IN THE SUPREME COURT
OF
THE STATE OF WASHINGTON

Supreme Court No. 93823-7

(Court of Appeals Division I, No. 73956-5-I)

SHANGHAI COMMERCIAL BANK LIMITED,

Respondent,

v.

KUNG DA CHANG and MICHELLE CHEN,

Petitioners.

RESPONDENT SHANGHAI COMMERCIAL BANK LIMITED'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Petitioners Kung Da Chang and Michelle Chen (collectively, the "Changs") cast this matter as one implicating "an issue of first impression" that "raises significant issues of great public interest," and they urge the Court to accept discretionary review. Such review is not warranted. The trial court and the Court of Appeals—in a crisp, succinct opinion—merely performed a routine application of Washington's straightforward choice-of-law analysis, and, as a result, correctly held that Shanghai Commercial Bank Limited ("SCB") is entitled to enforce its valid Hong Kong judgment against the Changs' marital community. A routine application of choice-of-law principles does not merit Supreme Court review.

Supreme Court review would be especially unproductive here because the circumstances so overwhelmingly pointed to application of Hong Kong law that this case would not make for widely useful precedent. This lawsuit involves a foreign creditor trying to enforce a debt against a debtor who, unbeknownst to the creditor, resided in Washington. As the Court of Appeals made plain, SCB neither knew nor had reason to believe it was dealing with a Washington resident: "[T]he record contains no indication that the Bank knew it was dealing with Washington residents; the documents Chang signed were all addressed to his father's residence in

Shanghai and he returned them to his father, not the Bank, after signing."[1] Such indirection by debtors is too rare to warrant public interest review by this Court, and such indirection by debtors does not render them compelling candidates for debt avoidance afforded by Washington community property law.

There is nothing extraordinary about this debt recognition case except for the fact that more than five years after SCB secured a judgment in Hong Kong for the Changs' unpaid loan, SCB still has yet to see a single penny in recovery.[2] The Court should deny the instant petition.

II. STATEMENT OF THE CASE

A. Factual Background

The only facts relevant to Petitioner's request for discretionary review are those facts directly related to the disputed issue in SCB's second motion for summary judgment. The relevant facts are undisputed and as follows: Chang entered into a credit facility arrangement with SCB between March and April of 2008 by executing five agreements.[3] Collectively, these five agreements enabled the Changs to borrow large sums from SCB, and those sums make up the underlying debt obligation

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[1] *Shanghai Commercial Bank Ltd. v. Kung Da Chang*, 381 P.3d 212, 216 (Wash. Ct. App. 2016) (hereafter, "*SCB II*").
[2] Declaration of May Ka Mo in Support of SCB's Second Motion for Summary Judgment ("Mo Decl.") ¶9. Clerk's Papers ("CP") 145.
[3] Mo Decl. ¶¶ 2–8. CP 144–45.

of this lawsuit.[4] These five agreements govern the extent of the Changs' obligation to SCB. All five of the agreements explicitly include a choice-of-law provision selecting Hong Kong law as the governing law.

The Facility Letter provides that the signor is subject to the Terms and Conditions, Appendix I, which "form an Integral part of this Facility Letter."[5] The Terms and Conditions are defined in Appendix 1 as "[c]ollectively refer[ring] to the terms and conditions contained in our Terms and Conditions for Bank Accounts and General Services, as well as those on our standard documents executed by you / your company in relation to the banking facilities and/or accounts with us."[6] The Terms and Conditions for Bank Accounts and General Services, in turn, provide that "[t]he validity, construction, interpretation, and enforcement of the Agreement and/or the Relevant Terms and Conditions shall be governed by the laws of HKSAR [Hong Kong Special Administrative Region]...."[7] Thus, through the Facility Letter's incorporation of the Terms and Conditions, the Facility Letter explicitly chooses Hong Kong law to apply to not just interpretation, but also enforcement, of the credit agreement.

The other four agreements, the terms of which are incorporated into the Facility Letter as the "terms and conditions contained in ...

[4] Mo Decl. ¶ 8. CP 145.
[5] Mo Decl., Ex. A at 1. CP 148.
[6] Mo Decl., Ex. A at 4. CP 151.
[7] Mo Decl., Ex. F at § 19.1. CP 172.

standard documents executed by [Chang] in relation to the banking facilities and/or accounts with [SCB]," also expressly choose Hong Kong law.[8] The General Letter of Hypothecation provides that it "shall be governed by and construed in accordance with the laws of the Hong Kong Special Administrative Region...."[9] The Charge Over Securities Agreement provides that it "is governed by and shall be construed in accordance with the laws of Hong Kong."[10] The Securities Finance Agreement provides that it "shall be governed by and interpreted in accordance with the Laws of Hong Kong."[11] The Deed of Charge on Account(s) and Set Off provides that "[t]he laws of Hong Kong shall be applicable to and governing this Deed...."[12]

During exchange of the documentation that forms the parties' agreement, SCB delivered papers to Chang in Shanghai, and Chang signed and returned the executed documents to Shanghai for delivery to SCB in Hong Kong.[13] No evidence in the record suggests SCB was put on notice

[8] Mo Decl., Ex. A at 4. CP 151.
[9] Mo Decl., Ex. B at 2. CP 155.
[10] Mo Decl., Ex. C at 2. CP 158.
[11] Mo Decl., Ex. D at 4. CP 163.
[12] Mo Decl., Ex. E at 3. CP 167.
[13] Declaration of Kung Da Chang in Support of Respondents' Opposition to Petitioner's Second Motion for Summary Judgment ("Chang Decl.") ¶ 5. CP 289.

that it was dealing with a person residing in Washington, as the Court of Appeals noted.[14]

The Changs ultimately defaulted on their debt obligation. In Hong Kong, the parties litigated this obligation in High Court Action No. 806/2009 ("HCA 806"), and SCB prevailed, securing a money judgment. Petitioners' assertion that they "were not able" to post the usual bond in that lawsuit is not germane to their petition here; their contention was at the heart of their unsuccessful challenge—all the way to the U.S. Supreme Court—to recognition of this judgment. (And the Court of Appeals correctly concluded in the first appeal that the Changs actually had refused to provide the Hong Kong Court with information about their ability to post the requisite bond.[15]). Similarly, the Changs asserting that they "did not defend" the Hong Kong lawsuit is not germane to their petition and is not true.[16]

The HCA 806 judgment encompasses what Washington considers the Changs' marital community, for Hong Kong law exempts solely separate property of a spouse, not community property, from judgments

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[14] *SCB II*, 381 P.3d at 216.
[15] *Shanghai Commercial Bank Ltd. v. Chang*, 183 Wn. App. 1007, 2014 WL 4198391, *3 (2014), *review denied sub nom. Shanghai Commercial Bank v. Kung Da Chang*, 182 Wn. 2d 1006, 342 P.3d 327 (2015), *and cert. denied sub nom. Kung Da Chang v. Shanghai Commercial Bank Ltd.*, 135 S. Ct. 2847, 192 L. Ed. 2d 877 (2015) (hereafter, "*SCB I*").
[16] *SCB I*, 2014 WL 4198391 at *3.

titularly entered against one spouse (Chang).[17] In short, the HCA 806 judgment applies to what Washington considers community property, a fact not challenged by the Changs:

> Hong Kong is a separate property jurisdiction, and there is no community property concept/principle. The judgment in High Court of Hong Kong HCA 806 of 2009 against KD Chang is enforceable in Hong Kong against all of KD Chang's assets, which I am given to understand include those assets that would be considered "community property" in Washington, but not against his wife's separate assets.[18]

As the Court of Appeals held: "Chang did not introduce contrary evidence and does not contest that his and Chen's community property would be subject to the judgment if Hong Kong law applies." *SCB II*, 381 P.3d at 216–17.

Thus, as noted above, the petition for discretionary review is attempting to elevate routine application of choice-of-law principles to a matter of substantial public interest.

B. Procedural History

Germane to the instant petition is SCB's second summary judgment motion, filed on July 2, 2015, which sought a ruling that HCA 806 could be enforced against the Changs' community property.[19] The

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[17] Declaration of Donny Chiu in Support of Petitioner's Second Motion for Summary Judgment ("Chiu Decl."). CP 76.
[18] Chiu Decl. ¶ 2. CP 77.
[19] CP 53.

second summary judgment motion was granted by the trial court on August 21, 2015.[20] The Changs moved for reconsideration, which was denied on September 15, 2015.[21] The Changs appealed, and the Court of Appeals affirmed the trial court on September 12, 2016.[22] The Changs petitioned this Court for review on October 12, 2016 (the "Petition" or "Pet.").

III. ARGUMENT

As their sole basis for this Court to accept review, the Changs contend that the decision below "raises significant issues of great public interest under RAP 13.4(b)(4)." Pet. at 12. The Changs are mistaken. The decision below is firmly rooted in routine application of Washington's well-established choice-of-law doctrine. The Petition should accordingly be denied.

The Court of Appeals' unanimous opinion that is the subject of this petition is so well-reasoned and so well-supported that little need be added to get to the conclusion that this matter does not merit Supreme Court review.

A. The Courts Below Properly Applied Washington Law, Which Requires a Choice-of-Law Analysis

The Changs do not argue that the three principal precedents relied

[20] CP 532.
[21] CP 539.
[22] *SCB II*, 381 P.3d 212.

upon by the Court of Appeals—*Pacific States Cut Stone Co. v. Goble*, 70 Wn.2d 907, 425 P.2d 631 (1967), *Pacific Gamble Robinson Co. v. Lapp*, 95 Wn.2d 341, 622 P.2d 850 (1980), and *Potlatch No. 1 Fed. Credit Union v. Kennedy,* 76 Wn. 2d 806, 459 P.2d 32 (1969)—were wrongly decided. Pet. at 13. Neither do the Changs argue that these precedents were wrongly applied to the facts of this case. Rather, the Changs argue that these cases are inapplicable because, supposedly, Washington's Uniform Foreign-Country Money Judgments Recognition Act ("Uniform Act") (RCW 6.40A, *et seq.*) mandates application of Washington law (but somehow excluding Washington law on choice-of-law). Pet. at 13. The Changs' argument fails to recognize that application of Washington law requires, as the first step, a choice-of-law analysis, a point that the Court of Appeals squarely and convincingly addressed in its decision:

> Chang skips a step in the correct analysis. When a Washington court bases its judgment on a debt one spouse incurred outside the state, Washington courts use a conflict of laws analysis to decide what law to apply to decide if the judgment can be collected from that spouse's marital community. As required by RCW 6.40A.060(2), we use the same conflict of laws analysis to decide whether the Hong Kong judgment can be enforced against his and Chen's marital community.

SCB II, 381 P.3d at 215 (citations omitted). In other words, the Changs' lament that Washington law must be applied is simply wrong because the trial court and Court of Appeals did in fact apply Washington law, for

Washington law mandates the very choice-of-law analysis that resulted in application of Hong Kong's substantive law.[23]

Petitioners never offer any basis or authority for skipping the step of applying Washington law on choice-of-law—and SCB has not seen any such authority. That the ultimate result of this choice-of-law analysis is a judgment against the marital community is not a groundbreaking "issue of first impression." Pet. at 1. To the contrary, Washington has never held that the marital community is sacrosanct when it comes to the foreign debts of its constituent spouses, merely because the marital community is based in Washington. The place of domicile of one of the parties is but one-half of five types of contacts in the choice-of-law analysis adopted by Washington.[24] When (1) the choice-of-law contacts are predominantly foreign; and (2) the law of the foreign jurisdiction allows for enforcement against what is "community property" in Washington, Washington courts routinely allow for enforcement against the community in Washington.[25]

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[23] The Changs cite a non-persuasive and non-binding New Mexico case for the proposition that "[m]atters relating to the enforcement of judgments are governed by the law of the forum." Pet. at 14 (citing *Huntington Nat. Bank v. Sproul*, 116 N.M. 254, 258, 861 P.2d 935 (1993)). Regardless of the result of an application of New Mexico law in that case, in Washington an application of the law of the forum mandates the very choice-of-law analysis that the courts below engaged in and that the Changs now take issue with.

[24] Restatement (Second) of Conflict of Laws § 188 (1971); *Freestone Capital Partners L.P. v. MKA Real Estate Opportunity Fund I, LLC*, 155 Wn. App. 643, 666, 230 P.3d 625 (2010).

[25] *Pacific States*, 70 Wn.2d at 908–09; *Pacific Gamble*, 95 Wn.2d at 346–47; *see also Potlatch*, 76 Wn. 2d at 813 (applying Washington law under the choice-of-law analysis because the creditor had full knowledge at the time of transacting that the debtors resided

Such is the case here. The Court of Appeals carefully analyzed each relevant contact and held: "Weighing the competing policies of Washington and Hong Kong, the justified expectations of Chang, Chen, and the Bank, and the five types of contacts, we conclude that Hong Kong has the most significant relationship to the issue here." *SCB II*, 381 P.3d at 216.

The Changs assert that the three principal precedents relied upon by the Court of Appeals are distinguishable because they involve original actions instituted in Washington as opposed to the instant foreign-judgment-recognition action. Pet. at 13. Yet, the Changs cite no authority that distinguishes the recognition of a foreign judgment from an original action. *Id.* Nor could they. The Uniform Act contemplates that a recognized judgment is "[e]nforceable in the same manner and to the same extent as a judgment rendered in this state," *i.e.*, treated for all purposes as an original action instituted in Washington.

It is of no import that Chen was not named in the original Hong Kong lawsuit or the resulting Hong Kong judgment. Pet. at 1. It is sufficient that Ms. Chen and Respondents' marital community are named in the instant recognition lawsuit, and neither can claim a lack of notice or

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in Washington, a critical fact not present in the record before this Court).

lack of opportunity to defend their interests.[26] Indeed, as the Court of Appeals recognized, this is the prerogative of a non-party spouse in Washington, and exercised by Chen in this case. *SCB II*, 381 P.3d at 214 ("When a spouse is not a party in a Washington lawsuit, that spouse can choose to wait and intervene at the time of execution to prove that the judgment cannot be collected from the marital community.") (citing *Komm v. Dep't of Soc. & Health Servs.*, 23 Wn. App. 593, 599 (1979)).

In sum, the Changs' assertion that *Potlatch*, *Pacific Gamble*, and *Pacific States* are not dispositive of the instant action is not supported by either logic or judicial authority. The Court of Appeals properly relied upon and applied these three precedents when affirming the trial court's ruling.

B. Choice-of-Law Analysis Requires Examination of the Facts Underlying the Transaction

The Changs argue in the alternative that even if the choice-of-law analysis was appropriate, the Court of Appeals "erroneously looked at the underlying transaction to determine that Hong Kong law applied." Pet. at 14. According to the Changs, the merger doctrine renders the underlying debt transaction "irrelevant to an inquiry into enforceability." *Id.*

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[26] Counsel has appeared on Ms. Chen's sole behalf. Dkt. No. 6. In any event, community property law is not a tool to evade service—"service of process upon either spouse and a resulting judgment for a community obligation is enforceable against the community." *Oil Heat Co. of Port Angeles v. Sweeney*, 26 Wn. App. 351, 356, 613 P.2d 169 (1980).

This is an unfounded interpretation of the merger doctrine. Under the merger doctrine, "when a valid final judgment for the payment of money is rendered, the original claim is extinguished, and a new cause of action on the judgment is substituted for it."[27] SCB is not trying to maintain an action on the original claim—it is merely enforcing a valid judgment for which it has yet to collect any money. As the Court of Appeals properly recognized, courts "look[] to the facts supporting the judgment to determine its reach." *SCB II*, 381 P.3d at 214 (citing *Komm*, 23 Wn. App. at 599–600; *Merritt v. Newkirk*, 155 Wash. 517, 523–24, 285 P. 442 (1930)).

Further, as is evident from the Uniform Act, Washington courts are required to examine the underlying circumstances leading to the judgment. For example, our courts have discretion to decline enforcement of a foreign obligation if "the cause of action on which the judgment is based is repugnant to the public policy of this state...." RCW 6.40A.030(3)(c).

Nothing in the merger doctrine suggests that this Court should discard Washington's carefully honed choice-of-law analysis.

C. Under Washington's Choice-of-Law Analysis, Hong Kong Has the Most Significant Relationship to the Issue

The "most significant relationship" test endorsed by the Restatement and adopted by Washington analyzes five factors: (a) the

[27] *Caine & Weiner v. Barker*, 42 Wn. App. 835, 837, 713 P.2d 1133 (1986).

place of contracting; (b) the place of negotiation of the contract; (c) the place of performance; (d) the location of the subject matter of the contract; and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties. Restatement (Second) of Conflict of Laws § 188 (1971); *Freestone Capital Partners,* 155 Wn. App. at 666; *SCB II*, 381 P.3d at 215. The Changs aver that under this test Washington has the most significant relationship to the issues. Pet. at 15. But the courts below correctly found that Hong Kong plainly dominates the contacts. *SCB II*, 381 P.3d at 215–17.

Of these five types of contacts, two strongly favor Hong Kong, an additional two favor Hong Kong, and one is neutral. These contacts are to be evaluated according to their relative importance with respect to the particular issue, *i.e.*, enforcement of a Hong Kong judgment based on a Hong Kong contract with a Hong Kong bank.

Here, both the place of performance and subject matter of the contract were in Hong Kong. The loan came from a Hong Kong bank, the subject account was located in Hong Kong,[28] and all the underlying financial transactions that led to the loan that resulted in the Hong Kong judgment involved accounts in Hong Kong.[29]

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[28] Respondents' Amended Response and Counterclaims ("move his money into various accounts at the Hong Kong branch of SCB"). CP 32:13–14.

[29] Mo Decl., Exs. A–F (loan transaction documents establishing that the bank is

The place of contracting also favors Hong Kong. SCB made the offer in Hong Kong, it was transmitted to Shanghai, Chang purports to have signed in Washington (even though SCB did not know and could not have known this), and the executed documents were returned from Shanghai.[30] Nothing in the record suggests that SCB had any reason to believe there was any Washington connection.[31]

The place of negotiation also favors Hong Kong. The extent of negotiations was the imposition of terms by a Hong Kong bank, with delivery of those terms to Shanghai. The record does not support the notion that any negotiation occurred in Washington. The Changs' declarations do not assert that they pushed back on any terms before the agreements were executed.[32]

The residence of the parties is a wash. SCB is incorporated and headquartered in Hong Kong. Chang—unbeknownst to SCB at the time—resided in Washington.[33]

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incorporated and headquartered in Hong Kong). CP 144–83. *See also* Declaration of Stephen Hsieh in Support of Petitioner's Second Motion for Summary Judgment ("Hsieh Decl."), Ex. B at ¶¶ 25, 148, 149 (sworn witness statement submitted in connection with HCA 806 establishing that the loan occurred in Hong Kong). CP 86–89.

[30] Chang Decl. ¶ 5. CP 289.

[31] SCB II, 381 P.3d at 216 ("the record contains no indication that the Bank knew it was dealing with Washington residents").

[32] Chang Decl. ¶ 5. CP 289. *See also* Declaration of Clark Chang in Support of Respondents' Opposition to Petitioner's Second Motion for Summary Judgment ("Clark Decl.") ¶ 9. CP 210.

[33] Mo Decl., Exs. A–F (loan transaction documents establishing that the bank is incorporated and headquartered in Hong Kong). CP 144–83.

As the Court of Appeals correctly found, the net result of two factors weighing heavily in favor of Hong Kong, an additional two factors weighing in favor of Hong Kong, and one neutral factor is that Hong Kong is the jurisdiction with the most significant relationship. *SCB II*, 381 P.3d at 217.

D. No Substantial Issues of Public Interest Are Implicated

The Changs' sole argument for this Court to accept review is that this case supposedly "raises significant issues of great public interest under RAP 13.4(b)(4)." Pet. at 12. Neither the settled, clear law applied by the Court of Appeals nor its method of applying that body of law raises any hint of a public interest issue of significance.

"To determine whether or not a sufficient public interest is involved, this court looks at three criteria: (1) the public or private nature of the question presented; (2) the desirability of an authoritative determination which will provide future guidance to public officers; and (3) the likelihood that the question will recur." *In re Dependency of A.K.*, 162 Wn. 2d 632, 643 (2007) (applying test for "substantial public interest" in context of deciding moot cases).

Here, the Changs argue that this case presents "an issue of substantial public interest to spouses whose community property is at stake for the separate debt of the other spouse and to creditors alike." Pet.

at 15–16. But an examination of the three public interest criteria demonstrates that insufficient public interest is involved for this Court to accept review.

First, the nature and extent of debt enforcement—between two private parties—is indisputably private. Second, it is undesirable to establish a bright-line rule that the marital community is always immune to the foreign debts of a single spouse because this would transform Washington into a safe haven for unscrupulous debtors. As this Court and the Court of Appeals below recognize, "the state has no policy interest in being a sanctuary for fleeing debtors." *SCB II*, 381 P.3d at 216 (quoting *Pacific Gamble*, 95 Wn.2d at 347). The Changs suggest that "leav[ing] the determination in the hands of the courts" is something undesirable, but the flexibility afforded under Washington's choice-of-law analysis is a boon to debtors and creditors alike that ensures the proper outcome in light of the unique facts of each individual case. Third, this is an unusual case in that the debtors' indirection left SCB with no reason to suspect that Washington's law would apply. Such a rare case is not likely to arise. Certainly, the likelihood of this unusual bundle of facts recurring is too insignificant to warrant public interest review by this Court.

All three public interest criteria militate against granting the Petition. The Changs should not be allowed yet another bite at the apple.

The Petition should be denied.

IV. CONCLUSION

For the foregoing reasons, Respondent Shanghai Commercial Bank Limited respectfully requests that the Court deny KD Chang's and Michelle Chen's Petition for Review.

Respectfully submitted this 14th day of November, 2016.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on November 14, 2016, I caused a true and correct copy of the foregoing **RESPONDENT SHANGHAI COMMERCIAL BANK LIMITED'S ANSWER TO PETITION FOR REVIEW** to be served on the following in the manner indicated:

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