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COURT OF APPEALS

STATE OF NEW YORK

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KEREN ELMALIACH, ET AL.,

Respondent,

-against-

No. 3

BANK OF CHINA LIMITED,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
January 5, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Sara Winkeljohn  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 3, Elmaliach  
2 v. Bank of China.

3 Counselor, would you like any rebuttal  
4 time?

5 MR. BERGER: Yes, Your Honor. Three  
6 minutes, if I may.

7 CHIEF JUDGE LIPPMAN: Three minutes, sure.  
8 Go ahead, counsel.

9 MR. BERGER: May it please the court,  
10 Mitchell Berger for Bank of China. Ever since  
11 Babcock in 1963, this court has consistently given  
12 presumptive choice of law guidance for breach of duty  
13 cases like this one. This court said in Babcock in  
14 1963, and I'm quoting, "Where the defendant's  
15 exercise of due care is in issue, the jurisdiction in  
16 which the allegedly wrongful conduct occurred would  
17 usually have a predominant, if not exclusive,  
18 concern." This court - - -

19 CHIEF JUDGE LIPPMAN: Counsel, Babcock  
20 didn't eliminate the - - - the concept of - - - of  
21 lex loci, right? It - - - it - - - generally, when  
22 you're dealing with conduct, it almost invariably  
23 still applies post-Babcock; doesn't it?

24 MR. BERGER: No, I think Babcock said  
25 precisely the opposite.

1 CHIEF JUDGE LIPPMAN: Babcat - - - bo - - -  
2 Babcock eliminated that doctrine?

3 MR. BERGER: Babcock eliminated the reflex  
4 - - -

5 CHIEF JUDGE LIPPMAN: That's what our case  
6 law says?

7 MR. BERGER: - - - reflexive reliance on -  
8 - -

9 CHIEF JUDGE LIPPMAN: That's what our case  
10 law says?

11 MR. BERGER: Yes, Your Honor. I do believe  
12 so. For example, Judge Read writing for the court in  
13 2011, in Edwards, repeated and ratified what I just  
14 quoted to you from Babcock that, "Where the  
15 defendant's exercise of due care is in issue, the  
16 jurisdiction in which the allegedly wrongful conduct  
17 occurred will usually have a predominant, if not  
18 exclusive, concern." And - - -

19 JUDGE READ: Let me ask you this.

20 MR. BERGER: Yes, Judge.

21 JUDGE READ: If - - - if we agree with you  
22 - - - I'm not saying we do, but if we - - - if we  
23 would agree with you that Israeli law does not apply,  
24 does it make any difference whether it's Chinese law  
25 or New York law? Do we have to decide that?

1 MR. BERGER: I don't believe this court  
2 needs to decide it, because it's established in the  
3 record that both Chinese law and New York law would  
4 not provide a remedy. That's what gives rise to the  
5 conflict, Your Honor.

6 JUDGE READ: Notwithstanding what Judge  
7 Kapnick - - - Justice Kapnick said? She had a - - -  
8 she had a different view of that, didn't she, at - -  
9 - at the Supreme Court?

10 MR. BERGER: Justice Kapnick didn't opine  
11 on Israeli law. Appellate Division noted that she -  
12 - -

13 CHIEF JUDGE LIPPMAN: She said even if it's  
14 New York law, it doesn't matter, right?

15 MR. BERGER: She substantively applied New  
16 York law, not Israeli law. And indeed, that's why  
17 plaintiffs cross-appealed. But what Justice Kapnick  
18 did not have before her, but which Appellate Division  
19 did have before it, was Judge Scheindlin's subsequent  
20 decision applying Chinese law in the look-alike Wultz  
21 case. Now, Justice Kapnick recognized, in Supreme  
22 Court opinion, that this case and Wultz were  
23 essentially mirror-image cases. That Wultz, although  
24 it has federal claims, repeated a negligence claim  
25 and a breach of statutory duty claim under Israeli

1 law. And it's in that instance that Judge Scheindlin  
2 applied Chinese law and dismissed the - - -

3 CHIEF JUDGE LIPPMAN: Counsel, but under  
4 New York law don't we recognize the difference  
5 between conflicts between - - - conduct-regulating as  
6 - - - as distinguished from loss-allocating?

7 MR. BERGER: Absolutely, and I'm glad you  
8 asked me that question, because the most - - -

9 CHIEF JUDGE LIPPMAN: Yes, I - - - I want  
10 to hear the answer. Go ahead.

11 MR. BERGER: The most recent conduct-  
12 regulating case where a choice of law decision was  
13 made by this court was when Judge Smith wrote in  
14 Mashreqbank, which was a forum non conveniens case  
15 that had to make a choice of law decision.

16 JUDGE READ: That's the one we decided last  
17 spring.

18 MR. BERGER: Correct, in 2014. And  
19 interestingly, in Mashreqbank - - - it's very  
20 important because in Mashreqbank, after reviewing the  
21 entire history of this court's jurisprudence on  
22 choice of law, what the court said - - -

23 CHIEF JUDGE LIPPMAN: The pla - - - the  
24 place of - - - of tortious conduct ruling really  
25 isn't really, you know, in - - -

1 MR. BERGER: It was in Mashreqbank. Indeed

2 - - -

3 CHIEF JUDGE LIPPMAN: That - - - that's a  
4 forum non conveniens case.

5 MR. BERGER: No. Indeed, the reason why  
6 this court had to resolve the choice of law issue is  
7 that choice of law has been uniformly recognized as a  
8 facet to form an opinion.

9 CHIEF JUDGE LIPPMAN: You think that case  
10 determines the issues in this case?

11 MR. BERGER: I think that when Judge Smith  
12 wrote for this court citing to both Edwards and to  
13 Cooney, which are landmark choice of law cases, and  
14 said that the place where the allegedly tortious  
15 conduct occurred was the governing law in that case,  
16 he wasn't misinterpreting fifty years of this court's  
17 precedent. What he was doing - - - because if you  
18 roll back from this precise language of these cases  
19 and look at the underlying policy - - - because this  
20 court has absolutely been uniform in explaining the  
21 underlying policy for a half a century. Even in  
22 Schultz, which my adversary relies on as his best  
23 case, the reason why Schultz comes out the way it is  
24 - - - does is that in Schultz this court said that  
25 the greatest interest choice of law test will select

1 the law that has the greatest admonitory effect on  
2 the primary conduct at issue in the case, including  
3 conduct within its borders. Now, Schultz was a loss-  
4 allocation case, so it didn't have to apply it. But  
5 the greatest interest test is trying to get at - - -

6 JUDGE ABDUS-SALAAM: So in this case,  
7 you're saying, counsel, that because this is  
8 regulating conduct of banks, that where the bank  
9 services were provided, which in this case you're  
10 claiming would be China, they would have a greater  
11 interest in this case than Israel?

12 MR. BERGER: Yes, Your Honor, that is the  
13 correct articulation of our argument. And the reason  
14 why is that an admonitory effect - - - and this is  
15 what Judge Smith said for the court in Padula. It  
16 really is a regulatory effect - - - it's designed  
17 prophylactically to prevent conduct that - - - from  
18 recurring in the future.

19 The question, therefore, underlying the  
20 greatest interest test is what jurisdiction is best  
21 positioned to regulate conduct on an ongoing basis?  
22 Well, with banks we don't have to look so far,  
23 because every bank is regulated by a prudential  
24 regulator in the jurisdiction where it chooses to do  
25 business.

1           We happen to know in this case, because of  
2           concessions made by plaintiffs' counsel - - - same in  
3           this case as it was in the Wultz case - - - that  
4           their argument is that the bulk of the banking  
5           conduct occurred in China, only an insignificant  
6           amount occurred in New York. And, indeed, Judge  
7           Scheindlin accepted that concession in Wultz.

8           So who has - - - who's best positioned to  
9           engage in the admonitory effect to create the  
10          regulatory prophylactic effect that this court spoke  
11          of in Padula? The answer is the jurisdiction where  
12          ongoing prudential regulation takes place.

13          JUDGE RIVERA: So - - - so - - - so what  
14          would - - - let - - - let's try the hypothetical. So  
15          what would it be - - - what would be the case if you  
16          have not China and New York? Let's assume for one  
17          moment that you've got the admonitory effect you're  
18          talking about, not this interest in holding non-  
19          customers liable. But you also have transfers in a  
20          jurisdiction in which you could hold the non-  
21          customers liable. How would you resolve that?

22          MR. BERGER: Well, the greatest interest  
23          test is expressly a balancing test. It's a policy-  
24          oriented test. So the que - - - what this court has  
25          done is set broad rules, given some presumptive - - -

1 JUDGE RIVERA: Um-hum.

2 MR. BERGER: - - - choice of law guidance,  
3 I submit, by saying, "generally where the conduct  
4 takes place." But in a split-conduct case - - -

5 JUDGE RIVERA: Um-hum.

6 MR. BERGER: - - - the trial judge would  
7 have to say okay, what's the evidence on this? Is -  
8 - - is it more important here or is it more important  
9 there? And we know exactly how that would come out  
10 in this case, because that's what Judge Scheindlin  
11 did. You know, she originally applied Israeli law  
12 until the Second Circuit explained its own view of  
13 this court's jurisprudence. She then reconsidered  
14 her ruling and said okay, yes. There was banking  
15 conduct in New York. There was banking conduct in  
16 China. But I accept plaintiffs' concession that the  
17 vast majority of it was China and that these wire  
18 transfers passed only incidentally - - - this is  
19 Judge Scheindlin's words - - - through New York. And  
20 therefore, on - - - on a balance, clearly China has  
21 the strongest interests. After all, China and New  
22 York are the two regulatory jurisdictions. Let's  
23 compare that to what Israel's interests - - -

24 JUDGE ABDUS-SALAAM: So this - - - this  
25 applies even if China doesn't care? Apparently they

1 don't, because, you know, the representatives from  
2 the government of Israel came to the Chinese  
3 government and said, your bank is really doing some  
4 horrible things here, please do something about it.  
5 And they did not, right?

6 MR. BERGER: Well, first of all, that  
7 allegation has never been established. It was - - -  
8 it's been denied for - - - perhaps that points at the  
9 vice of trying to decide these cases, A, by taking a  
10 foreseeability allegation into account and, B, by  
11 doing it on the complaint where allegations are  
12 deemed true.

13 From Bank of China's perspective, that's an  
14 outrageous allegation. But an outcome-determinative  
15 decision like choice of law - - - and we wouldn't be  
16 talking about this unless it were outcome-  
17 determinative - - - should not be made on the basis  
18 of an allegation that a defendant might rightly say  
19 has been bootstrapped.

20 JUDGE RIVERA: But does - - -

21 MR. BERGER: Because then you get the law  
22 you want.

23 JUDGE RIVERA: Does it - - - does it matter  
24 that the - - - the ultimate consequence of the  
25 conduct we're talking about is terrorist activity and



1 harmony, then? Why is it at odds with the policy of  
2 China and New York if what you're seeking to do,  
3 again, is to avoid the funding and facilitation of  
4 terrorist activity and the use of this - - - these  
5 funds going through banks?

6 MR. BERGER: For precisely this reason,  
7 Judge Rivera, which is that we - - -

8 CHIEF JUDGE LIPPMAN: And assuming that we  
9 know exactly - - - that the bank knew exactly - - -  
10 assume that the bank knew what these monies were for  
11 and where they were going.

12 MR. BERGER: Well, I - - -

13 CHIEF JUDGE LIPPMAN: How does that violate  
14 - - - that - - - that the bank knew, how does that  
15 violate anybody's policy, New York or - - - or China?

16 MR. BERGER: May I have leave to respond to  
17 both - - -

18 CHIEF JUDGE LIPPMAN: Yes, go ahead.

19 MR. BERGER: - - - Judge Rivera's question  
20 - - -

21 CHIEF JUDGE LIPPMAN: Yes.

22 MR. BERGER: - - - and your - - - and  
23 yours?

24 CHIEF JUDGE LIPPMAN: Yes, by all means.

25 MR. BERGER: So to - - - to - - - to Judge

1 Rivera's question what I would say is even though  
2 everybody thinks it's like being against motherhood  
3 and apple pie to be, you know, against imposing a new  
4 bank duty, the truth is when you impose a new bank  
5 duty, you crowd out a lot of socially very beneficial  
6 behavior.

7           So what happens is banks are risk-averse  
8 entities. If you say the line is here and you te - -  
9 - and no bank is going to go over that line. Banks  
10 are going to stop here. So what's happening around  
11 the world as a result of the stringent enforcement of  
12 anti-money-laundering laws, banking services are  
13 being cut off to needed regions. Mexico, there was a  
14 story on NPR the other day about banking services  
15 being cut off to Mexico. Sudan, Somalia, needed  
16 areas that need money transfers aren't getting it  
17 because banks are walking away from the field saying,  
18 too much risk. When you put private plaintiffs into  
19 the government regulator's shoes, you cause adverse  
20 collateral consequences.

21           CHIEF JUDGE LIPPMAN: Answer the second  
22 question. What about - - - assume the bank knows  
23 where those monies are going and what they're being  
24 used for.

25           MR. BERGER: And I'm delighted to answer

1 that question. The answer is that that violates the  
2 banks' duties under federal law and the bank would be  
3 penalized by the regulator. Tellingly, very  
4 important point here, New York State recognizes the  
5 importance of the primacy of the U.S. anti-money - -  
6 - money-laundering regime. New York State Department  
7 of Financial Services regs say we require banks to  
8 follow the federal anti-money-laundering laws. What  
9 that means is New York State recognizes if you put  
10 too many cooks in the regulatory kitchen, including  
11 private plaintiffs, you are going to have unintended  
12 consequences.

13 And the scheme works well. You have a  
14 government regulator that's effective. Banks know  
15 they're regulated. They invest a fortune in  
16 complying with it. What we're saying is that Chinese  
17 law and New York recognizes that; it's a policy-based  
18 decision. The greatest interest test ought to pick  
19 China.

20 CHIEF JUDGE LIPPMAN: Okay, counsel.  
21 You'll have rebuttal. Let's hear from your  
22 adversary.

23 MR. TOLCHIN: Thank you, Your Honor, Robert  
24 Tolchin for the plaintiffs.

25 Very quickly, I don't know why we're even

1 here talking about Chinese law. It was not raised in  
2 Supreme Court. If you look at page 42 of the record,  
3 which was the pre-argument statement in the Appellate  
4 Division, paragraph 8, "The lower court failed to  
5 conduct the necessary choice of law analysis which  
6 would have led it to conclude New York substantive  
7 law policies."

8 JUDGE PIGOTT: So if we disagree with you,  
9 we should send it back?

10 MR. TOLCHIN: I'm sorry?

11 JUDGE PIGOTT: So if we disagree with you -  
12 - -

13 MR. TOLCHIN: No.

14 JUDGE PIGOTT: - - - we should send it  
15 back?

16 MR. TOLCHIN: The issue is waived. They -  
17 - - they argued this case before Judge Kapnick in a -  
18 - - as a dichotomy of New York law versus Israeli  
19 law. They never brought up Chinese law. It came up  
20 in the Appellate - - -

21 JUDGE PIGOTT: Well, if - - -

22 JUDGE READ: Would it make a difference if  
23 it's New York? I mean is there a difference between  
24 New York and Chinese laws that's - - - that's - - -

25 MR. TOLCHIN: In - - - in terms of whether

1 the plaintiff could proceed?

2 JUDGE READ: Yeah, yeah.

3 MR. TOLCHIN: No, I don't think so. But we  
4 should confine ourselves to talking about what is  
5 actually before the court.

6 JUDGE PIGOTT: All right, if - - - if AMEX  
7 - - -

8 MR. TOLCHIN: The - - -

9 JUDGE PIGOTT: - - - you know, to take one  
10 - - - one party not in this case but in another one -  
11 - - was involved in this case.

12 MR. TOLCHIN: AMEX was a different  
13 circumstance.

14 JUDGE PIGOTT: If AMEX was involved in this  
15 case, and I realize it's different circumstances, but  
16 you're - - - but you're suggesting that we're going  
17 to apply Israeli law in New York. Would - - - would  
18 AMEX then be - - - would we, as a court, be deciding  
19 whether AMEX is guilty or not - - - or any - - - any  
20 ancillary bank in one of these things - - - saying we  
21 - - - we can't use New York law on a New York bank or  
22 institution. We're going to apply Israeli law. Does  
23 that make sense?

24 MR. TOLCHIN: I'm not sure I follow the  
25 question exactly. Are you asking me whether it would

1 make sense to apply different laws to different  
2 parties in the same case?

3 JUDGE PIGOTT: What I'm saying is if one of  
4 our citizens is involved in a lawsuit in which  
5 Israeli law is supposed to apply, does that make  
6 sense to - - -

7 MR. TOLCHIN: Well, where - - - where does  
8 the injury happen, Your Honor, in your scen - - - in  
9 your hypothetical?

10 JUDGE PIGOTT: You chose.

11 MR. TOLCHIN: Well, the reason I ask is  
12 that under all the cases that I've come across  
13 dealing with conduct-regulating measures, whether  
14 before Babcock, after Babcock, Schultz case - - -

15 CHIEF JUDGE LIPPMAN: Well, let - - - let's  
16 just take this case and let's assume that's  
17 everything happened the way it happened.

18 MR. TOLCHIN: Sure.

19 JUDGE PIGOTT: But the - - - the  
20 allegations include the fact that within the Bank of  
21 China in New York, they had - - - there had been  
22 transactions which involved - - - pick a New York  
23 bank or - - - or an ancillary institution. Would we  
24 be applying Israeli law to a New York citizen,  
25 conducting business in New York, under this - - -

1 under this lawsuit that you've brought?

2 MR. TOLCHIN: Judge Pigott, I don't mean to  
3 be daft, but we need to know where the person got  
4 hurt. It was - - -

5 JUDGE PIGOTT: I'm saying the Bank of China  
6 would have - - -

7 MR. TOLCHIN: I'm sorry?

8 JUDGE PIGOTT: The Bank of China did what  
9 it did over there.

10 MR. TOLCHIN: Right.

11 JUDGE PIGOTT: All right? And the money  
12 went wherever it went, but it was - - - it was - - -  
13 it was - - - it was transferred through a New York  
14 bank.

15 MR. TOLCHIN: Well, that's exactly what  
16 happened here.

17 JUDGE PIGOTT: Exactly.

18 MR. TOLCHIN: Transferred through - - -

19 JUDGE PIGOTT: Now, you - - -

20 MR. TOLCHIN: - - - Bank of China in New  
21 York. It was Bank of China in China transferred  
22 through Bank of China in New York and - - - which - -  
23 - which is common when it's dollar-denominated  
24 assets.

25 JUDGE PIGOTT: And are you suggesting that,

1           that this bank in New York is going to be tried in  
2           New York under Israeli law?

3                       MR. TOLCHIN:   If the result of the conduct  
4           was that the plaintiffs were killed or maimed in  
5           Israel, which was the location of the last act  
6           necessary to give rise to the tort, then the answer  
7           would be yes.

8                       JUDGE PIGOTT:   And we have - - - we have -  
9           - - we don't have the non-customer jurisprudence that  
10          you're looking for under Israeli law.   But you're  
11          saying that in this - - - in that instance, unlike -  
12          - - unlike all of our other citizens in New York  
13          banks doing whatever they do and we don't - - - if  
14          you're not a customer, you're not in it, in this case  
15          we're going to say you are?

16                      MR. TOLCHIN:   You are what?

17                      JUDGE PIGOTT:   You're liable for non-  
18          customers.

19                      MR. TOLCHIN:   That's correct, because we're  
20          talking here about tort liability.   You know, no one  
21          would say that - - - we - - - we're talking here  
22          about tort liability, and the - - - we're doing a  
23          choice of law analysis on tort claims.   We have the  
24          Babcock, Schultz, that whole line of cases, dichotomy  
25          that Judge Lippman brought up about the difference

1           between loss-regulating and conduct-regulating rules.  
2           And in conduct-regulating rules, every case that has  
3           ever addressed the issue has found that the law of  
4           the place of tort - - - the law of the place of the  
5           tort controls. Now, that only gets us - - -

6                   JUDGE READ: What is - - - what is the tort  
7           here? I mean what you're alleging - - -

8                   MR. TOLCHIN: Well, that only gets us a - -  
9           - up to a certain point, because - - -

10                   JUDGE READ: You're alleging here that the  
11           - - - the wrongdoing was what was done by the banks.

12                   MR. TOLCHIN: Well, Judge Read, if I were  
13           to take a rifle and stand in New Jersey and fire it  
14           across the Hudson River at Manhattan and I kill  
15           somebody in Manhattan, where did I commit the tort?  
16           I fired the gun in New Jersey; it killed somebody in  
17           New York. That's really what happened here. Any  
18           time you have a cross-border scenario where something  
19           happens in two jurisdictions, you have to grapple  
20           with this. This court grappled with this - - -

21                   JUDGE RIVERA: You're - - - you're saying  
22           the wire transfer - - -

23                   MR. TOLCHIN: Right.

24                   JUDGE RIVERA: - - - is conduct but the  
25           only reason - - -

1 MR. TOLCHIN: Yes.

2 JUDGE RIVERA: - - - your clients have a  
3 tort action is because there's an injury or a death?

4 MR. TOLCHIN: That's correct.

5 JUDGE RIVERA: So you got to have the  
6 completion. The wire transfer is meaningless in this  
7 sense - - -

8 MR. TOLCHIN: Eighty-seven years ag - - -

9 JUDGE RIVERA: - - - for - - - for the  
10 purpose of your torts - - -

11 MR. TOLCHIN: Eight-seven years ago - - -

12 JUDGE RIVERA: - - - unless they're in the  
13 - - -

14 MR. TOLCHIN: - - - Chief Judge Cardozo in  
15 this room said negligence in the air, so to speak,  
16 will not do. If the wire transfer began but nobody  
17 got hurt, it was just an innocuous transaction that  
18 maybe was carelessly done, ignored warnings, violated  
19 regulations, what have you, but nobody got hurt,  
20 maybe they could get some kind of a regulatory penal  
21 - - - fine or a penalty if anyone - - - if an auditor  
22 discovered it.

23 JUDGE RIVERA: Or the terrorist act was  
24 interrupted.

25 MR. TOLCHIN: But - - -

1 JUDGE RIVERA: And never occurred.

2 MR. TOLCHIN: Right, but nobody would be  
3 able to bring a tort suit, because nobody would have  
4 been hurt.

5 JUDGE READ: So you - - - you - - - you  
6 rely on Schultz principally?

7 MR. TOLCHIN: We rely on - - - we rely on  
8 Schultz and every - - - you know the - - - the Padula  
9 case is another example. Well, no, that was loss  
10 regulating. But we rely on Schultz and every case  
11 that has ever applied Schultz dealing with conduct-  
12 regulating rules. The - - - the place of the tort is  
13 what we have to address, and it's not always clear  
14 where is the place of the tort.

15 CHIEF JUDGE LIPPMAN: What about  
16 Mashreqbank that your adversary - - -

17 MR. TOLCHIN: Mashreqbank, Your Honor, is  
18 100,000 percent correct. That has nothing to do with  
19 this case.

20 CHIEF JUDGE LIPPMAN: Why?

21 MR. TOLCHIN: That was a forum non - - -

22 CHIEF JUDGE LIPPMAN: Why?

23 MR. TOLCHIN: It was a forum non conveniens  
24 case that discussed choice of law as an ancillary  
25 issue, I would even say a dicta, that had - - - you

1 know, when you're talking about for - - - selecting  
2 your forum of whether this is an nonconveniens forum,  
3 the - - - the issue of what law would be applied here  
4 or there is something that comes up. It was not  
5 remotely the focus of this court's decision to  
6 determine wher - - - I mean the - - - the key  
7 question in this case is when a tort is con - - - is  
8 - - - spans more than one jurisdiction, where do we  
9 say it occurred?

10 CHIEF JUDGE LIPPMAN: We have to assume for  
11 purposes of - - - of deciding what's before us that  
12 the bank knew what these monies were going for in - -  
13 - in Israel?

14 MR. TOLCHIN: I don't think you have to  
15 assume that in order to decide the choice of law. We  
16 are - - - if we ultimately can't prove that, then  
17 we'll lose the case on the merits, not based on the  
18 law. The - - - there's no question that the  
19 plaintiffs were killed and maimed in Israel. Where -  
20 - - there's no question that if this alleged pattern  
21 of conduct happened, the last act necessary to give  
22 rise to the claim is something that took place in  
23 Israel.

24 JUDGE ABDUS-SALAAM: Your - - - your  
25 position, counsel, is that it's the last act that

1 gave rise to the claim, not which jurisdiction has  
2 the greatest interests. Isn't that really what our  
3 focus should be?

4 MR. TOLCHIN: Well, it's the same thing,  
5 Judge. China maybe has some kind of - - - of high-  
6 altitude interest in monitoring the activities of its  
7 banks.

8 JUDGE PIGOTT: Regulating.

9 MR. TOLCHIN: The reg - - - regulating,  
10 monitoring, you know, standing above and making sure  
11 the banks work the way they want. Although, you  
12 know, it's - - - it's addressed in our brief, I don't  
13 want to dwell on it here, there's a substantial  
14 question about the close relationship between the  
15 Bank of China and its regulator. It - - - it - - -  
16 it's not an economy like our economy, and it - - -  
17 and it - - - the bank itself is - - -

18 JUDGE READ: Well, there've been  
19 allegations about the close relationship between our  
20 government and our - - - our banks, too, haven't  
21 there?

22 MR. TOLCHIN: Right, but - - - but our  
23 government doe - - - the Bank of China is - - - is  
24 own - - - is - - - is substantially owned, majority-  
25 owned by the government.

1 JUDGE READ: I understand.

2 MR. TOLCHIN: And - - - and the - - -

3 JUDGE READ: I was just trying to lighten  
4 the mood a little bit.

5 MR. TOLCHIN: And - - - and heads of the  
6 Bank of China move in and out of the government and -  
7 - - and communist party so - - -

8 JUDGE PIGOTT: So you could sue - - - you  
9 could sue them in China and apply China law and what  
10 would happen would happen, right?

11 MR. TOLCHIN: Well, considering that the  
12 Chinese courts are part of the government and - - -

13 JUDGE PIGOTT: So you don't like that. So  
14 you want to assume in New York but you want to apply  
15 not New York law, but Israeli law?

16 MR. TOLCHIN: That's correct, because  
17 they're here, right.

18 JUDGE READ: What about the Licci case? I  
19 gather the Second Circuit doesn't agree with you.

20 MR. TOLCHIN: Well, the Second Circuit  
21 thinks that the First Department doesn't - - - didn't  
22 accurately predict what this court would do. So, you  
23 know, if - - - if - - - if we win this appeal, if you  
24 affirm the First Department, Licci may be revisited.  
25 The Licci case was simply they looked at this case in

1 the Appellate Division because - - -

2 JUDGE READ: They looked at our case law  
3 and they basically said that the First Department - -  
4 -

5 MR. TOLCHIN: Right, but they make - - -  
6 they make the same - - -

7 JUDGE READ: - - - didn't interpret it  
8 correctly.

9 MR. TOLCHIN: They make the same mistake  
10 the Mr. Berger urges on this court that the location  
11 of - - - that the only interest, that the only  
12 location of conduct, was China. Getting back to  
13 Judge Abdus-Salaam's question, there are dead people  
14 in Israel. There are families who lost their  
15 children. There are crippled children with shrapnel  
16 in their bodies. There is a lot of interest in  
17 Israel in these attacks.

18 JUDGE PIGOTT: But if you - - -

19 MR. TOLCHIN: Much, much more than whatever  
20 is in China.

21 JUDGE PIGOTT: Right, but if you apply  
22 that, and let's assume that there's a lot of bad  
23 things that are happening in Iraq, all right, and  
24 people want to sue for whatever goes on in Iraq or in  
25 Syria. Do they come to New York, sue the bank, and

1 say now, here you got to apply Syrian law or here  
2 you've got to apply some other country's law because  
3 of what we claim, you know, are - - - are - - - are  
4 where our citizens are from. So that we'll find New  
5 York courts applying the law of wherever victims are  
6 or are - - - or are citizens of - - -

7 MR. TOLCHIN: It's not - - -

8 JUDGE PIGOTT: - - - involved in terrorist  
9 activities.

10 MR. TOLCHIN: It - - - it's not such a far-  
11 reaching thing, Judge. The - - - just use the  
12 Edwards case; Edwards was not a conduct-regulating  
13 rule. It was a lo - - - a loss-regulating rule, but  
14 it would be a good analogy to show that what Your  
15 Honor is raising as a - - - as - - - as a question is  
16 not so unreasonable. In that case, it was Canadians  
17 aboard a Canadian bus who collided in New York with a  
18 bus - - - with a truck that was, I believe, from  
19 Pennsylvania.

20 JUDGE PIGOTT: That was a law school  
21 question, believe me. And I - - - I remember - - -

22 CHIEF JUDGE LIPPMAN: Well - - -

23 MR. TOLCHIN: But - - - but - - -

24 JUDGE PIGOTT: - - - exactly where it  
25 happened. But - - - but - - -

1                   MR. TOLCHIN: But in that - - - in that  
2 case, this court said as to the Canadians and the  
3 claim against the Canadian bus, we apply Ontario law,  
4 because they're all from the - - - from Ontario. But  
5 in the same case, the same accident, as to the claim  
6 against the truck, we're going to apply New York law  
7 because that's the place of the tort. Even though  
8 the bus - - - the - - - the truck was not from New  
9 York. It was from Pennsylvania. But you wind up  
10 with two sets of laws being applied in a New York  
11 court.

12                   CHIEF JUDGE LIPPMAN: Counsel, what's - - -

13                   MR. TOLCHIN: One was a law of another  
14 country.

15                   CHIEF JUDGE LIPPMAN: What's the  
16 significance of Babcock? Your - - - your adversary  
17 is saying Babcock's changed the whole playing field.  
18 What's the significance of Babcock leading up to this  
19 particular kind of case?

20                   MR. TOLCHIN: Before Babcock, we always  
21 looked only at where the tort happened. After  
22 Babcock, we looked at which jurisdiction has a  
23 greater interest.

24                   JUDGE READ: That's where we started  
25 getting into this balancing.

1 MR. TOLCHIN: Right, and the balancing  
2 became very pronounced because of Neumeier in loss-  
3 allocating cases, because sometimes the people are  
4 from the same - - -

5 CHIEF JUDGE LIPPMAN: So is that the main  
6 distinction, the loss-allocating versus the conduct-  
7 regulating?

8 MR. TOLCHIN: Yes, but under - - - for  
9 conduct-regulating, as this court recited in the  
10 Schultz case and in the Cousins - - - I mean in  
11 Cousins, this court said, "It is true that lex loci  
12 delicti remains the general rule in tort cases."

13 I mean it - - - it - - - we look to - - -  
14 if - - - if there were a reason why another state  
15 would have a greater interest, we would look at it.  
16 But take a look at what happened in Padula. A New  
17 York company, a New York worker, are working doing  
18 construction in Massachusetts and somebody falls from  
19 a ladder. The New York plaintiff tried to sue the  
20 New York defendant, contractor, under Labor Law 240.  
21 This court said no. This is a conduct-regulating  
22 rule. We're going to apply the law to Massachusetts  
23 - - -

24 JUDGE PIGOTT: Just - - - just - - -

25 MR. TOLCHIN: - - - where the accident

1           happened.

2                   JUDGE PIGOTT:   Just so I'm clear, though,  
3           when - - - when I talked about Iraq or if - - - if  
4           there some bank, not the Bank of China.  I don't want  
5           to pick on anybody.  But if there is some bank that  
6           is - - - that is subsidizing terrorism around the  
7           world - - -

8                   MR. TOLCHIN:   Um-hum.

9                   JUDGE PIGOTT:   - - - and if they somehow  
10          had a - - - had a - - - a branch in New York City,  
11          it's conceivable, unlikely but conceivable, that the  
12          New York courts would be applying various countries'  
13          laws, depending on what they say, in cases like this,  
14          right?

15                  MR. TOLCHIN:   I would say that it's not  
16          only conceivable, it's - - - it - - - it - - - it's  
17          very likely.

18                  JUDGE PIGOTT:   All right.

19                  MR. TOLCHIN:   And it's not a bad thing.  If  
20          - - - pick a bank in New York.  If Chase Bank were to  
21          decide - - - well, it's J.P. Morgan now, but if they  
22          were to decide to ignore all rules and transfer money  
23          to terrorists and people in - - -

24                  JUDGE PIGOTT:   But we would apply New York  
25          law.

1 MR. TOLCHIN: - - - Iraq.

2 JUDGE PIGOTT: We would apply New York law  
3 to what the - - - the - - - to the bank and  
4 regulation.

5 MR. TOLCHIN: I'm not sure that you would.

6 JUDGE READ: Well, let's - - - let's take  
7 it and let it - - -

8 MR. TOLCHIN: I'm not sure that you would.  
9 Ev - - - they - - -

10 JUDGE READ: Let's - - - let's say it  
11 happens in Europe somewhere.

12 MR. TOLCHIN: Yeah.

13 JUDGE READ: Okay. So what law would we -  
14 - - let's say - - - let's say there's a terrorist act  
15 in Paris.

16 MR. TOLCHIN: Um-hum.

17 JUDGE READ: We would apply French law?

18 MR. TOLCHIN: To people who are killed or  
19 injured in France, I would say you have to apply  
20 French law. It's the las - - - that's where the  
21 lightning bolt struck. It circled and circled and it  
22 landed there.

23 JUDGE READ: That's your analogy - - -

24 MR. TOLCHIN: That is the location - - -

25 JUDGE READ: - - - the rifle shot from New

1 Jersey that hits somebody across the river in New  
2 York?

3 MR. TOLCHIN: I think that New York - - -  
4 the - - - the police in New York would have a great  
5 interest in arresting the person who fired that  
6 rifle. And I don't think it would be unreasonable at  
7 all to sue that person in New York for the wrongful  
8 death and apply New York law.

9 JUDGE RIVERA: But it sounds like under  
10 your argument, it's always - - - because of the  
11 nature of the tort we're talking about, it's always  
12 the injury. So it's always lex loci. So it's not an  
13 interest-balancing test?

14 MR. TOLCHIN: I - - - I would admit that  
15 there could be some circumstance, which is not  
16 present in this case, where maybe it would be  
17 different. But there is nothing - - - there is  
18 nothing here to argue otherwise. And if we want to  
19 talk about admonitory effect - - -

20 JUDGE RIVERA: Um-hum.

21 MR. TOLCHIN: - - - leaving the Bank of  
22 China to be theoretically scolded by the Chinese bank  
23 regulators - - - or not, because, you know, after  
24 all, this was a handful of transactions out of a  
25 great many, has comp - - - has very little admonitory

1 effect.

2 JUDGE RIVERA: Let me ask you. He - - - he  
3 argues that there is a balance. There is an almost -  
4 - - I - - - I think he was trying to respond to me  
5 that there's almost a global balance and that when  
6 you make the choice that you're suggesting that - - -  
7 that - - - that we stamp our approval on, that has  
8 implications in other parts of the world to the way  
9 you deal with terrorism. What's your response to  
10 that?

11 MR. TOLCHIN: My response is num - - - two-  
12 fold. Number one, I argue my case. I don't know  
13 what the facts are of those other cases and maybe  
14 they'll come here and they'll flesh out other aspects  
15 of the law.

16 JUDGE RIVERA: Um-hum.

17 MR. TOLCHIN: But in this case, the  
18 interest - - - you know, everyone talks - - - Mr.  
19 Berger talks about the interests of the Bank of China  
20 in being regulated and the interests of the Chinese  
21 regulators in being regulated. I have to think about  
22 the interests of the Israelis and the Americans in  
23 Israel who would have no claim who have been killed  
24 and maimed and have a far, far greater interest.

25 And Israel being the target of these

1 attacks has a tremendous interest in having its  
2 admonitory laws, its - - - its statutes designed  
3 specifically to allow actions for damage, designed  
4 specifically to be applied even extraterritorially,  
5 as we discuss in the brief, just outlays the  
6 regulatory interest of the Chinese bank regulator.

7 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank  
8 you.

9 Counsel, rebuttal.

10 MR. BERGER: Thank you, Your Honor. Let me  
11 preface my remarks by saying that sadly, I think  
12 what's happened in the law of terrorism in cases like  
13 this and - - - is that terrorism is kind of - - -  
14 kind of a modern day McCarthyism where the minute it  
15 is uttered as an allegation, the burden shifts to the  
16 party who is accused to say no, no, I didn't do it.  
17 But Mr. Tolchin says the reason why Israeli law ought  
18 to be applied is because people were maimed and  
19 killed and injured there. Those are terrible,  
20 regrettable acts Bank of China had nothing to do  
21 with.

22 CHIEF JUDGE LIPPMAN: What if they can show  
23 that they did it? That they did it, they knew that  
24 they did it, and that's where the ultimate harm came?

25 MR. BERGER: Well, A, they can't because

1 the government of Israel says they can't.

2 CHIEF JUDGE LIPPMAN: Well, that remains to  
3 be seen, but go ahead.

4 MR. BERGER: And, B, the problem is you  
5 will - - - you change the rules of the game if you  
6 accept what Mr. Tolchin said, because under - - -

7 CHIEF JUDGE LIPPMAN: Or is - - - or are we  
8 keeping the rules that have always been the game in  
9 terms of the doctrine that we guide these kinds of  
10 cases?

11 MR. BERGER: I - - - I may have miss - - -  
12 I may have said something different than the court  
13 understood, so let me try to clarify. I'm talking  
14 about the substantive rules of the game. Part of the  
15 reason why plaintiffs want Israeli law to apply is  
16 that they - - - it is easier for them to win their  
17 case under Israeli law. If they can't prove - - -

18 CHIEF JUDGE LIPPMAN: But you want the  
19 other side because it's harder for you to win your -  
20 - - your - - - your case if you use Israeli law so -  
21 - -

22 MR. BERGER: My view on that is - - -

23 CHIEF JUDGE LIPPMAN: - - - isn't it the  
24 same motivation that you both have? Aside from your  
25 honest belief in the law, you want it because you

1 think that favors your side. They want it because  
2 they think that favors their side.

3 MR. BERGER: Sure, and I'll take Judge Read  
4 as the tiebreaker because in Edwards, she addressed  
5 this point. Schultz, which they rely on, has been  
6 misread and misinterpreted repeatedly. What Judge  
7 Read said in Edwards in discussing Schultz - - - she  
8 said, you know - - - and this is at page 323 of 17  
9 NY3rd. She said, "As in Schultz, we acknowledge that  
10 although it was conceivable that the application of  
11 New York law in that case" - - - after all, New  
12 Jersey law was picked - - - "could have had a  
13 deterrent effect on future tortious conduct, the  
14 deterrent interest there was considerably less  
15 because none of the parties was a resident and the  
16 rule in conflict was loss-allocating rather than  
17 conduct-regulating."

18 What that language meant to me is Schultz,  
19 which gets misread as establishing a last-event test,  
20 really is a loss-allocation case that acknowledges  
21 that when you're dealing with conduct-regulating - -  
22 - because what I'm seeking is the application of  
23 Chinese law to the conduct - - - that we want to  
24 deter adverse conduct in a conduct-regulating case,  
25 and that's why Schultz would have picked New York law

1 if it were a conduct-regulating case. Schultz was  
2 continually misread and misread here by the Appellate  
3 Division, because Schultz had two separate  
4 components.

5 Schultz said, number one, what laws do we  
6 have to look at? It was in that context that the  
7 Schultz court took the - - - talked about the last-  
8 event test. And it said, okay, we have injuries in  
9 both New York and New Jersey, so we have to consider  
10 both states' laws. Then it said, apropos, Chief  
11 Judge Lippman, of your question about Babcock, how do  
12 we resolve that choice? And the answer is we no  
13 longer use lex loci delicti inflexibly. If I could  
14 close with one point?

15 CHIEF JUDGE LIPPMAN: But we still use it.

16 MR. BERGER: Lex loci is no longer the  
17 tiebreaker. It is not the iron rule, as Judge - - -

18 CHIEF JUDGE LIPPMAN: We - - -

19 MR. BERGER: - - - Rivera was saying that -  
20 - - Mr. Tolchin's arguing that in every single case,  
21 the place of injury; you need know nothing else. He  
22 said to Judge Pigott when he was given a  
23 hypothetical, you need to tell me where the  
24 plaintiffs were injured. Why, because in his iron  
25 rule, that dictates the answer, that's not a

1 balancing act.

2 CHIEF JUDGE LIPPMAN: But invariably, we  
3 use it in these kinds of cases, don't we?

4 MR. BERGER: It is a factor to be  
5 considered. It has much more weight, Chief Judge  
6 Lippman, in a loss-allocation case, because then  
7 you're trying to ensure a - - - the appropriate  
8 remedy for a loss. But if - - -

9 JUDGE RIVERA: But - - - yes. I'm sorry.

10 MR. BERGER: I'm sorry. Go ahead, Judge.  
11 I'm sorry.

12 JUDGE RIVERA: Let me try and get the  
13 interest - - - the way you're balancing this  
14 interest. So he's claiming there's an interest, of  
15 course, in eliminating, avoiding the funding of  
16 terrorist activities within the borders of Israel.  
17 He says that's the interest. People are harmed as a  
18 result of it. And that - - - that's - - - they have  
19 no tort without the injury. That's his point. Your  
20 point is that - - - that the Bank of China - - - and  
21 New York for - - - for the purposes of my question,  
22 have an interest in the way they regulate their  
23 banks, right? Am I correct so far?

24 MR. BERGER: Abso - - - absolutely.

25 JUDGE RIVERA: Yes, okay. So that

1 interest, though - - - what I'm not understanding  
2 about your argument is that interest encompasses  
3 ensuring that the bank is not used to fund terrorist  
4 activity. So I'm guess I'm not seeing - - -

5 MR. BERGER: I disagree. So if I can - - -  
6 if I can respond to that.

7 JUDGE RIVERA: Okay, that's - - - then  
8 explain that to me.

9 MR. BERGER: And it's very important,  
10 because this is the part that Appellate Division got  
11 right. They said China and New York have an interest  
12 in overseeing their financial institutions. That's a  
13 regulatory interest. That's an admonitory-effect  
14 interest. Israel has an interest in preventing  
15 terrorist attacks. Well, Bank of China didn't commit  
16 a terrorist attack. Bank of China doesn't operate in  
17 Israel. Bank of China isn't subject to Israeli  
18 jurisdiction.

19 JUDGE RIVERA: The Bank of China - - - the  
20 claim is the Bank of China facilitated the - - -  
21 there's no way you're going to have a terrorist  
22 attack unless money gets to the particular terrorist  
23 organization they're talking about. Bank of China  
24 facilitated the transfer of those funds.

25 MR. BERGER: I understand - - -

1 JUDGE RIVERA: That's their argument.

2 MR. BERGER: - - - that that's the  
3 allegation. Now, I think it crystalizes.

4 JUDGE RIVERA: Now, you may have a  
5 causation argument, but that's their argument.

6 MR. BERGER: But I think it crystalizes,  
7 Judge Rivera, why the balancing test, the greatest  
8 interest test, favors China or New York.

9 JUDGE RIVERA: Okay.

10 MR. BERGER: And it's this. Israel's  
11 interest is a retrospective penal interest. It is  
12 not an admonitory regulatory interest. What Mr.  
13 Tolchin basically says is if you hit them with a big  
14 enough stick under Israeli law, you'll really get  
15 their attention. Well, that's not the same as  
16 ongoing prudential regulation. And what the greatest  
17 interest test that this court has devised is all  
18 about is having an admonitory, regulatory,  
19 prophylactic effect, and that comes only from the  
20 jurisdictions that can regulate. That's why Israel  
21 doesn't actually - - -

22 JUDGE RIVERA: But it doesn't work, right,  
23 because you had a terrorist attack.

24 MR. BERGER: Well, there - - - there are  
25 terrorist attacks all the time.

1 JUDGE RIVERA: Yes, we know. We're in New  
2 York.

3 MR. BERGER: And the - - - and I appreciate  
4 that. And I think that goes to the point of why it  
5 is that the allegation should not be allowed to  
6 overtake the policy analysis here - - -

7 JUDGE RIVERA: Okay.

8 MR. BERGER: - - - or that at the end of  
9 the day, this is a claim about banking conduct. Was  
10 it negligent? The issue is should there be a duty?  
11 Israeli law imp - - - imposes a duty. New York law  
12 doesn't. You don't need to impose a duty. You don't  
13 need to stretch and bend over backwards to pick  
14 Israeli law for this reason.

15 JUDGE RIVERA: Um-hum.

16 MR. BERGER: The primary allegation, as  
17 Judge Abdus-Salaam points out in this, is the big-  
18 ticket item is the knowledge allegation. In New  
19 York, knowledge doesn't give rise to a duty, but  
20 knowledge could be an element of an aiding and  
21 abetting claim. They didn't plead one. They didn't  
22 plead one because they were out of time to plead one  
23 by the time that they brought this lawsuit. In other  
24 lawsuits they have brought aiding and abetting  
25 claims. We all know that knowledge is an ele - - -

1 is an element of aiding and abetting. But to make up  
2 for that flaw in their case by imposing a broad new  
3 duty under Israeli law on banks operating in New York  
4 and China would be a terrible disservice to the  
5 banking industry and would undermine the - - -

6 CHIEF JUDGE LIPPMAN: Okay, counsel.

7 MR. BERGER: - - - purpose of the various  
8 interests.

9 CHIEF JUDGE LIPPMAN: Thank you both.

10 MR. BERGER: Thank you.

11 CHIEF JUDGE LIPPMAN: Appreciate it.

12 MR. TOLCHIN: Thank you, Your Honor.

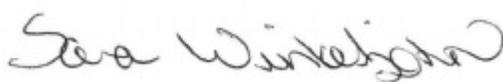
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Keren Elmaliach, Etc., Et Al. v. Bank of China Limited, No. 3 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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