CITATION: Sistem Mühendislik İnşaat Sanayi Ve Ticaret Anonim Sirketi v. Kyrgyz Republic, 2012 ONSC 4351
COURT FILE NO.: CV-11-9419-00CL
DATE: 20120725

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: Sistem Mühendislik İnşaat Sanayi Ve Ticaret Anonim Sirketi, Applicant

AND:

Kyrgyz Republic and Kyrgyzaltyn JSC, Respondents

BEFORE: D. M. Brown J.

COUNSEL: G. Pollack, for the Applicant

J. Casey and C. Doria, for the Respondent, Kyrgyzaltyn JSC

J. Judge and V. Voakes, for Centerra Gold Inc.

No one appearing for the Respondent, Kyrgyz Republic

HEARD: April 17, 2012

REASONS FOR DECISION

I. Overview of motions to set aside an Ontario order recognizing and enforcing an international arbitral award and to stay Ontario enforcement proceedings as *forum non conveniens*

[1] The applicant, Sistem Mühendislik İnşaat Sanayi Ve Ticaret Anonim Sirketi ("Sistem"), a Turkish company, invested in a hotel in the city of Bishkek, in the Kyrgyz Republic (the "Republic"), ultimately becoming sole owner and operator. Sistem was evicted from the hotel, literally at gun-point, in 2005 during a period of revolutionary politics in the Republic. Sistem then initiated proceedings before the International Centre for Settlement of Investment Disputes claiming compensation from the Republic for the loss of its investment. The Republic defended the claim before the international arbitration tribunal. Sistem succeeded on its claim, obtaining an award against the Republic of U.S. $8.5 million, together with interest and costs.

[2] The Republic did not pay the Award.

[3] Sistem then initiated proceedings to enforce the Award. Specifically, Sistem commenced this application against the Republic under the *International Commercial Arbitration Act* and the *State Immunity Act* seeking recognition and enforcement of the Award (the "Application"). Although made aware of the Application, the Republic did not respond. By order dated January 5, 2011, Echlin J. recognized and enforced the Award and ordered the Republic to pay Sistem an amount in Canadian currency sufficient to purchase US$9,147,470, which covered all elements of the Award (the "Judgment").

[4] Sistem then pursued steps to enforce the Judgment using tools available to it under Rule 60 of the *Rules of Civil Procedure*. Those steps involved an Ontario-based, *Canadian Business Corporations Act* company, Centerra Gold Inc., wholly-owned subsidiaries of which operate the Kumtor Mine in the Republic. Centerra is a reporting issuer. Sistem sought (i) to seize shares in Centerra registered in the name of Kyrgyzaltyn JSC ("Kyrgyzaltyn"), a joint stock company incorporated under the laws of the Republic which is wholly-owned by the Republic, contending that the Republic was the beneficial owner of those shares (the "Disputed Shares") and (ii) to garnish amounts it alleged Centerra owed the Republic.

[5] The Republic owns Kyrgyzaltyn which in turn owns 33% of the issued and outstanding shares of Centerra.

[6] Kyrgyzaltyn asserted that it owned the Disputed Shares in Centerra which Sistem was attempting to seize, and these proceedings resulted.

[7] Kyrgyzaltyn moved for two forms of relief before me. First, Kyrgyzaltyn moved under Rule 38.11 to set aside the Judgment of Echlin J. on the basis that it was a "party affected" by that recognition and enforcement Judgment and this Court lacked jurisdiction to recognize and enforce the Award against the Republic. Kyrgyzaltyn also moved for an order staying the proceedings regarding ownership of the Disputed Shares on the grounds of *forum non conveniens*.

II. Background facts

A. The international arbitration proceedings and award

[8] On September 30, 2005, Sistem initiated an arbitration claim against the Kyrgyz Republic before the International Centre for Settlement of Investment Disputes seeking compensation for the loss of its hotel investment. The nature of the claim was succinctly described by the Tribunal in its Decision on Jurisdiction dated September 13, 2007:

> [T]he claim arises from a joint venture formed in 1992 by the Claimant, Sistem, and a Kyrgyz company, the Ak-Keme Joint-Stock Company…Sistem says that it fulfilled its obligations under the various agreements that underpinned the project, that it bought Ak-Keme's share in the project in 1999 after Ak-Keme went into bankruptcy in 1998, and that it is entitled now to operate the hotel, but was dispossessed in March 2005 by Ak-

> Keme (now acting with a Malaysian partner). Sistem claims that the Kyrgyz Republic failed in its duty to protect Sistem's investment. The Respondent says that Sistem was simply a contractor hired to build the hotel, that it did not fulfill its obligations, that the 1998 bankruptcy procedure and 1998 purchase by Sistem of Ak-Keme's interest were legally invalid, and that Sistem unlawfully occupied the hotel until it was recovered by Ak-Keme and its Malaysian partner in March 2005. The Kyrgyz Republic does not accept Sistem's claim.

In its claim Sistem sought orders requiring the Republic to compensate it for the value of the hotel and for lost profit.

[9] The Tribunal conducted a two-stage hearing. First, it heard argument on whether it enjoyed jurisdiction over the dispute. The Republic contended that the Tribunal lacked jurisdiction. Both parties appeared before the Tribunal and made submissions. By Decision dated September 13, 2007 the Tribunal held that it was competent to hear and decide the claims.

[10] The Tribunal then conducted a hearing on the merits. The Republic fully participated and was represented by counsel. In its Award dated September 9, 2009, the Tribunal found that Sistem's ownership rights in the hotel were abrogated by an organ of the Krygyz State for which the Republic was responsible. The Tribunal ordered the Republic to pay Sistem compensation in the amount of U.S. $8.5 million, together with interest and some costs.

[11] As noted, the Republic has not paid the Award.

B. The Ontario enforcement proceedings

[12] After obtaining the recognition and enforcement Judgment from Echlin J., Sistem secured a Writ of Seizure and Sale on February 11, 2011, as a result of which the Sheriff of the City of Toronto served a Notice of Enforcement dated March 10, 2011 on Centerra which stated:

> "All monies and interest and all shares and dividends and any equitable or other right, property, interest or equity of redemption in or in respect of shares and dividends, standing in the name of Kyrgyz Republic in the stock of Centerra (Kyrgyzaltyn currently holds 77,401 Centerra Shares) are hereby seized."

[13] On April 1, 2011, Centerra informed the Sheriff that it did not possess or control any stock in the name of the Republic. The Sheriff indicated that it would not re-issue the Notice of Enforcement to provide for the seizure of the Disputed Shares in the name of Kyrgyzaltyn.

[14] Then, on April 12, 2011, the Registrar of this Court issued a Notice of Garnishment to Centerra in respect of a fine which the company might become liable to pay to the Republic. In its May 3, 2011 Garnishee's Statement Centerra indicated that no such fine had been levied, that Centerra did not carry on business in the Republic, and any fine would be the responsibility of the two wholly-owned Centerra subsidiaries which operate the Kumtor Mine in the Republic, namely Kumtor Operating Company and Kumtor Gold Company CJSC. Both subsidiaries are incorporated under the laws of the Republic.

[15] That then prompted Sistem to move in May, 2011, against Centerra for an order declaring that the Republic beneficially owned all shares in Centerra "nominally held by Kyrgyzaltyn". Sistem's motion ultimately was heard last September. Although given notice of the hearing neither the Republic nor Kyrgyzaltyn appeared. Cumming J. made an order dated September 30, 2011 (the "Amending Order") which added Kyrgyzaltyn as a party to the Application and amended the relief sought by Sistem to include a determination of the beneficial ownership of the Disputed Shares.[1] I will return later in these Reasons to consider the precise relief sought by Sistem in its Amended Application.

[16] At the same time, a new motion by Sistem seeking an order requiring Centerra to hold in trust an amount equal to the Award pending a determination about whether the Disputed Shares could be seized in satisfaction was adjourned. That motion has not been brought back on for hearing.

III. Request to set aside the recognition and enforcement Judgment

A. The positions of the parties

[17] Kyrgyzaltyn advanced several arguments in support of its request to set aside the Judgment:

(i) the recognition and enforcement Judgment was made *ex parte* in that Kyrgyzaltyn did not receive notice of the Application seeking the Judgment;[2]

(ii) since Sistem, in its Amended Application, claims "to seize Kyrgyzaltyn's assets to satisfy the Judgment against the Republic, Kyrgyzaltyn now under Rule 38.11(1) is a person affected by the Original Application and Judgment";

(iii) as a person affected Kyrgyzaltyn may move to set aside the Judgment; and,

(iv) this Court lacked jurisdiction to grant the Judgment because (i) the Republic was not served properly and (ii) no real and substantial connection exists between the litigation and Ontario.

[18] Sistem submitted that since Kyrgyzaltyn was not a party to the proceedings before the Tribunal, nor a party to the Award, nor a party to the Application seeking recognition and enforcement of the Award, it lacked standing to move to set aside the Judgment.

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[1] Reasons of Cumming J. dated September 30, 2011 (2011 ONSC 5731).
[2] Kyrgyzaltyn Factum, para. 20.

[19] Centerra filed extensive written submissions to the effect that Echlin J. lacked jurisdiction to make the Judgment and the court should grant Kyrgyzaltyn's motion to set aside the Judgment.

B. Analysis

[20] In support of its argument that it possessed the standing to set aside the Judgment, Kyrgyzaltyn relied on Rule 38.11(1) of the *Rules of Civil Procedure* which states:

> 38.11(1) A party or other person who is affected by a judgment on an application made without notice or who fails to appear at the hearing of an application through accident, mistake or insufficient notice may move to set aside or vary the judgment, by a notice of motion that is served forthwith after the judgment comes to the person's attention and names the first available hearing date that is at least three days after service of the notice of motion.

Kyrgyzaltyn contended that its "economic and proprietary rights are directly affected by the Judgment and by the subsequent Amending Order".

[21] I should observe that in its Factum Kyrgyzaltyn advanced an argument that it was an "affected person" with standing to set aside the Judgment, whereas in its Amended Notice of Motion Kyrgyzaltyn suggested that by reason of its joinder as an added respondent under the Amending Order it had become a "party affected" by the Judgment and could move to set it aside. I will deal with both arguments advanced by Kyrgyzaltyn.

[22] Certain facts are not in dispute. First, Kyrgyzaltyn was not a party to the proceedings before the Tribunal. Second, Kyrgyzaltyn was not a party to the Award. Finally, Kyrgyzaltyn was not named as a party in the original Application which resulted in the making of the Judgment and, as a result, there is no dispute that the Judgment was made without notice to Kyrgyzaltyn.

[23] Of course, Kyrgyzaltyn was not named as a party respondent to the Application because it was not a party to the Award which the Application sought to recognize and enforce. In common parlance, the Award made Sistem a judgment creditor of the Republic, the judgment debtor, and Kyrgyzaltyn was a stranger to the substantive dispute between the judgment creditor and the judgment debtor.

[24] In *Ivandaeva Total Image Salon Inc. v. Hlembizky*[3] Borins J.A. reviewed at some length the jurisprudence concerning Rule 37.14(1), the "motions" equivalent to the "applications" Rule 38.11(1). He concluded that the jurisprudence revealed that successful motions brought under Rule 37.14(1) to set aside or vary an order suggested that the order must be one that directly

[3] 2003 CanLII 43168 (ON CA).

affected the rights of the moving party in respect to the proprietary or economic interests of the party. It is worth reproducing the entirety of the case review conducted by Borins J.A. in order to gain a fuller understanding of when proprietary or economic interests of a person might be affected by an order. He wrote:

> [26] Since the inception of the rule in 1881, access to it has been available to one "affected by" the order which it is sought to rescind, set aside or vary. From 1881 to the introduction of the *Rules of Civil Procedure* in 1985, the rule provided that it was available to a "party affected by an *ex parte* order". However, in 1985 "person" replaced "party" in rule 37.14(1). In this regard, I note that in the complementary rule, rule 37.07(1), a notice of motion must be served "on *any person or party* who will be affected by the order sought" [emphasis added]. This raises the question of whether a party may bring a motion under rule 37.14(1), or whether it is available only to a "person", or whether a person includes a party.
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> [27] Other than *Stanley Canada Inc. v. 683481 Ontario Ltd.* reflex, (1990), 74 D.L.R. (4th) 528 (Ont. Gen. Div.), the cases that have considered the rule in its different forms do not discuss the meaning of "affected by". However, a review of the cases in which a successful motion has been brought under rule 37.14(1) and rule 38.11(1), which applies to applications, or their predecessors, to set aside or vary an order suggest that the order must be one that directly affects the rights of the moving party in respect to the proprietary or economic interests of the party. In addition, there is another broad group of cases, usually arising from the sealing of a court file, in which the media has complained that its right to freedom of expression as guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms* has been compromised and in which the principle of open and accessible court proceedings has been invoked. See, *e.g.*, *Sierra Club of Canada v. Canada (Minister of Finance)* 2002 SCC 41 (CanLII), (2002), 211 D.L.R. (4th) 193 (S.C.C.).
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> [28] In *Stanley*, the issue was whether a union and its members had standing under rule 37.14(1)(a) as persons "affected by an order obtained on motion made without notice", to move for an order setting aside an order obtained under rule 44.01(1) by the employer of the union members, Stanley, directing the sheriff to enter the defendant company's premises and to recover a quantity of steel owned by Stanley. At the time of the order, the union was on a legal strike against Stelco Inc., which had manufactured the steel for Stanley, that was stored for Stanley by the corporate defendant.
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> [29] The union contended that it had standing because the economic impact on Stelco of its picketing had been, and would be, diminished as a result of the rule 44.01(1) order. The union's picketing of the company precluded Stanley from removing its steel from the company's warehouse. The union contended that this represented an economic advantage to it in its strike against Stelco Inc.
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> [30] McKeown J., at p. 537, held "that the substantial economic advantage to the union members in keeping the steel in the warehouse makes them persons 'affected by an order' under rule 37.14". He also found at p. 539, that the "potential infringement" of its

freedom of expression guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms* "qualifies the union members as 'affected by' . . . the master's order".

[31] *Stanley* was applied in *Weinstein v. Weinstein (Litigation Guardian of)* 1997 CanLII 12272 (ON SC), (1997), 35 O.R. (3d) 229 (Gen. Div.). In that case a wife had settled a trust and provided that on her death the trust assets were to go to her estate, the residue of which had been bequeathed to her grandchildren under her will. Subsequently, her husband applied without notice to the grandchildren for a judgment equalizing the net family assets of himself and his wife. The application was granted and a judgment was given transferring $2.5 million from the wife's trust to the husband. The grandchildren moved under rule 38.11(1) to set aside the judgment on the ground that they were persons "affected by a judgment on an application made without notice". In setting aside the judgment, Sheard J. held that the grandchildren were "manifestly" persons affected by the judgment and that they should have received notice of the application. Citing *Stanley*, he rejected the argument that an economic interest in the outcome of a proceeding does not confer standing under rule 38.11(1).

[32] The following cases which have considered whether a stranger to a proceeding was a person affected by an *ex parte* order, or an order made without notice to him or her, within the meaning of rule 37.14(1) or rule 38.11(1), all determine standing on the ground that the order sought to be set aside or varied affected the moving party's propriety or economic interests:

> (1) The administrator of an estate of a deceased person had standing to move to set aside an order appointing an administrator *ad litem* to represent the estate of the deceased in an action against him commenced before his death: *McLean v. Allen* (1898), 18 P.R. 255 (Ont. Sup. Ct.).
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> (2) A person claiming to be entitled to moneys attached pursuant to a garnishee order obtained with notice to her, was a person affected by the order: *Canada Lumber Co. Limited v. Whatmough* (1923), 23 O.W.N. 584 (Ex.).
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> (3) The defendant's motor vehicle insurer was affected by an order renewing a writ of summons because it could be liable to indemnify the plaintiff for any damages recovered from the defendant: *Palmateer v. Bach* (1976), 9 O.R. (2d) 693 (High Ct.).
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> (4) A mortgagee's interests as a secured creditor were affected by an order expediting the sale of condominium units and requiring it to discharge its mortgage: *Unical Properties v. 784688 Ontario Ltd.*, [1993] O.J. No. 2039 (Gen. Div.).
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> (5) The Government of Canada was affected by an order in a garnishee proceeding that contemplated that it would exceed its statutory authority and pay out money in a manner other than as

authorized by statute: *Beattie v. Ladouceur* 1995 CanLII 7192 (ON SC), (1995), 23 O.R. (3d) 225.

[25] Did the Judgment directly affect the rights of Kyrgyzaltyn in respect to its proprietary or economic interests? On its face it did not. The Judgment recognized and enforced the Award which resulted from a proceeding to which Kyrgyzaltyn was not a party. Paragraph 2 of the Judgment directing payment imposed an obligation on the Republic, not on Kyrgyzaltyn. In sum, the operative parts of the Judgment did not impose any obligation to pay on Kyrgyzaltyn, did not require Kyrgyzaltyn to perform an act or refrain from performing an act, nor did they make any declaration about legal rights, including proprietary rights, enjoyed by Kyrgyzaltyn.

[26] Now, it is very true that steps taken by Sistem under Rule 60 of the *Rules of Civil Procedure* to execute on the Judgment have engaged proprietary interests claimed by Kyrgyzaltyn. Sistem seeks to seize the Disputed Shares; Kyrgyzaltyn takes the position that it, not the Republic, owns the shares. Where a person asserts ownership over property which a judgment creditor claims is owned by its judgment debtor, can that person move to set aside the judgment against the judgment debtor? I would not have thought so.

[27] In his reasons in *Ivandaeva Total Image Salon* case Borins J.A. referred to two cases involving execution proceedings in which a person was treated as one directly affected, so let me consider each of those cases. *Canada Lumber Co. Limited v. Whatmough*[4] involved a dispute arising in the context of garnishment proceedings. The judgment creditor, as part of its execution efforts, obtained an order attaching certain monies which he alleged were owed to the judgment debtor. Although the wife of the judgment debtor did not succeed in setting aside the garnishment attachment orders – she did not attack the main judgment - the court ordered what we would now call a garnishment hearing[5] – i.e. a hearing to determine whether the monies sought to be attached were payable to her husband or to a company which she owned.

[28] The other case, *Beattie v. Ladouceur*,[6] involved efforts by an applicant to enforce support obligations contained in the divorce order with her ex-husband. The husband, who lived outside of Canada, would become entitled to certain payments from the federal government. Instead of resorting to the statutory garnishment mechanisms contained in federal legislation, the applicant obtained an order appointing a receiver to obtain, on behalf of her ex-husband, amounts to which he would become entitled. The federal Attorney General successfully moved to set aside the order appointing a receiver on the basis that the order conflicted with federal garnishment legislation and was beyond the jurisdiction of the court.

[29] Neither case assists Kyrgyzaltyn as they involved setting aside orders made to secure the garnishment of amounts due to the judgment debtor, not setting aside the judgments which

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[4] [1923] O.W.N. 584 (S.C.)
[5] Rule 60.08(16).
[6] (1995), 23 O.R. (3d) 225 (Gen. Div.)

created the liability of the judgment debtor, which is the type of order attacked by Kyrgyzaltyn in the present case.

[30] Turning, then, to the *Rules of Civil Procedure*, Rule 60.07 dealing with writs of seizure and sale contains no provision permitting a person against whom a writ is sought to be enforced to move to set aside the judgment pursuant to which the writ was issued. Rule 60.07(13.1) does provide a process by which the judgment creditor may seek directions from the court where the Sheriff has declined to enforce the writ. Sistem has invoked that procedure following the Sheriff's refusal to seize the Disputed Shares, and Sistem now seeks a determination of who owns the Disputed Shares.

[31] Rule 60.08 dealing with garnishment does establish a mechanism – the garnishment hearing - by which to determine "the rights and liabilities of the garnishee, the debtor, co-owner of the debt and any assignee or encumbrancer",[7] but the rule does not contain any provision permitting a garnishee or co-owner of the debt to move to set aside the judgment in respect of which garnishment is sought.

[32] Rule 60.13 prescribes how multiple claims to seized property are to be determined, and Rule 60.17 enables resort to the court for directions "where a question arises in relation to the measures to be taken by a sheriff in carrying out an order, writ of execution or notice of garnishment", but neither rule authorizes a stranger to the initial judgment to move to set it aside.

[33] In sum, Rule 60 creates means by which a person who claims an interest in an asset against which execution is sought to assert and determine its interest in the asset, but the rule does not permit one who was not party to the judgment sought to be enforced to move to set it aside in order to protect its interests in an asset subject to the execution process. The policy behind that approach is obvious and sound. While the law enables a person to defend its interests in an asset, it may only do so to the extent necessary to protect that interest. To permit a claimant to an asset to go further and seek to interfere in the prior judicial determination of the rights between a judgment creditor and judgment debtor would exceed what was necessary to protect the claimant's interest in the asset and would result in no end of mischief as strangers to the dispute between the judgment creditor and judgment debtor officiously intermeddled in the matter.

[34] As a matter of policy, and as a matter of the interpretation of Rules 38.11 and 60, in my view it is not open to a person claiming a proprietary interest in an asset against which a judgment creditor seeks execution to seek to set aside the judgment against the judgment debtor. Its involvement in the execution process to defend its proprietary interests in an asset sought to be seized does not make it a "party or other person who is affected by a judgment" or, in the words of the *Ivandaeva Total Image Salon* case, a person whose rights are directly affected by a judgment in respect to its proprietary or economic interests. Accordingly, Kyrgyzaltyn is not a

[7] Rule 60.08(16).

"person affected" by the Judgment. It is entitled to defend any proprietary interest it enjoys in the Disputed Shares, but the law does not permit it to go so far as to attack the Judgment to protect its interest.

[35] Nor did the Amending Order made by Cumming J. give Kyrgyzaltyn status to attack the Judgment. Although both the Republic and Kyrgyzaltyn were given notice of the hearing for the Amending Order, neither appeared; Centerra did appear.[8] Cumming J. permitted Sistem to add Kyrgyzaltyn as a party respondent and to amend its Application to include the following requests for relief:

> (d) An Order declaring that Kyrgyz Republic beneficially owns all shares in Centerra Gold Inc. nominally held by Kyrgyzaltyn JSC;
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> (e) An Order declaring that the Sheriff may seize, to the extent necessary to satisfy the Award, all monies and interest and all shares and dividend and any equitable or other right, property, interest or equity of redemption in or in respect of shares and dividends, standing in the name of Kyrgyzaltyn JSC in the stock of Centerra Gold Inc.

The "grounds" portion of the Application set out the basis for the orders sought:

> (o) Kyrgyzaltyn JSC, which is wholly-owned by Kyrgyz Republic, nominally holds 77,401,766 shares in Centerra Gold Inc.;
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> (p) Kyrgyzaltyn JSC holds the shares in Centerra Gold Inc. on behalf of Kyrgyz Republic;
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> (q) Kyrgyz Republic is the beneficial owner of the shares in Centerra Gold Inc. held by Kyrgyzaltyn JSC.

It is clear from the amendment sought by Sistem to its Application and the Reasons of Cumming J. granting the amendment that the Amending Order added Kyrgyzaltyn as a party respondent because it was a necessary party for purposes of determining the ownership of the Disputed Shares in the context of the execution steps taken by Sistem to enforce the Judgment. The addition of Kyrgyzaltyn as a party did not transform it into an "affected party" with standing to challenge the Judgment; Kyrgyzaltyn enjoys the more limited status of a party entitled to defend its claim to ownership in the Disputed Shares.

[36] For those reasons, I conclude that Kyrgyzaltyn is not a "party or other person who is affected by" the Judgment, and Kyrgyzaltyn therefore lacks the standing to move to set aside the Judgment. I dismiss that part of its motion.

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[8] Amending Order reasons, para. 17.

[37] Although I have read the extensive submissions filed by Centerra and considered the oral submissions made by its counsel at the hearing, in my view Centerra lacks standing to make submissions about the validity of the Judgment. It was not a party to the arbitration proceedings before the Tribunal; it was not a party to the Award; and it was not a party to the Judgment. Centerra simply is the corporation which issued the shares now subject to an ownership dispute between others, and Centerra is a garnishee in execution steps undertaken by Sistem. Centerra's submissions aim to protect the interests of the Republic and Kyrgyzaltyn. As Cumming J. stated in his September 30, 2011 Reasons:

> Centerra is not a party to the motion and does not have standing to speak for either Kyrgyz Republic or Kyrgyzaltyn.[9]

I agree. Centerra is a stranger to the Judgment and lacks standing to challenge it.

[38] Notwithstanding the extensive submissions made by Kyrgyzaltyn about the validity of the Judgment, I have concluded that it would be inappropriate for me to proceed to consider them on the basis that an appellate court might disagree with my finding that Kyrgyzaltyn lacked standing to assert those arguments. Kyrgyzaltyn was a stranger to the Tribunal proceedings, the Award and the Judgment. It would not be proper for a court to consider, on an alternative basis, arguments about the validity of a judgment which are not advanced by a party to that judgment. Any such consideration could prejudice the rights of the party; that would be unfair to the Republic.

[39] Although I will not examine the arguments made by Kyrgyzaltyn about whether proper service was made of the Application on the Republic, evidence in the record concerning communications between Sistem's counsel and the Republic's embassy in Washington, D.C., made clear that the Republic had actual notice of the Application.[10] Whether that actual notice constituted proper service in the case of a sovereign state is a matter I need not consider given that the Republic seeks no relief from this Court in respect of the Judgment.

[40] Finally, before turning to the *forum non conveniens* motion by Kyrgyzaltyn, let me address the argument made in paragraph 41 of its Factum. Kyrgyzaltyn appeared to contend that Sistem must commence a new originating proceeding "in an appropriate jurisdiction" if it wished to seek a declaration about ownership of the Disputed Shares. I do not agree. The Amending Order made by Cumming J. permitted Sistem to amend its Application to seek such a declaration. In paragraph 30 of his September 30, 2011 Reasons Cumming J. stated:

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[9] Amending Order Reasons, para. 18. See also para. 26 of those Reasons.

[10] See the November 17, 2010 email from Matthew Milne-Smith to one Ruslan at the Republic's embassy in Washington, D.C. explaining the Application papers which the embassy had received: Sistem Supplementary Motion Record, Volume 1, Tab 1H, p. 28.

> [30] Joinder is appropriate under Rule 5.02(2) and is not inappropriate under Rules 5.03(6) or 5.05. Finally, the addition of Kyrgyzaltyn would not give rise to an abuse of process. *Kyrgyzaltyn will have every opportunity to participate in the hearing in respect of the Amended Application and oppose the relief ultimately sought by Sistem through the Amended Application if it chooses to do so. Kyrgyzaltyn can also challenge the jurisdiction of this Court if this is seen by Kyrgyzaltyn as an issue.*

However, Kyrgyzaltyn, in paragraph 44 of its Factum, did not challenge the jurisdiction of this Court over it stating:

> While it may have done so, Kyrgyzaltyn does not dispute that the Ontario court can exercise jurisdiction over it. There is no issue that Kyrgyzaltyn appears on the share register of Centerra as owing 77,401,766 shares. However, Kyrgyzaltyn does maintain that the determination of any issue of the legal ownership of the shares is more appropriately dealt with by the courts in the Republic, or possibly an arbitral tribunal properly constituted.

In light of that acknowledgement of the jurisdiction of this court to adjudicate the Disputed Shares issue, I see no need for Sistem to commence a new proceeding seeking the relief which Cumming J. already permitted it to seek in this Application. Let me turn, then, to the issue of the convenient forum.

IV. Request to stay the proceedings to determine ownership of the Disputed Shares

A. The issue for adjudication

[41] A live issue exists between Sistem and Kyrgyzaltyn as to the ownership of certain shares issued by Centerra, a *CBCA* reporting issuer, the head office of which is located in Toronto, Ontario. In paragraphs 1(d) and (e) of its Amended Application Sistem seeks declarations that the Republic owns the Disputed Shares which are registered in the name of Kyrgyzaltyn.

[42] Although the Republic would be a party affected by such a determination, and although I have no doubt that the Republic was aware of both the Initial Application and motion to amend the application, the Republic has elected not to participate in these proceedings. That would seem to suggest that the Republic supports the ownership claim to the Disputed Shares advanced by Kyrgyzaltyn, the result being that the *lis* in the ownership determination proceeding primarily lies between Sistem and Kyrgyzaltyn.

B. Governing legal principles

[43] The principles governing a *forum non conveniens* analysis recently were re-stated by the Supreme Court of Canada in *Club Resorts Ltd. v. Van Breda*.[11] They may be summarized as follows:

(i) The doctrine of *forum non conveniens* is based on a recognition that a common law court retains a residual power to decline to exercise its jurisdiction in appropriate, but limited, circumstances in order to assure fairness to the parties and the efficient resolution of the dispute. The court can stay proceedings brought before it on the basis of the doctrine;[12]

(ii) If a defendant raises an issue of *forum non conveniens*, the burden is on it to show why the court should decline to exercise its jurisdiction and displace the forum chosen by the plaintiff;[13]

(iii) The defendant must identify another forum that has an appropriate connection under the conflicts rules and that should be allowed to dispose of the action. The party asking for a stay on the basis of *forum non conveniens* must demonstrate why the proposed alternative forum should be preferred and considered to be more appropriate;[14]

(iv) The defendant must show that the alternative forum is clearly more appropriate. The use of the words "clearly" and "exceptionally" should be interpreted as an acknowledgment that the normal state of affairs is that jurisdiction should be exercised once it is properly assumed:

> The burden is on a party who seeks to depart from this normal state of affairs to show that, in light of the characteristics of the alternative forum, it would be fairer and more efficient to do so and that the plaintiff should be denied the benefits of his or her decision to select a forum that is appropriate under the conflicts rules. The court should not exercise its discretion in favour of a stay solely because it finds, once all relevant concerns and factors are weighed, that comparable forums exist in other provinces or states. It is not a matter of flipping a coin. *A court*

[11] 2012 SCC 17.
[12] *Ibid*., para. 104.
[13] *Ibid*., para. 103.
[14] *Ibid*.

> *hearing an application for a stay of proceedings must find that a forum exists that is in a better position to dispose fairly and efficiently of the litigation.* But the court must be mindful that jurisdiction may sometimes be established on a rather low threshold under the conflicts rules. *Forum non conveniens* may play an important role in identifying a forum that is clearly more appropriate for disposing of the litigation and thus ensuring fairness to the parties and a more efficient process for resolving their dispute.[15]

(v) A party applying for a stay on the basis of *forum non conveniens* may raise diverse facts, considerations and concerns. In essence, the doctrine focusses on the contexts of individual cases, and its purpose is to ensure that both parties are treated fairly and that the process for resolving their litigation is efficient.[16] The factors that a court may consider in deciding whether to apply *forum non conveniens* may vary depending on the context and might include:

> (a) the locations of parties and witnesses, (b) the cost of transferring the case to another jurisdiction or of declining the stay, (c) the law to be applied to the issues in the proceeding, (d) the impact of a transfer on the conduct of the litigation or on related or parallel proceedings and the desirability of avoiding a multiplicity of legal proceedings, (e) the possibility of conflicting judgments, (f) problems related to the recognition and enforcement of judgments, (g) loss of juridical advantage, and (h) the relative strengths of the connections of the two parties.[17]

(vi) Loss of juridical advantage is a difficulty that could arise should the action be stayed in favour of a court of another province or country. This difficulty is aggravated by the possible conflation of two different issues: the impact of the procedural rules governing the conduct of the trial, and the proper substantive law for the legal situation. If parties plead the foreign law, the court may well need to consider the issue and determine whether it should apply that law once it is proved. Even if the jurisdictional analysis leads to the conclusion that courts in different states might properly entertain an action, the same substantive law may apply, at least in theory, wherever the case is heard.[18]

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[15] *Ibid*., paras. 108 and 109 (emphasis added).
[16] *Ibid*., para. 105.
[17] *Ibid*., paras. 105 and 110.
[18] *Ibid*., para. 111.

C. Positions of the parties

[44] Kyrgyzaltyn submitted that the courts of the Republic clearly provided a more appropriate forum in which to litigate the ownership dispute.

[45] Sistem argued that the doctrine of *forum non conveniens* did not apply to the recognition and enforcement of international arbitral awards. Alternatively, if it did, Sistem submitted that Ontario was the appropriate forum to litigate the share ownership dispute.

D. Analysis

[46] I need not determine whether the doctrine of *forum non conveniens* applies to the recognition and enforcement in Ontario of international arbitral awards because I conclude that even if the doctrine did apply, Kyrgyzaltyn has not demonstrated on the evidence that the Republic is a clearly more appropriate forum in which to dispose fairly and efficiently of the litigation. I reach that conclusion for the following reasons.

D.1 The issues in the proceeding and the applicable law

[47] First, the dispute involves the exigibility of personal property – securities – issued by a *CBCA* corporation with its head office in Toronto, Ontario for the purpose of satisfying an Ontario Judgment recognizing and enforcing an international arbitral award. Several provisions of Ontario law govern the execution of judgment against personal property such as securities. Section 18(1) of the *Execution Act*[19] states that "the sheriff may seize and sell any equitable or other right, property, interest or equity of redemption in or in respect of any goods, chattels or personal property, including leasehold interests in any land of the execution debtor…" Section 47 of the *Securities Transfer Act, 2006*[20] (the "*STA*") makes the "the laws governing the civil enforcement of judgments apply to seizures" of certificated and uncertificated securities. Sections 48 through to 51 of the *STA* stipulate the procedure for seizing certificated or uncertificated securities and security entitlements.

[48] Of equal importance are the conflict of law provisions of the *STA*. Section 44(2) provides, in part, that "the law, other than the conflict of law rules, of the issuer's jurisdiction governs…(c) whether the issuer owes any duties to an adverse claimant to a security; and (d) whether an adverse claim can be asserted against a person, (i) to whom the transfer of a certificated or uncertificated security is registered, or (ii) who obtains control of an uncertificated security.

[49] There is no dispute that Kyrgyzaltyn is recorded as the registered owner of shares issued by Centerra on that issuer's share register. The record suggested that those securities are

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[19] R.S.O. 1990, c. E.24.
[20] S.O. 2006, c. 8.

certificated or, more precisely, were intended by Centerra, Kyrgyzaltyn and the Republic to be certificated. The evidence also revealed that if those shares were certificated, an independent Custodian might hold some or all of them.[21] Ontario law will require firm evidence addressing those questions as part of the determination of the exigibility of the Disputed Shares.

[50] Kyrgyzaltyn argued that questions concerning the status of a foreign corporation are governed by the law of its place of incorporation which, in the case of Kyrgyzaltyn, is the Republic.[22] But, as Professor Walker noted in her text, *Canadian Conflict of Laws*, such questions of status generally concern the legal attributes possessed by a corporation.[23] At issue in this enforcement proceeding is the ownership of the shares issued by a *CBCA* corporation, not the corporate attributes of Kyrgyzaltyn. Questions regarding the location of personal property, including securities, are matters for the *lex fori*, with the general rule being that property is situated where it is physically located.[24] Ontario law may (or may not) require the application of foreign law to determine aspects of this exigibility dispute. Section 46 of the *STA* states that: "The law, other than the conflict of law rules, of the jurisdiction in which a security certificate is located at the time of delivery governs whether an adverse claim may be asserted against a person to whom the security certificate is delivered."

[51] Further, Canadian corporate law and Ontario execution law recognize the distinction between legal and beneficial ownership. That may turn out to be an important issue for determining the exigibility of the Disputed Shares. The record before me did not disclose whether the laws of the Republic contain concepts of legal and beneficial ownership, although some expert evidence was filed regarding the ability of the Republic to own property through other entities.

[52] In sum, Ontario law raises a number of questions which must be addressed in the course of determining whether shares issued by a *CBCA* Ontario head-quartered corporation are subject to seizure to satisfy an Ontario Judgment. This factor strongly points to Ontario as the appropriate forum in which to address those issues. It may well be that in order to provide answers to questions posed by applicable Ontario law some evidence of foreign law will be required. Such a result is not unusual in cases before Ontario courts, and Ontario's law of evidence is well-equipped to deal with matters of foreign law.

D.2 The location of evidence

[53] The moving party, Kyrgyzaltyn, did not file the type of evidence usually seen addressing the various factors considered on a *forum non conveniens* motion, such the locations of parties

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[21] See sections 2.2, 2.3 and 2.4 of the Agreement on New Terms for the Kumtor Project, Sistem Supplementary Record, Vol. 2, Tab 3D.
[22] Kyrgyzaltyn Factum, para. 48(c).
[23] Castel & Walker, *Canadian Conflict of Laws, Sixth Edition* (Toronto: LexisNexis, 2005, looseleaf), §30.1.
[24] *Ibid.*, §22.2(c) and (d) dealing with securities.

and witnesses and the cost of transferring the case to another jurisdiction or of declining the stay. Kyrgyzaltyn made some assertions on these points in its factum, but the assertions were not supported by any evidence. As a result, the moving party did not develop much of an evidentiary record concerning the factors on which it bore the onus of demonstration.

[54] From what evidence was filed, I can conclude that evidence about the shares issued to Kyrgyzaltyn by Centerra will repose with Centerra, or its share transfer agent, in Ontario.

[55] Centerra filed evidence that it is a party to 2009 restated investment agreements with the Republic and/or Kyrgyzaltyn, notwithstanding that its two wholly-owned subsidiaries own and operate the Kumtor Mine. Sistem argued that some provisions of those agreements are relevant to the issue of the beneficial ownership of the Disputed Shares. Centerra, in a May 31, 2011 affidavit from its General Counsel, Mr. Frank Herbert, pointed to provisions in those agreements identifying Kyrgyzaltyn as the beneficial owner of the Disputed Shares. Those agreements would be available from Centerra, an Ontario-headquartered corporation, as would evidence from Mr. Herbert, who resides in Oakville.

[56] Mr. Hebert also adduced evidence touching on Centerra's interests as the garnishee in the garnishment proceedings taken by Sistem. Accordingly, evidence regarding amounts payable by Centerra to the Republic, if any, is located in Ontario.

[57] I would also observe that although Kyrgyzaltyn did not appear on the September, 2011 motion to amend the Application, it appeared from Mr. Herbert's affidavit that senior officers of Kyrgyzaltyn were more than prepared to provide him with information to include in his affidavit on an information and belief basis. The ease of placing before Ontario courts evidence regarding the arrangements amongst Centerra, its subsidiaries, Kyrgyzaltyn and the Republic therefore does not seem to be an issue.

[58] On this motion Sistem filed an affidavit from a Kyrgyz lawyer, Ms. Mirgul Smanalieva, who opined on the ownership of the Disputed Shares under the Republic's laws. Accordingly, expert evidence on foreign law is available to this Court to the extent it is relevant.

D.3 The existence of parallel proceedings and the possibility of conflicting judgments

[59] No parallel proceedings regarding the ownership of the Disputed Shares were disclosed in the record. Nor was there any concrete evidence about intended litigation elsewhere on that issue.

D.4 Problems related to the recognition and enforcement of judgments

[60] If it is determined that the Republic owns the Disputed Shares, no enforcement problem arises because the issuer of the shares is located in Toronto, Ontario and is a reporting issuer subject to Canadian and Ontario laws.

D.5 Loss of juridical advantage

[61] Drawing a line at this point in the analysis, Kyrgyzaltyn has not discharged its onus of demonstrating that the Republic clearly is the more appropriate forum to adjudicate the question of the exigibility of the Disputed Shares to satisfy the Judgment.

[62] Sistem argued that staying the Ontario enforcement proceeding would result in a loss of juridical advantage because of concerns about its ability to obtain justice in the courts of the Republic. Paragraph 83 of its Factum summarized its concerns:

> The reality is that it is a virtual certainty that Sistem will receive nothing resembling a fair hearing and it is improbable in the extreme that it will receive justice as we understand it if the issue of ownership is left to be decided by the courts of the Republic.

[63] Sistem filed an affidavit from an expert witness, Scott Newton, a Lecturer in the Laws of Central Asia at the School of Oriental and Asisan Studies, University of London. Professor Newton opined that "Sistem would not receive a fair hearing before the courts of Kyrgyzstan which have exhibited a pattern of endemic corruption and recurrent and frequently notorious external interference in the administration of justice, especially in disputes involving the official or personal interests of political authorities."

[64] Kyrgyzaltyn filed an affidavit from another expert, Professor Jeff Sahadeo of the Department of Political Science and Associate Professor and Director of the Institute of European, Russian and Eurasian Studies at Carleton University, Ottawa, Ontario. While acknowledging that the Kyrgyz judicial system "experienced significant corruption that worsened during the 2000s", Professor Sahadeo opined that the judicial system was "in a state of flux" and "no definitive conclusion can be reached as to how a particular judge will handle a case regarding ownership in Centerra Gold, particularly when the applicant is a Turkish company". In terms of the prospects of success for current efforts to reform the Republic's judicial system, Professor Sahadeo deposed that "there is a reasonable chance for significant judicial reform over the next 1-2 years, though this is by no means assured. Roadblocks remain in removing corrupt practices and the mentality that allows them to flourish at all levels of Kyrgzy society". As to the prospect of Sistem receiving a fair hearing in a Republic court, Professor Sahadeo opined:

> [I]t is my expert opinion that there is a reasonable chance that the matter of Sistem…and Kyrgyzaltyn…would have a fair hearing in a Kyrgyz court…To say there is a reasonable chance however does not at all mean that a fair trial is assured. Much will depend on the unknowns discussed above, particularly the character of the judge that handles the case (and by extension, the judge who assigns the case).

[65] Last year the Judicial Committee of the Privy Council, in *AK Investment CJSC v. Kyrgyz Republic Tel Limited*,[25] dealt with an appeal arising out of proceedings commenced in the Isle of Man by BITEL to enforce a Kyrgyz judgment at common law against the KFG Companies, all of which were incorporated in the Isle of Man. The KFG Companies counterclaimed against BITEL and sought and obtained permission to join thirteen additional defendants to the Counterclaim and serve them out of the jurisdiction. Some of those defendants to counterclaim applied successfully to a Deemster for an order setting aside the order for service out of the jurisdiction. The Deemster's decision was reversed by the Staff of Government Division, and the JCPC heard the appeal from that decision.

[66] At issue was whether the KFG Companies had failed to establish that the Isle of Man was clearly the appropriate forum for trial of the issues in the counterclaim. One aspect of that issue was whether the evidence disclosed that a real risk existed that justice would not be obtained in the Kyrgyz courts by reason of incompetence, lack of independence or corruption.

[67] The JCPC held that comity requires that a court be extremely cautious before deciding that there is a risk that justice will not be done in the foreign country by the foreign court. Cogent evidence must support any such finding.[26] In dismissing the appeal the JCPC stated:

> The Board is in no doubt that the Deemster erred in at least two significant respects. First, his finding that Kyrgyzstan was an available forum since the KFG Companies had not established by positive and cogent evidence that they had not obtained and would not obtain substantial justice there is open to two criticisms. The first, less important, is that focus should not have been on whether Kyrgyzstan was an available forum, but whether it was a forum in which the case could be suitably tried for the interests of all the parties and for the ends of justice. Second, but more important, was the focus on whether the KFG Companies "would" not obtain justice there, when the correct question was whether there was a risk that they would not obtain justice. *In any event, there was substantial evidence of specific irregularities, breach of principles of natural justice, and irrational conclusions, sufficient to justify a conclusion that there was considerably more than a risk of injustice.*[27]

[68] The JCPC concluded that while the Republic was the natural forum for claims under Kyrgyz law that the KFG Companies had been deprived of their shares in a Kyrgyz company through a conspiracy wholly or mainly carried out in Kyrgyzstan, "the fundamental point in this case is that, if there is no trial in the Isle of Man, there will be no trial anywhere. It is wholly

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[25] [2011] UKPC 7.
[26] *Ibid*., para. 97.
[27] *Ibid*., para. 143 (emphasis added).

unrealistic to suppose that the KFG Companies will ever be in a position to assert their civil claims."[28]

[69] Kyrgyzaltyn submitted that to give any weight to an argument that Sistem would lose a juridical advantage by staying Ontario proceedings in favour of those in the Republic, Sistem would have to demonstrate that the foreign court would act in a biased or corrupt manner in the specific case and that general allegations of systemic corruption were insufficient. In support of this submission Kyrgyzaltyn referred to the decision of the Court of Appeal in *Oakwell Engineering Ltd. v. Enernorth Industries Inc.*[29] That case did not involve a *forum non conveniens* stay motion, but a respondent who resisted the recognition and enforcement of a foreign judgment by asserting the bias aspect of the public policy defence against recognition. In such a circumstance the Court of Appeal held that the party asserting bias must prove actual corruption or bias.[30]

[70] In the present case the Tribunal, in its Award reasons, held that the abrogation of Sistem's ownership rights in the hotel resulted from 2005 Kyrgyz court decisions which annulled a 1999 bankruptcy order against the hotel's previous co-owner and invalidated the 1999 agreement under which Sistem purchased all the shares of the hotel. Those decisions placed the ownership of the hotel back in the hands of the previously bankrupt co-owner which had seized control of the hotel in March, 2005 from Sistem. The Tribunal held that the Republic was responsible for those acts of its courts.

[71] In the *AK Investment CJSC* case the Republic was regarded as the natural forum for the dispute. The JCPC was required to address the issue of whether the case could be suitably tried in the Republic's courts for the interests of all the parties and for the ends of justice in order to determine whether the Isle of Man courts were a more appropriate forum for the litigation. By contrast, in the present case my analysis of the factors other than juridical advantage indicated that Kyrgyzaltyn had not demonstrated that the Republic clearly was the more appropriate forum to adjudicate the question of the exigibility of the Disputed Shares to satisfy the Judgment. Accordingly, I need not make any specific finding about whether the case could be suitably tried in the Republic's courts for the interests of all the parties and for the ends of justice. However, the evidence concerning the past corruption of the Republic's courts and the present uncertainties surrounding the independence of its judicial system certainly do not operate to point to the Republic as the clearly more appropriate forum in which to litigate the ownership of the Disputed Shares.

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[28] *Ibid*., para. 151.
[29] (2006), 81 O.R. (3d) 288 (C.A.).
[30] *Ibid*., para. 22.

D.6 Conclusion

[72] For these reasons I conclude that Kyrgyzaltyn has not demonstrated that the Republic clearly is the more appropriate forum in which to litigate this dispute and, consequently, I dismiss its motion to stay this proceeding on the grounds of *forum non conveniens*.

V. Summary and Costs

[73] For the reasons set out above I dismiss the motions brought by Kyrgyzaltyn.

[74] I would encourage the parties to try to settle the costs of these motions. If they cannot, Sistem may serve and file with my office written cost submissions, together with a Bill of Costs, by August 8, 2012. Kyrgyzaltyn and Centerra may serve and file with my office responding written cost submissions by August 31, 2012. The costs submissions shall not exceed three pages in length, excluding the Bill of Costs.

[75] I direct the parties to book a 9:30 appointment before me for a date no later than September 21, 2012. The parties shall present at that appointment a plan and timetable for the adjudication of the balance of this Application – i.e. the issue of the ownership of the Disputed Shares. Sistem shall deliver a copy of these Reasons to the Republic no later than August 3, 2012 by (i) couriering a copy to the Embassy of the Republic in Washington, D.C., which represents that country's interests in Canada, and (ii) couriering a copy to Ms. Indira Satarkulova, the attorney in Monsey, New York State, United States of America, who represented the Republic before the Tribunal. If the Republic intends to participate in these proceedings, it must file a Notice of Appearance no later than September 1, 2012 and it must ensure that its counsel participates in the ordered 9:30 appointment before me.

D. M. Brown J.

Date: July 25, 2012