

No. 93823-7

NO. 73956-5-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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

Respondent,

v.

KUNG DA CHANG and MICHELLE CHEN, husband and wife, and the
marital community comprised thereof,

Appellants.

CORRECTED BRIEF OF RESPONDENT

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I. INTRODUCTION

In 2008, appellant Kung Da Chang entered into a credit facility agreement with respondent Shanghai Commercial Bank Limited (“SCB”), borrowing large sums in order to further a series of risky financial investments at another bank, unaffiliated with SCB. These investments ultimately failed, and the debt went into default. In Hong Kong, the parties litigated this obligation in High Court Action No. 806/2009 (“HCA 806”), and SCB prevailed, securing a money judgment. But the Changs did not have any assets in Hong Kong from which to collect, and SCB accordingly sought recognition of the HCA 806 judgment here in Washington. The trial court granted recognition of HCA 806. The Changs appealed. This Court affirmed the trial court’s ruling that the money judgment rendered in HCA 806 was properly recognized and enforceable in Washington. *Shanghai Commercial Bank Ltd. v. Chang*, 183 Wn. App. 1007 (2014) *review denied*, 182 Wn. 2d 1006, 342 P.3d 327 (2015), *cert. denied*, 135 S. Ct. 2847, 192 L. Ed. 2d 877 (2015).

After appellants Kung Da Chang (“Chang”) and Michelle Chen (“Chen”) unsuccessfully exhausted every possible appeal of the judgment recognition order, SCB secured a second summary judgment order, which holds that the Hong Kong judgment is enforceable against both Chang and the marital community of Chang and Chen (collectively, “Changs”), but

not Chen's separate property. The instant appeal challenges the second summary judgment order as to the marital community.

The lower court's ruling must once again be affirmed. First, the parties contractually selected Hong Kong law to govern the interpretation and enforcement of their agreements. Second, even if the parties had not contractually agreed that Hong Kong law governs, Washington's rule—the most significant relationship test—nonetheless requires application of Hong Kong law. As the uncontroverted expert testimony establishes, application of Hong Kong law has only one result: the Changs' community property is properly subject to enforcement of the obligation. Under the unique facts of this case—where the foreign judgment would encompass marital community property and where creditor SCB was not informed of the Changs' residence in Washington—the proper and fair result is to permit enforcement of the judgment against the marital community.

The time has come to put this simple debt collection case—in which, after eight years of effort, SCB has yet to recover a single dollar—to rest. For the reasons below, the Changs' appeal is without merit, and the trial court's ruling should be affirmed.

II. STATEMENT OF THE CASE

The only facts relevant to this appeal are those directly related to

the choice of law of the parties. Those facts are few and not in dispute. The underlying facts that were the subject of the Hong Kong proceeding are not relevant to the instant appeal because the enforceability of the Hong Kong judgment has already been determined by the trial court and affirmed by this Court. All that is left for this Court to determine is whether the Washington-recognized judgment can be enforced against the Changs' community property.

Many of the purported "facts" the Changs seek to introduce on this appeal consist of nothing more than unsubstantiated accusations of fraud and wrongdoing—accusations that were fully litigated and rejected by the courts in Hong Kong. Not one of the Changs' 230-plus pages of declaration attachments submitted in connection with the second summary judgment is even tangentially relevant to this appeal.

SCB will accordingly summarize only those few facts that are actually relevant to a Washington court's determination of whether the Hong Kong judgment can be enforced against the Changs' community property.

A. The Parties Entered Into a Credit Facility Arrangement Governed by Hong Kong Law

Chang entered into a credit facility arrangement with SCB between

March and April of 2008 by executing five agreements.¹ Collectively, these five agreements enabled the Changs to borrow large sums from SCB, and those sums make up the underlying debt obligation of this lawsuit.² 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.”³ 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.”⁴ 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]....”⁵ Thus, through the Facility Letter's incorporation of the Terms and

¹ Declaration of May Ka Mo in Support of SCB's Second Motion for Summary Judgment (“Mo Decl.”) ¶¶ 2–8. Clerk's Papers (“CP”) 144–45.

² *Id.* ¶ 8. CP 145.

³ Mo Decl., Ex. A at 1. CP 148.

⁴ Mo Decl., Ex. A at 4. CP 151.

⁵ Mo Decl., Ex. F at § 19.1. CP 172.

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 ... standard documents executed by [Chang] in relation to the banking facilities and/or accounts with [SCB],” also expressly choose Hong Kong law.⁶ 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....”⁷ The Charge Over Securities Agreement provides that it “is governed by and shall be construed in accordance with the laws of Hong Kong.”⁸ The Securities Finance Agreement provides that it “shall be governed by and interpreted in accordance with the Laws of Hong Kong.”⁹ 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....”¹⁰

During the exchange of 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

⁶ Mo Decl., Ex. A at 4. CP 151.

⁷ Mo Decl., Ex. B at 2. CP 155.

⁸ Mo Decl., Ex. C at 2. CP 158.

⁹ Mo Decl., Ex. D at 4. CP 163.

¹⁰ Mo Decl., Ex. E at 3. CP 167.

SCB in Hong Kong.¹¹ There is not a scintilla of evidence in the record that suggests SCB was put on notice that it was dealing with a person residing in Washington.

The HCA 806 judgment encompasses what Washington considers the Changs' marital community, for Hong Kong exempts solely separate property of a spouse, not community property, from judgments titulary entered against one spouse (Chang). This feature of Hong Kong law, and of the HCA 806 judgment, is not a legal issue for purposes of the instant appeal. Rather, because foreign law is treated as a fact and requires expert testimony of a foreign law expert, the parties were required to provide the trial court with pertinent expert testimony to enable the court to decide the "fact" of the operation of Hong Kong law and the HCA 806 judgment. *Byrne v. Cooper*, 11 Wn. App. 549, 553, 523 P.2d 1216 (1974).

SCB submitted the expert testimony of a seasoned Hong Kong lawyer, Donny Siu Keung Chiu.¹² The Changs opted not to contest Mr. Chiu's expert declaration, and so it established the fact of whether the HCA 806 judgment encompasses what Washington considers community property. In short, the HCA 806 judgment applies to what Washington considers community property:

¹¹ Declaration of Kung Da Chang in Support of Respondents' Opposition to Petitioner's Second Motion for Summary Judgment ("Chang Decl.") ¶ 5. CP 289.

¹² Declaration of Donny Chiu in Support of Petitioner's Second Motion for Summary Judgment ("Chiu Decl."). CP 76.

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.¹³

All of the above pertinent facts are undisputed, for nothing in the record before this Court contravenes any of these germane facts.

B. Procedural History

On June 20, 2012, pursuant to RCW 6.40A.050, SCB filed a petition seeking recognition of the Hong Kong judgment rendered in HCA 806. CP 1. On December 12, 2012, KD Chang filed his Amended Response, Affirmative Defenses, and Counterclaims. CP 24. On June 7, 2013, the trial court granted SCB's first motion for partial summary judgment.¹⁴ On August 25, 2014, this Court affirmed the trial court's ruling.¹⁵

On July 15, 2015, SCB filed its second motion for summary

¹³ Chiu Decl. ¶ 2. CP 77.

¹⁴ *Shanghai Commercial Bank Ltd. v. Chang*, King Cnty. No. 12-2-21293-7 SEA (Sup. Ct. Wash. 2013), Dkt. No. 81.

¹⁵ *Shanghai Commercial Bank Ltd. v. Chang*, 183 Wn. App. 1007 (2014).

judgment. CP 53. On August 10, 2015, the Changs filed their opposition thereto. CP 184. On August 17, 2015, SCB filed its reply in support of its second motion for summary judgment. CP 524. On August 21, 2015, the trial court granted SCB's second motion for summary judgment. CP 532. On September 15, 2015, the Changs filed a motion for reconsideration. CP 535. On September 16, 2015, the trial court denied the motion for reconsideration. CP 539. On September 17, 2015, the Changs filed a notice of appeal. CP 540. On February 1, 2016, the Changs filed their Opening Brief of Appellants Kung Da Chang and Michelle Chen ("Br.") with this Court.

III. ARGUMENT

The trial court properly granted SCB's Second Motion for Summary Judgment. As explained above, the HCA 806 judgment itself encompasses what Washington considers community property, and Hong Kong law applies to enforcement of the judgment under the parties' binding choice-of-law agreements. Even disregarding the binding choice-of-law agreements, Washington's choice-of-law analysis, used in the absence of a contractual choice-of-law clause, would nonetheless require the application of Hong Kong law. None of the merger doctrine, Chen's assertion of prejudice, and RCW 6.40A.060(2) alters this legal determination. Because Hong Kong law applies, and because

uncontroverted expert testimony has established that, under Hong Kong law the HCA 806 judgment encompasses and may be enforced against the Changs' community property (but not Chen's separate property), the trial court properly granted summary judgment in favor of SCB.

Especially here, where SCB was not informed of the Changs' residence in Washington, it would be improper and fundamentally unfair to permit the Changs to hide their considerable assets under the marital community blanket.

A. Standard of Review

The Court reviews summary judgment decisions *de novo*. *Verdon v. AIG Life Ins. Co.*, 118 Wn. App. 449, 452, 76 P.3d 283 (2003). “[A]ssignments of error unsupported by citation of authority or legal argument will not be considered.” *Hamilton v. State Farm Ins. Co.*, 83 Wn. 2d 787, 795, 523 P.2d 193 (1974).

**B. The Parties' Valid Contractual Choice of Law
Mandates Application of Hong Kong Law**

As detailed above, all five governing agreements explicitly choose Hong Kong law to control. The Changs concede the validity of the choice of law in four of the agreements and dispute the choice-of-law provision only in the Facility Letter. Br. at 18. The Changs' statement that “[t]he Facility Letter itself does not contain an explicit Hong Kong choice-of-law

provision” is simply incorrect. Br. at 19.

Specifically, the Changs disregard the Facility Letter’s explicit incorporation of the Terms and Conditions for Bank Accounts and General Services, and fail to recognize that “[i]ncorporation by reference allows the parties to incorporate contractual terms by reference to a separate agreement.” *W. Washington Corp. of Seventh-Day Adventists v. Ferrellgas, Inc.*, 102 Wn. App. 488, 494, 7 P.3d 861 (2000).

The Facility Letter explicitly provides that Chang is “subject to the provisions herein contained, the Terms and Conditions...”¹⁶ and explicitly defines “Terms and Conditions” as “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.”¹⁷

The Terms and Conditions for Bank Accounts and General Services, in turn, explicitly 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]...”¹⁸ Thus, through simple incorporation by reference, the Facility Letter explicitly chooses Hong Kong law to apply. The Changs cannot divorce the Facility Letter from its

¹⁶ Mo Decl. Ex A at 1. CP 149.

¹⁷ Mo Decl. Ex A at 3. CP 151.

¹⁸ Mo Decl., Ex. F at § 19.1 (emphasis added). CP 172.

explicitly integrated parts.

Washington courts always enforce contractual choice-of-law clauses, with one narrow exception. *McKee v. AT & T Corp.*, 164 Wn.2d 372, 384, 191 P.3d 845 (2008). Courts will only “disregard the contract provision and apply Washington law if, without the provision, Washington law would apply; if the chosen state’s law violates a fundamental public policy of Washington; and if Washington’s interest in the determination of the issue materially outweighs the chosen state’s interest. [Courts] will enforce a choice-of-law provision **unless all three of these conditions are met.**” *Id.* (emphasis added). The trial court did not err in applying the choice-of-law clause because none of the three conditions for declining to apply Hong Kong law is met in the instant case.

1. The First *McKee* Condition

Determining whether Washington law would apply in the absence of the five choice-of-law provisions requires an analysis under Washington’s conflict-of-laws principles. In enforcing a debt involving multiple jurisdictions where the results might vary depending on which jurisdiction’s law is applied, Washington courts apply the law of the jurisdiction with the “most significant relationship” to the underlying debt obligation. *Pacific States Cut Stone Co. v. Goble*, 70 Wn.2d 907, 908–09, 425 P.2d 631 (1967); *Pacific Gamble Robinson Co. v. Lapp*, 95 Wn.2d

341, 346–47, 622 P.2d 850 (1980) (citing Restatement (Second) of Conflict of Laws § 188 (1971)), *overruled on other grounds by Haley v. Highland*, 142 Wn.2d 135, 142, 12 P.3d 119 (2000).¹⁹ Here, Hong Kong law would still apply even absent the five choice-of-law provisions because Hong Kong has the most significant relationship.

The Changs seem to question whether *Pacific Gamble* and *Pacific States* govern because they deal with enforcement of a contract, rather than enforcement of a judgment. Br. at 24–25. These precedents are directly on point because they set forth the choice-of-law analysis to be applied by Washington courts when determining which jurisdiction’s laws apply, regardless of whether the case deals with contract or enforcement of a foreign judgment arising from a contract. *See* Restatement (Second) of Conflict of Laws § 2 cmt. a (1971) (“Matters falling within the field of Conflict of Laws. Conflict of Laws covers an extremely wide area, embracing all situations where the affairs of men cut across state lines. Important matters falling within the scope of a state’s Conflict of Laws

¹⁹ SCB notes that the Changs misstate the holding of *Haley*, which is not, as the Changs state, that “separate debt obligations are enforceable only against the separate property of the debtor spouse.” Br. at 27 n.70. To the contrary, the Washington Supreme Court “affirm[ed] the Court of Appeals’ holding that RCW 26.16.200 does not bar the use of Highland’s one-half interest in community property to satisfy a judgment based on his premarital tort in the event that his separate property is insufficient to satisfy the claim.” *Haley*, 142 Wn. 2d at 158 (emphasis added). *Haley* is in any event inapposite because it involves pre-marital tortfeasor liabilities, whereas the debt liabilities in the instant case were incurred after the Changs’ 1994 marriage. Br. at 11. As the *Haley* court notes, “[d]istinction can be made between debts and torts, and it is not necessary that the rules regarding them be parallel.” 142 Wn. 2d at 143.

rules include: ... Foreign judgments.”). There is simply nothing about a judgment, and nothing in *Pacific Gamble* or *Pacific States*, that gives any basis for not applying Washington’s choice-of-law rules to enforcement of a judgment.

The “most significant relationship” test endorsed by the Restatement and adopted by Washington analyzes five factors:²⁰ (a) the 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 L.P. v. MKA Real Estate Opportunity Fund I, LLC*, 155 Wn. App. 643, 666, 230 P.3d 625 (2010).

²⁰ The seven “factors” cited and analyzed by the Changs in their brief are merely the Restatement’s “choice-of-law principles.” Restatement (Second) of Conflict of Laws § 6 (1971); Br. at 27–28. Nonetheless, even these “principles” support an application of Hong Kong law because: (1) the international system would undoubtedly benefit from a consistent approach to enforcement of cross-border judgments, and Hong Kong-Washington commerce could be adversely impacted if Washington community property rules could be used to shield personal debts, especially where the creditor was not on notice of the debtors’ Washington residence; (2) Washington obviously has no policy supporting its becoming a haven for international judgment debtors; (3) Hong Kong has a strong interest in ensuring that the money-judgments of its courts cannot be thwarted by foreign property law regimes; (4) SCB was more than justified in expecting that for a loan taken at its Hong Kong office, with each and every governing contract selecting Hong Kong law, that Hong Kong law would apply, especially in light of the dearth of evidence suggesting that SCB had any reason to expect application of Washington law; (5) the basic policies of judgment enforcement support a consistent application between Hong Kong and Washington; (6) applying the law of the location of all the relevant events and transactions—Hong Kong—would promote certainty, predictability, and uniformity of result; and (7) it is easy to determine and apply Hong Kong law when, again, all the relevant events and transactions occurred in Hong Kong.

Of the five types of contacts examined under the most significant relationship test, two are unequivocally in favor of Hong Kong, two of them slightly 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.*, the enforcement of a Hong Kong judgment based on a Hong Kong contract with a Hong Kong bank. *Id.*

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,²¹ and all the underlying financial transactions that led to the loan that resulted in the Hong Kong Judgment involved accounts in Hong Kong.²²

The place of contracting slightly favors Hong Kong. SCB made the offer in Hong Kong, but Chang purports to have signed in Washington, even though SCB did not know and could not have known this, as the papers had been mailed to Shanghai.²³ Indeed, nothing in the record suggests that SCB had any reason to believe there was any Washington

²¹ Respondents' Amended Response and Counterclaims ("...move his money into various accounts at the Hong Kong branch of SCB."). CP 32:13–14.

²² Mo Decl., Exs. A–F (loan transaction documents establishing that the bank is incorporated and headquartered in Hong Kong). CP 144–83. *See also* 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.

²³ Chang Decl. ¶ 5. CP 289.

connection.²⁴

The place of negotiation also slightly 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. Indeed, the Changs' declarations do not assert that they pushed back on any terms before the agreements were executed.²⁵

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.²⁶

The net result of these two factors weighing heavily in favor of

²⁴ In *G.W. Equip. Leasing, Inc. v. Mt. McKinley Fence Co.*, 97 Wn. App. 191, 982 P.2d 114 (1999), the court applied the law of the couple's domicile, Arizona, under the reasoning that "typically" the state with the most significant interests is the state where the spouses reside. The instant case is far from the "typical" case in many respects. The guaranty contract at issue in *G.W. Equip.* specifically provided that the debtors were signing in Arizona, plainly putting the creditor on notice of the potential application of Arizona law, but here nothing in the record suggests that SCB was aware of the Changs' residence in Washington. As is evident from post-*G.W. Equip.* decisions, *G.W. Equip.* does not stand for the proposition that courts should ignore the five-factor test and look only to the domicile of the spouses. See, e.g., *Singh v. Edwards Lifesciences Corp.*, 151 Wn. App. 137, 142, 210 P.3d 337 (2009) (applying the most significant relationship test and holding that California law controls despite plaintiff's residency in Washington). More fundamentally, *G.W. Equip.* is inapposite because the guaranty contract that was at issue did not have a choice-of-law clause, in stark contrast to the instant case where there is an explicit choice of law clause in favor of Hong Kong in each of the agreements that forms the contract.

²⁵ 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.

²⁶ Mo Decl., Exs. A–F (loan transaction documents establishing that the bank is incorporated and headquartered in Hong Kong). CP 144–83.

Hong Kong, two factors weighing slightly in favor of Hong Kong, and one neutral factor is that Hong Kong is the jurisdiction with the most significant relationship.

In *Pacific States*, Oregon was found to be the jurisdiction with the most significant relationship because “[t]he contract was executed in Oregon, at least part of the negotiations took place in Oregon, the seller completely performed in Oregon, and the situs of the subject matter of the contract at the time of contracting as at the time of performance by the seller was in Oregon. Most significant is that the place of delivery of possession by the seller was in Oregon.” 70 Wn. 2d at 909. Likewise, in the instant case it is undisputed that although the Changs are now Washington residents, the loan came from a Hong Kong bank, the subject account was located in Hong Kong,²⁷ and all the underlying financial transactions that led to the loan that resulted in the Hong Kong judgment involved accounts in Hong Kong.²⁸ Under the analysis used in *Pacific States*, Hong Kong has the most significant relationship, and its law controls even absent the Hong Kong choice-of-law provisions.

²⁷ Respondents’ Amended Response and Counterclaims (“...move his money into various accounts at the Hong Kong branch of SCB.”). CP 32:13–14.

²⁸ Mo Decl., Exs. A–F (loan transaction documents establishing that the bank is 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.

Potlatch No. 1 Fed. Credit Union v. Kennedy, 76 Wn. 2d 806, 459 P.2d 32 (1969), in which Washington law was applied, is inapposite and does not avail the Changs. Specifically, *Potlatch* hinged on the court's determination that the creditor knew that it was dealing with Washington residents and thus expected or should have expected Washington law to come into play:

Plaintiff credit union, on the other hand, was aware that it was dealing with Washington residents. It also knew that the property covered by the chattel mortgage executed by Roy H. Kennedy and his wife was located in Washington. It was also likely that most, if not all, of the community property of A. V. Kennedy and Vivian Kennedy would be situated in Washington. Therefore, if plaintiff had considered the matter, it would have been fairly certain that any execution of a judgment on the note or mortgage would have to be in Washington court.

Potlatch, 76 Wn. 2d at 813.

In stark contrast to *Potlatch*, the record here shows that SCB had absolutely no reason to believe that Washington law was in the equation at all. According to Chang's own testimony, "SCB sent the credit facility agreement and four other agreements to me [Chang] at my father's address in Shanghai ... I received the documents, signed them, and then mailed them back to my father in Shanghai."²⁹ Unlike the creditor in *Potlatch*, SCB was not, at the time of contracting, "fairly certain that any execution

²⁹ Chang Decl. ¶ 5. CP 289.

of a judgment on the note or mortgage would have to be in Washington court.” *Id.* Indeed, SCB first sought enforcement on the debt in Hong Kong court—it was only the Changs’ evasive tactics that forced SCB to pursue a remedy here in Washington.

Accordingly, because Hong Kong law would apply absent the choice-of-law provisions under any analysis, the first condition under *McKee* is not met. This alone requires the Court to enforce the Hong Kong choice-of-law provision, for the choice-of-law clauses are to be applied unless all three of the *McKee* exception conditions are established.

2. The Second *McKee* Condition

Hong Kong law does not violate the fundamental public policy of Washington. In fact, considerations of public policy are part of the analysis for recognition of foreign judgments, and this Court rejected the Changs’ public-policy argument in the prior appeal on the recognition and enforcement of the Hong Kong judgment. *Shanghai Commercial Bank Ltd. v. Chang*, 183 Wn. App. 1007, *1 (2014), *review denied*, 182 Wn. 2d 1006, 342 P.3d 327 (2015), *cert. denied*, 135 S. Ct. 2847, 192 L. Ed. 2d 877 (2015) (“Kung Da Chang fails to demonstrate that ... the judgment is repugnant to state or federal public policies....”). There is no reason for the Court to deviate from its previous determination.

Moreover, as to enforcement of contract obligations against a

marital community, it is also obvious that such enforcement is not deemed to violate Washington's fundamental public policy. Washington courts regularly enforce, against Washington marital communities, out-of-state agreements that were entered into by an individual spouse and that do not benefit the marital community. *Pacific States*, 70 Wn. 2d at 914; *Pacific Gamble*, 95 Wn. 2d at 349. Our Supreme Court, in *Pacific Gamble*, underlined the "non-fundamental" nature of Washington's policy regarding marital property:

[T]he Washington policy in favor of the protection and predictability of the marital property provisions is not always followed strictly, but has been modified by this court and the legislature in some circumstances.

...

[I]t is clear that neither this court nor the legislature currently adheres to the rule that the marital property, including the wages of a debtor spouse, are under all circumstances to be insulated from the claims of a creditor on a separate debt.

95 Wn. 2d at 347.

It is actually "contrary to [the] public policy" of Washington for the community to "benefit from the wrongful act of one of its members." *U. S. F. & G. Ins. Co. v. Brannan*, 22 Wn. App. 341, 349, 589 P.2d 817 (1979) (emphasis added).

Thus, the second *McKee* factor for not enforcing a choice-of-law clause also is not satisfied, requiring the Court to enforce the Hong Kong

choice-of-law provision.

3. The Third *McKee* Condition

Washington's interest in the determination of this issue does not materially outweigh Hong Kong's. In addition to the fact that Hong Kong has the most significant relationship to the subject matter of the contract (detailed above), this lawsuit is the final recourse for a Hong Kong party seeking compensation for a large, unpaid debt. SCB has yet to collect a single penny of the monies owed to it.³⁰ Moreover, Washington has no interest in becoming a safe haven for debtors to sequester their assets and thwart judgment creditors. This is not to say that Washington has no interest. That interest is most vigorously promoted by our courts when the debtor(s) put the creditor on notice **at the time of contracting** regarding the potential for application of Washington law. *See, e.g., Potlatch*, 76 Wn. 2d at 813 (applying Washington law against out-of-state creditor where "Plaintiff credit union ... was aware that it was dealing with Washington residents."). Where, as here, the record shows SCB had no reason to believe it was dealing with Washington residents, Washington's interest is substantially lessened.

In sum, not one of the three factors to reject a choice-of-law clause under *McKee* is met, where the absence of even one of the factors is

³⁰ Mo Decl. ¶ 9. CP 145.

sufficient to require enforcement of the parties' choice-of-law agreement. Accordingly, the choice-of-law provisions selecting Hong Kong law in all five of the agreements govern here.

C. Even Under Washington's Default Rule—the Most Significant Relationship Test—Hong Kong Law Applies

As explained above, in the absence of a choice-of-law clause, Washington courts apply the five-part most significant relationship test. If there were not a choice-of-law clause here, then Hong Kong law would still apply because, as detailed above at Section III.B.1, SCB has established that under Washington's most significant relationship test, two of the five contacts strongly favor application of Hong Kong law, two of the factors slightly favor application of Hong Kong law, and the fifth factor is neutral. Hong Kong law has the most significant relationship. Thus, even if the Facility Letter did not integrate the choice-of-law provision of the Terms and Conditions for Bank Accounts and General Services—which it undoubtedly does—Hong Kong law nonetheless applies.

D. The Merger Doctrine Does Not Apply

The Changs argue that the agreements, all of which require application of Hong Kong law, are somehow erased via “merger” in the at-issue Hong Kong judgment. But Washington's rule of merger does not

override the parties' binding choice-of-law provisions dictating application of Hong Kong law.

To be sure, as a function of res judicata, “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 ... plaintiff cannot maintain an action on the original claim.” *Caine & Weiner v. Barker*, 42 Wn. App. 835, 837, 713 P.2d 1133 (1986). But 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.³¹ The purpose of the rule of merger is not to expunge valid choice-of-law clauses governing enforcement of a judgment, but to “prevent vexatious relitigation of matters that have already passed into judgment as between the parties to the litigation and their successors.” *Caine & Weiner*, 42 Wn. App. at 837. SCB is not seeking to, and has no desire to, re-litigate the underlying claim.

Here, the parties specifically agreed that “**enforcement** of the Agreement ... shall be governed by the laws of the HKSAR [Hong Kong Special Administrative Region].”³² No matter how broadly the merger doctrine is applied, a judgment cannot wipe out the parties' specific

³¹ Mo Decl. ¶ 9. CP 145.

³² Mo Decl., Ex. F at §19.1 (emphasis added). CP 172.

agreement that enforcement of the judgment is to be governed by Hong Kong law.

Nor would broad application of the rule of merger serve its underlying policy. “[T]he doctrine is designed to promote justice and should not be carried further than that end requires. Therefore, where the original obligation provides for special rights or exemptions, in some circumstances these may be preserved and recognized despite merger.” *Caine & Weiner*, 42 Wn. App. at 837. Applying Washington law over Hong Kong law would not promote justice, as it would frustrate the intent of the parties entering into the choice-of-law agreement in the first instance, in addition to further hindering the already-protracted process of collecting on the debt owed to SCB. Though the instant case does not fall within the purview of the rule of merger, even if it did, it would be one of the “special rights or exemptions” that may be preserved and recognized in the furtherance of justice.

The Changs merger argument boils down to the proposition that contracting parties can never bind themselves regarding post-judgment issues, including interest, attorneys’ fees, costs, etc. That is not and cannot be the law. Every day many hundreds of Washington residents and Washington companies enter into contracts that spell out terms that govern post-judgment matters, including interest rates, responsibility for

attorneys' fees, and responsibility for enforcement-related costs. To our knowledge, never has a Washington Court held that such terms governing post-judgment matters are wiped out by a judgment pursuant to the merger doctrine.

A choice-of-law clause governing post-judgment enforcement is, with respect to the merger doctrine, no different than an interest clause, attorneys' fees clause, or costs clause. It makes no sense to dramatically extend the merger doctrine to invalidate all such terms governing post-judgment matters.

E. Application of Hong Kong Law Is Not Unfair to Chen

The Changs seem to start from the false foundation that debts arising from contracts signed by only one spouse or benefiting only one spouse can never be enforced against marital community assets of Washington residents. In truth, the cases are many in which the marital community of Washington residents are required to answer for debts incurred for the benefit of one spouse. *See, e.g., Pacific Gamble*, 95 Wn. 2d at 349.

Such reported decisions arise from fact patterns in which foreign law is held to apply. The instant case fits that pattern. The mere fact that Chen did not sign the credit agreements does not automatically preclude her from being bound by their choice-of-law provisions. In both *Pacific*

States and *Pacific Gamble*, only one spouse signed the contract and the marital community was bound by the contracts. 70 Wn. 2d at 907; 95 Wn. 2d at 341. As already established, notwithstanding the express choice-of-law clauses in the credit agreements, under Washington’s most significant relationship test Hong Kong law would still control. The agreements’ explicit choice-of-law clauses are thus only additive to what Washington already requires: Hong Kong’s most significant relationship to the loan mandates the application of Hong Kong law.³³

Contrary to the Changs’ assertions, whether Chen benefitted or sought to benefit from the loans is not relevant. Br. at 22. Such benefit analysis is used only to determine, under Washington law, the character of a particular obligation (*i.e.*, if the community benefitted from incurring the obligation, then the obligation flows to the community). *Oil Heat Co. of Port Angeles v. Sweeney*, 26 Wn. App. 351, 355, 613 P.2d 169 (1980). But here, Washington law does not apply—Hong Kong law does. And under Hong Kong law, it is undisputed that there is no such character-of-debt analysis because in Hong Kong, what would be considered “the

³³ The Changs’ citation to *Oltman v. Holland Am. Line USA, Inc.*, 163 Wn. 2d 236, 250, 178 P.3d 981 (2008) for the proposition that “a non-signing spouse will not be bound by a choice-of-law provision in an agreement signed solely by the other spouse” is a misstatement of the law. *Oltman* dealt solely with a forum selection clause. *Id.* The considerations of unfairness and inconvenience in enforcing a forum selection clause that would “essentially den[y the plaintiff] his day in court” are absent in a choice-of-law determination. *Id.* at 253.

community” in Washington is always liable for obligations such as the Hong Kong judgment, regardless of how Washington courts would otherwise characterize the obligation. Chiu Decl. ¶ 2. CP 76.³⁴

F. RCW 6.40A.060(2) Does Not Limit the Application of Hong Kong Law

Because of the dispositive effect of *Pacific States* and *Pacific Gamble*, the Changs seek a path around those precedents and their choice-of-law analysis and consequences. One avoidance path proposed by the Changs is a snippet from RCW 6.40A.060(2) of the Uniform Foreign-Country Money Judgments Recognition Act (“Uniform Act”), stating that a recognizable foreign-country judgment is “[e]nforceable in the same manner and to the same extent as a judgment rendered in this state.”

The Changs attempt to twist those words to mean that the Hong

³⁴ The Changs present no argument regarding Chen’s participation or lack of participation in the Hong Kong litigation. Though the Changs note in passing that Chen was not sued individually in Hong Kong, Chen does not deny she was contemporaneously fully aware of the Hong Kong proceedings. Even though Chen makes no argument regarding her Hong Kong participation, we note that for nearly a century, Washington’s Supreme Court has held to the rule “[t]hat a judgment rendered upon a community obligation in an action to which the wife is not a party is enforceable against the community property....” *Manche v. Russell*, 121 Wn. 65, 66–67, 207 P. 955 (1922). There is no precedent that derogates from the *Manche* rule. Moreover, it is sufficient that Chen and the Changs’ marital community are named in the instant recognition lawsuit, and neither can claim a lack of notice or opportunity to defend their interests. Indeed, counsel has appeared on Chen’s sole behalf. CP 19–23. “[S]ervice of process upon either spouse and a resulting judgment for a community obligation is enforceable against the community.” *Oil Heat Co*, 26 Wn. App. at 356. The Changs and their marital community had the opportunity to raise objections to the Hong Kong judgment during the first summary judgment proceeding in this case. Any attempts to do so now are barred by *res judicata*.

Kong judgment is *per se* unenforceable in Washington against the Changs' marital community. Br. at 2. For several reasons, this slender reed of the snippet from the statute does not bear the weight the Changs need to apply to escape the dispositive effect of *Pacific States* and *Pacific Gamble*.

First, the Changs fail to come to grips with the fact that the HCA 806 judgment does in fact encompass the marital community. The sole requisite expert testimony on the meaning of the Hong Kong judgment is found in Mr. Chiu's Declaration. Chiu Decl. ¶ 2. CP 76. Thus, the at-issue judgment already covers the Changs' community property. This judgment does not need to be "expanded," as the Changs falsely suggest, to encompass the marital community.

Second, the statute's "same manner and to the same extent" language does not explicitly or implicitly erase a century of Washington choice-of-law analysis precedent and doctrine, yet that is apparently how the Changs are asking this Court to read those few words! If, with respect to judgments, the Legislature had intended to obliterate the extensive body of court-created common law in Washington, the Legislature would have done so explicitly and not through a six-word phrase that must be twisted to get to the Changs' desired result.

In construing a foreign judgment, like any other document with cross-border legal implications, a court must start with the threshold

question: Whose law applies? Of course, in answering that question, a Washington court must apply Washington choice-of-law principles. Performing that exercise in this case results in the trial court's conclusion: Hong Kong law applies.

What the Changs are apparently suggesting is that, as to a foreign judgment, the Legislature has barred Washington courts from performing the choice-of-law analysis that our state judiciary has crafted over a century. The, at best, cryptic six words in the statutory snippet on which the Changs rely to erase the applicable common law, do not come close to the explicit statutory dictate that would be needed to make such a drastic change to the common law:

[W]e are hesitant to recognize an abrogation or derogation from the common law absent clear evidence of the legislature's intent to deviate from the common law. It is a well-established principle of statutory construction that the common law ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose. A law abrogates the common law when the provisions of a statute are so inconsistent with and repugnant to the prior common law that both cannot simultaneously be in force. A statute in derogation of the common law must be strictly construed and no intent to change that law will be found, unless it appears with clarity.

Potter v. Washington State Patrol, 165 Wn. 2d 67, 76-77, 196 P.3d 691 (2008) (internal citations and quotation marks omitted).

Third, even if the at-issue judgment did not already apply to the

marital community as Mr. Chiu's uncontested testimony establishes, and even if RCW 6.40A.060(2) explicitly rejected common law, the at-issue judgment would nonetheless apply to the Changs' marital community under the Changs' strained reading of the statute. The Changs essentially argue that a court's function in interpreting a foreign judgment is to imagine the judgment that would have resulted if the lawsuit had instead originated in Washington. Br. at 25. If SCB, instead of initiating HCA 806 in Hong Kong, had brought the original action in Washington, then this lawsuit would have been a nearly identical repeat of *Pacific States*. *Pacific States*, an original Washington action, held that the Washington marital community was liable for the separate obligation of a spouse under application of Oregon law. 70 Wn. 2d at 907. Like Oregon, Hong Kong is not a community property jurisdiction. Thus, the Changs' community would be liable even under the Changs' strained interpretation of the Uniform Act.

G. Applying Hong Kong Law, the Marital Community Is Subject to the Hong Kong Judgment

Because Hong Kong law applies to enforcement of the debt, the Changs' marital community property (but not Chen's separate property) is subject to the debt obligation. Washington courts look to the law of the jurisdiction governing the debt obligation to determine whether the debt

obligation can be enforced against community property. Because Hong Kong law applies to enforcement of the Changs' debt obligation, this Court must apply Hong Kong law to determine whether and to what extent the Changs' marital community is liable.

When a debt that does not benefit the marital community is incurred in a non-community property jurisdiction (such as Hong Kong) by one spouse, Washington courts hold that the debt may be enforced against all of that spouse's separate assets **as well as the community assets** if the jurisdiction in which the debt was incurred does not bar enforcement against community property. *See Pacific Gamble*, 95 Wn.2d at 349–50 (applying Colorado law and holding that all of the husband's separate property, **plus community property**, could be used to satisfy the judgment against him in Washington for the debt he incurred in Colorado where the community was not benefitted); *see also Pacific States*, 70 Wn. 2d at 914 (“since the obligation of a husband in Oregon subjects all the property of the married couple to the debt except the separate property of the wife, the effect of applying Oregon law to the situation before us is that all property, including community property, held by the Gobles and the Wallaces, with the exception of the wives' separate property, is subject to the obligation involved.”).

Exactly like Oregon and Colorado, Hong Kong's only limit on

enforcing a debt incurred by one spouse is that the separate property of the non-debtor spouse cannot be used to satisfy the judgment.³⁵ Accordingly, because the HCA 806 judgment is enforceable in Hong Kong against Chang's separate property **and what would be community property in Washington**, but not against Chen's separate assets, it must likewise be recognized and enforced in Washington against Chang's separate property and the property of his marital community (but not Chen's separate property).³⁶

The Changs casually say there is an issue of fact regarding whether the at-issue debt can be enforced against the Changs' marital community property. Br. at 35–36. As is clear from the above discussion, no germane facts are actually disputed; only the law is disputed. The Changs point to not a single material fact that is genuinely disputed.

This Court has before it a Hong Kong judgment that a qualified expert has testified covers what Washington would consider to be the

³⁵ Chiu Decl. ¶ 2. CP 76.

³⁶ In the closely related proceeding *Shanghai Commercial Bank Limited v. Ching Ho Chang et al.*, King Cnty. No. 12-2-17107-6 SEA (Sup. Ct. Wash. 2014), Judge Spearman found that under very similar facts, the Hong Kong judgment rendered against the respondent in that case (Chang's sister) was **fully enforceable against her marital community**, but not her spouse's separate property. Hsieh Decl., Ex. A. CP 83. In applying Hong Kong law, Judge Spearman held that the signatory spouse legally bound herself as well as the community and that, accordingly, the community property (but not the separate property of the non-signing spouse) was properly subject to the debt. *Id.* There are no material distinctions between these two cases as it relates to this legal issue of community property, and the Hong Kong judgment in the instant case is likewise enforceable against the marital community.

Changs' marital community property. Chiu Decl. ¶ 2. CP 76. That testimony is undisputed.

The question before this Court is whether the Changs, who did not disclose to SCB their Washington residency at the time of contracting, should be permitted to put assets out of reach from the community-encompassing Hong Kong judgment, by now seeking refuge in Washington law. But Washington law is not a safe haven for the Changs, for Washington law includes a well-developed body of choice-of-law precedents. The two on-point precedents, *Pacific States* and *Pacific Gamble*, dictate the conclusion that Hong Kong law applies, and the community property is subject to enforcement of the debt.

A different result might be merited if the Changs, before entering into the subject agreements, had informed SCB of their Washington residency. Whether in a for-publication or not-for-publication decision, this Court may decide to emphasize that it is not opining on what the outcome should be when an out-of-state creditor has knowledge of the debtors' Washington residency and then attempts to enforce against community property an obligation created by one spouse. But these are not our facts.

Under our facts, with the Changs not having revealed their Washington residency, the just and proper result here is to permit

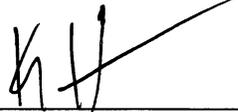
enforcement of the debt against the Changs' community property.

IV. CONCLUSION

For the foregoing reasons, respondent Shanghai Commercial Bank Limited respectfully requests that the Court affirm the trial court's grant of summary judgment permitting the enforcement of the HCA 806 judgment against the Changs' marital community property.

Respectfully submitted this 3rd day of March, 2016.

DLA PIPER LLP (US)



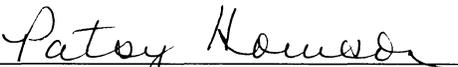
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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on March 3, 2016, I caused a true and correct copy of the foregoing **CORRECTED BRIEF OF RESPONDENT** to be served on the following in the manner indicated:

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Patsy Howson

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NO. 73956-5-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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

Respondent,

v.

KUNG DA CHANG and MICHELLE CHEN, husband and wife, and the
marital community comprised thereof,

Appellants.

PRAECIPE - BRIEF OF RESPONDENT

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TO: CLERK OF THE COURT

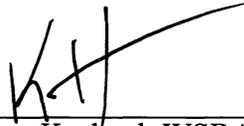
AND TO: OPPOSING COUNSEL

YOU ARE HEREBY REQUESTED to substitute the attached Brief of Respondent for that filed March 2, 2016. There are no substantive changes. This Praecipe is being filed to correct the typographical error listed below. The corrected Brief of Respondent is attached hereto as Exhibit A.

- Page 27, “explained” is replaced by “expanded.”

Respectfully submitted this 3rd day of March, 2016.

DLA PIPER LLP (US)



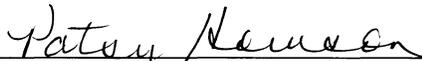
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CERTIFICATE OF SERVICE

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EXHIBIT A

NO. 73956-5-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SHANGHAI COMMERCIAL BANK LIMITED, a banking corporation
organized and existing under the Laws of Hong Kong Special
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KUNG DA CHANG and MICHELLE CHEN, husband and wife, and the
marital community comprised thereof,

Appellants.

CORRECTED BRIEF OF RESPONDENT

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I. INTRODUCTION

In 2008, appellant Kung Da Chang entered into a credit facility agreement with respondent Shanghai Commercial Bank Limited (“SCB”), borrowing large sums in order to further a series of risky financial investments at another bank, unaffiliated with SCB. These investments ultimately failed, and the debt went into default. In Hong Kong, the parties litigated this obligation in High Court Action No. 806/2009 (“HCA 806”), and SCB prevailed, securing a money judgment. But the Changs did not have any assets in Hong Kong from which to collect, and SCB accordingly sought recognition of the HCA 806 judgment here in Washington. The trial court granted recognition of HCA 806. The Changs appealed. This Court affirmed the trial court’s ruling that the money judgment rendered in HCA 806 was properly recognized and enforceable in Washington. *Shanghai Commercial Bank Ltd. v. Chang*, 183 Wn. App. 1007 (2014) *review denied*, 182 Wn. 2d 1006, 342 P.3d 327 (2015), *cert. denied*, 135 S. Ct. 2847, 192 L. Ed. 2d 877 (2015).

After appellants Kung Da Chang (“Chang”) and Michelle Chen (“Chen”) unsuccessfully exhausted every possible appeal of the judgment recognition order, SCB secured a second summary judgment order, which holds that the Hong Kong judgment is enforceable against both Chang and the marital community of Chang and Chen (collectively, “Changs”), but

not Chen's separate property. The instant appeal challenges the second summary judgment order as to the marital community.

The lower court's ruling must once again be affirmed. First, the parties contractually selected Hong Kong law to govern the interpretation and enforcement of their agreements. Second, even if the parties had not contractually agreed that Hong Kong law governs, Washington's rule—the most significant relationship test—nonetheless requires application of Hong Kong law. As the uncontroverted expert testimony establishes, application of Hong Kong law has only one result: the Changs' community property is properly subject to enforcement of the obligation. Under the unique facts of this case—where the foreign judgment would encompass marital community property and where creditor SCB was not informed of the Changs' residence in Washington—the proper and fair result is to permit enforcement of the judgment against the marital community.

The time has come to put this simple debt collection case—in which, after eight years of effort, SCB has yet to recover a single dollar—to rest. For the reasons below, the Changs' appeal is without merit, and the trial court's ruling should be affirmed.

II. STATEMENT OF THE CASE

The only facts relevant to this appeal are those directly related to

the choice of law of the parties. Those facts are few and not in dispute. The underlying facts that were the subject of the Hong Kong proceeding are not relevant to the instant appeal because the enforceability of the Hong Kong judgment has already been determined by the trial court and affirmed by this Court. All that is left for this Court to determine is whether the Washington-recognized judgment can be enforced against the Changs' community property.

Many of the purported "facts" the Changs seek to introduce on this appeal consist of nothing more than unsubstantiated accusations of fraud and wrongdoing—accusations that were fully litigated and rejected by the courts in Hong Kong. Not one of the Changs' 230-plus pages of declaration attachments submitted in connection with the second summary judgment is even tangentially relevant to this appeal.

SCB will accordingly summarize only those few facts that are actually relevant to a Washington court's determination of whether the Hong Kong judgment can be enforced against the Changs' community property.

A. The Parties Entered Into a Credit Facility Arrangement Governed by Hong Kong Law

Chang entered into a credit facility arrangement with SCB between

March and April of 2008 by executing five agreements.¹ Collectively, these five agreements enabled the Changs to borrow large sums from SCB, and those sums make up the underlying debt obligation of this lawsuit.² 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.”³ 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.”⁴ 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]....”⁵ Thus, through the Facility Letter’s incorporation of the Terms and

¹ Declaration of May Ka Mo in Support of SCB’s Second Motion for Summary Judgment (“Mo Decl.”) ¶¶ 2–8. Clerk’s Papers (“CP”) 144–45.

² *Id.* ¶ 8. CP 145.

³ Mo Decl., Ex. A at 1. CP 148.

⁴ Mo Decl., Ex. A at 4. CP 151.

⁵ Mo Decl., Ex. F at § 19.1. CP 172.

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 ... standard documents executed by [Chang] in relation to the banking facilities and/or accounts with [SCB],” also expressly choose Hong Kong law.⁶ 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...”⁷ The Charge Over Securities Agreement provides that it “is governed by and shall be construed in accordance with the laws of Hong Kong.”⁸ The Securities Finance Agreement provides that it “shall be governed by and interpreted in accordance with the Laws of Hong Kong.”⁹ 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...”¹⁰

During the exchange of 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

⁶ Mo Decl., Ex. A at 4. CP 151.

⁷ Mo Decl., Ex. B at 2. CP 155.

⁸ Mo Decl., Ex. C at 2. CP 158.

⁹ Mo Decl., Ex. D at 4. CP 163.

¹⁰ Mo Decl., Ex. E at 3. CP 167.

SCB in Hong Kong.¹¹ There is not a scintilla of evidence in the record that suggests SCB was put on notice that it was dealing with a person residing in Washington.

The HCA 806 judgment encompasses what Washington considers the Changs' marital community, for Hong Kong exempts solely separate property of a spouse, not community property, from judgments titulary entered against one spouse (Chang). This feature of Hong Kong law, and of the HCA 806 judgment, is not a legal issue for purposes of the instant appeal. Rather, because foreign law is treated as a fact and requires expert testimony of a foreign law expert, the parties were required to provide the trial court with pertinent expert testimony to enable the court to decide the "fact" of the operation of Hong Kong law and the HCA 806 judgment. *Byrne v. Cooper*, 11 Wn. App. 549, 553, 523 P.2d 1216 (1974).

SCB submitted the expert testimony of a seasoned Hong Kong lawyer, Donny Siu Keung Chiu.¹² The Changs opted not to contest Mr. Chiu's expert declaration, and so it established the fact of whether the HCA 806 judgment encompasses what Washington considers community property. In short, the HCA 806 judgment applies to what Washington considers community property:

¹¹ Declaration of Kung Da Chang in Support of Respondents' Opposition to Petitioner's Second Motion for Summary Judgment ("Chang Decl.") ¶ 5. CP 289.

¹² Declaration of Donny Chiu in Support of Petitioner's Second Motion for Summary Judgment ("Chiu Decl."). CP 76.

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.¹³

All of the above pertinent facts are undisputed, for nothing in the record before this Court contravenes any of these germane facts.

B. Procedural History

On June 20, 2012, pursuant to RCW 6.40A.050, SCB filed a petition seeking recognition of the Hong Kong judgment rendered in HCA 806. CP 1. On December 12, 2012, KD Chang filed his Amended Response, Affirmative Defenses, and Counterclaims. CP 24. On June 7, 2013, the trial court granted SCB's first motion for partial summary judgment.¹⁴ On August 25, 2014, this Court affirmed the trial court's ruling.¹⁵

On July 15, 2015, SCB filed its second motion for summary

¹³ Chiu Decl. ¶ 2. CP 77.

¹⁴ *Shanghai Commercial Bank Ltd. v. Chang*, King Cnty. No. 12-2-21293-7 SEA (Sup. Ct. Wash. 2013), Dkt. No. 81.

¹⁵ *Shanghai Commercial Bank Ltd. v. Chang*, 183 Wn. App. 1007 (2014).

judgment. CP 53. On August 10, 2015, the Changs filed their opposition thereto. CP 184. On August 17, 2015, SCB filed its reply in support of its second motion for summary judgment. CP 524. On August 21, 2015, the trial court granted SCB's second motion for summary judgment. CP 532. On September 15, 2015, the Changs filed a motion for reconsideration. CP 535. On September 16, 2015, the trial court denied the motion for reconsideration. CP 539. On September 17, 2015, the Changs filed a notice of appeal. CP 540. On February 1, 2016, the Changs filed their Opening Brief of Appellants Kung Da Chang and Michelle Chen ("Br.") with this Court.

III. ARGUMENT

The trial court properly granted SCB's Second Motion for Summary Judgment. As explained above, the HCA 806 judgment itself encompasses what Washington considers community property, and Hong Kong law applies to enforcement of the judgment under the parties' binding choice-of-law agreements. Even disregarding the binding choice-of-law agreements, Washington's choice-of-law analysis, used in the absence of a contractual choice-of-law clause, would nonetheless require the application of Hong Kong law. None of the merger doctrine, Chen's assertion of prejudice, and RCW 6.40A.060(2) alters this legal determination. Because Hong Kong law applies, and because

uncontroverted expert testimony has established that, under Hong Kong law the HCA 806 judgment encompasses and may be enforced against the Changs' community property (but not Chen's separate property), the trial court properly granted summary judgment in favor of SCB.

Especially here, where SCB was not informed of the Changs' residence in Washington, it would be improper and fundamentally unfair to permit the Changs to hide their considerable assets under the marital community blanket.

A. Standard of Review

The Court reviews summary judgment decisions *de novo*. *Verdon v. AIG Life Ins. Co.*, 118 Wn. App. 449, 452, 76 P.3d 283 (2003). “[A]ssignments of error unsupported by citation of authority or legal argument will not be considered.” *Hamilton v. State Farm Ins. Co.*, 83 Wn. 2d 787, 795, 523 P.2d 193 (1974).

B. The Parties' Valid Contractual Choice of Law Mandates Application of Hong Kong Law

As detailed above, all five governing agreements explicitly choose Hong Kong law to control. The Changs concede the validity of the choice of law in four of the agreements and dispute the choice-of-law provision only in the Facility Letter. Br. at 18. The Changs' statement that “[t]he Facility Letter itself does not contain an explicit Hong Kong choice-of-law

provision” is simply incorrect. Br. at 19.

Specifically, the Changs disregard the Facility Letter’s explicit incorporation of the Terms and Conditions for Bank Accounts and General Services, and fail to recognize that “[i]ncorporation by reference allows the parties to incorporate contractual terms by reference to a separate agreement.” *W. Washington Corp. of Seventh-Day Adventists v. Ferrellgas, Inc.*, 102 Wn. App. 488, 494, 7 P.3d 861 (2000).

The Facility Letter explicitly provides that Chang is “subject to the provisions herein contained, the Terms and Conditions...”¹⁶ and explicitly defines “Terms and Conditions” as “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.”¹⁷

The Terms and Conditions for Bank Accounts and General Services, in turn, explicitly 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]...”¹⁸ Thus, through simple incorporation by reference, the Facility Letter explicitly chooses Hong Kong law to apply. The Changs cannot divorce the Facility Letter from its

¹⁶ Mo Decl. Ex A at 1. CP 149.

¹⁷ Mo Decl. Ex A at 3. CP 151.

¹⁸ Mo Decl., Ex. F at § 19.1 (emphasis added). CP 172.

explicitly integrated parts.

Washington courts always enforce contractual choice-of-law clauses, with one narrow exception. *McKee v. AT & T Corp.*, 164 Wn.2d 372, 384, 191 P.3d 845 (2008). Courts will only “disregard the contract provision and apply Washington law if, without the provision, Washington law would apply; if the chosen state’s law violates a fundamental public policy of Washington; and if Washington’s interest in the determination of the issue materially outweighs the chosen state’s interest. [Courts] will enforce a choice-of-law provision **unless all three of these conditions are met.**” *Id.* (emphasis added). The trial court did not err in applying the choice-of-law clause because none of the three conditions for declining to apply Hong Kong law is met in the instant case.

1. The First *McKee* Condition

Determining whether Washington law would apply in the absence of the five choice-of-law provisions requires an analysis under Washington’s conflict-of-laws principles. In enforcing a debt involving multiple jurisdictions where the results might vary depending on which jurisdiction’s law is applied, Washington courts apply the law of the jurisdiction with the “most significant relationship” to the underlying debt obligation. *Pacific States Cut Stone Co. v. Goble*, 70 Wn.2d 907, 908–09, 425 P.2d 631 (1967); *Pacific Gamble Robinson Co. v. Lapp*, 95 Wn.2d

341, 346–47, 622 P.2d 850 (1980) (citing Restatement (Second) of Conflict of Laws § 188 (1971)), *overruled on other grounds by Haley v. Highland*, 142 Wn.2d 135, 142, 12 P.3d 119 (2000).¹⁹ Here, Hong Kong law would still apply even absent the five choice-of-law provisions because Hong Kong has the most significant relationship.

The Changs seem to question whether *Pacific Gamble* and *Pacific States* govern because they deal with enforcement of a contract, rather than enforcement of a judgment. Br. at 24–25. These precedents are directly on point because they set forth the choice-of-law analysis to be applied by Washington courts when determining which jurisdiction’s laws apply, regardless of whether the case deals with contract or enforcement of a foreign judgment arising from a contract. *See* Restatement (Second) of Conflict of Laws § 2 cmt. a (1971) (“Matters falling within the field of Conflict of Laws. Conflict of Laws covers an extremely wide area, embracing all situations where the affairs of men cut across state lines. Important matters falling within the scope of a state’s Conflict of Laws

¹⁹ SCB notes that the Changs misstate the holding of *Haley*, which is not, as the Changs state, that “separate debt obligations are enforceable only against the separate property of the debtor spouse.” Br. at 27 n.70. To the contrary, the Washington Supreme Court “affirm[ed] the Court of Appeals’ holding that RCW 26.16.200 does not bar the use of Highland’s one-half interest in community property to satisfy a judgment based on his premarital tort in the event that his separate property is insufficient to satisfy the claim.” *Haley*, 142 Wn. 2d at 158 (emphasis added). *Haley* is in any event inapposite because it involves pre-marital tortfeasor liabilities, whereas the debt liabilities in the instant case were incurred after the Changs’ 1994 marriage. Br. at 11. As the *Haley* court notes, “[d]istinction can be made between debts and torts, and it is not necessary that the rules regarding them be parallel.” 142 Wn. 2d at 143.

rules include: ... Foreign judgments.”). There is simply nothing about a judgment, and nothing in *Pacific Gamble* or *Pacific States*, that gives any basis for not applying Washington’s choice-of-law rules to enforcement of a judgment.

The “most significant relationship” test endorsed by the Restatement and adopted by Washington analyzes five factors:²⁰ (a) the 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 L.P. v. MKA Real Estate Opportunity Fund I, LLC*, 155 Wn. App. 643, 666, 230 P.3d 625 (2010).

²⁰ The seven “factors” cited and analyzed by the Changs in their brief are merely the Restatement’s “choice-of-law principles.” Restatement (Second) of Conflict of Laws § 6 (1971); Br. at 27–28. Nonetheless, even these “principles” support an application of Hong Kong law because: (1) the international system would undoubtedly benefit from a consistent approach to enforcement of cross-border judgments, and Hong Kong-Washington commerce could be adversely impacted if Washington community property rules could be used to shield personal debts, especially where the creditor was not on notice of the debtors’ Washington residence; (2) Washington obviously has no policy supporting its becoming a haven for international judgment debtors; (3) Hong Kong has a strong interest in ensuring that the money-judgments of its courts cannot be thwarted by foreign property law regimes; (4) SCB was more than justified in expecting that for a loan taken at its Hong Kong office, with each and every governing contract selecting Hong Kong law, that Hong Kong law would apply, especially in light of the dearth of evidence suggesting that SCB had any reason to expect application of Washington law; (5) the basic policies of judgment enforcement support a consistent application between Hong Kong and Washington; (6) applying the law of the location of all the relevant events and transactions—Hong Kong—would promote certainty, predictability, and uniformity of result; and (7) it is easy to determine and apply Hong Kong law when, again, all the relevant events and transactions occurred in Hong Kong.

Of the five types of contacts examined under the most significant relationship test, two are unequivocally in favor of Hong Kong, two of them slightly 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.*, the enforcement of a Hong Kong judgment based on a Hong Kong contract with a Hong Kong bank. *Id.*

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,²¹ and all the underlying financial transactions that led to the loan that resulted in the Hong Kong Judgment involved accounts in Hong Kong.²²

The place of contracting slightly favors Hong Kong. SCB made the offer in Hong Kong, but Chang purports to have signed in Washington, even though SCB did not know and could not have known this, as the papers had been mailed to Shanghai.²³ Indeed, nothing in the record suggests that SCB had any reason to believe there was any Washington

²¹ Respondents' Amended Response and Counterclaims ("...move his money into various accounts at the Hong Kong branch of SCB."). CP 32:13–14.

²² Mo Decl., Exs. A–F (loan transaction documents establishing that the bank is incorporated and headquartered in Hong Kong). CP 144–83. *See also* 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.

²³ Chang Decl. ¶ 5. CP 289.

connection.²⁴

The place of negotiation also slightly 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. Indeed, the Changs' declarations do not assert that they pushed back on any terms before the agreements were executed.²⁵

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.²⁶

The net result of these two factors weighing heavily in favor of

²⁴ In *G.W. Equip. Leasing, Inc. v. Mt. McKinley Fence Co.*, 97 Wn. App. 191, 982 P.2d 114 (1999), the court applied the law of the couple's domicile, Arizona, under the reasoning that "typically" the state with the most significant interests is the state where the spouses reside. The instant case is far from the "typical" case in many respects. The guaranty contract at issue in *G.W. Equip.* specifically provided that the debtors were signing in Arizona, plainly putting the creditor on notice of the potential application of Arizona law, but here nothing in the record suggests that SCB was aware of the Changs' residence in Washington. As is evident from post-*G.W. Equip.* decisions, *G.W. Equip.* does not stand for the proposition that courts should ignore the five-factor test and look only to the domicile of the spouses. See, e.g., *Singh v. Edwards Lifesciences Corp.*, 151 Wn. App. 137, 142, 210 P.3d 337 (2009) (applying the most significant relationship test and holding that California law controls despite plaintiff's residency in Washington). More fundamentally, *G.W. Equip.* is inapposite because the guaranty contract that was at issue did not have a choice-of-law clause, in stark contrast to the instant case where there is an explicit choice of law clause in favor of Hong Kong in each of the agreements that forms the contract.

²⁵ 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.

²⁶ Mo Decl., Exs. A–F (loan transaction documents establishing that the bank is incorporated and headquartered in Hong Kong). CP 144–83.

Hong Kong, two factors weighing slightly in favor of Hong Kong, and one neutral factor is that Hong Kong is the jurisdiction with the most significant relationship.

In *Pacific States*, Oregon was found to be the jurisdiction with the most significant relationship because “[t]he contract was executed in Oregon, at least part of the negotiations took place in Oregon, the seller completely performed in Oregon, and the situs of the subject matter of the contract at the time of contracting as at the time of performance by the seller was in Oregon. Most significant is that the place of delivery of possession by the seller was in Oregon.” 70 Wn. 2d at 909. Likewise, in the instant case it is undisputed that although the Changs are now Washington residents, the loan came from a Hong Kong bank, the subject account was located in Hong Kong,²⁷ and all the underlying financial transactions that led to the loan that resulted in the Hong Kong judgment involved accounts in Hong Kong.²⁸ Under the analysis used in *Pacific States*, Hong Kong has the most significant relationship, and its law controls even absent the Hong Kong choice-of-law provisions.

²⁷ Respondents’ Amended Response and Counterclaims (“...move his money into various accounts at the Hong Kong branch of SCB.”). CP 32:13–14.

²⁸ Mo Decl., Exs. A–F (loan transaction documents establishing that the bank is 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.

Potlatch No. 1 Fed. Credit Union v. Kennedy, 76 Wn. 2d 806, 459 P.2d 32 (1969), in which Washington law was applied, is inapposite and does not avail the Changs. Specifically, *Potlatch* hinged on the court's determination that the creditor knew that it was dealing with Washington residents and thus expected or should have expected Washington law to come into play:

Plaintiff credit union, on the other hand, was aware that it was dealing with Washington residents. It also knew that the property covered by the chattel mortgage executed by Roy H. Kennedy and his wife was located in Washington. It was also likely that most, if not all, of the community property of A. V. Kennedy and Vivian Kennedy would be situated in Washington. Therefore, if plaintiff had considered the matter, it would have been fairly certain that any execution of a judgment on the note or mortgage would have to be in Washington court.

Potlatch, 76 Wn. 2d at 813.

In stark contrast to *Potlatch*, the record here shows that SCB had absolutely no reason to believe that Washington law was in the equation at all. According to Chang's own testimony, "SCB sent the credit facility agreement and four other agreements to me [Chang] at my father's address in Shanghai ... I received the documents, signed them, and then mailed them back to my father in Shanghai."²⁹ Unlike the creditor in *Potlatch*, SCB was not, at the time of contracting, "fairly certain that any execution

²⁹ Chang Decl. ¶ 5. CP 289.

of a judgment on the note or mortgage would have to be in Washington court.” *Id.* Indeed, SCB first sought enforcement on the debt in Hong Kong court—it was only the Changs’ evasive tactics that forced SCB to pursue a remedy here in Washington.

Accordingly, because Hong Kong law would apply absent the choice-of-law provisions under any analysis, the first condition under *McKee* is not met. This alone requires the Court to enforce the Hong Kong choice-of-law provision, for the choice-of-law clauses are to be applied unless all three of the *McKee* exception conditions are established.

2. The Second *McKee* Condition

Hong Kong law does not violate the fundamental public policy of Washington. In fact, considerations of public policy are part of the analysis for recognition of foreign judgments, and this Court rejected the Changs’ public-policy argument in the prior appeal on the recognition and enforcement of the Hong Kong judgment. *Shanghai Commercial Bank Ltd. v. Chang*, 183 Wn. App. 1007, *1 (2014), *review denied*, 182 Wn. 2d 1006, 342 P.3d 327 (2015), *cert. denied*, 135 S. Ct. 2847, 192 L. Ed. 2d 877 (2015) (“Kung Da Chang fails to demonstrate that ... the judgment is repugnant to state or federal public policies....”). There is no reason for the Court to deviate from its previous determination.

Moreover, as to enforcement of contract obligations against a

marital community, it is also obvious that such enforcement is not deemed to violate Washington's fundamental public policy. Washington courts regularly enforce, against Washington marital communities, out-of-state agreements that were entered into by an individual spouse and that do not benefit the marital community. *Pacific States*, 70 Wn. 2d at 914; *Pacific Gamble*, 95 Wn. 2d at 349. Our Supreme Court, in *Pacific Gamble*, underlined the "non-fundamental" nature of Washington's policy regarding marital property:

[T]he Washington policy in favor of the protection and predictability of the marital property provisions is not always followed strictly, but has been modified by this court and the legislature in some circumstances.

...

[I]t is clear that neither this court nor the legislature currently adheres to the rule that the marital property, including the wages of a debtor spouse, are under all circumstances to be insulated from the claims of a creditor on a separate debt.

95 Wn. 2d at 347.

It is actually "contrary to [the] public policy" of Washington for the community to "benefit from the wrongful act of one of its members." *U. S. F. & G. Ins. Co. v. Brannan*, 22 Wn. App. 341, 349, 589 P.2d 817 (1979) (emphasis added).

Thus, the second *McKee* factor for not enforcing a choice-of-law clause also is not satisfied, requiring the Court to enforce the Hong Kong

choice-of-law provision.

3. The Third *McKee* Condition

Washington's interest in the determination of this issue does not materially outweigh Hong Kong's. In addition to the fact that Hong Kong has the most significant relationship to the subject matter of the contract (detailed above), this lawsuit is the final recourse for a Hong Kong party seeking compensation for a large, unpaid debt. SCB has yet to collect a single penny of the monies owed to it.³⁰ Moreover, Washington has no interest in becoming a safe haven for debtors to sequester their assets and thwart judgment creditors. This is not to say that Washington has no interest. That interest is most vigorously promoted by our courts when the debtor(s) put the creditor on notice **at the time of contracting** regarding the potential for application of Washington law. *See, e.g., Potlatch*, 76 Wn. 2d at 813 (applying Washington law against out-of-state creditor where "Plaintiff credit union ... was aware that it was dealing with Washington residents."). Where, as here, the record shows SCB had no reason to believe it was dealing with Washington residents, Washington's interest is substantially lessened.

In sum, not one of the three factors to reject a choice-of-law clause under *McKee* is met, where the absence of even one of the factors is

³⁰ Mo Decl. ¶ 9. CP 145.

sufficient to require enforcement of the parties' choice-of-law agreement. Accordingly, the choice-of-law provisions selecting Hong Kong law in all five of the agreements govern here.

C. Even Under Washington's Default Rule—the Most Significant Relationship Test—Hong Kong Law Applies

As explained above, in the absence of a choice-of-law clause, Washington courts apply the five-part most significant relationship test. If there were not a choice-of-law clause here, then Hong Kong law would still apply because, as detailed above at Section III.B.1, SCB has established that under Washington's most significant relationship test, two of the five contacts strongly favor application of Hong Kong law, two of the factors slightly favor application of Hong Kong law, and the fifth factor is neutral. Hong Kong law has the most significant relationship. Thus, even if the Facility Letter did not integrate the choice-of-law provision of the Terms and Conditions for Bank Accounts and General Services—which it undoubtedly does—Hong Kong law nonetheless applies.

D. The Merger Doctrine Does Not Apply

The Changs argue that the agreements, all of which require application of Hong Kong law, are somehow erased via “merger” in the at-issue Hong Kong judgment. But Washington's rule of merger does not

override the parties' binding choice-of-law provisions dictating application of Hong Kong law.

To be sure, as a function of *res judicata*, “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 ... plaintiff cannot maintain an action on the original claim.” *Caine & Weiner v. Barker*, 42 Wn. App. 835, 837, 713 P.2d 1133 (1986). But 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.³¹ The purpose of the rule of merger is not to expunge valid choice-of-law clauses governing enforcement of a judgment, but to “prevent vexatious relitigation of matters that have already passed into judgment as between the parties to the litigation and their successors.” *Caine & Weiner*, 42 Wn. App. at 837. SCB is not seeking to, and has no desire to, re-litigate the underlying claim.

Here, the parties specifically agreed that “**enforcement** of the Agreement ... shall be governed by the laws of the HKSAR [Hong Kong Special Administrative Region].”³² No matter how broadly the merger doctrine is applied, a judgment cannot wipe out the parties' specific

³¹ Mo Decl. ¶ 9. CP 145.

³² Mo Decl., Ex. F at §19.1 (emphasis added). CP 172.

agreement that enforcement of the judgment is to be governed by Hong Kong law.

Nor would broad application of the rule of merger serve its underlying policy. “[T]he doctrine is designed to promote justice and should not be carried further than that end requires. Therefore, where the original obligation provides for special rights or exemptions, in some circumstances these may be preserved and recognized despite merger.” *Caine & Weiner*, 42 Wn. App. at 837. Applying Washington law over Hong Kong law would not promote justice, as it would frustrate the intent of the parties entering into the choice-of-law agreement in the first instance, in addition to further hindering the already-protracted process of collecting on the debt owed to SCB. Though the instant case does not fall within the purview of the rule of merger, even if it did, it would be one of the “special rights or exemptions” that may be preserved and recognized in the furtherance of justice.

The Changs merger argument boils down to the proposition that contracting parties can never bind themselves regarding post-judgment issues, including interest, attorneys’ fees, costs, etc. That is not and cannot be the law. Every day many hundreds of Washington residents and Washington companies enter into contracts that spell out terms that govern post-judgment matters, including interest rates, responsibility for

attorneys' fees, and responsibility for enforcement-related costs. To our knowledge, never has a Washington Court held that such terms governing post-judgment matters are wiped out by a judgment pursuant to the merger doctrine.

A choice-of-law clause governing post-judgment enforcement is, with respect to the merger doctrine, no different than an interest clause, attorneys' fees clause, or costs clause. It makes no sense to dramatically extend the merger doctrine to invalidate all such terms governing post-judgment matters.

E. Application of Hong Kong Law Is Not Unfair to Chen

The Changs seem to start from the false foundation that debts arising from contracts signed by only one spouse or benefiting only one spouse can never be enforced against marital community assets of Washington residents. In truth, the cases are many in which the marital community of Washington residents are required to answer for debts incurred for the benefit of one spouse. *See, e.g., Pacific Gamble*, 95 Wn. 2d at 349.

Such reported decisions arise from fact patterns in which foreign law is held to apply. The instant case fits that pattern. The mere fact that Chen did not sign the credit agreements does not automatically preclude her from being bound by their choice-of-law provisions. In both *Pacific*

States and *Pacific Gamble*, only one spouse signed the contract and the marital community was bound by the contracts. 70 Wn. 2d at 907; 95 Wn. 2d at 341. As already established, notwithstanding the express choice-of-law clauses in the credit agreements, under Washington’s most significant relationship test Hong Kong law would still control. The agreements’ explicit choice-of-law clauses are thus only additive to what Washington already requires: Hong Kong’s most significant relationship to the loan mandates the application of Hong Kong law.³³

Contrary to the Changs’ assertions, whether Chen benefitted or sought to benefit from the loans is not relevant. Br. at 22. Such benefit analysis is used only to determine, under Washington law, the character of a particular obligation (*i.e.*, if the community benefitted from incurring the obligation, then the obligation flows to the community). *Oil Heat Co. of Port Angeles v. Sweeney*, 26 Wn. App. 351, 355, 613 P.2d 169 (1980). But here, Washington law does not apply—Hong Kong law does. And under Hong Kong law, it is undisputed that there is no such character-of-debt analysis because in Hong Kong, what would be considered “the

³³ The Changs’ citation to *Oltman v. Holland Am. Line USA, Inc.*, 163 Wn. 2d 236, 250, 178 P.3d 981 (2008) for the proposition that “a non-signing spouse will not be bound by a choice-of-law provision in an agreement signed solely by the other spouse” is a misstatement of the law. *Oltman* dealt solely with a forum selection clause. *Id.* The considerations of unfairness and inconvenience in enforcing a forum selection clause that would “essentially den[y the plaintiff] his day in court” are absent in a choice-of-law determination. *Id.* at 253.

community” in Washington is always liable for obligations such as the Hong Kong judgment, regardless of how Washington courts would otherwise characterize the obligation. Chiu Decl. ¶ 2. CP 76.³⁴

F. RCW 6.40A.060(2) Does Not Limit the Application of Hong Kong Law

Because of the dispositive effect of *Pacific States* and *Pacific Gamble*, the Changs seek a path around those precedents and their choice-of-law analysis and consequences. One avoidance path proposed by the Changs is a snippet from RCW 6.40A.060(2) of the Uniform Foreign-Country Money Judgments Recognition Act (“Uniform Act”), stating that a recognizable foreign-country judgment is “[e]nforceable in the same manner and to the same extent as a judgment rendered in this state.”

The Changs attempt to twist those words to mean that the Hong

³⁴ The Changs present no argument regarding Chen’s participation or lack of participation in the Hong Kong litigation. Though the Changs note in passing that Chen was not sued individually in Hong Kong, Chen does not deny she was contemporaneously fully aware of the Hong Kong proceedings. Even though Chen makes no argument regarding her Hong Kong participation, we note that for nearly a century, Washington’s Supreme Court has held to the rule “[t]hat a judgment rendered upon a community obligation in an action to which the wife is not a party is enforceable against the community property....” *Manche v. Russell*, 121 Wn. 65, 66–67, 207 P. 955 (1922). There is no precedent that derogates from the *Manche* rule. Moreover, it is sufficient that Chen and the Changs’ marital community are named in the instant recognition lawsuit, and neither can claim a lack of notice or opportunity to defend their interests. Indeed, counsel has appeared on Chen’s sole behalf. CP 19–23. “[S]ervice of process upon either spouse and a resulting judgment for a community obligation is enforceable against the community.” *Oil Heat Co*, 26 Wn. App. at 356. The Changs and their marital community had the opportunity to raise objections to the Hong Kong judgment during the first summary judgment proceeding in this case. Any attempts to do so now are barred by *res judicata*.

Kong judgment is *per se* unenforceable in Washington against the Changs' marital community. Br. at 2. For several reasons, this slender reed of the snippet from the statute does not bear the weight the Changs need to apply to escape the dispositive effect of *Pacific States* and *Pacific Gamble*.

First, the Changs fail to come to grips with the fact that the HCA 806 judgment does in fact encompass the marital community. The sole requisite expert testimony on the meaning of the Hong Kong judgment is found in Mr. Chiu's Declaration. Chiu Decl. ¶ 2. CP 76. Thus, the at-issue judgment already covers the Changs' community property. This judgment does not need to be "expanded," as the Changs falsely suggest, to encompass the marital community.

Second, the statute's "same manner and to the same extent" language does not explicitly or implicitly erase a century of Washington choice-of-law analysis precedent and doctrine, yet that is apparently how the Changs are asking this Court to read those few words! If, with respect to judgments, the Legislature had intended to obliterate the extensive body of court-created common law in Washington, the Legislature would have done so explicitly and not through a six-word phrase that must be twisted to get to the Changs' desired result.

In construing a foreign judgment, like any other document with cross-border legal implications, a court must start with the threshold

question: Whose law applies? Of course, in answering that question, a Washington court must apply Washington choice-of-law principles. Performing that exercise in this case results in the trial court's conclusion: Hong Kong law applies.

What the Changs are apparently suggesting is that, as to a foreign judgment, the Legislature has barred Washington courts from performing the choice-of-law analysis that our state judiciary has crafted over a century. The, at best, cryptic six words in the statutory snippet on which the Changs rely to erase the applicable common law, do not come close to the explicit statutory dictate that would be needed to make such a drastic change to the common law:

[W]e are hesitant to recognize an abrogation or derogation from the common law absent clear evidence of the legislature's intent to deviate from the common law. It is a well-established principle of statutory construction that the common law ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose. A law abrogates the common law when the provisions of a statute are so inconsistent with and repugnant to the prior common law that both cannot simultaneously be in force. A statute in derogation of the common law must be strictly construed and no intent to change that law will be found, unless it appears with clarity.

Potter v. Washington State Patrol, 165 Wn. 2d 67, 76-77, 196 P.3d 691 (2008) (internal citations and quotation marks omitted).

Third, even if the at-issue judgment did not already apply to the

marital community as Mr. Chiu's uncontested testimony establishes, and even if RCW 6.40A.060(2) explicitly rejected common law, the at-issue judgment would nonetheless apply to the Changs' marital community under the Changs' strained reading of the statute. The Changs essentially argue that a court's function in interpreting a foreign judgment is to imagine the judgment that would have resulted if the lawsuit had instead originated in Washington. Br. at 25. If SCB, instead of initiating HCA 806 in Hong Kong, had brought the original action in Washington, then this lawsuit would have been a nearly identical repeat of *Pacific States*. *Pacific States*, an original Washington action, held that the Washington marital community was liable for the separate obligation of a spouse under application of Oregon law. 70 Wn. 2d at 907. Like Oregon, Hong Kong is not a community property jurisdiction. Thus, the Changs' community would be liable even under the Changs' strained interpretation of the Uniform Act.

G. Applying Hong Kong Law, the Marital Community Is Subject to the Hong Kong Judgment

Because Hong Kong law applies to enforcement of the debt, the Changs' marital community property (but not Chen's separate property) is subject to the debt obligation. Washington courts look to the law of the jurisdiction governing the debt obligation to determine whether the debt

obligation can be enforced against community property. Because Hong Kong law applies to enforcement of the Changs' debt obligation, this Court must apply Hong Kong law to determine whether and to what extent the Changs' marital community is liable.

When a debt that does not benefit the marital community is incurred in a non-community property jurisdiction (such as Hong Kong) by one spouse, Washington courts hold that the debt may be enforced against all of that spouse's separate assets **as well as the community assets** if the jurisdiction in which the debt was incurred does not bar enforcement against community property. *See Pacific Gamble*, 95 Wn.2d at 349–50 (applying Colorado law and holding that all of the husband's separate property, **plus community property**, could be used to satisfy the judgment against him in Washington for the debt he incurred in Colorado where the community was not benefitted); *see also Pacific States*, 70 Wn. 2d at 914 (“since the obligation of a husband in Oregon subjects all the property of the married couple to the debt except the separate property of the wife, the effect of applying Oregon law to the situation before us is that all property, including community property, held by the Gobles and the Wallaces, with the exception of the wives' separate property, is subject to the obligation involved.”).

Exactly like Oregon and Colorado, Hong Kong's only limit on

enforcing a debt incurred by one spouse is that the separate property of the non-debtor spouse cannot be used to satisfy the judgment.³⁵ Accordingly, because the HCA 806 judgment is enforceable in Hong Kong against Chang's separate property **and what would be community property in Washington**, but not against Chen's separate assets, it must likewise be recognized and enforced in Washington against Chang's separate property and the property of his marital community (but not Chen's separate property).³⁶

The Changs casually say there is an issue of fact regarding whether the at-issue debt can be enforced against the Changs' marital community property. Br. at 35–36. As is clear from the above discussion, no germane facts are actually disputed; only the law is disputed. The Changs point to not a single material fact that is genuinely disputed.

This Court has before it a Hong Kong judgment that a qualified expert has testified covers what Washington would consider to be the

³⁵ Chiu Decl. ¶ 2. CP 76.

³⁶ In the closely related proceeding *Shanghai Commercial Bank Limited v. Ching Ho Chang et al.*, King Cnty. No. 12-2-17107-6 SEA (Sup. Ct. Wash. 2014), Judge Spearman found that under very similar facts, the Hong Kong judgment rendered against the respondent in that case (Chang's sister) was **fully enforceable against her marital community**, but not her spouse's separate property. Hsieh Decl., Ex. A. CP 83. In applying Hong Kong law, Judge Spearman held that the signatory spouse legally bound herself as well as the community and that, accordingly, the community property (but not the separate property of the non-signing spouse) was properly subject to the debt. *Id.* There are no material distinctions between these two cases as it relates to this legal issue of community property, and the Hong Kong judgment in the instant case is likewise enforceable against the marital community.

Changs' marital community property. Chiu Decl. ¶ 2. CP 76. That testimony is undisputed.

The question before this Court is whether the Changs, who did not disclose to SCB their Washington residency at the time of contracting, should be permitted to put assets out of reach from the community-encompassing Hong Kong judgment, by now seeking refuge in Washington law. But Washington law is not a safe haven for the Changs, for Washington law includes a well-developed body of choice-of-law precedents. The two on-point precedents, *Pacific States* and *Pacific Gamble*, dictate the conclusion that Hong Kong law applies, and the community property is subject to enforcement of the debt.

A different result might be merited if the Changs, before entering into the subject agreements, had informed SCB of their Washington residency. Whether in a for-publication or not-for-publication decision, this Court may decide to emphasize that it is not opining on what the outcome should be when an out-of-state creditor has knowledge of the debtors' Washington residency and then attempts to enforce against community property an obligation created by one spouse. But these are not our facts.

Under our facts, with the Changs not having revealed their Washington residency, the just and proper result here is to permit

enforcement of the debt against the Changs' community property.

IV. CONCLUSION

For the foregoing reasons, respondent Shanghai Commercial Bank Limited respectfully requests that the Court affirm the trial court's grant of summary judgment permitting the enforcement of the HCA 806 judgment against the Changs' marital community property.

Respectfully submitted this 3rd day of March, 2016.

DLA PIPER LLP (US)



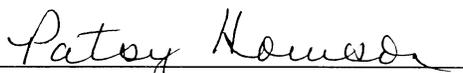
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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on March 3, 2016, I caused a true and correct copy of the foregoing **CORRECTED BRIEF OF RESPONDENT** to be served on the following in the manner indicated:

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Patsy Howson

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