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COURT OF APPEALS  
STATE OF NEW YORK

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2138747 ONTARIO, INC.,

Appellant,

-against-

SAMSUNG C&T CORPORATION,

Respondent.

No. 57

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20 Eagle Street  
Albany, New York  
April 24, 2018

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Sara Winkeljohn  
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal on this  
2 afternoon's calendar is appeal number 57, Ontario v.  
3 Samsung.

4 Counsel.

5 MR. BUCHDAHL: Good afternoon; Jacob Buchdahl of  
6 Susman Godfrey for the plaintiff-appellant. I'd like to  
7 reserve three minutes for rebuttal.

8 CHIEF JUDGE DIFIORE: You may, sir.

9 MR. BUCHDAHL: May it please the court. This is  
10 a case about freedom of contract, specifically about the  
11 ability of commercial parties from around the world to  
12 choose New York Law to enforce their contracts. Our client  
13 - - -

14 JUDGE STEIN: Aren't we - - - aren't we looking  
15 to intent here? Isn't that what - - - isn't that what it's  
16 all about?

17 MR. BUCHDAHL: Absolutely.

18 JUDGE STEIN: Okay. So in doing that seems to me  
19 nobody here has argued, okay, that we intended this and we  
20 intended that and there should be extrinsic evidence of our  
21 negotiations or something like that and then we can  
22 determine intent. It seems to me that what is being argued  
23 is that given the language of this contract, we can  
24 determine as a matter of law what was intended. Is that -  
25 - - is that a fair assessment?



1 MR. BUCHDAHL: That is absolutely right, Your  
2 Honor.

3 JUDGE STEIN: Okay. All right. And so in doing  
4 that it also seems to me that it depends on what we mean by  
5 that language. So when - - - when there is a very broad  
6 choice of law provision, right, and it talks about - - - it  
7 talks about substantive and procedural law. We - - - I  
8 think everybody agrees on that. So doesn't that kind of  
9 boil down to whether - - - what 202 is? Is that a  
10 procedural law that then applies according to the language  
11 of your agreement? Or is it something else? Is it a pure  
12 choice of law provision that maybe might result in some  
13 other application? Or is it some combination of the two?  
14 So that's where I start. So I - - - if you would just  
15 address that.

16 MR. BUCHDAHL: And I think that's exactly the  
17 right place to start because in the Ministers and  
18 Missionaries decision the question is is there a statutory  
19 choice of law directive that would apply here absent some  
20 choice of law provision that the parties put in their  
21 contract and therefore indicated their intent to select New  
22 York Law. So as you said, what is CPLR 202? And we submit  
23 there's no question that this is a statutory choice of law  
24 directive because when you look at CPLR 202 it asks you to  
25 look at the law of this jurisdiction - - -



1 JUDGE FAHEY: Yeah, but aren't you - - - aren't  
2 you leaving out the fact that in - - - in Ministers and  
3 Missionaries the EPTL provision that was being referenced  
4 was a - - - was a statutory directive that - - - that arose  
5 out of the Common Law and this - - - this statute, Section  
6 202, did not arise out of the Common Law. In point of  
7 fact, it is in derogation of the Common Law, specifically  
8 lex fori. And so the question for us then is not so much  
9 the nature of 202 but whether or not we want to extend that  
10 holding.

11 MR. BUCHDAHL: Well, first of all, you're  
12 certainly correct that the law from the Estate, Powers &  
13 Trust Law that was found not to apply in Ministers and  
14 Missionaries came out of the Common Law. But footnote 7 of  
15 that decision actually said that the court was not  
16 primarily relying on - - -

17 JUDGE FAHEY: That's always a dangerous thing,  
18 though, to - - - to have the footnote swallow the decision.

19 MR. BUCHDAHL: Well, it's not - - -

20 JUDGE FAHEY: It's a - - - it's a danger in this  
21 job, I recognize that. I think we all do. But it's  
22 something that usually our holdings are our holdings, and  
23 our footnotes aren't generally our holdings.

24 MR. BUCHDAHL: Well, I don't think that you need  
25 to somehow rely just on the footnote because the question,



1 right, is not what is the title of CPLR 202, what is the  
2 caption of that, or what - - - how does it appear in the  
3 statute books. The question is what does it ask you to do,  
4 and is that consistent with the party's intent? Because  
5 202 says that for a non-resident - - - recall it only  
6 applies to non-residents, you have to look and compare the  
7 statute of limitations from this jurisdiction to the  
8 jurisdiction where the cause of action accrued. And you  
9 may, depending on how that comparison goes, decide to  
10 apply, right, or borrow the statute of limitations from  
11 another jurisdiction. And what that is doing is giving you  
12 a choice of law that's based on a statute.

13 JUDGE RIVERA: Yeah, but - - - look - - -

14 MR. BUCHDAHL: And that's exactly what - - -

15 JUDGE RIVERA: Well, exactly. I'm not sure where  
16 you're going with that, but isn't really the borrowing  
17 statutes have been viewed under the restatement under case  
18 law in this court, case law throughout the country viewed  
19 as just statutes of limitations? They're not viewed as  
20 part of sort of this larger area of the law that deals with  
21 the complexities of choice of law doctrine.

22 MR. BUCHDAHL: We submit that's not entirely  
23 true, Your Honor. I mean - - -

24 JUDGE RIVERA: Okay. How is that not true?

25 MR. BUCHDAHL: Because choice of law is a broad



1 concept that encompasses not just Common Law ideas or  
2 Common Law rules but it also encompasses different places  
3 in the statutory scheme that tell you which law to select.  
4 That argument could apply just as equally to the Ministers  
5 and Missionaries case where you had a substantive law that  
6 said depending on where the decedent dies we're going to  
7 apply - - -

8 JUDGE RIVERA: Yeah, 202 also doesn't apply in  
9 every case, right? It only applies to a subset of  
10 plaintiffs.

11 MR. BUCHDAHL: That - - - that is correct.

12 JUDGE RIVERA: So it doesn't really align even  
13 with your argument. Even if I accepted your argument I  
14 don't think it really aligns.

15 MR. BUCHDAHL: Well, I think you could say the  
16 same thing about Ministers and Missionaries, right. If the  
17 person died in New York you wouldn't have to worry about  
18 whether there was any other jurisdictional law that you  
19 would look to. And here, if you look at the parties,  
20 right, we had a party from Korea. We had parties  
21 incorporated in Delaware that were headquartered in New  
22 Jersey. We represent a plaintiff that is - - - that is  
23 headquartered in Ontario.

24 JUDGE RIVERA: Yeah, but - - -

25 MR. BUCHDAHL: So it shouldn't - - -



1 JUDGE RIVERA: - - - see, here's my problem.  
2 Here's what I see as the - - - as really the underlying  
3 tension in this case. You've got the borrowing statute,  
4 the purpose of which is, what, to - - - to avoid forum  
5 shopping. Then you've got, as we've said in IRB, the  
6 legislative desire that this court has recognized and  
7 sought to always promote to encourage certain types of  
8 plaintiffs to come and use our courts, adopt our  
9 jurisprudence in the commercial area, and so forth, right.  
10 So that strikes me as there's somewhat of a tension there,  
11 and the only way I see to harmonize that is to respect the  
12 - - - the desire under 202 to avoid the gaming unless the  
13 parties absolutely agree. And I don't think you're ready  
14 to agree when you don't know if you're plaintiff or  
15 defendant.

16 MR. BUCHDAHL: Well, I think - - -

17 JUDGE RIVERA: That's my problem with this whole  
18 case.

19 MR. BUCHDAHL: So you're correct. You don't know  
20 if you're going to be a plaintiff or a defendant. But  
21 there is no reason to believe that these parties would want  
22 a statute of limitations to turn on who brought suit.

23 JUDGE RIVERA: Yeah, but there's certainly - - -  
24 that argument doesn't mean any more than what I've  
25 suggested which is, sure, until you're the plaintiff or the



1 defendant. And if you're the defendant, yeah, you want the  
2 shorter statute of limitations, and if you're the plaintiff  
3 you want the longer statute of limitations.

4 MR. BUCHDAHL: Well, let's look at - - -

5 JUDGE FAHEY: So - - - so to follow up on - - -  
6 on Judge Rivera's argument, so then clarity becomes  
7 essential. Then at least all the parties know where  
8 they're going. And see, I - - - I think taking a step back  
9 to - - - to what Judge Stein said before which I - - - I  
10 think in many ways is the heart of the case, it's - - -  
11 we're talking about how do we determine what we mean by  
12 enforced in the - - - in the forum selection clause and the  
13 choice of law clause in the contract. Then how clear do  
14 you have to be? Is enforced sufficient for us to be able  
15 to determine how to apply this law in this context? And it  
16 seems to me that what I'm struggling with is a lack of  
17 clarity here, and as Judge Rivera said, if you expressly  
18 put it in there whether it applies or not we have the  
19 clarity that - - - and we wouldn't be here.

20 MR. BUCHDAHL: This whole line of cases suggest  
21 that we're going to infer intent based on the words that  
22 are used. We - - - may I continue just to answer the  
23 question?

24 CHIEF JUDGE DIFIORE: Yes, please.

25 MR. BUCHDAHL: So we know that when they choose



1 New York Law they are choosing New York substantive law.  
2 We know when they choose New York venue that that  
3 automatically brings out most of New York's procedural law.  
4 So the question -

5 CHIEF JUDGE DIFIORE: So, counsel, how far - - -  
6 when the parties choose New York Law and they choose New  
7 York as a forum, how far can the parties go in altering the  
8 procedural law that our courts ordinarily apply?

9 MR. BUCHDAHL: So just as far as to honor their  
10 expectation that, as it was put in the Ministers and  
11 Missionaries case, the law of the chosen state and no other  
12 state will be applied. Just as in Ministers and  
13 Missionaries it was not appropriate for them to suddenly be  
14 subject to the law of Colorado, here it - - - there's no  
15 reason to believe that any party to this contract, which  
16 was signed in New York on Lehman Brothers letterhead,  
17 there's no reason to think anybody would expect or intend  
18 that when it came time to file a lawsuit it would be  
19 subject to the statute of limitations from the province of  
20 Ontario. There is nothing to record to - - - or in the  
21 contract that would suggest that. But there is - - -

22 JUDGE RIVERA: Unless you're the defendant and  
23 that forecloses the action. I mean I think you're not  
24 really getting to my point.

25 MR. BUCHDAHL: Well, it - - - that would be a



1 windfall for that defendant. And it seems to me that just  
2 as every one of these cases has sought to impose clarity  
3 and certainty and predictability there's no better way to  
4 do all of that than to say that 202, just like EPTL 3-  
5 5.1(b)(2), we're not going to send you to another state's  
6 law to figure out how to interpret this contract. We're  
7 going to do it just with the laws here, a six-year statute  
8 of limitations.

9 CHIEF JUDGE DIFIORE: Thank you, counsel.

10 Counsel.

11 MR. HANESSIAN: Thank you. Good afternoon. May  
12 it please the court, my name is Grant Hanessian of the  
13 Baker & McKenzie firm. We represent the appellants in this  
14 matter.

15 JUDGE WILSON: Could the parties have contracted  
16 to a six-year statute of limitations for everyone?

17 MR. HANESSIAN: They - - - they contracted to New  
18 York Law.

19 JUDGE WILSON: Could they have contracted?

20 MR. HANESSIAN: Could they have? We don't  
21 believe so.

22 JUDGE WILSON: Why?

23 MR. HANESSIAN: We think that 201 does not - - -  
24 well, on its face and in the - - - I think it's the Kassner  
25 case from 1979 by this court says parties cannot extend the



1 time for limitations - - -

2 JUDGE STEIN: But - - -

3 MR. HANESSIAN: - - - prior to the accrual of the  
4 claim.

5 JUDGE STEIN: But New York Law provides for a  
6 six-year statute of limitation. If we're not looking to  
7 any other court's - - - jurisdiction's law it's six years,  
8 so you wouldn't be extending it. You'd just be applying  
9 what New York Law says.

10 MR. HANESSIAN: But for this choice of law  
11 clause, there would be no argument the two years applies  
12 under New York Law. The parties would be extending that to  
13 six years by choosing 213 and not - - - and avoiding 202.

14 JUDGE RIVERA: Well, but the - - - really the  
15 language of the statutes and the cases is about where you  
16 move that dial on accrual. It's - - - that - - - that I'm  
17 not really understanding your argument there.

18 MR. HANESSIAN: Well, I don't think there's any  
19 issue - - - I don't think that there's any issue that this  
20 claim accrued in Ontario. I don't think there's any issue  
21 about that at all.

22 JUDGE STEIN: Can - - - if - - - can I just  
23 follow up on something that Judge Rivera raised, and that  
24 is that intention, it's hard to know what the intention  
25 would be when you're - - - when you're executing the



1 agreement because you don't know who's going to be  
2 plaintiff or defendant. But isn't that the very thing  
3 then? You don't know who the plaintiff and what that  
4 jurisdiction's statute of limitations is going to be.

5 MR. HANESSIAN: I - - - I don't - - -

6 JUDGE STEIN: Isn't that right?

7 MR. HANESSIAN: - - - agree. I fundamentally  
8 disagree with the idea that there was any misunder - - - or  
9 could have been by anybody knowledgeable about New York Law  
10 - - - about what New York Law meant in 2008. At this time  
11 you had three decisions of this court that said - - -  
12 including one in the Smith Barney v. Luckie case that had  
13 the magic word "enforced" and applied the borrowing  
14 statute. And there's also the Insurance Company - - -

15 JUDGE WILSON: Well, it sent it back to - - -

16 MR. HANESSIAN: - - - against ABB.

17 JUDGE WILSON: Didn't it - - - didn't it actually  
18 send it back to the Appellate Division to determine whether  
19 the borrowing statute applied?

20 MR. HANESSIAN: It referenced the borrowing  
21 statute and then the Appellate Division applied the  
22 borrowing statute. But 202, the borrowing statute, is  
23 referenced in this court's decision in the Luckie case, and  
24 there was no argument that it didn't apply.

25 JUDGE RIVERA: So is it your position at the time



1 what the parties understood was that 202 always applies?

2 MR. HANESSIAN: There would be no basis for it  
3 not to. There was no suggestion that it wouldn't. There's  
4 nothing in any case that's been cited here. There's  
5 nothing in any case that we know of - - -

6 JUDGE WILSON: But - - - but your argument's a  
7 little different really. It's that even if they understood  
8 that they couldn't have done anything about it  
9 contractually.

10 MR. HANESSIAN: I think 201, exactly, would have  
11 prohibited them from lengthening the statute. 201 on its  
12 face - - -

13 JUDGE WILSON: Well - - -

14 MR. HANESSIAN: - - - says that they can shorten  
15 it but they can't - - -

16 JUDGE WILSON: By - - - by lengthen you mean  
17 lengthen the foreign statute?

18 MR. HANESSIAN: Lengthen the otherwise - - -

19 JUDGE WILSON: The Ontario statute, for example.

20 MR. HANESSIAN: - - - applicable statute whatever  
21 it turned out to be here. If you have an - - - this is  
22 quite correct. There are different parties whose claims  
23 that accrue in different places, but if you were to take  
24 any of those and lengthen them to six years if the contract  
25 had said we're going to apply the six-year statute and the

1 claim accrued outside the state and it was contrary to 202,  
2 201 would prohibit that.

3 JUDGE RIVERA: Which then - - - which then - - -

4 MR. HANESSIAN: As interpreted by the Kassner  
5 case.

6 JUDGE RIVERA: - - - you - - - which then you  
7 mean to argue that even if they wanted - - - or even if the  
8 parties wanted to do this they could not say we want New  
9 York Law to apply except 202, everything but that?

10 MR. HANESSIAN: It's - - - it's very interesting  
11 in the - - - in the papers of the appellant here in - - -  
12 in responding to that argument, the cases that they look at  
13 are cases where New York has applied substantive law of  
14 other states that is not in the New York substantive law.  
15 The principle case here is Welsbach where Florida has a pay  
16 when paid provision, which we don't have in New York, the  
17 question is will New York apply that, and the answer is  
18 yes. It's not fundamentally against our public policy.  
19 This is New York Law that they're seeking to set aside,  
20 which I - - - there's no - - - there's no case that  
21 suggests that the parties can do that. 201 has been part  
22 of - - -

23 JUDGE STEIN: Well, does it make any difference  
24 if we were to conclude that 202 is not a procedural law  
25 strictly it is a choice of law provision? Does that make a



1 difference?

2 MR. HANESSIAN: I don't think it should. I don't  
3 think it should. I - - - because I don't think - - -

4 JUDGE STEIN: But - - - but it might?

5 MR. HANESSIAN: Well - - -

6 JUDGE STEIN: Well, because - - - because - - -

7 MR. HANESSIAN: The courts have - - - this Court  
8 has consistently said that this is part of the statute of  
9 limitations law. The Insurance Company of North America v.  
10 ABB particularly said this and said this, "Applicable law  
11 clauses don't override 202." It said, "The state's  
12 procedural code requires that a court when preceded with a  
13 cause of action accruing outside New York should apply the  
14 limitation of the foreign jurisdiction." This is a 1997  
15 case. This case was in front of everybody when this  
16 contract was signed in 2008. And I think importantly that  
17 case, Insurance Company v. ABB, talked about one of the  
18 purposes of the borrowing statute is not just to prevent  
19 forum shopping but to provide this clarity and certainty in  
20 the law. The - - - one of the reasons New York is such a  
21 treasured commercial center is because we have a stable  
22 rule of law here. We don't - - - we don't - - - we're not  
23 constantly changing the rules of the game with respect to  
24 parties - - -

25 JUDGE RIVERA: So you mean certainty that you



1 know that the rule that's set out in 202 applies as opposed  
2 to certainty in the outcome?

3 MR. HANESSIAN: Yeah, of course.

4 JUDGE RIVERA: Of the application of the rule.

5 MR. HANESSIAN: You - - - you know that 202 - - -

6 JUDGE RIVERA: Which is what he's arguing.

7 MR. HANESSIAN: You know there's a borrowing  
8 statute - - - of course.

9 JUDGE RIVERA: Which is I think what they're  
10 arguing which is we want certainty in the outcome as - - -  
11 as in what statute of limitation applies specifically.

12 MR. HANESSIAN: This comes - - - in my - - - as I  
13 said in response to the question about 201, I don't think  
14 that the parties can choose a statute of limitations given  
15 that the legislature has enacted 202 as part of our statute  
16 of limitations and given that this court has said the  
17 choice of law clauses don't override that.

18 JUDGE RIVERA: You - - - they - - - you mean you  
19 can't choose one that would be longer than what would apply  
20 if 202 applied?

21 MR. HANESSIAN: Prior to the accrual of the  
22 claim, and this is - - - this question was exactly before  
23 the court in the Kassner case in 1979. So they're - - -  
24 they're asking you to reform not just 202 but also 201  
25 which are the first two articles - - - first two sections



1 of Article 2. I mean to say one looks at 213 and doesn't  
2 look at 201 and 202 to me doesn't make any sense. No - - -  
3 every New York lawyer, certainly one that advises on  
4 disputes, knows about the borrowing statute.

5 JUDGE RIVERA: Let's say we disagree with you on  
6 what you have set out now as this per se rule that - - -  
7 that parties could never make this choice. Let's say we  
8 decided they could make this choice. Why is it in this  
9 case they did or didn't make this choice?

10 MR. HANESSIAN: Well, because we know that in  
11 2008 when they entered into the contract the - - - the  
12 cases they had before them were the Luckie case and again  
13 this Insurance Company v. ABB case. And these cases - - -  
14 one involving these so-called talismanic words of  
15 "enforceable" in the Luckie case applied the borrowing  
16 statute. And in the Insurance Company case, they said, you  
17 know, notwithstanding the fact that you've chosen a foreign  
18 law we're going to apply a borrowing statute. That is part  
19 of the law. It is part of the law. There's - - - there's  
20 really not a policy reason to read it out in my opinion.  
21 And there's no reason to think the parties intended to read  
22 it out. There's - - - there's no basis in 2008 - - - this  
23 is well before Ministers and Missionaries, it's well before  
24 IRB.

25 JUDGE STEIN: Well, I mean - - -



1 MR. HANESSIAN: I don't see how a lawyer could  
2 predict these things.

3 JUDGE STEIN: ABB also talked about the - - - the  
4 purpose being to prevent forum shopping. But when you - -  
5 - when you have a contract with a choice of law provision,  
6 how does - - - how does that apply?

7 JUDGE WILSON: Choice of forum.

8 MR. HANESSIAN: I'm sorry?

9 JUDGE STEIN: Choice - - - yeah, sorry.

10 MR. HANESSIAN: Well, one thing to be clear about  
11 is - - - is these cases I think are all considered to be  
12 choice of forum - - - choice of - - - choice of law  
13 clauses. You're reading the choice of law. Choice of New  
14 York Law will mean substantive law - - - I think this is my  
15 - - - what was going on in IRB and also in - - - in  
16 Ministers and Missionaries. And we're going to apply the  
17 substantive - - - the parties choose New York Law. We're  
18 going to give them the substantive law that they intend to  
19 have without regard to these Common Law or even statutory  
20 conflicts regarding the substantive law. One of the  
21 interesting things about Ministers and Missionaries is it  
22 never mentions - - -

23 JUDGE FAHEY: But you're not relying - - - you're  
24 not relying on that substantive procedural distinction  
25 here?

1 MR. HANESSIAN: Well - - -

2 JUDGE FAHEY: I thought that the parties had  
3 agreed that you weren't. I may be wrong.

4 MR. HANESSIAN: No, I - I- I - Ministers and  
5 Missionaries uses the word "procedural" sixteen times - - -  
6 or "substantive law" sixteen times. The dissent uses it  
7 twenty-one times. It doesn't directly confront this issue  
8 of substantive against procedural in my view. And you have  
9 this question about what would it mean to extend it to  
10 procedural. The - - - the CPLR has sixty different  
11 articles.

12 JUDGE FAHEY: Well, I - - -

13 MR. HANESSIAN: How many of these now will come  
14 into - - -

15 JUDGE FAHEY: - - - can only tell you the way I  
16 look at it. The way I look at the word enforce and the way  
17 I understood your - - - both of your arguments is that you  
18 both were saying that substantive and procedural law was  
19 included within the word enforce. We're, we're onto the  
20 next question which is the application of 202 and whether  
21 or not it's in derogation of the Common Law or part of it.  
22 So - - - you see what I'm saying?

23 MR. HANESSIAN: I have to say I don't quite.

24 JUDGE FAHEY: Okay. I just want to be clear in  
25 my own mind. Are you relying on the distinction between



1 substantive and procedural enforce - - - for your argument?

2 MR. HANESSIAN: Let me say - - - let me say - - -  
3 let me answer you in this way. The cases that have - - -  
4 have been before this court that - - - that touch upon what  
5 enforcement or enforced means have been arbitration cases.  
6 The - - - the Luckie case, the - - -

7 JUDGE FAHEY: Triarc, Diamond - - -

8 MR. HANESSIAN: Diamond Waterproofing - - - yeah,  
9 Triarc. Yeah, these - - - the question there is was it - - -  
10 - was it actually a gatekeeping issue? This - - - this is  
11 a very complicated part of law, this arbitration should it  
12 be - - - who should decide things like statute of  
13 limitations or who the parties are to an arbitrate - - - a  
14 contract providing for arbitration and what - what these  
15 cases have said is if parties say their contract is to be  
16 enforced under New York Law then our courts will decide it  
17 under the CPLR Article 75 and not the arbitrator under the  
18 Federal Arbitration Act. To - - - that's all this Court  
19 has looked at with respect to this procedural - - - so-  
20 called procedural substantive division - - - distinction.  
21 To - - - to take the holding of Ministers and Missionaries  
22 and extend it to proced - - - to the CPLR generally I think  
23 would be a leap - - - would be a leap.

24 CHIEF JUDGE DIFIORE: Thank you, counsel.

25 JUDGE FAHEY: Thank you.



1 MR. HANESSIAN: Thank you.

2 CHIEF JUDGE DIFIORE: Counsel.

3 MR. BUCHDAHL: So the question - - - here you go.

4 MR. HANESSIAN: Thank you.

5 MR. BUCHDAHL: So the question is whether the  
6 parties can make that extension using the word enforce,  
7 right. That's what we're talking about.

8 JUDGE FAHEY: Right.

9 MR. BUCHDAHL: They've selected the substantive  
10 law. They've selected their venue. They've written the  
11 broadest choice of law clause they can. They've used this  
12 "enforce" which many courts have said brings in statute of  
13 limitations questions, not this Court yet. But certainly  
14 lots of lower courts have said if you have the word  
15 "enforce," and the Appellate Division just agreed, this  
16 would bring in statute of limitations questions. So what  
17 more can they do to signal their intent that they want New  
18 York Law to apply? And it really is - if it's not entirely  
19 - - - it's certainly not a big leap for Ministers and  
20 Missionaries to say that just as in that case you shouldn't  
21 be randomly subject to Colorado State Law, you shouldn't  
22 here be subject to Ontario Statute of Limitations Law.

23 JUDGE RIVERA: But - - - but at the time that the  
24 language is drafted and the parties sign off on it, it  
25 predates those cases. So you're left with, as your



1 adversary suggested, a different line of cases that if it's  
2 not expressed certainly suggests that you have to do more  
3 than say what the clause says to make it clear that you are  
4 trying to carve out the application of 202.

5 MR. BUCHDAHL: These cases don't change the law.  
6 They simply interpret the intent of the parties. Whether  
7 it's IRB-Brasil or Ministers and Missionaries, they both  
8 say we're going to let parties select New York Law, and  
9 we're not going to make them be subject to conflicts of  
10 laws rules. We're not going to make them be subject to  
11 statutory choice of law directives.

12 JUDGE RIVERA: But why are we - - - why did this  
13 court send it back in Matter of Smith Barney for  
14 application of 202 and potential tolling provisions that  
15 might apply.

16 MR. BUCHDAHL: The question simply wasn't  
17 directly presented to the court. Was that an oversight?  
18 It may well have been, but it was not briefed below. The -  
19 - - one of the litigants was pro se. No briefs were  
20 submitted to the Appellate Division upon remand. So it's  
21 not a question that had ever been clearly decided by  
22 anyone. But what is clear here is that they tried to draft  
23 the broadest possible choice of law clause, and they should  
24 not, as a result of that, be subject to a Canadian statute  
25 of limitations. It does not make sense the commercial



1 parties would sit down in New York and say, well, if you  
2 sue you've got the Korean statute of limitations five or  
3 ten years, if you sue you've got Canadian, and if you sue  
4 you've got Delaware three years. If you sue you've got New  
5 York six years.

6 JUDGE RIVERA: But 202 is longstanding, and as  
7 your adversary makes clear the - - - this is a - - - is  
8 reflecting a strong public policy.

9 MR. BUCHDAHL: Well, but the policy is one of,  
10 you pointed out, is to avoid venue shopping, right. It's  
11 to avoid forum shopping that would somehow game the system.  
12 Here no one's doing that. Everyone knew the case was going  
13 to be litigated here in New York. And then the question is  
14 if that's already accomplished by a venue selection clause  
15 - - -

16 JUDGE RIVERA: Right, but litigated in New York  
17 if you're not time-barred.

18 MR. BUCHDAHL: The - - - absolutely. But the  
19 question is - - -

20 JUDGE RIVERA: And we're back to the problem I  
21 pointed out.

22 MR. BUCHDAHL: Right, but if you already have the  
23 venue, and you already have the procedural law that comes  
24 with that venue what else does enforced give you? It has  
25 to give you the statute of limitations or it adds nothing



1 to the contract whatsoever. And the word enforced we know  
2 is supposed to have some effect. That can't suddenly  
3 become meaningless.

4 CHIEF JUDGE DIFIORE: Thank you, counsel.

5 (Court is adjourned)

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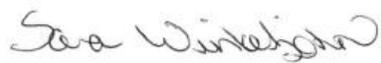
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of 2138747 Ontario, Inc. v. Samsung C&T Corporation, No. 57 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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