

**NEW YORK  
CITY BAR**

**COMMITTEE ON  
COMMUNICATIONS AND MEDIA LAW**

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Re: Assembly Bill 9652-A and Senate Bill 6687-B  
The “Libel Terrorism” Bill

Dear Counsel:

The Committee on Communications and Media Law (the “Committee”) of the Association of the Bar of the City of New York (the “Association”) has been asked by the Association to respond to the

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recent letter of the Advisory Committee on Civil Practice (the “Advisory Committee”) with regard to A.9652-A and S.6687-B, otherwise known as the “Libel Terrorism Protection Act” (the “Bill”). Earlier this year, the Association issued a position paper favoring passage of the Bill.

The Committee believes that the Advisory Committee’s views as to the constitutionality and wisdom of the Bill are not well founded. We continue to urge that the Legislature pass the Bill. As the Association’s position paper explained the desirability of the Bill, we will limit this letter to the constitutional and overbreadth objections raised in the Advisory Committee’s letter.

### **Inapplicability of Minimum Contacts Jurisdictional Analysis**

First, the Advisory Committee argues that the Bill would be unconstitutional because the debtor under a foreign libel judgment could initiate a New York action to have the foreign judgment declared unenforceable even though the foreign libel judgment creditor may lack “minimum contacts” with New York. We respectfully disagree with this argument. Constitutional due process considerations require minimum contacts between the defendant and the forum only in the action that determines a defendant’s liability to the plaintiff and that may result in a final judgment (monetary or injunctive) for plaintiff. *Shaffer v. Heitner*, 433 U.S. 186, 213-17 (1977); *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945) (“[D]ue process requires only that in order *to subject a defendant to a judgment in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”) (citation omitted; emphasis added). Article 53 of the CPLR, which is New York’s implementation of the Uniform Foreign Money Judgments Recognition Act, recognizes this requirement by allowing New York to enforce foreign judgments only when the defendant had minimum contacts with the nation in which the judgment was rendered. *See* CPLR §§ 5304(a)(2).

However, if a court with personal jurisdiction over a defendant renders a money judgment against the defendant, that judgment may be enforced in New York, regardless of whether the defendant/debtor has minimum contacts with the state. The United States Supreme Court made this clear in *Shaffer*:

Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter.

433 U.S. at 210 n. 36.

Thus, for example, a plaintiff who wins a judgment against a defendant in a foreign country where the defendant lives can have a New York court enforce that judgment against the defendant's property in New York, even though New York has no personal jurisdiction over the defendant. In reliance on *Shaffer*, the Appellate Division, Fourth Department, held that that under Article 53 of the CPLR "no jurisdictional basis for proceeding against the judgment debtor need be shown before a foreign judgment will be recognized or enforced in a given state." *Lenchyshyn v. Pelko Electric, Inc.*, 281 A.D.2d 42, 48 (4th Dep't 2001). *Lenchyshyn* cites numerous cases in which New York and other courts, citing to *Shaffer*, have held that personal jurisdiction is not required in an action to enforce a final money judgment. *Id.* It follows that the Constitution will not require minimum contacts conferring personal jurisdiction in a New York action that challenges the enforceability of a final libel money judgment entered by a foreign court.

The Bill would only enlarge jurisdiction of the New York courts in proceedings to enforce final money judgments of foreign courts, not in proceedings to determine liability, where the Constitution would require minimum contacts. See CPLR §§ 5302, 5303. The decision in *Yahoo! Inc. v. La Ligue Contre Le Racisme et l'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006) (*en banc*), cited in the Advisory Committee's letter, is therefore not pertinent to the jurisdictional question presented by the Bill. That decision did not involve enforcement of a final money judgment, but whether Yahoo! would be liable to the plaintiffs (LICRA/UJEF) in the underlying French action were it to defy certain injunctive orders of a French court. In *Yahoo!*, the majority of a divided *en banc* Ninth Circuit concluded, based on *International Shoe* and the later Supreme Court decision in *Calder v. Jones*, 465 U.S. 783 (1984), that the

contacts between LICRA/UJEF and California, as well as the effects of the French court orders on Yahoo!, were sufficient to create personal jurisdiction in California. *Yahoo!*, 433 F.3d at 1205-06

*Shaffer*, however, makes clear that the *International Shoe* minimum contacts analysis, which was applied in *Yahoo!*, does not apply to the enforcement of final money judgments. (See discussion above.) *Yahoo!*'s discussion of jurisdiction is therefore not relevant to the constitutionality of the Bill.

### **No Violation of Privileges and Immunities Clauses of U.S. Constitution**

The current draft of the Bill grants the right to bring a declaratory judgment action to New York residents and entities that have a principal place of business in New York. The Advisory Committee asserts that the fact that non-residents may not seek declaratory relief violates the privileges and immunities clause of the U.S. Constitution. However, the Advisory Committee cites no authority for its assertion, and controlling U.S. Supreme Court precedent is squarely to the contrary.

The U.S. Supreme Court has made clear that the privileges and immunities clause does not invalidate statutes that limit access to state courts to residents of the state. *Missouri ex rel. Southern R. Co. v. Mayfield*, 340 U.S. 1, 4 (1950) (“But if a State chooses to ‘[prefer] residents in access to often overcrowded Courts’ and to deny such access to all non-residents, whether its own citizens or those of other States, it is a choice within its own control.”).

In fact, a number of New York laws already limit the ability to bring actions in New York courts to state residents or to corporations which have been licensed to do business in the State. *See, e.g.*, Business Corporations Law (BCL) § 1312 (barring foreign corporation doing business in New York but not licensed from maintaining action in state until has obtained a license and paid all fees and taxes due); BCL § 1314(b) (barring individual non-resident or foreign corporation from maintaining actions against another foreign corporation except in enumerated cases); Banking Law § 200- b (same as BCL § 1314(b) for actions against foreign banking corporations). These statutes have withstood constitutional challenges. *Douglas v. N.Y., N.H. & Hartford R.R.*, 279 U.S. 377, 386-87 (1929) (holding that predecessor of BCL § 1314(b) did not violate privileges and immunities clause); *see also Farrell v.*

*Piedmont Aviation, Inc.*, 411 F.2d 812, 815 n. 4 (2d Cir. 1969) (noting constitutionality of BCL § 1314(b)). The Bill, which likewise would limit actions for non-enforcement of libel judgments to individuals and entities resident in New York, is constitutional for the same reason.

### **Alleged Overbreadth**

The Advisory Committee criticizes the bill as overbroad. It suggests that there could be instances where a foreign libel judgment would be consistent with U.S. and New York free speech standards, but would not be enforced because the overall defamation law of the foreign country does not provide as much protection for free speech as do the U.S. and New York constitutions. (The Advisory Committee gives Great Britain as an example.) It is difficult to conceive of such a circumstance, given the fundamental differences between the two systems of defamation law. For example, British law places the burden of proving the truth of an allegedly defamatory statement on the plaintiff, whereas U.S. law, as a constitutional matter, generally requires the plaintiff to prove that the statement is false. British law imposes what is essentially strict liability for defamatory statements, while U.S. constitutional law requires proof that the defendant acted with fault, and often with knowledge or reckless disregard that his or her statement is false. *See Bachchan v. India Abroad Publ'ns Inc.*, 154 Misc.2d 228, 231-32 (Sup. Ct. N.Y. County 1992) (summarizing the difference between British and U.S. defamation law). Few, if any, British libel judgments will be based on law that is compatible with U.S. constitutional standards.

In any event, the bill as currently amended by the Assembly accommodates the Advisory Committee's concerns for a case-by-case adjudication. It provides that a foreign judgment creditor may enforce its judgment if it shows that the particular "defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by both the United States and New York constitutions." As long as the specific defamation law applied by the foreign court in rendering the judgment was compatible with U.S. guarantees of free speech and free press, the fact that other aspects of that law were not compatible with U.S. principles would not be an obstacle to enforcement.

## **Conclusion**

The Committee finally notes that Professor David Siegel of Albany Law School, the noted commentator on New York civil practice and a member of the Advisory Committee, has recently published an article in which he dissents from the views expressed in the Advisory Committee letter and supports passage of the Bill. *See* David D. Siegel. "Libel Terrorism Bill," NYLJ (March 12, 2008) (copy enclosed). We believe Professor Siegel persuasively responds to many of the objections stated in the Advisory Committee letter. The Committee urges Counsel to give Professor Siegel's views substantial weight.

Respectfully submitted,

A handwritten signature in black ink that reads "David E. McCraw". The signature is written in a cursive style with a long horizontal stroke at the end.

David E. McCraw