daimler AG*, 727 F.3d 174, 193–94 (2d Cir. 2013) (holding that for a court to issue a writ of mandamus, the court must be sure that the party seeking the writ has no other adequate means of relief, a clear right to issuance of the writ, and that the circumstances justify the use of the writ, and that petitioners had an adequate redress through a motion for judgment on the pleadings).

22. See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1663 (2013).

23. See *Balintulo I*, 727 F.3d at 189.

On remand, IBM and Ford moved for judgment in their favor,²⁴ but the District Court held that, as a result of *Kiobel II*, the interpretation that the ATS does not confer jurisdiction over corporations was overruled.²⁵ The Plaintiffs were therefore allowed to amend their complaints in order to allege facts sufficient to rebut the presumption of extraterritoriality.²⁶ The Plaintiffs submitted amended complaints, but, upon review, the District Court held that their revised allegations were insufficient, because the relevant conduct all occurred abroad,²⁷ and that the theory espoused by the Plaintiffs was already rejected by the Second Circuit in *Balintulo I*.²⁸ The Plaintiffs then appealed this decision, arguing that the conduct alleged was sufficient to overcome the presumption against extraterritoriality.²⁹

III. Holding

Upon consideration of the Plaintiffs' appeal, Judge Cabranes of the United States Court of Appeals for the Second Circuit held that the Plaintiffs had failed to allege relevant conduct perpetrated within the United States that was sufficient to rebut the presumption against extraterritoriality under the ATS.³⁰

Judge Cabranes, in reaching this decision, further held that knowledge of or complicity in a crime under customary international law was not sufficient to establish a claim of aiding and abetting under the ATS without proof that the defendant purposefully facilitated the commission of the crime.³¹ In addition, Judge Cabranes held that bidding upon and losing a contract that would assist a country in violating customary international law is not in itself a violation of international customary law.³² Finally, Judge Cabranes held that allegations of general corporate supervision are not sufficient to overcome the presumption against extraterritoriality in the ATS and that the Plaintiffs' pleadings failed to establish jurisdiction, because they did not contain plausible allegations that Ford and IBM involved themselves in "relevant conduct" within the United States that would overcome the presumption against extraterritoriality in the ATS.³³

IV. Analysis

The analysis of the court began by laying out the claims of the Plaintiffs.³⁴ On appeal, the Plaintiffs claimed that the United States-based actions of Ford and IBM during the era of South African apartheid amounted to aiding and abetting under customary international law.³⁵

24. *See id.*

25. *See* South African Apartheid Litigation, 15 F. Supp. 3d 454, 460 (S.D.N.Y. 2014).

26. *See id.* at 465.

27. *See* South African Apartheid Litigation, 56 F. Supp. 3d 331, 338 (S.D.N.Y. 2014).

28. *See id.* at 338–39.

29. *See* Balintulo v. Ford Motor Co., 796 F.3d 160, 167 (2d Cir. 2015).

30. *See id.* at 163.

31. *See id.* at 170.

32. *See id.* at 170–71.

33. *See id.* at 171.

34. *See id.* at 165.

35. *See id.*

Particularly, the Plaintiffs claimed that Ford “(1) provided specialized vehicles to the South African police and security forces to enable these forces to enforce apartheid, and (2) shared information with the South African regime about anti-apartheid and union activists, thereby facilitating the suppression of anti-apartheid activity.”³⁶ The Plaintiffs further claimed that IBM “(1) designed specific technologies that were essential for racial separation under apartheid and the denationalization of black South Africans; (2) bid on, and executed, contracts in South Africa with unlawful purposes such as “denationalization” of black South Africans; and (3) provided training, support, and expertise to the South African government in using IBM’s specialized technologies.”³⁷

Ford and IBM conversely contended that the “District Court properly denied Plaintiffs’ motion for leave to amend their complaints because (1) plaintiffs cannot satisfy the ATS’s territoriality and *mens rea* requirements; (2) corporations cannot be sued under the ATS; and (3) there is no aiding and abetting liability under the ATS.”³⁸

The court then applied these facts to the legal framework for assessing jurisdiction under the Alien Tort Statute. The court began by analyzing the jurisdictional predicates contained within the ATS, each of which must be satisfied before a court can properly assume jurisdiction over an ATS claim.³⁹ These jurisdictional predicates include: (1) a complaint that pleads a violation of the law of nations; (2) that the claim is not barred by the presumption against extraterritoriality; (3) that customary international law recognizes the asserted liability of a defendant; and (4) that the theory of liability alleged by the Plaintiffs is recognized by customary international law.⁴⁰ While a defect in any of these jurisdictional predicates would be sufficient to bar a plaintiffs claim, the court stated that it need address only the issue of whether the complaint alleged sufficient facts to rebut the presumption against extraterritoriality and that, because the complaint failed to do this, it did not need to reach the other factors.⁴¹

The court then gave some context to the ATS and its presumption against extraterritoriality.⁴² Citing *Kiobel II*, the court stated that, while it is not possible to bring a claim under the ATS for violative conduct that occurs outside the United States, the *Kiobel II* Court dealt only with alleged conduct that was wholly outside the United States, as opposed to the alleged conduct here, which was allegedly conducted partly within the U.S.⁴³

The court then outlined the test from its decision in *Mastafa v. Chevron* for the rebuttal of the presumption against extraterritoriality, to establish that the focus of the ATS analysis should be on the nature and location of the conduct at the source of the alleged violations of custom-

36. *Id.*

37. *Id.*

38. *Id.*

39. *See id.* at 165–66 (quoting *Mastafa v. Chevron Corp.*, 770 F.3d 170, 179 (2d Cir. 2014)).

40. *See id.*

41. *See id.* at 166.

42. *See id.*

43. *See id.* (quoting *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013)).

ary international law.⁴⁴ This conduct is then subjected to a two-step jurisdictional analysis: 1) determining whether the conduct sufficiently “touches and concerns” the United States in a way that displaces the presumption against extraterritoriality and 2) determining whether that conduct states a claim for violating the law of nations or aiding and abetting another’s violations of the same.⁴⁵ Furthermore, to satisfy the second step, under an aiding and abetting theory, plaintiff must establish that the defendant (A) provided practical assistance to the principal which had a substantial effect on the perpetration of the crime, and (B) did so with the purpose of facilitating the commission of that crime.⁴⁶ The court also established the standard for mens rea as being “purpose,” stating that proving knowledge of or complicity in the perpetration of a crime alone “is insufficient to establish a claim of aiding and abetting liability under the ATS.”⁴⁷

The court then turned to the specific claims against the Defendants. With regards to Ford, the court found the allegations insufficient to rebut the presumption against extraterritoriality, because the alleged “relevant conduct” occurred only in South Africa and therefore did not meet the requirements of the previously enunciated test.⁴⁸ This was because it was a South African Ford subsidiary that sold the vehicles to the South African Government, with parts shipped in from the U.K. and Canada, and having nothing to do with the U.S.⁴⁹ The court rejected the Plaintiffs’ contentions that Ford was vicariously liable for its subsidiary, deeming the amended claims to be “materially identical” to the claims of vicarious liability that were dismissed in *Balintulo I*.⁵⁰

Furthermore, the court rejected the Plaintiffs’ contention that Ford controlled its subsidiary so much as to make it directly, rather than vicariously, liable for the subsidiary’s actions.⁵¹ To hold Ford liable, the court held, would undermine settled principles of law, which treat parent and subsidiary companies as distinct entities, and decline to do this only in exceptional circumstances, which were not present here.⁵²

Therefore, because the Plaintiffs failed to demonstrate extraordinary facts that would warrant this exception, they did not rebut the presumption against extraterritoriality under the ATS.⁵³

The court then turned to the allegations against IBM, first addressing the claim that IBM’s subsidiary had trained South African government employees to use IBM equipment to

44. *See id.* (citing *Mastafa*, 770 F.3d at 185–86).

45. *See id.* at 167 (citing *Mastafa*, 770 F.3d at 186).

46. *See id.* (citing *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009)).

47. *Id.* (citing *Presbyterian Church of Sudan*, 582 F.3d at 263 (2d Cir. 2009)).

48. *Id.* at 168.

49. *See id.*

50. *Id.* (citing *Balintulo v. Daimler AG*, 727 F.3d 174, 192 (2d Cir. 2013) (holding that no relevant conduct was committed in the United States that would confer jurisdiction under the ATS)).

51. *See id.*

52. *See id.*

53. *See id.*

produce identity materials that furthered racial segregation.⁵⁴ The court found that the allegations failed the first step of the two-step test, because the conduct occurred outside the United States and did not touch or concern the United States.⁵⁵

The court then found that the fact that IBM's subsidiary bid and lost on contracts that violated customary international law did not constitute a breach of customary international law by IBM itself.⁵⁶ The court stated that "[i]t is simply not a violation of the law of nations to bid on, and lose, a contract that arguably would help a sovereign government perpetrate an asserted violation of the law of nations."⁵⁷ Therefore, this allegation was found to be insufficient.⁵⁸

Finally, the court addressed the issue of IBM manufacturing in the United States and subsequently transferring to South Africa an ID program that would be used to further apartheid.⁵⁹ This, the court said, did "touch and concern" the United States and therefore fulfilled the first step of the two-step analysis to rebut the presumption against extraterritoriality.⁶⁰ Therefore, if this conduct aided and abetted a violation of customary international law, then the presumption against extraterritoriality under the ATS could have been rebutted for this allegation.⁶¹ However, the court found that the allegations did not meet the adequate mens rea requirement for aiding and abetting, establishing, at most, that IBM acted "with knowledge" that the program might facilitate South Africa's human rights abuses under apartheid, but not "with the purpose" of achieving this result.⁶² Knowledge absent purpose falls short of the required mens rea for aiding and abetting and thus this final claim was found to be insufficient to rebut the presumption against extraterritoriality.⁶³

V. Conclusion

In conclusion, there was a clear lack of connection between the alleged conduct and the United States, or a lack of basis to state a claim under the law of nations for the Plaintiffs' claims to succeed. To hold otherwise, the court would have been forced to fly in the face of precedent cases, such as *Mastafa and Kiobel II*, as well as settled principles of corporations law. There was a clear lack of basis to bring these claims in Federal Court, as the use of jurisdiction under the ATS would have been tenuous at best. While the claims may have had merit, this was clearly the wrong forum for their adjudication under the ATS.

The outcome of this case has two wider implications, firstly for corporate liability under the ATS and secondly for the mens rea requirement for accomplice liability. In terms of the for-

54. See *id.* at 169.

55. See *id.*

56. See *id.*

57. *Id.*

58. See *id.*

59. *Id.*

60. See *id.*

61. *Id.* at 170.

62. *Id.*

63. *Id.*

mer, it is clear that this holding serves as a further limitation upon corporate liability for overseas subsidiaries, with the “touch and concern” test proving a high bar to overcome. This serves to insulate corporations, for better or worse, from the tortious actions of subsidiaries and thus may encourage investment by such companies in countries with poor human rights records. This sets a worrying tone, as this kind of insulation from liability makes corporations seem above international human rights law, an unsettling prospect indeed. Perhaps it is time for a retooling of the ATS, as in its current state, and with the judicial interpretations that it has been given, it is evidently somewhat toothless. I do not disagree with the court’s holding based upon the available precedent and reasoning given; I do, however, believe that the statute and its interpretation should not have led to this result.

The second implication of this holding is that the mens rea requirement for accomplice liability, according to the Second Circuit, is “purposefully.” The battle between knowledge and purpose as a mens rea for accomplice liability is not a new one and still varies by jurisdiction.⁶⁴ It has been argued that knowledge is too low a bar to establish a culpable mens rea for accomplice liability, while purpose is too high and rarely results in a culpable person being held to account.⁶⁵ The “purposeful” mens rea held by the Second Circuit as the true measure of accomplice liability here sets an unfortunate precedent and presents a large hurdle in the already difficult task of proving accomplice liability under the ATS in cases such as this.

64. See Sherif Girgis, *Note, The Mens Rea of Accomplice Liability: Supporting Intentions*, 123 YALE L.J. 460, 462–63 (2013).

65. See, e.g., *id.* at 468.

Eastman Kodak Co. v. Asia Optical Co., Inc.

118 F. Supp. 3d 581 (S.D.N.Y. 2015)

The United States District Court for the Southern District of New York held that the anti-suit injunction requested by the plaintiff was appropriate against the defendant pursuant to the test set out in *China Trade* for determining when an anti-suit injunction is appropriate.

I. Holding

In the recent case, *Eastman Kodak Co. v. Asia Optical Co.*,¹ Judge Cote of the United States District Court of the Southern District of New York concluded that Kodak's anti-suit injunction to halt Asia Optical's Chinese lawsuit was appropriate pursuant to the Second Circuit's *China Trade* test.² Judge Cote granted Kodak's anti-suit injunction, because *China Trade*'s threshold requirements, as well as the discretionary factors, were met.³ The court found that the parties were the same in both proceedings and that resolution of the case before the United States court was dispositive of the Chinese action to be enjoined.⁴ Also, each of the five discretionary factors defined in *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*⁵ was met.⁶ Therefore, Kodak's anti-suit injunction was appropriate against Asia Optical.

II. Facts and Procedure

According to its complaint, Kodak owns patents relating to digital camera technology.⁷ These patents have been licensed to digital camera manufacturers, including Asia Optical.⁸ The manufacturers assemble cameras for sale under other companies' brand names.⁹ Kodak and Asia Optical entered into a patent-licensing agreement in April 2009.¹⁰ This patent-licensing agreement licensed Kodak's full set of digital camera patents to Asia Optical in exchange for royalty payments.¹¹ A written modification, which described the situations where Asia Optical may not be required to pay royalties, was also executed with the patent licensing agreement.¹²

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1. *Eastman Kodak Co. v. Asia Optical Co.*, 118 F. Supp. 3d 581 (S.D.N.Y. 2015).
 2. *Id.* at *8. *See also* *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33 (2d Cir. 1987).
 3. *Id.* at *7.
 4. *Id.* at *3.
 5. *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 119–20 (2d Cir. 2007).
 6. *Id.* at *6.
 7. *Id.* at *1.
 8. *Id.*
 9. *Id.*
 10. *Id.*
 11. *Id.*
 12. *Id.* at *1.

Asia Optical manufactured cameras according to Kodak's patents and sold these cameras to Fuji.¹³ Asia Optical contends that Fuji is responsible for paying to Kodak the patent licensing fees associated with those cameras.¹⁴ Litigation over these fees has occurred in multiple jurisdictions: (1) New York State court, (2) U.S. federal court, (3) Japan and (4) China.¹⁵

Litigation began in New York State courts, where Asia Optical alleged "that Fuji owed a duty to indemnify Asia Optical for any royalties it owed Kodak."¹⁶ The suit was dismissed for lack of personal jurisdiction over Fuji in June 2011. Thereafter, Asia Optical made an application for jurisdictional discovery, which was denied in July 2011.¹⁷ Kodak then commenced the federal action against Asia Optical on August 26, 2011, seeking royalty payments pursuant to the patent-licensing agreements.¹⁸ The Southern District granted partial summary judgment for Kodak, holding that the written modification exempts Asia Optical from royalty payments only when it manufactures for a Kodak licensee and that Fuji was not a Kodak licensee.¹⁹

A damages trial was held, in which judgment was entered on July 18, 2012, in favor of Kodak for approximately thirty-three million dollars (the "Final Judgment").²⁰ Asia Optical delayed payment, but agreed to pay the Final Judgment with interest, which was done by December 2014.²¹ This case was then closed on January 12, 2015.²² After the Final Judgment was entered, Asia Optical brought an arbitration action against Fuji in Japan seeking indemnification.²³ The Japanese arbitration panel denied Asia Optical's claims and then denied Asia Optical's appeal.²⁴

Finally, Asia Optical and Sintai Optical began a lawsuit in China against Kodak.²⁵ Asia Optical claims that Kodak breached the patent licensing agreement, so that Asia Optical was entitled to reimbursement from Kodak of approximately twelve million dollars.²⁶ Asia Optical reasoned that Fuji and Kodak had a separate patent licensing agreement, where Fuji paid royalties to Kodak for the same digital cameras that were the subject of the federal litigation.²⁷ The federal litigation was then reopened and Kodak filed a motion seeking an anti-suit injunction on March 24, 2015.²⁸

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at *1.

18. *Id.*

19. *Id.*

20. *Id.* at *2.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at *3.

26. *Id.*

27. *Id.*

28. *Id.*

III. Discussion

A. Anti-Suit Injunction

An anti-suit injunction may be appropriate to protect the jurisdiction and judgment of the enjoining court, so as to prevent a party from pursuing litigation in a foreign jurisdiction.²⁹ The test for when an anti-suit injunction is appropriate was set out by the Court of Appeals for the Second Circuit in *China Trade & Dev. Corp. v. M.V. Choong Yong*.³⁰ An anti-suit injunction is appropriate when two threshold requirements are met: (1) the parties must be the same in both proceedings and (2) resolution of the case before the enjoining court must be dispositive of the action to be enjoined.³¹ If these threshold requirements are met, courts in the Second Circuit weigh five additional discretionary factors: (1) the threat to the enjoining court's jurisdiction posed by the foreign action; (2) the potential frustration of strong public policies in the enjoining forum; (3) the vexatiousness of the foreign litigation; (4) the possibility of delay, inconvenience, expense, inconsistency, or a race to judgment; and (5) other equitable considerations.³² This court gives the first two discretionary factors greater weight.³³ All of these factors weigh in favor of an anti-foreign-suit injunction "that is sought to protect a federal judgment."³⁴

1. Are the Parties in the Federal and Chinese Litigation the Same?

The parties need not be identical to satisfy *China Trade's* first threshold requirement that the parties be the same.³⁵ Therefore to satisfy the first requirement, the parties must be "sufficiently similar."³⁶ Judge Cote found this requirement to be satisfied, because the Chinese complaint requested that Kodak pay damages to Asia Optical; these are the two parties involved in the federal litigation.³⁷ Even though an additional plaintiff, Sintai Optical, was present on the Chinese complaint, Asia Optical failed to indicate what role Sintai Optical had in the Chinese litigation.³⁸ The court also found that Fuji being listed as a "third-party" did not prevent the finding that the parties were the same in both litigations.³⁹

29. *Id.*

30. *Id.* at *3 (citing *China Trade*, 837 F.2d 33).

31. *Id.*

32. *Id.* at *4 (citing *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 119–20 (2d Cir. 2007)).

33. *Id.*

34. *Karaha Bodas*, 500 F.3d at 119–20.

35. *Id.* (See *Paramedics Electromedicina Comercial, Ltda v. GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 652–53 (2d Cir. 2004)).

36. *Paramedics*, 369 F.3d at 652; see also *In re Millenium Seacarriers, Inc.*, 458 F.3d 92, 97 n. 5 (2d Cir. 2006).

37. *Kodak*, 118 F. Supp. 3d at *4.

38. *Id.*

39. *Id.*

Asia Optical argued that Fuji being a “third-party” in the Chinese action was relevant, because Fuji possessed relevant evidence.⁴⁰ This evidence included an agreement between Asia Optical and Fuji, stating that Fuji would be responsible for any royalties that Asia Optical would owe Kodak producing digital cameras for Fuji.⁴¹ The agreement also indicated that Kodak was responsible for contacting Fuji for any such royalties.⁴² Furthermore, the patent license agreement between Kodak and Fuji stated that Fuji “may not pay the royalty repeatedly.”⁴³ Even with this additional agreement, the court’s finding was not affected, because Asia Optical brought this action against Kodak, not Fuji.⁴⁴

Asia Optical further contended that the parties differed between the federal and the Chinese litigation, because Fuji was an indispensable party in the Chinese litigation.⁴⁵ This argument was not persuasive to the court, as Asia Optical’s complaint in the Chinese litigation set out that Kodak breached the patent licensing agreement by accepting double royalties, so Kodak should repay Asia Optical.⁴⁶ The question whether Kodak received double royalties could be resolved without Fuji as a party in the litigation and the main agreement, the patent licensing agreement, did not include Fuji as a party.⁴⁷

Asia Optical also argued that, because Fuji had been dismissed as a party to the federal litigation, it would be grossly unfair to enjoin Asia Optical.⁴⁸ Asia Optical failed to explain its reasoning, especially because Asia Optical had not brought suit against Fuji, but rather Kodak.⁴⁹ Therefore, no unfairness would occur by enjoining Asia Optical from proceeding against Kodak in China.⁵⁰ Thus, the court held that the parties in both litigations were the same.⁵¹

2. Is the Federal Litigation Dispositive of the Chinese Litigation?

The first threshold requirement was met, so Judge Cote moved to the second threshold requirement and looked to see whether the resolution of the case before the district court would be dispositive of the action to be stopped.⁵² To determine whether the resolution is dispositive, the court must determine the substance of the case before the enjoining court.⁵³

40. *Id.*

41. *Id.*

42. *Id.* at *4.

43. *Id.*

44. *Id.*

45. *Id.* at *5.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at *4.

52. *Id.* at *5.

53. *Id.* (Citing *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 121 (2d Cir. 2007)).

Moreover, the court must look to see that the judgment sought to be protected was dispositive of the subsequent action.⁵⁴ It is important to note that the actions in the two courts do not have to be identical.⁵⁵

The court found that the judgment entered in the federal litigation was dispositive of the action that Asia Optical brought in China.⁵⁶ The action brought in both litigations involved patent royalty payments for the same set of cameras that Asia Optical sold to Fuji.⁵⁷ Asia Optical contended in both actions that Kodak breached the patent-licensing agreement by seeking royalty payments from Asia Optical.⁵⁸

Asia Optical believed that Kodak's agreement with Fuji entitled the judgment to be vacated, because the agreement between Kodak and Fuji was formed after the final judgment was entered in the federal litigation.⁵⁹ The court agreed with Asia Optical's assertion that the agreement was formed after the Final Judgment, but Asia Optical was using this information to prove that there was no obligation to pay Kodak under the patent licensing agreement.⁶⁰ Both actions relied on the patent licensing agreement between Kodak and Asia Optical.⁶¹ These royalty payments had already been litigated and could not be attacked by filing a lawsuit in another jurisdiction.⁶² Therefore, the court held the decision in the federal litigation was dispositive.

3. Do the discretionary factors of *China Trade* apply?

Judge Cote concluded that all of the discretionary factors support the anti-suit injunction.⁶³ First, the Chinese litigation sought reimbursement to Asia Optical for money that was paid as part of the Final Judgment in the federal litigation and threatened to undermine the judgment of the federal court.⁶⁴ Furthermore, the court reasoned, because the Chinese litigation involved the same provision of the patent licensing agreement, a risk of inconsistent judicial readings of the provision was created.⁶⁵

The court further noted that the Chinese litigation was simply a way for Asia Optical to forum shop, undermining the policies of finality.⁶⁶ Parties to a litigation are entitled to freedom

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at *5.

58. *Id.*

59. *Id.* at *5–6.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at *5–6.

65. *Id.*

66. *Id.*

from further litigation when the issues are resolved in one jurisdiction.⁶⁷ Kodak received a judgment that was upheld on appeal and pursued enforcement proceedings to obtain payment.⁶⁸ Asia Optical had a full and fair opportunity to be heard and did not argue any grounds to vacate the judgment.⁶⁹ Asia Optical had not argued any reasons as to why the Chinese litigation was not forum shopping, especially as neither company had any connection to China.⁷⁰

Asia Optical filed suit in China during the payment enforcing proceedings without informing Kodak.⁷¹ By doing this, Asia Optical was found to be acting in a vexatious manner, because Asia Optical did not seek relief in the current jurisdiction, but decided to file suit in a foreign jurisdiction that had no relation to the facts of the case.⁷² Furthermore, the Chinese lawsuit was found to be an inconvenience to Kodak and impose further litigation expenses.⁷³ The court reasoned that Kodak's principal place of business was in New York and the legal issues concerning the patent licensing agreement had already been resolved in federal court and required the application of New York law.⁷⁴

The only argument Asia Optical set forth was that the purpose of the suit in China was not to challenge the Final Judgment.⁷⁵ However, Judge Cote pointed out in the opinion that this was exactly what the Chinese litigation would do. The Chinese suit would negate the Final Judgment and allow payments that were made to Kodak to be retrieved by Asia Optical.⁷⁶ Asia Optical also claimed the Chinese suit was not vexatious, because there was a legitimate dispute.⁷⁷ Even though a legitimate dispute existed, it had already been litigated and argued to a final judgment by the district court.⁷⁸

Thus, as both the threshold requirements and the discretionary factors of *China Trade* were satisfied, Kodak's motion for an anti-suit injunction was deemed to be appropriate by the court.⁷⁹

B. Ancillary Jurisdiction

Asia Optical asserted that the district court could not enter an anti-suit injunction, because the court lacked ancillary jurisdiction over this matter.⁸⁰ As the case law states, a federal

67. *Ibeto Petrochemical Indus. Ltd. V. M/T Beffen*, 475 F.3d 56, 64 (2d Cir. 2007).

68. *Kodak*, 118 F. Supp. 3d at *6.

69. *Id.*

70. *Id.*

71. *Id.* at *7.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Kodak*, 118 F. Supp. 3d at *7.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

court retains the authority to enforce its judgment and ancillary jurisdiction does not divest a court of that power.⁸¹ The court took note that the Second Circuit reasons that ancillary jurisdiction does not apply, because federal courts have continuing jurisdiction based on res judicata and collateral estoppel.⁸² These concepts enjoin a party from re-litigating in a non-federal forum issues that were already decided in federal court.⁸³ The Court of Appeals applied the *China Trade* test to determine whether the anti-suit injunction was appropriate, rather than looking to ancillary jurisdiction.⁸⁴ When ancillary jurisdiction is raised with an anti-suit injunction, the *China Trade* test for anti-suit injunction controls.⁸⁵ Therefore, ancillary jurisdiction does not affect the appropriateness of the anti-suit injunction.

IV. Conclusion

Kodak properly filed and was properly granted an anti-suit injunction against a suit filed by Asia Optical in China. Throughout the litigation between Kodak and Asia Optical in the United States, Asia Optical had the opportunity to dispute the royalties to be paid to Kodak. The Southern District of New York correctly found that the anti-suit injunction was appropriate, because the injunction prevented Asia Optical from forum shopping. If the court were to deny the anti-suit injunction, this would open the door to other companies seeking relief in a foreign jurisdiction after the case has already been decided on the merits. With the court's holding, parties are given a sense of security from having any lawsuits brought against them in a foreign jurisdiction with whom neither party had a connection. With this ruling, a company cannot file suit in a country after the federal court has ruled on the merits when there is no reason for the suit to be filed in a foreign country.

Alyssa D'Antonio

81. *Kodak*, 118 F. Supp. 3d at *7. *See, e.g.*, *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 120–28 (2d. Cir. 2007); *Ibeto Petrochemical Indus. Ltd. V. M/T Beffen*, 475 F.3d 56, 62–65; *Paramedics Electromedicina Comercial, Ltda v. GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 652–55.

82. *Kodak*, 118 F. Supp. 3d at *7.

83. *Id.*

84. *Id.*

85. *Id.*

F. TV Ltd. v. Bell Media Inc.

2015 WL 2258301 (S.D.N.Y. May 14, 2015)

The Federal District Court for the Southern District of New York held that there was sufficient evidence to support the defendant’s motion to dismiss plaintiff’s claims based on a lack of jurisdiction. The court determined that there were not strong enough ties between defendant Bell Media Incorporated and the State of New York for Plaintiff to pursue its claims in the District.

I. Holding

In the recent case *FTV Ltd. v. Bell Media Inc.*,¹ the Federal District Court for the Southern District of New York held that it had no personal jurisdiction over defendant Bell Media Inc., a Canadian company, and that plaintiffs F.TV Ltd. and Fashion TV Programmgesellschaft mbH (together, “FTV”) had failed to state a claim. FTV had sought to hold Bell and defendant Bigfoot Entertainment, Inc. d/b/a Fashion Television International, Ltd. (“Bigfoot”) liable for false advertising, tortious interference, and trade libel.² FTV further sought a declaratory judgment with regard to the use of the mark “Fashion Television.”³ Bigfoot also moved to dismiss FTV’s claims, but in this decision the court dealt only with the motion submitted by Bell.

II. Facts and Procedural History

FTV commenced this action against Bell, as a successor-in-interest to Chum Limited, and Bigfoot.⁴ After receiving a cease and desist letter from a subsidiary of Bigfoot regarding the use of “certain marks in connection with programming broadcasts,”⁵ FTV alleges, its right to use the marks was resolved by litigation between 1998 and 2002—the results of which are binding on Bigfoot and Fashion Television International, Ltd. (FTIL).⁶

FTV has been involved in broadcasting “fashion-related content since 1997.”⁷ One year later, before FTV launched in the United States, Bell’s predecessor, Chum Limited, sued FTV for using the name “fashion television.”⁸ Within the lawsuit, “it was ‘undisputed that those of defendants’ marks that use the word ‘fashion’ in conjunction with TV or television ‘look [] similar’ to the [Chum] marks.’”⁹ Therefore, the court granted summary judgment “dismissing Chum’s trademark infringement and dilution claims but denied it as to a remaining unfair

1. *F. TV v. Bell Media, Inc.*, 2015 WL 2258301 (S.D.N.Y. May 14, 2015).

2. *Id.* at *1.

3. *Id.*

4. *Id.*

5. *See id.*

6. *Id.*

7. *Id.*

8. *Id.*; *see Chum v. Lisowski et al.*, 98 Civ. 5060 (KMW), 2001 WL 243541, at *1 (S.D.N.Y. Mar. 12, 2001).

9. *Id.* at *2.

competition claim.”¹⁰ Further, “the court found that the mark ‘fashion television’ was generic.”¹¹ As a result, after a bench trial, the Southern District of New York entered a judgment in favor of FTV.”¹²

Four years after the judgment in favor of FTV was entered, Bell acquired Chum.¹³ In 2014, Bell entered into a letter of intent with Bigfoot, in which Bigfoot “would license the worldwide rights to a series of trademarks.”¹⁴ As a result of the letter of intent, Bigfoot paid \$4 million to Bell in exchange for acquiring Bell’s “worldwide rights, excluding Canada, to a series of marks including ‘Fashion Television,’ and logos using that name.”¹⁵ Further included in the deal was Bell’s promise, “if requested and in its sole discretion,” to help Bigfoot with any potential enforcement steps necessary, and Bigfoot agreed to indemnify Bell for the cost of that assistance.¹⁶

Bell is not an American corporation; rather, it is a Canadian media corporation based in Toronto, Ontario.¹⁷ Bell broadcasts and advertises throughout Canada and does some advertising in the United States.¹⁸ However, Bell does not maintain a substantial physical presence within the United States and does not have any of the following in New York (and the larger United States): real property, offices, bank accounts, employees, broadcast content, good or services, or other assets.¹⁹

The company has limited contact with New York: it is the successor-in-interest to Chum, which had initiated the earlier proceeding against FTV in New York in 1998.²⁰ Further, Bell’s parent company BCE Corporation is listed on the New York Stock Exchange.²¹ Bell’s last connection to New York is its use of TeleRep LLC, which is an independent media sales agency, to buy advertising time in both Canada and the United States.²² TeleRep does have offices in New York.²³

Bell also has trademarks registered in the United States, including the “FT Fashion Television” logo, which was registered in 2005 and incontestable five years later in 2010.²⁴ The company, in its history, has had a number of marks that include some form of the phrase “fashion television” on documents with Bigfoot: one with a New York mailing address for Bigfoot, of which the communications were sent from Bell in Canada to representatives of Bigfoot in New

10. *Id.* at *7.

11. *Id.* at *8.

12. *Chum Ltd. v. Lisowski*, 198 F. Supp. 2d 530, 542 (S.D.N.Y. 2002).

13. *F. TV*, 2015 WL 2258301, at *1.

14. *Id.*

15. *Id.*; see also Declaration of Raymond J. Dowd (Dowd Decl.) ex. I ¶ 4.1 & sched. D.

16. See *id.*; see also Dowd Decl. ex I ¶ 6.6.2, ¶ 6.6.2.3.

17. *Id.* at *2.

18. *Id.*

19. *Id.*

20. *Id.*; see also ECF No. 64 (Bell Reply Br.) at 5.

21. See *id.*

22. *Id.*

23. *Id.*

24. *Id.*

York.²⁵ Further, while plaintiff alleges that Bell has contacts within New York, the court found although “the extent to which the negotiations relating to the license agreement occurred in New York is disputed, the Court finds based on the record before it that the bulk were not in the district.”²⁶ Additionally, Bell does have revenue coming in from New York, “one-off content licenses and the acquisition of advertising time on Bell’s channels by U.S. companies that lack a Canadian presence.”²⁷ However, this source of revenue is not consequential in the grand scheme of Bell’s overall profits.

TeleRep, the company Bell uses as an intermediary in selling advertising time, is a separate entity from Bell. TeleRep and Bell do not work exclusively together; TeleRep “promotes more Canadian companies than just Bell; it accepts orders for Fashion TV as one of a group of properties, not by itself.”²⁸ Further, “Bell licenses content from U.S. companies for broadcast in Canada,” of which two of the most significant are New York corporations: HBO and Comedy Central.²⁹

III. Court’s Rational

The court turns next to a discussion of personal jurisdiction over Bell. Here, FTV “bears the burden of demonstrating sufficient facts to justify a court’s exercise of personal jurisdiction.”³⁰ Plaintiff also has alleged “both general and specific jurisdiction.”³¹ Now, “if the Court finds that the provisions of the New York statute—the Civil Practice Law and Rules—have been met, the Court must then inquire into whether the exercise of personal jurisdiction comports with constitutional due process.”³²

A. Specific Jurisdiction

The governing New York Civil Practice Law regarding specific jurisdiction is CPLR § 302(a). This statute provides instances in which an action of a defendant may result in personal jurisdiction being granted.³³ In order to succeed on an assertion of personal jurisdiction, one

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at *3; *see also* TeleRep Aff. ¶ 8.

29. *F. TV*, 2015 WL 2258301, at *3.

30. *Id.* (citing *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 566 (2d Cir. 1996)).

31. *Id.* at *3.

32. *Id.* (citing *Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161, 168 (2d Cir. 2013)).

33. *Id.* at *3; *see* CPLR 302(a), stating

Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent: 1. Transacts any business within the state or contracts anywhere to supply goods or services in the state; or 2. Commits a tortious act within the state . . . ; or 3. Commits a tortious act without the state causing injury to person or property within the state . . . if he *i.* regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or *ii.* expects or should reasonably expect the act to have consequences in the state.

must show a “nexus between the act which gives rise to jurisdiction and plaintiff’s cause of action.”³⁴ Next, after establishing a nexus, “even a single act of contact with New York may be sufficient.”³⁵ The court must examine what contacts the actor may have had with the forum state.

Here, “plaintiffs allege that specific jurisdiction over Bell pursuant to CPLR 302(a)(1) may be premised on the negotiations relating to the license agreement,” which included various dealings between Bell and Bigfoot. Plaintiffs use the various agreements between Bell and Bigfoot as a basis for their assertion of jurisdiction under CPLR 302(a)(3).³⁶

In this instance, the court “has reviewed the record relating to the negotiations of the license agreement” and concluded that “there is no evidence that Bell spent any time in this District in meetings or negotiation sessions, nor is there any evidence that Bell executed the agreement in this District.”³⁷ The court finds it irrelevant here whether Bigfoot has an office in the District, because it has no direct bearing on Bell’s potential connection to New York.³⁸ Therefore, the court “finds that Bell was not actively negotiating the license in this District.”³⁹ Even though invoices may have been sent between Bell and Bigfoot within the District, the court found that alone to be “insufficient to support purposeful availment by Bell of New York as a forum.”⁴⁰

Plaintiffs’ jurisdictional claims hinge on the proposition that “Bell and Bigfoot are acting in concert—that Bell is ultimately behind the cease and desist letters, or other efforts to assert rights over FTV to the ‘Fashion Television’ mark.”⁴¹ The court states that there is currently no evidence being proffered by the plaintiff to support their supposition. The present evidence “supports only that Bell and Bigfoot entered into an arms-length (\$4 million) license agreement, pursuant to which Bigfoot obtained whatever rights Bell may have had to the ‘Fashion Television’ marks and logos in all jurisdictions except Canada.”⁴² Here, “the evidence does not support an inference that Bell is in fact behind the cease and desist letters and is using Bigfoot as its New York foil.”⁴³ The evidence before the court does support Bell’s assertion that it is a Canadian company “that licenses programming entirely unrelated to this litigation from certain U.S. (and New York) entities, sells advertising to its programming (that also has nothing to do with this lawsuit) through an agent based, *inter alia*, in New York.”⁴⁴

34. *F TV*, 2015 WL 2258301 at *4 (citing *Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 166–67 (2d Cir. 2010)).

35. *Id.* (citing *Chloe*, 616 F.3d at 170).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at *5.

B. Due Process

While the court must determine the issue of jurisdiction, it must also determine “whether the district court’s exercise of personal jurisdiction over a foreign defendant comports with due process protections established under the United States Constitution.”⁴⁵ In order to for the court to make a determination whether its exercise of jurisdiction is in line with the Constitution, “the Court considers first whether ‘a defendant purposefully established minimum contacts within the forum State’ and second ‘whether the assertion of personal jurisdiction would comport with fair play and substantial justice’—that is, whether it would be reasonable.”⁴⁶

The Second Circuit has enumerated a five-factor test for a court to determine whether personal jurisdiction would be reasonable. The five factors include: “(1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests of the forum state in adjudicating the case; (3) the plaintiff’s interest in obtaining convenient and effective relief; (4) the interstate judicial system’s interest in obtaining the most efficient resolution of the controversy; and (5) the shared interest of the states in further substantive social policies.”⁴⁷

Here, “even if this Court were to determine that any of the above facts, or Chum’s prior litigation with FTV—and the resulting judgment—satisfied CPLR § 302(a), it would nonetheless find that due process prevented the exercise of jurisdiction in these circumstances.”⁴⁸ The court here determined that the factors enumerated by the Second Circuit were not met. Here, the litigation in the Chum case “occurred over a decade ago,” and, moreover, “that litigation was commenced by a predecessor entity to Bell and, while it is certainly the case that Bell is bound by the determination in that case, that is not the equivalent of requiring Bell to appear in this jurisdiction to the end of time in connection with any lawsuits relating to the Fashion Television mark or the FT Fashion Television logo.”⁴⁹

In this specific instance, Bell has “washed it hands of the marks through its license to Bigfoot.”⁵⁰ Moreover, “Bigfoot’s rights are limited to those that Bell has—and Bigfoot cannot seek to enforce greater rights than those that Bell has.”⁵¹ The court addresses the Chum judgment by saying, “FTV is fully entitled to use the *Chum* judgment as appropriate—but it must do so in this jurisdiction as against the licensee or assignee, not against Bell.”⁵²

Therefore, the record support’s Bell’s contention that it is a Canadian company that does not “regularly do business in New York” and “litigating here would be burdensome.”⁵³ The

45. *Id.* (citing *Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161, 168 (2d Cir. 2013)).

46. *Id.* (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985)).

47. *Id.* (quoting *Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 164 (2d Cir. 2010) (citing *Asahi Metal Indus. Co., Ltd. v. Superior Ct. of California*, 480 U.S. 102, 113–14 (1987))).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at *6.

state of New York does not have any compelling interest in having this issue tried in New York courts. Further, “no showing has been made that principles of collateral estoppel could not be applied in another forum.”⁵⁴ The court determines that, while the plaintiff clearly has an interest in litigating the case within the Southern District of New York, which would meet the third factor enumerated by the Second Circuit, “that alone is not enough.”⁵⁵

C. General Jurisdiction

Plaintiffs did not succeed in their arguments that they had general jurisdiction over Bell Media. The concept and application of general jurisdiction is “broader than specific jurisdiction—it is the equivalent of a defendant being ‘at home’ in a forum state.”⁵⁶ However, it could be the case that the court has one type of jurisdiction and not the other.⁵⁷ The court determined here that “the facts developed during discovery leave no doubt that Bell is a foreign, non-domiciliary corporation” and “no facts support an inference—let alone a finding—that Bell is ‘at home’ in New York.”⁵⁸ The plaintiff further asserts “the efforts of Bell’s advertising rep, TeleRep, and other licensing efforts are so frequent and continuous as to make it ‘at home’ in New York.”⁵⁹ The court disagrees with that assertion.⁶⁰ The court observes that TeleRep “sells advertising time on behalf of Bell,” but “it is not itself ‘Bell,’ is it [*sic*] not a subsidiary or even an affiliate of Bell.”⁶¹ The court states that, if some of the circumstances within the case were different, the outcome would naturally be different and perhaps a finding of jurisdiction would have resulted.⁶² However, that was not the case and the court adjudicated the matter it was faced with.

IV. Conclusion

The court determined Bell’s assertion that it was a Canadian corporation with insufficient connections to New York to be valid. There was no finding of a sufficient nexus to tie Bell to New York, so the court granted Bell’s motion to dismiss.

Lauren E. Russo

54. *Id.*

55. *Id.*

56. *Id.* (citing *Goodyear Dunlop Tire Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011)).

57. *Id.* at *6.

58. *See id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

In re the Matter of D.A.

No.14-CV0586, 2015 WL 2344079 (E.D.N.Y. May 14, 2015)

The United States District Court for the Eastern District of New York held that Respondent was not required to return her minor son, D.A., to Greece based upon the court's finding that the age and maturity exception of Article 13 of the Hague Child-Abduction Convention was satisfied by D.A.'s mature demeanor and his reasoning for remaining in the United States.

I. Introduction

Under Article 13 of the Hague Convention on the Civil Aspects of International Child Abduction, the court is not bound to return a child if the respondent can establish that: (1) the petitioner was not actually exercising custody rights at the time of removal or retention or had consented subsequently acquiesced in the removal or retention; or (2) there is a grave risk that the child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation.¹ Likewise, should a child reach a sufficient age and degree of maturity, a court can refuse to order the return of the child.² The United States District Court for the Eastern District of New York held that, while Petitioner established that his child's habitual residence at the time of his removal was Greece and that Petitioner had custodial rights under Greek law, the child was not to be removed from the United States because of Petitioner's initial consent to the relocation of the child and because the child had attained a sufficient age and degree of maturity.³

II. Background

The Petitioner, Nickolaos Adamis (hereafter, Petitioner), filed a verified petition, pursuant to the Hague Convention on the Civil Aspects of International Child Abduction and the International Child Abduction Remedies Act⁴ for the return of his minor son, D.A., against D.A.'s mother, Fotini Lampropoulou (hereafter, Respondent).⁵ At the time that the petition was filed, D.A. and Respondent were living in Douglaston, NY.⁶ Petitioner alleged in his petition that Respondent moved with D.A. from their home in Greece to the United States without Petitioner's knowledge or consent.⁷

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1. Hague Convention on the Civil Aspects of International Child Abduction, art. 13, Oct. 25, 1980. T.I.A.S No. 11,670, 1343 U.N.T.S.
 2. *Id.*
 3. *See In re D.A.*, No.14-CV0586, 2015 WL 2344079, at *6 (E.D.N.Y. May 14, 2015).
 4. International Child Abduction Remedies Act, 42 U.S.C. §11601 (1988).
 5. *See D.A.*, 2015 WL 2344079 at *1.
 6. *Id.*
 7. *Id.*

Petitioner, a United States and Greek citizen, and Respondent, a Canadian citizen, met in the 1990's and married in Greece in September 2001.⁸ Following the events of September 11, 2001, Petitioner and Respondent decided to move to Greece with Respondent's daughter, Toula. D.A. was born in October 2002 and was twelve years old at the time this case commenced.⁹ D.A. did not have many friends in Greece and did not spend much time with Petitioner's relatives.¹⁰ When D.A. reached the fourth grade, he experienced trouble learning in Greek and developed anxiety about attending school.¹¹ In response to her son's social and educational complaints, Respondent began discussing the possibility of moving to the United States with Petitioner.¹²

During several conversations, Petitioner acknowledged that Respondent and D.A. intended to move to the United States.¹³ In preparing for the move, Respondent packed their household items and personal belongings and shipped them to the United States.¹⁴ It was alleged that, based on various family conversations, Petitioner was fully aware of the plans for the move to the United States. Additionally, D.A.'s school, his classmates and their families, neighbors, and Respondent's co-workers all knew about the move to the United States.¹⁵

One or two months before the move to the United States, Respondent recorded a conversation with Petitioner on an audiotape out of fear that Petitioner might change his mind about letting D.A. live in the United States.¹⁶ Following Respondent, Toula, and D.A.'s move to the United States, Petitioner changed his mind about allowing D.A. to live in the United States, went to the Greek Ministry of Justice and filed his complaint.¹⁷

Between November 12, 2014, and November 21, 2014, the court conducted a five-day bench trial.¹⁸ During the second day of the trial, the court interviewed D.A. to assess his maturity and understanding of the court proceeding.¹⁹ The court concluded that D.A. was an "unusually poised and mature adolescent, who [was] comfortable with adults, and engaged readily and openly with the Court."²⁰ Additionally, the court found that D.A. was perceptive and bright and serious about his education.²¹ An important aspect of this interview is the fact

8. *Id.*

9. *Id.* at *2.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at *3.

16. *Id.*

17. *Id.* at *4.

18. *Id.* at *1.

19. *Id.* at *4.

20. *Id.*

21. *Id.*

that the court did not find that D.A.'s relationship with his parents or feelings towards them clouded his judgment about his place of residence.²²

D.A. desired to remain in America for many reasons including the presence of his mother, sister, and other family members.²³ Additionally, D.A. believed that the quality of the education provided in the schools in the United States far surpassed those in Greece.²⁴ D.A. expressed the difficulties he experienced in the Greek educational system, including the lack of adequate science and computer science programs in Greek schools and his inability to learn properly in Greek.²⁵ The court noted that D.A. did not feel any pressure to answer the court's questions in a certain way and just wanted to be able to say his side, namely that he wanted to stay in America, "very, very badly."²⁶

III. Holding

Judge Chen of the United States District Court for the Eastern District of New York ruled that D.A. would not be required to return to Greece to live with his father and he could remain in the United States with his mother.²⁷ The evidence presented in this case, including witness testimony and audio-recording, proved that Petitioner consented to D.A.'s removal from Greece in December 2013.²⁸ Additionally, D.A. proved his maturity through his answers to the court's questions and his corresponding reasoning for remaining in the United States.²⁹ Therefore, pursuant to the "age and maturity" exception recognized by Article 13 of the Hague Convention of the Civil Aspects of International Child Abduction, the court found that D.A. was sufficiently mature to object to his return to Greece.³⁰

IV. Analysis

A. The Hague Convention on the Civil Aspects of International Child Abduction

The Hague Convention on the Civil Aspects of International Child Abduction (the "Child Abduction Convention") was created with the specific purpose "to protect 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."³¹ The drafters intended to discourage parents from removing or retaining a child in a country other than the child's habitual residence in order to use the laws of another country to obtain a right of

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at *5.

27. *Id.* at *1.

28. *Id.* at *7.

29. *Id.* at *4.

30. *Id.* at *7.

31. *In re Sol Iris Kim*, 404 F. Supp. 2d 495, 516 (S.D.N.Y. 2005).

custody.³² Additionally, the drafters sought to prevent parents from forum shopping in foreign countries for laws that would be sympathetic to their child-custody claim.³³

Under the Child Abduction Convention, a child may be removed by the court if the petitioner is able to prove: (1) respondent removed the child from his or her habitual residence and (2) petitioner was exercising his or her parental custody rights, under the law of the State of the child's habitual residence, over the child at the time of his or her removal.³⁴ It is important to note that, while the court has the authority to determine the merits of an abduction claim under the Child Abduction Convention, it does not have the authority to determine the merits of the underlying custody claim.³⁵ In this case, the parties stipulated to Petitioner's *prima facie* case for wrongful removal.³⁶ The parties agreed that "(1) D.A.'s habitual residence at the time of his removal was Greece, and (2) Petitioner had custodial rights pursuant to Greek law."³⁷

B. International Child Abduction Remedies Act

The implementation of the Child Abduction Convention in the United States is controlled by the International Child Abduction Remedies Act (hereafter, ICARA).³⁸ Under ICARA, the United States District Courts are granted concurrent jurisdiction with the state courts over petitions filed under the Child Abduction Convention.³⁹ In these cases, the petitioner must establish by a preponderance of the evidence that the child has been wrongfully removed or retained within the meaning of the Child Abduction Convention.⁴⁰

Additionally, the respondent has the burden of establishing by clear and convincing evidence that one of the exceptions in the Child Abduction Convention applies.⁴¹ If the petitioner is successful in her claim, under ICARA, "the court must order the child's return to the country of habitual residence unless the respondent demonstrates that one of the narrow exceptions applies."⁴²

1. Article 13 Consent Exception

The Child Abduction Convention specifies that, upon a finding that the removal or retention of a child was wrongful, the child is to be returned to the petitioning parent.⁴³ However, Article 13 of the Child Abduction Convention states that the court is not bound to order the

32. See, e.g., *Walker v. Kitt*, 900 F. Supp. 2d 849, 856 (N.D. Ill. 2012).

33. *Id.*

34. *Id.* at 857.

35. See, e.g., *Poliero v. Centenaro*, No. 09-CV-2682, 2009 WL 2947193, at *9 (E.D.N.Y. Sept. 11, 2009).

36. See *In re D.A.*, No. 14-CV-0586, 2015 WL 2344079, at *6 (E.D.N.Y. May 14, 2015).

37. *Id.*

38. International Child Abduction Remedies Act, 42 U.S.C. § 11601 (1988).

39. *Id.*

40. *Id.*

41. International Child Abduction Remedies Act, 42 U.S.C. § 11603 (1988).

42. *Poliero v. Centenaro*, No. 09-CV-2682, 2009 WL 2947193, at *9 (E.D.N.Y. Sept. 11, 2009).

43. E.g., *Moreno v. Pena*, No. 15-CV-2372 (JPO), 2015 WL 4992005, at *6 (S.D.N.Y. Aug. 19, 2015).

return of the child if the respondent can prove that the petitioner “was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention.”⁴⁴ The respondent may prove this through the petitioner’s conduct prior to the contested removal or retention.⁴⁵ Additionally, it is important to consider the petitioner’s subjective intent when evaluating the alleged consent.⁴⁶ The respondent must prove that the petitioner had the subjective intent to allow the permanent removal of the child.⁴⁷

a. D.A. Case

The first of two main issues here was whether respondent had satisfied the consent exception of Article 13 of the Child Abduction Convention, giving the court discretion in deciding whether to allow D.A. to remain in the United States.⁴⁸ Petitioner claimed that he was informed of Respondents plans to move only following a phone conversation after she and D.A. had left Greece.⁴⁹ This claim was contradicted by the evidence regarding Respondent’s “substantial preparations for the move, such as selling numerous pieces of furniture and other household items, and the packing of numerous boxes over a long period of time.”⁵⁰

Judge Chen considered *In Re Kim* to determine that credible witness testimony could be used to prove by a preponderance of the evidence that the petitioner consented to the child’s move.⁵¹ In that case, the court held that the respondent met his burden of showing by a preponderance of the evidence that the petitioner consented to their child’s removal to the United States through her statements in an email expressing passive regret for allowing her child to remain in the United States and her subjective behavior regarding the child.⁵²

The testimony here included several conversations between Petitioner and Respondent, during which he gave her direct permission to go to the United States.⁵³ Likewise, Petitioner had conversations with D.A. about the United States and once again consented to D.A.’s relocation.⁵⁴ Petitioner was found to have given consent on several occasions mentioned in the tes-

44. Hague Convention on the Civil Aspects of International Child Abduction, art. 13(a), Oct. 25, 1980. T.I.A.S. No. 11,670. 1343 U.N.T.S. 89.

45. *E.g., Moreno*, 2015 WL 4992005, at *6.

46. *See In re Sol Iris Kim*, 404 F. Supp. 2d 495, 516 (S.D.N.Y. 2005).

47. *Id.*

48. *See In re D.A.*, No.14-CV0586, 2015 WL 2344079, at *6 (E.D.N.Y. May 14, 2015).

49. *Id.*

50. In this case, D.A.’s mother packed up their household items and personal belongings and had them shipped to the United States. Additionally, she sold some of the furniture for the expenses of the move. *Id.* at *6.

51. *See Sol Iris Kim*, 404 F. Supp. 2d 495, 519.

52. In this case, the court held that the email between Petitioner and Respondent “powerfully demonstrate[d] that Petitioner had, in fact, consented to leave Sol Iris in New York with Petitioner.” The court reasoned that, if she had not consented, the Petitioner’s expression of regret about parting with her daughter “would not make sense.” *Id.*

53. *See D.A.*, 2015 WL 2344079, at *2.

54. *Id.*

timony of Respondent, Toula, and D.A., as well as in the audiotape recording of Petitioner evidencing his permission to D.A.'s relocation to the United States.⁵⁵

2. Article 13 Age and Maturity Exception

Article 13 of the Child Abduction Convention states, “the judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.”⁵⁶ The age and maturity exception is discretionary, because of the possible risk of an alleged abductor’s influence on a child, especially one of young age.⁵⁷ The court must determine whether such influence is present in a case and must be careful not to give weight to the child’s opinion should such influence be recognized.⁵⁸ However, should a child be deemed of proper age and maturity, the court may “refuse repatriation solely on the basis of a considered objection to returning by [the] sufficiently mature child.”⁵⁹ Additionally, the precise age at which a child is deemed to be “sufficiently mature” is considered on a case-by-case basis.⁶⁰

a. D.A. Case

The court next addressed the issue of whether D.A. was of proper age and maturity for the corresponding Article 13 exception to apply. The court conducted an in-camera interview with D.A. in the presence of Petitioner’s and Respondent’s counsel.⁶¹ The court observed that D.A. had an impressive understanding of the court proceedings, was serious about his education, and was able to engage with the court comfortably in the manner of a mature adolescent.⁶² The court also observed that, while D.A. was close with his mother and harbored some negative feelings towards his father, these relationships and feelings did not cloud his judgment or unduly influence his decision to remain in the United States.⁶³

While the court does not seem to rely heavily on case law to determine the requirements for a child to be deemed of proper age and maturity, the New York courts have indicated certain instances where children have been held not to satisfy this exception. In *Poliero v. Centenaro*, the court was forced to rule that the age and maturity exception did not apply in a case where the children of Respondent had successfully adjusted to life in the United States.⁶⁴ In this case, the court held that while the children had expressed their desire to stay and had

55. During the audiotaped conversation between Petitioner and Respondent, Petitioner stated “I said to you that you should go.” *Id.* at *6.

56. Hague Convention on the Civil Aspects of International Child Abduction, art. 13, Oct. 25, 1980. T.I.A.S. No. 11,670. 1343 U.N.T.S. 89.

57. *E.g.*, Walker v. Kitt, 900 F. Supp. 2d 849, 859.

58. *Id.*

59. *Poliero v. Centenaro*, No. 09-CV-2682, 2009 WL 2947193, at *10 (E.D.N.Y. Sept. 11, 2009).

60. *Id.*

61. *See In re D.A.*, No.14-CV0586, 2015 WL 2344079, at *4 (E.D.N.Y. May 14, 2015).

62. *Id.*

63. *Id.*

64. *See Poliero*, 2009 WL 297193, at *21.

adjusted well to their new lives in New York, it could not find that returning the children to Italy “would be so tantamount to taking the child out of the family and social environment in which its life has developed.”⁶⁵ Here, removing D.A. from the United States would take him away from his closest family members and friends.⁶⁶ Additionally, unlike the children in *Poliero*, who spoke and learned in Italian, D.A. struggled to learn Greek, and therefore could not effectively learn in the Greek schools if he were returned to Greece.⁶⁷ D.A.’s reluctance to return was not grounded only in concerns for his social well-being, but in his educational and mental well-being as well.⁶⁸

Overall, the court determined that D.A.’s reasons for wanting to stay in the United States included: (1) superior education opportunities, especially in the science and computer science; (2) his ability to participate in extracurricular activities; (3) proximity to relatives with whom he was evidently close; and (4) better friendships.⁶⁹ These reasons were held to be sincere and rational and were supported by observational testimony of friends and family, who stated that D.A.’s life had drastically improved since his arrival in the United States.⁷⁰ Accordingly, the court decided to refuse to order D.A.’s return to Greece.⁷¹

V. Conclusion

In this case, Respondent clearly established that Petitioner had given his permission for D.A.’s move to the United States. Therefore, the court was not compelled by the Child Abduction Convention to send D.A. to Greece. The consent exception does not allow parents to rescind retroactively their permission in order to demand the return of their children from a foreign country. It provides a safe-guard for parents who move with their children with the permission of the other parent. The court made it clear that Petitioner could not demand the return of D.A. simply because he regretted allowing D.A. to move to the United States.

Additionally, while this case does not create a precise rule for the exact qualifications under the age and maturity exception of Article 13, it seems that the court does indicate that a child must express something more than simply a desire to remain in the new country. The court emphasized D.A.’s inability to learn in Greece and the educational detriment that removal would cause him. Likewise, the anxiety D.A. was likely to experience in Greece would have compromised his health. It seems as though the reasoning for allowing a child, such as D.A., to remain in the United States must be well-founded and have a potentially drastic and detrimental effect on the child’s growth and well-being. It is important that the development of a child be considered during this evaluation process, because the decisions implemented by the court could have a great effect on the rest of the child’s life. Additionally, these reasons for denying removal must be articulated by the child in the way an adult would express similar concerns.

65. *Id.*

66. *See D.A.*, 2015 WL 2344079, at *4.

67. *Id.*

68. *Id.*

69. *Id.* at *6.

70. *Id.*

71. *Id.*

This is what D.A. did here and therefore it was proper to deny his father's demand for his return to Greece.

The court properly held that D.A. should not be removed from the United States based upon the detrimental effect that the removal would have on D.A.'s quality of life. It is important that laws and statutes that are created for the preservation of a child's well-being are implemented in a way that accomplishes that purpose. It would be unjust to remove a child in D.A.'s situation simply because this is the mandated statutory remedy. Each case must be evaluated on a case-by-case basis along with the applicable exceptions to determine whether a child's removal will result in the best possible long-term outcome for the child. As in this case, when it is likely that removal will have an irreversible effect on the child's future, the removal should be denied to preserve the child's right to a happy and successful life.

Krista Schluock

Mees v. Buiter

793 F.3d 291 (2d Cir 2015)

The United States Court of Appeals for the Second Circuit held that the United States District Court for the Southern District of New York erred in its decision not to grant appellant's application to compel discovery to bring suit against the appellee in a foreign jurisdiction pursuant to 28 U.S.C. § 1782, because the appellant is not required to show that the discovery would be necessary for success or in commencing the foreign litigation to satisfy the statute's "for use" requirement.

I. Holding

In the recent case, *Mees v. Buiter*,¹ Judge Lynch, of the United States Court of Appeals for the Second Circuit, concluded that the decision of the United States District Court for the Southern District of New York was erroneous for not granting Mees's application for discovery pursuant to 28 U.S.C. § 1782.² The District Court reasoned that Mees's application should have been denied on the ground that it did not meet the "for use" requirement of § 1782, because it was not necessary for Mees to draft an adequate complaint in the Netherlands.³ Judge Lynch disagreed with the reasoning of the District Court, because an applicant can satisfy the "for use" requirement even if the discovery is not necessary for the applicant to succeed in the foreign jurisdiction.⁴ Furthermore, Judge Lynch determined that discovery does not need to be necessary for the applicant to commence the litigation in the foreign jurisdiction.⁵ Therefore, the court vacated the judgment of the District Court and remanded the case.⁶

II. Facts and Procedure

According to the complaint, Mees's application arose out of a situation in which Buiter made accusations against her to law enforcement, which caused her to be arrested and charged with five misdemeanor counts of stalking, menacing and harassment in New York.⁷ Buiter alleged that Mees had sent him thousands of emails and attempted to meet him at his residence, despite his requests that she cease contact with him.⁸ Buiter also claimed to fear for his safety, because he received correspondence from Mees about her wishing his "plane falls out of the sky" as well as a picture of dead birds.⁹ The criminal complaint that led to Mees's arrest included the report from a New York City Police Department detective that was similar to

1. *Mees v. Buiter*, 793 F.3d 291 (2d Cir. 2015).

2. *Id.* at 295; *see also* 28 U.S.C. § 1782 (1996).

3. *Mees*, 793 F.3d at 294.

4. *Id.* at 295.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

Buiter's initial report, but also included the accusation of several sexually explicit accusations that were omitted in Buiter's affidavit.¹⁰

On March 10, 2014, Mees accepted an Adjournment in Contemplation of Dismissal in her criminal case, pursuant to which the charges would be dismissed after one year if Mees completed counseling and complied with an order of protection for Buiter and his wife.¹¹

On March 28, 2014, Mees filed a § 1782 application, seeking discovery from Buiter, as part of her Dutch attorneys' investigation of a defamation claim against Buiter in the Netherlands and to prepare for the prosecution of that claim.¹² Because of Buiter's reputation as a prominent business and academic economist, the case and its intimate details were widely reported on in the United States and the Netherlands.¹³ Mees claimed that Buiter's allegations were false and foreseeably passed on to the media and that the reporting on those allegations caused Mees to lose her job teaching economics at New York University, as well as other opportunities, and emotional harm.¹⁴ Mees's application alleged that her contact with Buiter was not one-sided, as it claimed that Mees and Buiter had regularly had romantic encounters, dating back to 2008.¹⁵ To corroborate this allegation, the application included over a dozen emails that were exchanged between Buiter and Mees.¹⁶ The discovery sought would corroborate Mees's claims that she had met with Buiter for over 27 romantic dates.¹⁷

Mees's application also included a statement from her Dutch attorney regarding the procedural law in the Netherlands.¹⁸ According to Mees's Dutch attorney, under Dutch law, the plaintiff has a duty to substantiate a complaint that is particularly demanding, even in the European "fact pleading" system.¹⁹ Furthermore, the plaintiff does not have a right to reply after the defendant has filed a "statement of defense," thereby preventing the plaintiff from supplementing the facts.²⁰ Therefore, Mees's attorney asserted that there was a necessity to assert all of the evidence in the complaint.²¹

Buiter opposed Mees's application by submitting a competing declaration from his Dutch attorney that stated the requirements of Dutch law.²² Contrary to the statement made by

10. *Id.*

11. *Id.*

12. Upon the request of a foreign or international tribunal, or any interested person, the district court may compel a person within that district to cooperate with discovery to be used in a proceeding in a foreign or international tribunal. *E.g.*, 28 U.S.C. § 1782(a) (1996).

13. *See Mees*, 793 F.3d at 295.

14. *See id.*

15. *See id.*

16. *See id.* at 295–96.

17. *See id.* at 296.

18. *See id.*

19. *See id.*

20. *See id.*

21. *See id.*

22. *See id.*

Mees's attorney, Buiter's attorney stated that the Dutch pleading standard is not particularly high.²³ Furthermore, Buiter's attorney disputed Mees's allegation that she required the deposition in order to bring her case, because the threshold evidentiary requirement is limited to what a plaintiff knows prior to bringing the case.²⁴ Thus, Buiter's attorney stated that Mees already had sufficient evidence to satisfy the Dutch threshold requirement.²⁵

On May 6, 2014, the district court held oral argument on the application.²⁶ Mees argued that the purpose of the application was to get the evidence necessary to prove the case in Holland and to plead that case.²⁷ Buiter claimed that Mees had failed to meet two of the statutory requirements for discovery under § 1782.²⁸ First, Buiter argued that Mees's defamation suit did not meet the "within reasonable contemplation" requirement established by the Supreme Court in *Intel Corp. v. Advanced Micro Devices, Inc.*²⁹ Second, Buiter contended that Mees failed the statute's "for use" requirement, because she failed to tie the request for discovery to any actual need to meet the Dutch pleading requirements.³⁰

At the conclusion of the oral argument, the district court rejected Mees's application from the bench.³¹ The district court stated that it denied Mees's application solely on the "for use" requirement, because Mees failed to show that discovery would be required for use in the foreign proceeding.³² The court based its decision on the ability that Mees already had to provide detailed allegations against Buiter, including possession of numerous emails and other materials to corroborate those allegations.³³ The court went on to dismiss the argument made by Mees's Dutch attorney as conclusory and noted that the argument even conceded that the complaint only needed to sum up the evidence.³⁴

Because of the court's conclusion, it did not reach Buiter's argument that a defamation suit was not "within reasonable contemplation" under *Intel*.³⁵ The court addressed some discretion-

23. *See id.*

24. *See id.*

25. *See id.*

26. *See id.*

27. *See id.*

28. *See id.* 28 U.S.C. § 1782(a) allows a district court to grant an order compelling a person found or residing in its district to produce a document or other material "for use" in a proceeding in a foreign or international tribunal, "including criminal investigations conducted before formal accusation." 28 U.S.C. § 1782 (1996); the Supreme Court extended this to proceedings that are within reasonable contemplation. *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 259 (2004).

29. In *Intel*, the Supreme Court interpreted Congress's amendment to clarify that § 1782(a) covered "criminal investigations conducted before formal accusation," as a broadening of the discovery authorized. Therefore, the Supreme Court held that § 1782(a) required only that a proceeding "be within reasonable contemplation." *See Intel*, 542 U.S. at 259.

30. *See id.*

31. *See Mees v. Buiter*, 793 F.3d 291, 296 (2d Cir. 2015).

32. *See id.*

33. *See id.*

34. *See id.* at 297.

35. *See id.*

ary factors introduced by *Intel* and decided that they weighed against granting the application.³⁶ The court found that the application was an attempt by Mees to avoid the foreign proof-gathering restrictions, because the scope of discovery asked for in the application was far broader than Dutch courts allow.³⁷ Taken in the context of the Dutch discovery rules, the discovery that Mees sought through her application would be burdensome and intrusive.³⁸ Furthermore, the district court reasoned that the discovery would contravene U.S. policy, because the request collaterally attacked the pending prosecution in New York.³⁹

The district court denied the application without prejudice, so that it might be re-filed in the Dutch courts.⁴⁰ On May 27, 2014, Mees timely appealed the order and on June 24, 2014, served Buiter and his wife with a summons and complaint for a defamation suit filed in the Netherlands.⁴¹

III. Discussion

A. Applicable Law

The Second Circuit reviewed the district court's interpretation of § 1782 de novo.⁴² A district court has authority to grant an applicant's § 1782 application for discovery to be used in a foreign or international tribunal where (1) the person from whom discovery is sought resides (or is found) in the district of the district court in which the application is made, (2) the discovery is for use in a foreign proceeding before a foreign or international tribunal, and (3) the application is made by a foreign or international tribunal or any interested person.⁴³ Once the statutory requirements are made, a district court may grant a § 1782 application based on its discretion.⁴⁴ The discretion is limited to the two objectives of the statute: providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to U.S. courts.⁴⁵

36. In *Intel*, the Supreme Court determined there were four discretionary factors that a district court could consider when deciding whether to grant a § 1782 application for discovery. The factors are, (1) whether the person from whom the discovery is sought is a participant in the foreign proceeding, in which case the need for § 1782(a) aid is generally not apparent; (2) the nature of the foreign tribunal, the character of the proceedings underway abroad and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance; (3) whether the § 1782(a) application conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States; and (4) whether the request is unduly burdensome or intrusive. See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264–65 (2004).

37. See *Mees*, 793 F.3d at 297.

38. See *id.*

39. See *id.*

40. See *id.*

41. See *id.*

42. See *In re Edelman*, 295 F.3d 171, 175 (2d Cir. 2002).

43. See *Brandi-Dohrn v. IKB Deutsche Industriebank AG*, 673 F.3d 76, 80 (2d Cir. 2012).

44. See *Schmitz v. Bernstein Liebhard & Lifshitz, LLP*, 376 F.3d 79, 83–84 (2d Cir. 2004).

45. See *id.* at 84.

In *Intel*, the Supreme Court identified four additional factors that bear on the decision whether to grant a § 1782 application.⁴⁶ The factors are, (1) whether the person from whom the discovery is sought is a participant in the foreign proceeding, in which case the need for § 1782(a) aid is generally not apparent; (2) the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance; (3) whether the § 1782(a) application conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States; and (4) whether the request is unduly burdensome or intrusive.⁴⁷

B. The “For Use” Requirement

The Second Circuit held that the district court had erred in two ways when it determined that Mees’s application did not meet the “for use” requirement of § 1782.⁴⁸

First, the discovery sought pursuant to § 1782 does not have to be necessary for the applicant to prevail in the foreign litigation in order for the “for use” statutory requirement to be satisfied.⁴⁹ The plain meaning of “for use in a proceeding” indicates that the applicant seeks to gain an advantage in the litigation, not that the success of the litigation hinges on the discovery sought.⁵⁰ The Second Circuit found no requirement of necessity in the statute and declined to read in requirements that were not found within the text.⁵¹ Furthermore, a necessity requirement would be contradictory to the aims of § 1782.⁵² The court reasoned that such a requirement would require a painstaking analysis of the evidence that the applicant already has, as well as the amount of evidence that would be required to prevail in a foreign litigation.⁵³ Such a determination, according to the court, would require an interpretation and analysis of foreign law, which would be “fraught with danger.”⁵⁴ Furthermore, speculative analyses of legal territories unfamiliar to federal judges would go against the two objectives of § 1782.⁵⁵ The court determined that, pursuant to § 1782, an applicant can seek discovery that would present the applicant with evidence to increase her chances of success.⁵⁶

46. See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264–65 (2004).

47. See *id.*

48. See *Mees v. Buiter*, 793 F.3d 291, 297 (2d Cir. 2015).

49. See *id.*

50. See XIX OXFORD ENGLISH DICTIONARY 354 (2d ed. 1989) (defining “use” as “to employ . . . in some function or capacity, esp. for an advantageous end”); see also WEBSTER’S TENTH NEW COLLEGIATE DICTIONARY 1301 (1998) (defining “use” as “the act or practice of employing something”).

51. See *Mees*, 793 F.3d at 297.

52. See *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1099 (2d Cir. 1995).

53. See *Mees*, 793 F.3d at 297.

54. See *Brandi-Dohrn v. IKB Deutsche Industriebank AG*, 673 F.3d 76, 82 (2d Cir. 2012); *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 263 (2004).

55. See *Euromepa*, 51 F.3d at 1099–1100. The Second Circuit describes the “twin-aims” of § 1782(a) as a balance of “the policy of not infringing upon a foreign nation’s procedural rules with the policy of promoting the efficient resolution of [a] dispute in a foreign tribunal.” *Id.* at 1103.

56. See *Mees*, 793 F.3d at 299.

Second, the court determined that the discovery does not need to be used at all in the drafting of the complaint to satisfy the “for use” requirement.⁵⁷ The Second Circuit disagreed with the district court’s reasoning that discovery was not necessary to plead Mees’s claim, stating that such a determination would establish that any subsequent use of the discovery would not satisfy the “for use” requirement.⁵⁸ The Second Circuit stated that the word “proceeding” in the statute implies the whole proceeding, not just its initiation.⁵⁹ In a usual § 1782 application, the foreign proceeding has already commenced and the applicant is seeking discovery to prove her claims, not to plead them.⁶⁰

The Second Circuit dismissed Buiters’s argument that, where there is not a foreign proceeding pending, an applicant can meet the “for use” requirement only by showing she could not commence a foreign proceeding without the discovery sought.⁶¹ The court found that such a rule would be contradictory to the Supreme Court’s ruling in *Intel*, because the Supreme Court required only that the discovery would eventually be used in a proceeding.⁶² To the court, eventual use in a proceeding means that the discovery can be used at any part of a proceeding and to require the applicant to wait until the stage of the litigation in which the discovery is needed to apply would be contradictory to the statutory objective to provide efficient means of assistance to the applicant.⁶³

The Second Circuit went on to reject Buiters’s attempt to distinguish *Intel* on the basis that *Intel* was about an investigation conducted by an international tribunal, whereas Mees is an individual trying to assess the strength of her claim.⁶⁴ The court reasoned that the statute provides for discovery for foreign and international tribunals as well as for private individuals, but does not provide separate standards for evaluating the two.⁶⁵ Furthermore, in *Intel*, the party seeking discovery was a private corporation that would turn the evidence over to the international tribunal and the Second Circuit has previously applied *Intel* to suits between private parties without Buiters’s distinction.⁶⁶

The Second Circuit concluded that Mees satisfied § 1782’s “for use” requirement, by showing that materials sought by discovery would be used at some point in a foreign proceeding that was within reasonable contemplation at the time of the proceedings in the district court.⁶⁷ The Second Circuit noted that both the Fifth and Eleventh had reached the same con-

57. *See id.*

58. *See id.*

59. *See id.*

60. *See id.*; *see also* Brandi-Dohrn v. IKB Deutsche Industriebank AG, 673 F.3d 76, 77 (2d Cir. 2012); *Euromepa*, 51 F.3d at 1097.

61. *See Mees*, 793 F.3d at 299.

62. *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 259 (2004).

63. *See Brandi-Dohrn*, 673 F.3d at 81.

64. *See Mees*, 793 F.3d at 300.

65. *See id.*

66. *See Brandi-Dohrn*, 673 F.3d at 82; *Schmitz v. Bernstein Liebhard & Lifshitz, LLP*, 376 F.3d 79, 84–85 (2d Cir. 2004).

67. *See Mees*, 793 F.3d at 301.

clusion.⁶⁸ However, the court also noted that, although Mees satisfied the statutory requirements, her application could be denied by a district court because of one of the discretionary factors.⁶⁹

C. Discretionary Factors

Although the district court found some discretionary factors to be in favor of denying Mees's application, the Second Circuit addressed the issue of discretionary factors, because the basis for the district court's denial of the application was Mees's failure to meet the statutory requirements.⁷⁰ The Second Circuit refused to determine the discretionary factors for this application.⁷¹ The court determined that it was for the district court to decide whether the discretionary factors are grounds for granting or dismissing Mees's application, because the circumstances of Mees's foreign litigation had changed.⁷²

Although the appellate court refused to make a discretionary determination about whether to grant Mees's application, it did review the district court's discretionary reasoning.⁷³ The court disagreed with the determination that the discovery would be burdensome and intrusive based on the scope of discovery that would be available to the parties in Dutch courts.⁷⁴ Instead of using the availability of discovery in foreign courts, federal courts should rely on Rule 26 of the Federal Rules of Civil Procedure to determine whether discovery would be burdensome or intrusive.⁷⁵ Also, the Second Circuit had previously ruled that there was a preference for district courts to order a "closely tailored" discovery order rather than outright denying the application.⁷⁶

The court likewise rejected the district court's reasoning that Mees's application was an attempt to circumvent the foreign proof-gathering restrictions, because it once again based its determination on foreign discovery rules.⁷⁷ The Second Circuit acknowledged that district courts are allowed to take foreign discovery rules into consideration, but are not permitted to deny an application based on their observations of the foreign law.⁷⁸

68. See *Bravo Express Corp. v. Total Petrochemicals & Refining USA, Inc.*, 2015 WL 3466085 at *2–3 (5th Cir. June 2, 2015); *Consortio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 747 F.3d 1262, 1270 (11th Cir. 2014).

69. See *Brandi-Dobrn*, 673 F.3d at 80–81.

70. See *Mees*, 793 F.3d at 301.

71. See *id.*

72. See *id.* at 301–02.

73. See *id.* at 302.

74. See *id.*

75. See *In re Edelman*, 295 F.3d 171, 179 (2d Cir. 2002).

76. See *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1101 (2d Cir. 1995); *Malev Hungarian Airlines v. United Techs. Int'l Inc.*, 964 F.2d 97, 102 (2d Cir. 1992).

77. See *Mees*, 793 F.3d at 303.

78. See *Foden v. Gianoli Aldunate*, 3 F.3d 54, 60 (2d Cir. 1993); *Metallgesellschaft AG v. Hodapp*, 121 F.3d 77, 79 (2d Cir. 1997).

Lastly, the Second Circuit addressed the district court's dismissal of the application without prejudice.⁷⁹ The court found that it was correct, because it allowed Mees to reapply when her proceeding in the Netherlands started; however, it was incorrect, because it could be read to impose a necessity standard or an exhaustion requirement.⁸⁰ The statement could be read to require Mees to reapply only after failing to get discovery in the Dutch courts, a requirement that had previously been rejected by the Second Circuit.⁸¹ Also, the court should not have to wait for the foreign court to express a need for the evidence, because § 1782 was drafted to allow interested private parties to apply for discovery, not only foreign and international tribunals.⁸²

IV. Conclusion

The United States Court of Appeals, Second Circuit, held that the United States District Court for the Southern District of New York erred when it reasoned that Mees had failed to meet the statutory "for use" requirement. Mees had satisfied the "for use" requirement by seeking to gain evidence that she sought to use to strengthen her case in a foreign proceeding that was within reasonable contemplation of being filed at the time that Mees filed her application for discovery pursuant to § 1782. As a result of the Second Circuit's ruling, foreign entities and interested persons will be able to satisfy § 1782's "for use" requirement even when there is no pending foreign litigation, as long as it is foreseeable that such litigation will be initiated in the near future. The broadening of the "for use" requirement from the district court's interpretation will likely result in parties seeking to litigate in foreign jurisdictions to seek discovery under § 1782, either to avoid foreign discovery restrictions or in order to provide a sufficient factual basis to initiate a proceeding in a foreign jurisdiction. However, although it may be easier for a party to satisfy the "for use" requirement, it does not necessarily follow that more applications will be granted by district courts, because of the discretionary factors created by the Supreme Court in *Intel*. Here, the Second Circuit remanded Mees's application to the district court for an examination of the discretionary factors.

Dave J. Gallacher

79. See *Mees*, 793 F.3d at 303.

80. See *id.*

81. See *Metallgesellschaft*, 121 F.3d at 79.

82. See *Mees*, 793 F.3d at 303–04.

Moreno v. Basilio Pena

2015 WL 4992005 (S.D.N.Y. Aug. 19, 2015)

The United States District Court for the Southern District of New York denied the petition brought by the plaintiff for the return of her child to the Dominican Republic pursuant to the Hague Convention on the Civil Aspects of International Child Abduction. The court held that the plaintiff failed to establish a *prima facie* case that her child had been wrongfully removed to or retained in the United States by the defendant. In the alternative the court held that the defendant had established the defense of consent or acquiescence under Article 13 of the Convention.

I. Holding

In the recent case, *Moreno v. Basilio Pena*,¹ Judge Oetken of the United States District Court for the Southern District of New York concluded that Moreno failed to demonstrate by a preponderance of evidence the second element in a *prima facie* showing under the Child-Abduction Convention that Basilio breached Moreno's custody rights under the law of the Dominican Republic, by wrongfully retaining WKBM in the United States.² Further, the court held that, because Moreno's testimony concerning the parties' agreements about WKBM's residence was not credible, she failed to establish by a preponderance of the evidence that Basilio retained WKBM in violation of Moreno's custodial rights.³ In the alternative, the court found that Basilio had established the defense of consent or acquiescence by a preponderance of the evidence under Article 13 of the Convention, all of which served as a basis for the court to deny Moreno's petition.⁴

II. Facts and Procedure

Both parties are nationals of the Dominican Republic and their daughter WKBM was born on August 12, 2009 in the Dominican Republic, which was her habitual residence until April 2014.⁵ The parties weren't married or in any formal relationship and there was no evidence of any court decision within the Dominican Republic regarding custody over WKBM.⁶ Beyond these basic points each party had conflicting accounts about the whereabouts of WKBM as well as their agreements concerning her custody from 2013 to the present.⁷

1. *Moreno v. Basilio Pena*, No. 15-CV-2372 JPO, 2015 WL 4992005, at *11 (S.D.N.Y. Aug. 19, 2015).

2. *Id.* at *7.

3. *Id.* at *9.

4. *Id.* at *11.

5. *Id.* at *1.

6. *Id.*

7. *Id.*

Moreno testified that WKBM lived with her in the Dominican Republic at all times from her birth until mid-2013 and that WKBM had never lived with Basilio.⁸ WKBM's first visit with Basilio occurred in the later half of the year in 2013 in New York for three months.⁹ Moreno agreed to a second 15-day visit; however, the written authorization permitting WKBM to travel outside the country did not include that limitation.¹⁰ On this second trip, WKBM brought only a few suitcases and all of her other belongings remained in the Dominican Republic.¹¹ A significant portion of Moreno's testimony centered on WKBM's status as a permanent resident of the United States, namely how it was obtained, and Moreno's degree of knowledge and involvement in the process.¹² Moreno denied ever agreeing that WKBM would come to reside permanently in the United States.¹³ However, in subsequent testimony Moreno indicated that she had in fact accompanied WKBM to the American Consulate in the Dominican Republic, provided her birth certificate, passport, medical examination results and address information prior to WKBM's first visit to the United States.¹⁴ Upon WKBM's return to the Dominican Republic after her first trip in 2013, she had a permanent resident card, which Moreno held for her, although Moreno maintained that she did not know what a permanent resident card was.¹⁵ Further, although Moreno initially claimed not to understand the reason behind WKBM's travel every six months back and forth between the Dominican Republic and the United States, she did subsequently acknowledge that Basilio had advised her that if WKBM did not make these visits she would lose her permanent card.¹⁶

Basilio, on the other hand, testified that he applied for permanent residency on WKBM's behalf in February 2013, with Moreno's consent.¹⁷ Basilio accompanied WKBM on her return to the Dominican Republic after her first trip to the United States in 2013.¹⁸ During that trip, he asserted that Moreno had agreed with no objections that WKBM would return to the United States within six months so that WKBM would not lose her permanent resident status.¹⁹ Moreover, Basilio alleges that by WKBM's second trip to the United States in April 2014, he and Moreno had agreed that WKBM would live with him permanently in the United States so she could attend school, and would return to the Dominican Republic during her vacations.²⁰ Basilio conceded that he had nothing in writing to support this claim that Moreno agreed that WKBM would live with him permanently in the United States.²¹ Basilio offered into evidence the travel authorization signed by both parties for WKBM's trip in April 2014,

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at *2.

13. *Id.* at *1.

14. *Id.* at *2.

15. *Id.*

16. *Id.* at *2-3.

17. *Id.* at 3.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

which did not specify an end date or in any way limit the scope of WKBM's travel.²² A copy of WKBM's U.S. permanent resident card, which went into effect on July 30, 2013, was also admitted into evidence.²³

Moreno initiated proceedings seeking WKBM's return with authorities in the Dominican Republic in July 2014.²⁴ In October 2014, the U.S. State Department contacted Basilio by letter, stating that Moreno had sought WKBM's return to the Dominican Republic but there is no record of any response from Bastilio.²⁵

Moreno subsequently commenced this action under the Child-Abduction Convention on March 31, 2015.²⁶ Shortly thereafter, the Petition was served on Basilio and the Court received testimony and other evidence relevant to the Petition on April 27, 2015.²⁷

III. Legal Standard

Both the United States of America and the Dominican Republic are contracting parties under the Hague Conference on Private International Law adopted by the Convention on the Civil Aspects of International Child Abduction.²⁸ The International Child Abduction Remedies Act implements this Convention in the United States.²⁹

The Hague Convention "generally requires courts in the United States to order children returned to their countries of habitual residence, if the courts find that the children have been wrongfully removed to or retained in the United States."³⁰ This remedy of repatriation under the Convention is designed to preserve the status quo in the child's country of habitual residence, thus deterring parents from crossing international borders to seek a more sympathetic court.³¹ In fact the court is restricted exclusively to deciding only on the merits of the abduction claim, with no authority to determine the underlying custody dispute.³²

22. *Id.* at *4.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at *5.

27. *Id.*

28. Art. 1, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89. This convention was adopted "To address the problem of international child abductions during domestic disputes." *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1228 200 (2014) (citation and internal quotation marks omitted).

29. 22 U.S.C. § 9001 *et seq.* ("ICARA"). See *Ermini v. Vittori*, 758 F.3d 153, 156 (2d Cir. 2014).

30. *Chafin v. Chafin*, 133 S. Ct. 1017, 1021 (2013); see also *Abbott v. Abbott*, 560 U.S. 1, 9 (2010) ("When a child under the age of 16 has been wrongfully removed or retained, the country to which the child has been brought must 'order the return of the child forthwith,' unless certain exceptions apply." (quoting Child-Abduction Convention arts. 4, 12)).

31. *Souratgar v. Lee*, 720 F.3d 96, 102 (2d Cir. 2013) (internal quotation marks omitted).

32. *Mero v. Prieto*, 557 F. Supp. 2d 357, 374 (E.D.N.Y. 2008) (citing *Blondin v. Dubois*, 189 F.3d 240, 245–46 (2d Cir. 2001)).

The removal or retention of a child under 16 years of age is wrongful for purposes of the Convention where:

[1] It is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

[2] At the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.³³

A. Prima Facie Case

To establish a prima facie case for the return of a child under the Hague Convention, the petitioner must demonstrate three elements: “(1) the child was habitually resident in one State and has been removed to or retained in a different State; (2) the removal or retention was in breach of the petitioner’s custody rights under the law of the State of habitual residence; and (3) the petitioner was exercising those rights at the time of the removal or retention.”³⁴ The prima facie case must be established by a preponderance of the evidence.³⁵

B. Possible Defenses:

If a parent establishes that the removal or retention was wrongful, the child is to be returned unless the defendant establishes one of [several] defenses.”³⁶ The defendant is required to provide clear and convincing evidence that one of the exceptions set forth in Article 13(b) or Article 20 of the Convention applies; and a preponderance of the evidence that any other exception set forth in Article 12 or Article 13 of the Convention applies.³⁷

33. *Moreno v. Basilio Pena*, No. 15-CV-2372 JPO, 2015 WL 4992005, at *6 (S.D.N.Y. Aug. 19, 2015) (citing to *Ermini*, 758 F.3d at 161 (quoting Child-Abduction Convention art. 3) (brackets in *Ermini*)).

34. *Id.*; see *Hofmann v. Sender*, 716 F.3d 282, 291 (2d Cir.2013) (quoting *Gitter v. Gitter*, 396 F.3d 124, 130–31 (2d Cir. 2005)) (internal quotation marks omitted).

35. 22 U.S.C. § 9003(e)(1)(A).

36. *Ermini*, 758 F.3d at 161. The Child-Abduction Convention under art. 12 outlines a one-year period from the date of wrongful removal or retention within which the petitioner must bring an action for removal. However, the judicial or administrative authority is not required to order the return of the child if the defendant can demonstrate that the child is settled in its new environment. Moreover, in Article 13, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body that opposes its return establishes that -

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

37. 22 U.S.C.S. § 9003 (e)(2)(A)–(B).

IV. Discussion

The court held that the petitioner was able to establish much of the prima facie case under the Child-Abduction Convention, because there were several uncontested elements, namely, that the Convention applied to this dispute, WKBM was under 16 years old, there was a stipulation from the parties that she was a habitual resident of the Dominican Republic prior to April 2014, and the United States and the Dominican Republic were contracting parties under the Convention.³⁸ As to the first element, the parties both stipulated that WKBM was a habitual resident of the Dominican Republic and she had been retained by Basilio in the United States.³⁹ Moreno also clearly established that she actually exercised her custody rights over WKBM prior to WKBM being retained by Basilio in the United States, thus satisfying the third element under the Convention.⁴⁰ The undisputed evidence demonstrated that from WKBM's birth until April 2014, she was under the exclusive care of Moreno, except for the single prior trip she made to visit Basilio in the United States in 2013.⁴¹

However, the court concluded that Moreno failed to establish the second element in the prima facie case for wrongful removal or retention by a preponderance of the evidence.⁴² This element required Moreno to demonstrate that Basilio breached Moreno's custody rights under the law of the Dominican Republic by wrongfully retaining WKBM in the United States.⁴³ Under the Child-Abduction Convention, a parent's "rights of custody" is defined as "including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence."⁴⁴ In fact, "[T]he Convention's broad definition of rights of custody is not constrained to traditional notions of physical custody. Instead, the Convention recognizes the increasingly common exercise of joint legal custody, in which one parent cares for the child while the other has joint decision-making authority concerning the child's welfare."⁴⁵ The Convention looks to the law of the child's country of habitual residence to determine rights of custody.⁴⁶

38. *Moreno*, 2015 WL 4992005, at *6.

39. *Id.*

40. *Id.*, see also *Olguin v. Cruz Santana*, No. 03 Civ. 6299 (JG), 2004 WL 1752444, at *4 (E.D.N.Y. Aug. 5, 2004) (quoting Hague International Child Abduction Convention: Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,507 (Mar. 26, 1986)) (the Department of State noted in its analysis of the Hague Convention that "[v]ery little is required of the applicant in support of the allegation that custody rights have actually been or would have been exercised. The applicant need only provide some preliminary evidence that he or she actually exercised custody of the child, for instance, took physical care of the child.").

41. *Moreno*, 2015 WL 4992005, at *6.

42. *Id.* at *7.

43. See *Hofmann v. Sender*, 716 F.3d 282, 291 (2d Cir. 2013).

44. *Ozaltin v. Ozaltin*, 708 F.3d 355, 366 (2d Cir. 2013) (quoting Child-Abduction Convention art. 5) (brackets omitted).

45. *Id.* at 367 (citing *Abbott v. Abbott*, 560 U.S. 1, 12 (2010)) (internal citation and quotation marks omitted).

46. *Moreno*, 2015 WL 4992005, at *7.

The court held that parental authority under Article 67 of the Dominican Republic's Code of the Minor invested both parents with "equal rights over their children."⁴⁷ However, the court also found that, under the law of the Dominican Republic, Moreno possessed a separate *ne exeat* right concerning WKBM's removal from the Dominican Republic.^{48,49} But, because Moreno explicitly consented to WKBM's departure from the country to visit Basilio in New York by signing the travel authorization, the court found that this might preclude Moreno from establishing a violation of a *ne exeat* right under Dominican law.⁵⁰ However, even when a parent had consented to removal, the *retention* of the child beyond "certain conditions or circumstances" agreed upon by the parents may be wrongful.⁵¹ Despite Moreno's contention that Basilio wrongfully detained WKBM in the United States beyond the scope of her consent for a 15-day vacation, the court did not find her testimony to be credible and found that Moreno had not established by a preponderance of the evidence that Basilio retained WKBM in violation of Moreno's custodial rights.^{52,53} Moreover, the court did not address this question:

47. *Id.* Parental authority under Article 67 of the Dominican Republic's Code of the Minor "is the set of rights and duties that belong equally to the father and mother, in relation to the sons and daughters who have not attained [the] age of majority." Furthermore, "[w]hen both parents have parental authority and none of the causes established [i]n Article 72" of the Code of the Minor—that is, the majority, emancipation, or death of the child, or the termination of parental authority by a court order—both parents "have equal rights over their children."

48. *Id.* at *8.

49. In *Abbott*, the Supreme Court held that a *ne exeat* right—that is, "the authority to consent before the other parent may take the child to another country"—also qualified as a "right of custody" that is cognizable under the treaty. 560 U.S. at 5, 10. Thus, where a removal or retention "was in violation of the petitioner's custody rights-[including] a *ne exeat* right," it is wrongful. *Duran v. Beaumont*, 622 F.3d 97, 98 (2d Cir. 2010) (per curiam). Because WKBM habitually resided in the Dominican Republic, the court looked to Dominican law and found that Moreno held a *ne exeat* right. Under the Code of the Minor of the Dominican Republic, a parent may leave the country with his child only if he has the consent of the child's other parent. *Moreno*, 2015 WL 4992005, at *8.

50. *Moreno*, 2015 WL 4992005, at *8.

51. *Baxter v. Baxter*, 423 F.3d 363, 370 (3d Cir.2005).

52. *Moreno*, 2015 WL 4992005, at *8.

53. To analyze this issue, the court examined the evidence of the parties' agreement, including their testimony and other circumstantial evidence. Because the court was confronted with inconsistent versions of the key facts, and there was little in the way of evidence beyond the parties' testimony, the decision of the Court relied "largely on the Court's assessment of the credibility of the witnesses." *In re Kim*, 404 F. Supp. 2d 495, 520 (S.D.N.Y. 2005). The court examined four pieces of evidence in coming to this conclusion that Moreno's testimony was not credible. Namely, the travel authorization provided no support for Moreno's assertion that the visit was limited to 15 days, and by the time of her testimony, she no longer asserted that the written authorization provided the 15-day limitation and admitted that there was only a "verbal agreement" concerning the length of travel. *See Moreno*, 2015 WL 4992005, at *9. The next factor was the permanent resident card. The court held that WKBM's green card provided persuasive evidence supporting Basilio's version of the parents' agreement and discredited Moreno's testimony that she objected to and was unaware of WKBM's U.S. permanent resident status throughout the relevant period. *Id.* The fact that WKBM travelled with very few of her possessions was also examined by the court, which held that the tendency of the evidence to indicate the non-permanent nature of WKBM's April 2014 travel to the United States was somewhat ambiguous in light of the fact that Basilio and his relatives purchased her clothing and other items upon her arrival in New York. *Id.* at 10. Finally, Moreno's contention that her permission for WKBM to stay in the United States was conditioned on Basilio's agreement to have her spend vacations in the Dominican Republic and this condition was not fulfilled, was accorded little weight by the court, which felt, because the condition appeared to be untethered to any particular timeframe, it was difficult, if not impossible, to determine whether Basilio had violated it. *Id.*

because it held that joint custody provided a separate source of custodial rights in this case, and the existence of Moreno's *ne exeat* right against unlawful retention was not dispositive.⁵⁴

Alternatively, the court also held that Basilio had established the defense of consent or acquiescence by a preponderance of the evidence.⁵⁵ Under Article 13 of the Convention, a court is "not bound to order the return of the child" if the respondent establishes that "the person ... having the care of the person of the child ... had consented to or subsequently acquiesced in the removal or retention."⁵⁶ Consent and acquiescence are analytically distinct defenses to return under the Convention.⁵⁷ The court explained that the consent defense involved the petitioner's conduct prior to the contested removal or retention, while acquiescence addressed whether the petitioner subsequently agreed to or accepted the removal or retention.⁵⁸ Moreover, the key to the consent inquiry is the petitioner's subjective intent, including the nature and scope of the alleged consent.⁵⁹

As such, the facts that precluded from showing wrongful removal also established Basilio's consent defense.⁶⁰ The court credited Basilio's testimony that he and Moreno agreed prior to the April 2014 trip that WKBM would come to live with Basilio indefinitely, so even if Moreno established a *prima facie* case under the Convention, her consent to WKBM's removal from the Dominican Republic and her retention in the United States would serve as a basis for the court to deny her petition.⁶¹

V. Conclusion

Moreno did establish a *prima facie* case for wrongful retention of WKBM under the Child-Abduction Convention. There was a preponderance of evidence to demonstrate that all three elements under the Convention were in fact satisfied, even the contested second element that WKBM's retention in the United States was in breach of Moreno's custody rights under Dominican Republic law. The decision in this case appeared to turn exclusively on the credibility that the court attributed to the parties, which was unfortunate given the circumstances of the evidentiary hearings.

The court acknowledged that there were difficulties in translation and a poor telephone connection during a fact-finding hearing, which may have impeded clarity at times. Thus Moreno as the petitioner appeared to have suffered a disproportionate disadvantage arising out of these difficulties. In fact, since Basilio and his counsel were present in the courtroom, and only Moreno's New York counsel was present, it appears that Basilio's testimony may have enjoyed some advantage over Moreno's and was characterized as more credible.

54. *Moreno*, 2015 WL 4992005, at *8.

55. *Id.* at *11.

56. Child-Abduction Convention art. 13(a); *see also* *Mota v. Castillo*, 692 F.3d 108, 117 (2d Cir.2012).

57. *Walker v. Walker*, 701 F.3d 1110, 1122 (7th Cir.2012).

58. *Baxter v. Baxter*, 423 F.3d 363, 371 (3d Cir. 2005).

59. *In re Kim*, 404 F. Supp. 2d 495, 516 (S.D.N.Y. 2005).

60. *Moreno v. Basilio Pena*, No. 15-CV-2372 JPO, 2015 WL 4992005, at *11 (S.D.N.Y. Aug. 19, 2015).

61. *See Kim*, 404 F. Supp. 2d at 520–21.

Basilio's submission of the signed travel authorization as well as WKBM's permanent resident card adequately supported his assertion that Moreno consented to WKBM's removal from the Dominican Republic to the United States. However, this same evidence was not sufficient to support his contention that his retention of WKBM in the United States was not wrongful. Although Moreno did not include any language that clearly limited WKBM's visit to the United States in April 2014 to fifteen days within the travel authorization that she signed, the court did not adequately demonstrate that the absence of such language was dispositive. Further, the court did not adequately consider the fact that Morena raised objections with Basilio and filed her first petition for the return of WKBM less than three months after her alleged permanent move, and did not allow a considerable length of time to elapse. Similarly, the court also did not appear to deliberate on Basilio's concession that he had nothing in writing from Moreno supporting his claim that Moreno agreed that WKBM would live with Basilio permanently. Moreover, the court appears to have completely discounted Basilio's failure to adhere to his admitted agreement with Morena to allow WKBM to visit the Dominican Republic during vacations.

Finally, the court did not give sufficient weight to the fact that WKBM was less than five years old at the time of the trip in 2014. And even though Moreno may have consented for WKBM to travel to the United States every six months to maintain her permanent resident status, she may have still believed that there would be no permanent move to the United States until WKBM was old enough to make such a decision on her own. In the same vein, the court did not properly account for the fact that Morena sent WKBM with so few of her belongings on what was allegedly a permanent move to the United States.

Therefore, Basilio failed to demonstrate by clear and convincing evidence that Moreno's intent met the standard for finding consent under Article 13(a) of the Convention. This makes it a potentially foreseeable outcome that this case will be reversed upon appeal.

Janelle Aaron

NS United Kaiun Kaisha, Ltd. v. Cogent Fibre Inc.

2015 WL 4881993 (S.D.N.Y. July 14, 2015)

The United States District Court for the Southern District of New York granted the plaintiff's petition for a confirmation of an arbitration award pursuant to 9 U.S.C. §9 and denied the defendant's cross motion to vacate the award under 9 U.S.C. §10, because the arbitration panel was correct in finding that mitigation efforts were reasonable, did not overstep its boundaries by awarding attorney's fees, and did not implement unfair arbitration procedures.

I. Holding

In the recent case *NS United Kaiun Kaisha, Ltd. v. Cogent Fibre Inc.*,¹ District Judge Engelmayer of the United States District Court for the Southern District of New York confirmed NS United Kaiun Kaisha, Ltd.'s (NSU) petition to confirm its arbitration award pursuant to 9 U.S.C. §9² and denied Cogent Fibre Inc.'s (Cogent) cross motion to vacate the order pursuant to 9 U.S.C. §10.³ The court found that the panel correctly addressed the issue of mitigating damages. They reasoned that NSU acted reasonably with regards to mitigation efforts in the first period of time analyzed, October 16, 2011 to December 26, 2011.⁴ They also found that in accordance with past decisions from the Second Circuit, NSU also used reasonable mitigation efforts in the second period of time analyzed by the court, December 27, 2011 to June 29, 2013.⁵ Furthermore, the court also reasoned that it was not an abuse of authority for the panel to award the plaintiff damages for attorney's fees for the arbitration, because this is allowed under the Federal Arbitration Act (FAA),⁶ and that the FAA outweighs the state law.⁷ Finally, the court found that the arbitration panel did not use unfair procedures when deciding on this issue.⁸

II. Facts and Procedure

NSU is a Japanese company that provides international transportation services.⁹ Cogent is a Canadian company that exports woodchips from the United States to countries in Europe.¹⁰

1. *NS United Kaiun Kaisha, Ltd. v. Cogent Fibre Inc.*, No. 15 Civ. 1784 (PAE), 2015 WL 4881993 (S.D.N.Y. July 14, 2015).

2. *Id.* at *1.

3. *Id.*

4. *Id.* at *5.

5. *Id.* at *7.

6. 9 U.S.C. § 1 (1925).

7. *Id.* at *8.

8. *Id.* at *10.

9. *Id.* at *1.

10. *Id.*

NSU and Cogent entered into a five-year contract, called a charter or continuous-voyage contract (CVC), which allowed Cogent to use one of NSU's vessels, the Daishin Maru, to transport its materials.¹¹ The parties agreed on different terms in the CVC, such as penalties for loading the vessel late, and they also agreed that any dispute that arose between the parties under the CVC would be resolved by arbitration.¹²

The CVC also had terms for dry-docking the boat. The parties agreed that NSU could dry-dock the boat at any time under the CVC, as long as it gave Cogent six months advance notice that it was going to do so and the parties mutually agreed on the time that the boat would be dry-docked.¹³ The boat was delivered to Cogent in February 2009. After Cogent had completed fifteen voyages, NSU informed it that the boat needed to be dry-docked at some point during August and September of 2011.¹⁴ Cogent was not happy with this decision and objected, but NSU decided to dry-dock the boat from September 7, 2011 to October 16, 2011.¹⁵ In retaliation, Cogent then refused to provide NSU with a definite answer as to when it would begin transporting cargo on the vessel after the dry-dock period.¹⁶ Instead of making mitigation voyages, NSU decided to bring the ship back to the United States until Cogent was ready to begin using it to transport cargo again.¹⁷ As of December 21, 2011, NSU had made six attempts to ask Cogent when it would begin making voyages, but received no answer.¹⁸ NSU then made the decision to start mitigating damages and used the ship for other voyages during the period from December 27, 2011 to June 29, 2013, then sold the ship on June 29, 2013.¹⁹

NSU and Cogent began arbitration on February 1, 2012.²⁰ The panel found that "Cogent had breached the Charter in October, 2011, when it refused to provide a cargo for the Daishin Maru, and that it was therefore liable for damages resulting from the breach."²¹ The total awarded to NSU was \$11,606,421.51. This award was divided into the damages accrued for breach of the CVC, the damages for the interest on the damages from breach, the damages in terms of attorney's fees, the damages for arbitration costs, and the damages for arbitration fees.²² The damages were also calculated for two separate periods, that between October 16, 2011 and December 26, 2011 and that between December 26, 2011 and June 29, 2013.²³

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at *2.

19. *Id.*

20. *Id.*

21. *Id.* (quoting the arbitration panel's decision from January 23, 2015).

22. *Id.*

23. *Id.*

On March 10, 2015 NSU filed a petition to confirm this award.²⁴ On April 15, 2015, Cogent filed a cross motion arguing that these damages should be vacated.²⁵ Cogent claims that the award should be vacated for three reasons. First, Cogent states that the panel disregarded the law when granting the award, because it did not correctly analyze the mitigation efforts taken by NSU.²⁶ Second, Cogent argues that the arbitration panel was outside its power when awarding attorney's fees as part of the damages for NSU.²⁷ Finally, Cogent says that the panel used unfair procedures in authorizing the parties to submit some of their documents via email.²⁸

III. Discussion

A. Judicial Review of Arbitration Awards

Pursuant to 9 U.S.C.A §9, if the parties made an arbitration agreement and they specify the court that should enter the arbitration decision, "then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant an order unless the award is vacated, modified, or corrected."²⁹ The provisions in 9 U.S.C.A. §10 lay out the circumstances in which an award can be vacated.³⁰ However, "[t]he reviewing court owes 'strong deference' to 'arbitral awards and the arbitration process.'"³¹ The reviewing court cannot vacate a decision just because "the panel committed an error or even a serious error."³² Therefore, the power that the courts have to vacate orders is severely limited.³³

1. Whether the panel disregarded the law in its damages award for October 16, 2011- December 26, 2011

Cogent's first argument is that the panel "ignored the fundamental principle that 'a non-breaching party to contract has the right to mitigate damages,'"³⁴ during the period from October 16, 2011 to December 26, 2011. However, the court here disagreed with Cogent, finding that NSU acted reasonably during this period, even though it did not make efforts to mitigate damages.

24. *Id.* at *3.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. 9 U.S.C.A. § 9 (2005).

30. *See* 9 U.S.C.A. § 10 (2002).

31. *NS United Kaiun Kaisha*, 2015 WL 4881993 at *3 (S.D.N.Y. July 14, 2015) (quoting *Scandinavian Reins. Co. v. Saint Paul Fire & Marine Ins. Co.*, 668 F.3d 60, 71–72 (2d Cir. 2012)).

32. *See id.* (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671 (2010)).

33. *Id.* at *4.

34. *Id.*

In contract law, it is a fundamental principle that the non-breaching party to a contract should make efforts to mitigate damages.³⁵ The panel also recognizes that, because Cogent breached the charter on October 16, 2011, therefore the duty to mitigate began on that day under New York law, because the “time-of-breach rule is longstanding in New York.”³⁶ Notwithstanding these findings, the court still found that NSU acted reasonably for several reasons. First of all, Cogent did not expressly state to NSU on October 16, 2011, that it was no longer going to honor the charter and, therefore, NSU was not put on notice that mitigation efforts needed to be made.³⁷ The court also reasoned that between the months of November and December, NSU had made six requests to Cogent regarding the issue of when it would be loading cargo onto the vessel and in response NSU received only vague assurances that cargo would be coming soon.³⁸ From these circumstances, the panel reasoned that, “if a party is in doubt whether the charter has been repudiated, he is entitled to seek adequate assurances of performance from his contractual partner.”³⁹ Also, although at some point in November, NSU was told that Cogent would not be providing Cargo until mid-December, the court found that this might not have been enough notice to plan for a mitigation voyage, it found that NSU’s later mitigation voyages were “roughly 46.7 days each.”⁴⁰ Therefore, the panel was correct in concluding that NSU acted reasonably under these circumstances, during this period of time.⁴¹

2. Whether the Panel Disregarded the Law in its Damages Award for December 26, 2011-June 29, 2013

Cogent argues that the mitigation efforts undertaken by NSU during this period were not sufficient. Cogent states that NSU kept the Daishin Maru in the Atlantic Ocean during this time, while making mitigation voyages, but would have profited more from making voyages in the Pacific Ocean.⁴² Therefore, Cogent believes that the damages awarded to NSU for this period were incorrect when viewed in light of the mitigation efforts that it made.⁴³

The court states that “[a] non-breaching party to a contract has a duty to undertake reasonable efforts to mitigate its losses.”⁴⁴ Cogent relies on an argument by Professor Martin Davies, Director of Tulane Law School’s Maritime Law Center. His argument is that “if a comparable long-term charter had been available at the time a CVC was repudiated, that charter should be used as the basis for assessing whether the mitigation efforts were reasonable, regard-

35. See Restatement (Second) of Contracts § 350 (1981).

36. *NS United Kaiun Kaisha*, 2015 WL 4881993 at *5 (quoting *White v. Farrell*, 987 N.E.2d. 244, 252 (N.Y. 2013)).

37. See *id.*

38. See *id.*

39. *Id.* (quoting Restatement (Second) of Contracts).

40. *Id.*

41. *Id.* at *5.

42. *Id.* at *6.

43. *Id.*

44. *Id.* (citing *Jewish Press, Inc. v. Willner*, 594 N.Y.S.2d 51, 51 (2d Dep’t 1993)).

less of what mitigation the non-breaching party actually conducted.”⁴⁵ NSU combats this argument by providing a decision from the Second Circuit in the case of *Federal Ins. Co. v. Sabine Towing & Transp. Co.*, where the court stated that, “if the course of action chosen by the plaintiff was reasonable, the plaintiff can recover despite the existence of another reasonable course of action that would have avoided further damage.”⁴⁶

Therefore, because Cogent did not rely on precedent law to make its argument that the mitigation efforts taken by NSU were not sufficient, their arguments were insufficient and could not be accepted by the panel. Therefore, the panel must rely on the argument made by NSU here that is based on substantive law, because this is what is binding.⁴⁷ Because the panel here relied on the binding substantive law, to make its decision, the court reasoned that the findings of the panel should be confirmed.⁴⁸

3. Whether the Panel Overstepped Its Boundaries by Awarding Attorney’s Fees

Cogent argues that it is not within the arbitration panel’s authority to award damages for attorney’s fees.⁴⁹ Cogent says that the panel was wrong in doing so for two reasons. The first is that there was nothing in the arbitration clause expressly stating that attorney’s fees would be decided upon in arbitration.⁵⁰ The second reason is that New York law prevents arbitrators from awarding attorney’s fees.⁵¹

In this instance, the arbitration agreement between NSU and Cogent did not address the issue of attorney’s fees.⁵² However, in the case of *PaineWebber Inc. v. Bybyk*, the Second Circuit held that, “when an arbitration agreement provided for ‘any and all controversies’ to be submitted to arbitration, and contained no express limitation with respect to attorney’s fees, the arbitrators were empowered to consider applications for such fees.”⁵³ Here, NSU did request attorney’s fees to be considered when the panel was determining damages and therefore the panel was correct in considering these fees, under *PaineWebber*.⁵⁴

Cogent then goes on to argue that, “New York law precludes arbitrators from awarding attorney’s fees when such authority is not granted expressly in an arbitration agreement.”⁵⁵ However, the panel relies on *PaineWebber* in this instance, which held that “the FAA takes precedence over state law and allows arbitrators to award attorney’s fees when an argument clause

45. *Id.*

46. *Id.* (quoting *Federal Ins. Co. v. Sabine Towing & Transp. Co.*, 783 F.2d 347, 350 (2d Cir. 1986)).

47. *Id.* at *7.

48. *See id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at *8.

53. *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193 (2d Cir. 1996).

54. *NS United Kaiun Kaisha*, 2015 WL 4881993, at *8.

55. *Id.* (citing CPLR 7513).

is sufficiently broad.”⁵⁶ The arbitration clause between NSU and Cogent was sufficiently broad, because it did not specify that the issue be decided under New York law, and therefore the panel did not abuse its authority by awarding attorney’s fees.⁵⁷

4. Whether the Arbitration Procedures were Unfair

Lastly, Cogent argues that the award should be vacated, because the procedures put in place by the panel were unfair.⁵⁸ The court here states that “arbitrators must comply with the requirements of due process: ‘Although [an arbitrator] is not required to hear all the evidence proffered by a party an arbitrator must give each of the parties to a dispute an adequate opportunity to present its evidence and argument.’”⁵⁹

Cogent says that the requirement for submission of materials through email was unfair, because it allowed one side to present materials before the other side could respond.⁶⁰ NSU, however, argued that this is the same process that occurs when different sides file briefs.⁶¹ The court agreed with NSU and concluded that, because both sides were given the opportunity to provide evidence and arguments to the panel before it made its decision, the procedures were not unfair.⁶²

IV. Conclusion

The court in *NS United Kaiun Kaisha, Ltd. v. Cogent Fibre Inc.* was correct in finding that the arbitration award should be confirmed for NSU.⁶³ The court found that NSU exercised reasonable mitigation efforts, that the panel was allowed to award damages for attorney’s fees, and that the procedures of the panel were not unfair. The court correctly relied upon precedent federal law. If the court had relied on certain sources presented by Cogent, such as the testimony of Professor Davies on the issue of whether or not to award attorney’s fees, it would have been undermining well-established Second Circuit case law. The court was also correct in applying loose standards to evaluating the reasonableness of the mitigation efforts made by NSU. The law is that the courts have very little grounds to vacate arbitration agreements and this is because we would like to encourage arbitration in order to help speed up litigation.⁶⁴ An important purpose of arbitration is to provide a speedier analysis and ruling than the court system would.⁶⁵ Therefore, the courts were correct in honoring the policy behind arbitration

56. *Id.* (quoting *PaineWebber*, 81 F.3d at 1202).

57. *Id.*

58. *Id.* at *10.

59. *Id.* at *9. (quoting *Kolel Beth Yechiel Mechil of Tartikov Inc. v. YLL Irrevocable Trust*, 729 F.3d 99, 107 (2d Cir. 2013)).

60. *See id.* at *10.

61. *See id.*

62. *See id.*

63. *See id.* at *1.

64. *See id.* at *3.

65. *Id.*

when evaluating Cogent's arguments and when confirming the award. Any other finding made by the court in this case would have likely undermined the arbitration process completely.

This decision to confirm the arbitration award in *NS United Kaiun Kaisha, Ltd. v. Cogent Fibre Inc.* will also impact future cases brought in arbitration in the Second Circuit, mostly with regards to awarding attorney's fees. Some attorneys, such as Victoria Gleason from *The Daily Record*, advise that the ruling in this case is a lesson to people who enter into arbitration agreements in the future; such parties must make sure that they are careful when drafting their arbitration agreements in regards to whether or not they will agree to having attorney's fees be awarded at the time of arbitration.⁶⁶ Gleason warns that if one does not specifically state that he does not agree to have attorney's fees be part of the arbitration decision, he may be subject to a decision that does award these fees, and thus could be caught paying extraordinary arbitration fees.⁶⁷ The decision by the court here also affirms the standard that if one acts in bad faith with regards to the contract, then the court will not look upon the motion to vacate an arbitration agreement in a favorable manner.⁶⁸ Here, the court found that, because Cogent acted in bad faith during the arbitration agreement, it was not entitled to have the decision vacated.⁶⁹ In light of these findings from the court, people who intend to participate in arbitration agreements in the future should protect themselves by being aware of their agreements in regards to how they will handle attorney's fees and by not acting in bad faith during the arbitration agreements.

Julia Maguire

66. Victoria Gleason, *Trials & Tribulations: Potential pitfalls when entering into arbitration agreements*, THE DAILY RECORD (Aug. 5, 2015), <http://nydailyrecord.com/blog/2015/08/05/trials-tribulations-potential-pitfalls-when-entering-into-arbitration-agreements/>.

67. *Id.*

68. Baker & McKenzie, *Confirmation of arbitral awards. Manifest disregard of law. District court confirms \$11.6 million international arbitral award*, LEXOLOGY (Sept. 24, 2015) <http://www.lexology.com/library/detail.aspx?g=7997c271-f661-4cb3-af69-aaf534080543>.

69. *Id.*

O.Y. v. A.G.

2015 WL 4920073, 2015 N.Y. Slip Op. 51190(U) (Sup. Ct., Westchester Co. 2015)

The New York State Supreme Court for Westchester County held that a marital agreement executed in Egypt in accordance with Islamic law was unenforceable under New York Domestic Relations Law §236(B)(3) and New York Real Property Law § 301, because the defendant provided insufficient evidence as to the agreement's validity. The court further held that as a matter of law a postnuptial agreement is a settlement agreement, not an opt-out agreement, when entered into solely to settle and dismiss a pending divorce action.

I. Holding

In the recent case, *O.Y. v. A.G.*,¹ Judge Ecker of the Westchester County Supreme Court concluded that the defendant husband did not provide sufficient evidence under Domestic Relations Law § 236(B)(3) in support of his affirmative defense that the marital agreement he entered into with plaintiff wife in Egypt was valid under New York law.² Judge Ecker further held that the postnuptial agreement executed after the wife initiated the first divorce proceeding between the parties was not an opt-out divorce agreement, but rather a settlement agreement to dismiss the proceeding.³ Judge Ecker declined to determine whether the court could dispose of the parties' property in Egypt, because of insufficient proof from both the husband and the wife on the assets held and whether a disposition of property in an American divorce proceeding would be upheld in Egypt.⁴

II. Facts and Procedure

Plaintiff and Defendant were married under Islamic law in Zagazig, Egypt on July 28, 1977.⁵ As part of the marriage ceremony, Defendant entered into a marital agreement with Plaintiff's uncle, "allegedly as proxy" for Plaintiff.⁶ The agreement provided for a deferred dowry, or *mahr*, to be paid to Plaintiff upon divorce or Defendant's death.⁷ Pursuant to Islamic law, a male relative represented Plaintiff and there was offer and acceptance before witnesses.⁸ The dowry amounted to approximately \$131.00.⁹

1. *O.Y. v. A.G.*, 2015 WL 4920073, 2015 N.Y. Slip Op. 51190(U) (Sup. Ct., Westchester Co. 2015).

2. *See id.* at *4.

3. *See id.* at *5.

4. *Id.*

5. *Id.* at *2.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

Plaintiff initially filed for a divorce on December 20, 2012.¹⁰ The initial divorce proceeding was dismissed pursuant to a Notice of Discontinuance without prejudice on February 25, 2013.¹¹ As part of the first proceeding's dismissal, the parties entered into a postnuptial agreement, dated February 15, 2013.¹²

On August 11, 2014, Plaintiff commenced a second divorce proceeding.¹³ Defendant raised three affirmative defenses: (1) the marital and postnuptial agreements were valid and controlling under New York law; (2) the agreements precluded Plaintiff from seeking any relief other than a divorce decree; and (3) the agreements limited the court's jurisdiction to a consideration of the U.S. property and assets only.¹⁴ By motion for an Order to Show Cause, dated March 9, 2015, Plaintiff moved for an order striking Defendant's affirmative defenses and seeking any other relief the court deemed proper.¹⁵ On April 21, 2015, Judge Ecker held Plaintiff's motion to strike Defendant's affirmative defenses in abeyance pending Defendant's submission of proof regarding Egyptian law on marital agreements and documentation under RPL §301 proving the authentication of the marital agreement.¹⁶ Subsequently, Defendant submitted three documents for Judge Ecker's review: (1) the marital agreement; (2) a German government-issued article on the rights of women in Egypt, published in Arabic and English; and (3) select Egyptian statutes.¹⁷

III. Discussion

A. The Marital Agreement

Judge Ecker first considered whether Defendant submitted sufficient evidence demonstrating that the Islamic marital agreement would be enforceable under DRL §236(B)(3).¹⁸ The court "recognize[d] that the *mahr*, or Islamic marriage contract, is an enforceable document in New York, notwithstanding [that] it was executed pursuant to religious or civil law."¹⁹

The court cited three cases referencing the validity of Islamic marital agreements under varying circumstances. First, a marital agreement signed and entered into in the state of New York, under Islamic law, and with the supervision of an Islamic religious leader, was enforceable under New York law.²⁰ The second case rested its decision on whether to enforce an Islamic

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at *3.

15. *Id.* at *2.

16. *See id.*

17. *Id.* at 3.

18. N.Y. Dom. Rel. Law § 236(B)(3) provides, in pertinent part, that an agreement entered into before or during a marriage "shall be valid and enforceable in a matrimonial action if such an agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded."

19. *O.Y.*, 2015 N.Y. Slip Op. 51190(U) at *3.

20. *Id.* (citing *Aziz v. Aziz*, 127 Misc. 2d 1013 (Sup. Ct., Queens Co. 1985)).

marital agreement “upon considerations of international comity,” as the parties had obtained a divorce in Saudi Arabia before commencing the New York action.²¹ Finally, the third case found an Islamic marital agreement unenforceable, because it was entered into after the parties were married, despite the parties having read and signed the agreement before a video camera and under the supervision of an Imam.²²

Judge Ecker ultimately found that Defendant did not satisfy DRL §236(B)(3). Section 236(B)(3) requires that any marital agreement be in writing, signed by both parties, and acknowledged.²³ The court found dispositive that Plaintiff did not sign the agreement herself, thus the agreement was “not acknowledged by her.”²⁴ Even if execution by proxy was acceptable under Egyptian or Islamic law, Plaintiff’s failure to sign the agreement rendered it invalid under New York law.²⁵

Moreover, Defendant failed to provide the court with proof of authentication of the marital agreement as required by Real Property Law § 301 and 301-a.²⁶ Section 301 allows a party to seek acknowledgement in a foreign country of a conveyance of property made in New York.²⁷ Section 301-a requires that any such acknowledgement be formalized with a certificate of conformity, essentially providing that the acknowledgement was made in the manner prescribed by that country’s laws.²⁸ The documents that Defendant submitted were insufficient to show that the marital agreement was authentic under Egyptian law, because he failed to provide an “apostille in accordance with the Hague Convention of 1961,”²⁹ and because the documents did not prove Plaintiff’s execution and acknowledgement of the marital agreement.³⁰

Judge Ecker briefly noted that Plaintiff’s benefit under the deferred dowry (\$131.00) was “*de minimis*,” and that there was “no reason for the parties’ resources or the court’s time to be

21. *Id.* (citing S.B. v. W.A., 38 Misc. 3d 780 (Sup. Ct., Westchester Co. 2012)).

22. *Id.* (citing Odatalla v. Odatalla, 810 A.2d 93 (N.J. Sup. Ct. 2002)).

23. See *supra* n. 18.

24. *O.Y.*, 2015 N.Y. Slip Op. 51190(U), at *3.

25. *Id.*

26. *Id.*

27. N.Y. R.P.L. § 301 provides that “the acknowledgement of real property situate in this state may be made in foreign countries before any of the following acting within his [or her] territorial jurisdiction or within that of the court which he is an officer[.]” including ambassadors, judges, notaries, commissioners, and “[a]ny person authorized, by the laws of the country where the acknowledgment or proof is made, to take acknowledgments of conveyances of real estate.”

28. N.Y. R.P.L. § 301-a provides, in pertinent part, that “[a]n acknowledgment or proof made pursuant to the provisions of [§301] may be taken in the manner prescribed either by the laws of the state of New York or by the laws of the country where the acknowledgment or proof is taken. The acknowledgment or proof, if taken in the manner prescribed by the laws of such foreign country, must be accompanied by a certificate to the effect that it conforms with such laws.”

29. *O.Y.*, 2015 N.Y. Slip Op. 51190(U) at *3. An apostille is a certification that allows legal documents executed in one country to have a valid legal purpose in another country. For more information on apostille procedures, see the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalization for Foreign Public Documents (“Apostille Convention”), available at <https://www.hcch.net/en/instruments/specialised-sections/apostille>.

30. See *id.*

further expended in attempting to prove the validity” of the dowry.³¹ In addition to finding the marital agreement unenforceable, Judge Ecker held that Plaintiff was estopped from seeking recovery of the \$131.00 owed to her.³²

B. The Postnuptial Agreement

The court begins the discussion of the 2013 postnuptial agreement (“2013 agreement”) by acknowledging that it comports with DRL §236(B)(3), because it is a writing that both Plaintiff and Defendant signed and acknowledged in New York.³³ The 2013 agreement provided for the disposition of the parties’ real property in Egypt, monthly alimony paid to Plaintiff, and the renovation of the family home.³⁴

As a matter of law, however, the court held that the 2013 agreement was a settlement agreement to dispose of Plaintiff’s first divorce proceeding, and not “an opt-out agreement binding upon the parties in a subsequent divorce proceeding.”³⁵ Plaintiff’s agreement to discontinue the first divorce proceeding as consideration for the 2013 agreement, according to the court, was sufficient evidence to prove that the agreement was, in fact, for settlement purposes only.³⁶

Although the court agreed with Defendant that the 2013 agreement bestowed certain benefits on Plaintiff that would “have a bearing upon her entitlements to maintenance, equitable distribution, counsel fees[,] and all other ancillary demands for relief,” Judge Ecker did not find the 2013 agreement a “complete bar” to Plaintiff’s request for relief.³⁷ The court struck down Defendant’s affirmative defense that Plaintiff was not entitled to any relief, but also denied Plaintiff’s demand for ancillary relief separate from a divorce decree.³⁸

C. Disposition of the Egypt Property

Finally, Defendant argued that the court’s jurisdiction over the parties’ Egyptian property ought to be limited, because, as a matter of comity, an Egyptian court would be unlikely to honor a disposition of property under New York law.³⁹ The court declined to address Defendant’s contention for two reasons. First, the court needed “full disclosure of the parties’ assets” to “fully appreciate their financial circumstances, and to then make informed distributions of their property, together with proper consideration of maintenance and counsel fees.”⁴⁰ Second, the court was concerned with having to make alternative arrangements in the event that an

31. *Id.*

32. *Id.*

33. *Id.* at *4.

34. *Id.*

35. *Id.*

36. *See id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

Egyptian court would not honor the court's judgment.⁴¹ Judge Becker reserved judgment on this issue until trial.

IV. Conclusion

Simmering under the surface of this opinion, although not addressed by Judge Becker, are competing cultural and legal interests. Judge Becker did much more than just decide, as a matter of law, that a marital agreement signed by a male relative as proxy—in compliance with Islamic law—did not satisfy the requirements of New York law. As a matter of comity, Judge Becker could have acknowledged the validity of the agreement, especially because Plaintiff was seeking to enforce the dowry provision of the agreement.

The facts raise an interesting question about how far New York courts can go in refusing to acknowledge a foreign-executed agreement that may violate core American public policy considerations. Judge Becker's focus on the fact that the Plaintiff herself did not sign the agreement largely ignored the fact that disposition of the agreement in Egyptian courts would not have questioned the signature by proxy. If two parties agree to be married under a particular agreement and rule of law, can a judge rightfully disregard that decision?

Ashlee Aguiar

41. *Id.*

Vringo, Inc. v. ZTE Corporation

2015 WL 3498634 (S.D.N.Y. June 3, 2015)

A preliminary injunction was sought to prevent the defendant corporation from using confidential information, which was protected by a non-disclosure agreement, in pending antitrust and patent litigation. The United States District Court for the Southern District of New York held that a preliminary injunction was reasonable against defendant corporation.

I. Holding

In the recent case, *Vringo, Inc. v. ZTE Corporation*,¹ Judge Kaplan of the United States District Court for the Southern District of New York held that it would be fair for a preliminary injunction to go forward, because Vringo would likely suffer irreparable injury without it.² The injury would occur as a result of ZTE breaching a non-disclosure agreement and using confidential information, which was prohibited under the agreement.³ At the same time, the court held that a prohibitory injunction, forcing ZTE Corporation (“ZTE”) to withdraw its complaints and enjoin future actions in the same or other courts, would be beyond the scope of what was necessary.⁴

II. Facts and Procedure

Vringo is a company involved in the innovation, development, and monetization of intellectual property and mobile technologies and holds over 600 patents and patent applications in the areas of telecommunications infrastructure, internet search, and mobile technologies.⁵ Vringo’s principal place of business is the State of New York.⁶ ZTE develops, designs, manufactures, and sells telecommunications products and equipment.⁷ Headquartered in Shenzhen, China, ZTE claims to be one of the top five smartphone manufactures in China and one of the ten largest in the world.⁸ In August 2012, Vringo purchased a patent portfolio from Nokia Corporation, which included several patents that have been declared essential to wireless communications standards and as a result are necessary to operate telecommunications equipment.⁹ It is alleged that ZTE has been selling telecommunications equipment that falls under Vringo’s patents without a license for several years.¹⁰ As a result, in October 2012, Vringo initiated patent infringement litigation against ZTE in at least ten countries.¹¹

1. No. 14-CV-4988 (LAK). 2015 WL 3498634 (S.D.N.Y. June 3, 2015).

2. *Id.* at *9.

3. *Id.* at *6.

4. *Id.* at *11.

5. *Id.* at *1.

6. *Id.* at *7.

7. *Id.* at *1.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

In late 2013, ZTE and Vringo decided they would meet to discuss potential settlement of the international litigation.¹² Vringo, believing it the best way to create an environment for productive discussions and good faith offers, set forth the idea of exchanging information pursuant to a non-disclosure agreement (“NDA”).¹³ As a result, on November 26, 2013, Vringo sent a proposed draft of the NDA to ZTE.¹⁴ The chief intellectual property counsel at ZTE signed, initialed, and delivered it back to Vringo on December 9, 2013, where Vringo’s chief operating officer also signed and initialed it.¹⁵

The agreement, signed by both parties, would allow them to “explore a potential settlement of some portion of or all of the outstanding litigation as well as any other disputes.”¹⁶ Importantly, it also stated that “any and all statements made, positions taken, or documents used or exchanged by either Party during the course of the Discussions constituted ‘Confidential Information.’”¹⁷ The agreement also contained details on no party using the Confidential Information “in any existing or future judicial or arbitration proceedings” or “for [their] commercial advantage, dispute advantage, or any other purpose.”¹⁸

The NDA contained a clause stating that the Confidential Information “shall be confidential, inadmissible, and without prejudice and shall not be used or referenced in any way by any Party in any existing or future judicial arbitration proceeding or made the subject of any public comment of press release.”¹⁹ There was an additional clause that stated, “each Party agrees not to disclose information covered by this Agreement to any of its personnel or representatives except on a strictly ‘need to know’ basis, or to any third party.”²⁰

One day after the executed NDA was returned to Vringo, the two parties met to discuss a potential resolution to their patent litigation.²¹ At this meeting, Vringo made a 40-page presentation, which included, but was not limited to, its settlement proposal.²² Each page of the presentation contained included the following words: “CONFIDENTIAL – VRINGO/ZTE SETTLEMENT DISCUSSIONS SUBJECT TO NDA.”²³ No settlement was reached at this time.

On February 21, 2014, ZTE initiated an antitrust lawsuit in Shenzhen, China claiming Vringo abused its market position by refusing to license some of its essential patents on fair, rea-

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at *2.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

sonable, and nondiscriminatory (“FRAND”) terms and conditions.²⁴ The complaint ZTE filed specifically relied on Vringo’s Confidential Information and attached the presentation given on December 10, 2013, as an exhibit.²⁵ Vringo was unaware of this litigation until it received, on June 26, 2014, a copy of the complaint and supporting documents showing ZTE disclosed the Confidential Information.²⁶

On April 10, 2014, ZTE filed another complaint against Vringo, this time with the European Commission (“EC”).²⁷ When Vringo received a copy of the complaint on May 15, 2014, it was given the opportunity to respond. As a result, on June 4, 2014, it sent a requested waiver to ZTE, which would allow Vringo to disclose “any information that constitutes Confidential Information” that dealt with the complaint.²⁸ ZTE did not respond and Vringo was unable to respond to the EC in time; as a result, Vringo did not include any Confidential Information.²⁹ On June 24, 2014, ZTE responded to Vringo’s earlier request to disclose Confidential Information. ZTE said it would agree to a waiver of the confidential privilege only if (1) the waiver was made reciprocal and Vringo would also waive the confidentiality agreement and (2) the reciprocal confidentiality waiver would concern only the information directly related to the complaint filed with the EC.³⁰

Vringo received a letter on January 13, 2015, from the Bureau of Price Supervision and Anti-Monopoly of China’s National Development and Reform Commission (“NDRC”), stating that an investigation had been started after a claim had been made that the corporation was violating China’s Anti-Monopoly Law.³¹ ZTE admits to submitting the confidential presentation to the NDRC in or about April 2014.³²

This action was commenced by Vringo on July 2, 2014, for breach of the NDA. Vringo moved by order to show cause for a temporary restraining order (“TRO”) and a preliminary injunction on July 3, 2014.³³ On July 7, 2014, following argument, a more limited TRO than was sought was granted by the court.³⁴ It restrained ZTE “from using, referencing, or disclosing any Confidential Information...in any manner inconsistent with the terms of th[e] [NDA].”³⁵ The TRO remains in effect. An amended complaint by Vringo on August 13, 2014, asserts additional claims for fraudulent inducement, breach of the implied covenant of good faith and fair dealing, and unfair competition.³⁶ It alleges the NDA was entered into only to

24. *Id.*

25. *Id.*

26. *Id.* at *3.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at *4.

35. *Id.*

36. *Id.*

elicit the Confidential Information so ZTE could use it for its commercial advantage.³⁷ On April 6, 2015, Vringo's motion for partial judgment on the pleadings to the extent it determined the parties entered into the NDA and that ZTE's actions breached its NDA obligations by disclosing Confidential Information was granted.³⁸ ZTE's motion for judgment on the pleadings that deal with unfair competition was also granted.³⁹

III. Discussion

A. Preliminary Injunction

When a litigant seeks a primarily injunction, it must show it is likely to succeed on the merits, the balance of equities tips in its favor, and an injunction is in the public interest.⁴⁰ If that does not apply, it may also show irreparable harm and either a likelihood of success on the merits or "sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief."⁴¹ A heightened showing is needed when a party seeks a preliminary injunction that is mandatory, meaning it "alters the status quo by commanding some positive act."⁴² In the Second Circuit, mandatory injunctions are issued only if there is a clear showing that the moving party is entitled to the relief it requested or a denial of preliminary relief would result in extreme or very serious damage.⁴³ The NDA also clearly and unmistakably prohibited disclosure of any Confidential Information. The agreement stated that any information that could be construed as confidential "shall not be used or referenced in any way by any Party in any existing or future judicial arbitration proceeding." Even with this agreement in place, ZTE admits to having disclosed that information in its Shenzhen complaint.⁴⁴

1. Vringo's Likelihood to Suffer Irreparable Injury Without a Preliminary Injunction

ZTE has followed the idea that the NDA it signed with Vringo did not prohibit "submission of competent evidence of an antitrust violation."⁴⁵ ZTE assured the court that it did not share any confidential material following the TRO going into effect.⁴⁶ Without the TRO, the court found that ZTE would be likely to continue disclosing Confidential Information.⁴⁷ ZTE would continue disclosing the information as it has directly ignored NDA obligations in the

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* (quoting *Winter v. NDRC*, 555 U.S. 7, 20, 129 S. Ct 356, 172 L.Ed.2d 249 (2008)).

41. *Id.* (quoting *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holdings, Inc.*, 696 F.3d 206, 215 (2d Cir. 2012)).

42. *Id.* (quoting *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 34 (2d Cir. 1995)).

43. *Id.*

44. *Id.*

45. *Id.* at *9.

46. *Id.*

47. *Id.*

past and the court found that it would likely do so in any situation where ZTE felt it might be to its advantage to share more.⁴⁸

The issue here is what the impact on Vringo would be if the public were to have access to the Confidential Information provided to ZTE.⁴⁹ The value of Vringo's patent portfolio determines the licenses it can sell to third parties; if its proposed settlement were to get out, there would be substantial impact on the prices others would pay and what their competition would offer.⁵⁰ The court held this disclosure would have a "lasting and immeasurable harm to Vringo's business."⁵¹

2. The Balance of Public Interest and Equity

When considering the equities, courts balance competing claims of injury with the effect of granting or withholding relief requests on each party.⁵² Courts are to pay special attention to the public consequences of granting or withholding certain injunctive remedies.⁵³ Here, if the court were to deny a preliminary injunction, ZTE would likely continue sharing Vringo's Confidential Information, which is exactly what Vringo was trying to avoid by entering into the NDA.⁵⁴ On the other hand, ZTE would suffer no comparable harm if a preliminary injunction had been improperly granted; it would simply not be able to use information it had agreed not to use in its pending judicial proceedings.⁵⁵

There is positive public interest for appropriate injunctive relief. There must be "due regard to principles of international comity" and it is important to issue anti-suit injunctions "only with care and great restraint."⁵⁶ Here, ZTE's action in Shenzhen would not be prevented from continuing with this action, it would just have to use the information that is available to the public.⁵⁷ The court held that Vringo was entitled to appropriate injunctive relief.⁵⁸

3. Scope of Preliminary Injunction

Bringing a suit in a United States court does not mean that a proceeding in a foreign forum should be enjoined.⁵⁹ A proper approach to this situation would be to determine first whether the parties in both suits are the same and second figure out whether a resolution by the

48. *Id.* at *10.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at *11.

55. *Id.*

56. *Id.* (quoting *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 35 (2d Cir. 1987)).

57. *Id.*

58. *Id.*

59. *China Trade*, 837 F.2d at 36.

enjoining court would “be dispositive of the enjoined action.”⁶⁰ If these two conditions were met, the court would then look to see whether an injunction would “(1) frustrate a policy in the enjoining forum; (2) be vexatious; (3) threaten the issuing court’s in rem or quasi in rem jurisdiction; (4) prejudice other equitable considerations; or (5) result in delay, inconvenience, expense, inconsistency or race to judgment.”⁶¹ Here, they were the same parties; however, ZTE believes an anti-suit injunction would not be appropriate, because a breach of the NDA would not mean a decision on ZTE’s antitrust claim should be precluded.⁶² Vringo did not show that ZTE’s antitrust claim would fail without the Confidential Information and there is a possibility that ZTE could provide the Shenzhen court with sufficient other evidence to prove its claim.⁶³ The court held that, while Vringo would be entitled to a preliminary injunction because of the likelihood of irreparable harm, the balance of equities, and public interest it did not rise to the level required for a mandatory injunction.⁶⁴

B. Violation of Clear NDA Terms

“A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms.”⁶⁵ The court found that the pleadings established the existence and terms of the NDA and that ZTE had violated them.⁶⁶ Vringo had written that the material in its presentation was Confidential; in addition to that, it discussed the confidentiality during their meetings.⁶⁷ The terms in the NDA were clear and unambiguous and as a result the court found ZTE to have violated the terms.⁶⁸

C. Enforceability of Confidentiality Provision

A federal court with diversity jurisdiction must apply the law of the forum state when determining the choice of law.⁶⁹ In New York, a contractual designation of what law should govern all disputes from a particular contract is determined by which state has sufficient contacts with the transaction.⁷⁰ One example of a sufficient contact would be a party’s principal place of business.⁷¹ Here, Vringo had its principal place of business in New York and ZTE was sufficiently aware of this, as it was sending the executed NDA back to Vringo in New York.

60. *Id.* (adding that, if there is question as to whether a foreign court would recognize the judgment made in the Southern District, it will not be necessary to determine that question of the foreign law, because the injunction will be deficient for another reason).

61. *Vringo*, 2015 WL 3498634, at *11 (quoting *Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111 (2d Cir. 2007)), where the court held that all factors should be considered when determining whether an anti-suit injunction is warranted, instead of only the two factors from *China Trade*).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at *5 (quoting *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002)).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

New York recognizes the “strong ‘public policy of encouraging and facilitating settlement.’”⁷² Courts have held that documents created specifically and directly for off-the-record negotiations for the purpose of settling claims are confidential.⁷³ Here, the NDA was clearly entered into to allow the parties to have successful and open settlement discussions.⁷⁴ New York law also permits covenants not to sue private parties and private parties may release potential adversaries from private liability, as long as it is the clear and unmistakable intent of the parties.⁷⁵ In this case, the agreement not to disclose confidential information is less restrictive than a release or covenant not to sue.⁷⁶ Additionally, the idea that ZTE could agree to settle or not to bring future litigation but not agree not to disclose confidential information would be illogical.⁷⁷

IV. Conclusion

Vringo is entitled to a portion of the preliminary injunction it requested, but not the preliminary injunction in its entirety. Because of ZTE’s breach of the NDA and sharing of the Confidential Information, Vringo would be irreparably harmed if ZTE were allowed to continue. As a result, ZTE and all related parties, including but not limited to officers and agents, are not allowed to disclose, use or reference any information provided through the confidential settlements. ZTE clearly breached its NDA and the confidentiality agreement within the NDA was enforceable under New York law, where ZTE was aware Vringo had its principal place of business, so allowing ZTE to continue to use the private information would go against public policy and their agreement. However, Vringo is not granted an injunction on all other international suits brought by ZTE against it. Assuming ZTE can provide sufficient evidence that does not include the Confidential Information, those suits may continue.

Alexa Lofaro

72. *Id.* at *6. (quoting *Crow-Crimmins-Wolff & Munier v. Westchester Cnty.*, 126 A.D.2d 696, 697, 511 N.Y.S.2d 117, 119 (2d Dept. 1987) (recognizing that “observations made for the stated purpose of arriving at a settlement agreement, and expressly not for litigation ... should likewise generally be protected by the same public policy of encouraging attempts at settlement”))

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

