review process. As a separate matter, there is no proof in the record whether plaintiff was a sentenced inmate or a pre-trial detainee, nor is there any submissions on either side whether, if he was a pre-trial detainee, a different rule other than articulated in *Washington v. Harper* should apply. Finally, Chief Moehrle's affidavit concedes personal knowledge of many of the circumstances of plaintiff's disciplinary history and treatment thus raising a fair issue of material fact on the supervisory liability issue in the event plaintiff may prove that his due process rights were violated.[4]

Accordingly, the motion for summary judgment and the cross motion for summary judgment are recommended to be denied.

CONCLUSION

The foregoing is my Decision and Order that defendant's motion for an order directing plaintiff to file an amended complaint with numbered paragraphs, and plaintiff's motion for an order granting leave to file an amended complaint, be granted. Defendants are ordered to file and serve an answer to the amended complaint within 20 days of service of this order. This is also my Report and Recommendation that plaintiff's motion for summary judgment and defendant's cross motion for summary judgment each be denied.

The parties should be on notice that, pursuant to 28 U.S.C. § 636(b)(1)(C) and Local Rule 30(a)(3), any objections to this Report and Recommendation must be filed with the Clerk of the Court within ten (10) days of receipt thereof. Failure to file objections within the specified time waives the right to appeal a District Court Order adopting this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 72, 6(a) and 6(c); *Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); *Small v. Secretary of Health and Human Services*, 892 F.2d 15 (2d Cir.1989); *Wesolek v. Canadair Limited*, 838 F.2d 55 (2d Cir.1988).

Rochester, New York
Dated: September 12, 1991

4. Although the Second Circuit has left open the issue whether a *pro se* complaint affirmed under penalty of perjury, 28 U.S.C. § 1746, suffices as an affidavit within the meaning of Rule 56, *Graham v. Lewinski*, 848 F.2d at 343–44, the complaint in that case was "devoid of specific facts" thus requiring a remand for supplementation of the record. In this case, the Amended Complaint alleges specific facts and, with peculiar procedural posture of the cross motions for summary judgment, I find it sufficient to defeat Rule 56 relief. *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972).

NATIONAL DEVELOPMENT COMPANY, Petitioner,

v.

Adnan M. KHASHOGGI, Respondent.

No. 89 Civ. 7457 (MP).

United States District Court, S.D. New York.

Jan. 23, 1991.

Action was brought to confirm award issued by tribunal of the Court of Arbitration of the International Chamber of Commerce. The District Court, Milton Pollack, Senior District Judge, held that: (1) court had jurisdiction; (2) defendant's fear of extradition if he appeared in England to attend the arbitration proceedings did not constitute an inability to attend; and (3) it was too late to argue that defendant was neither a party nor the alter ego of a party.

Judgment for plaintiff.

1. Federal Courts ⇐198

Court had jurisdiction over petition to confirm and enforce arbitration award issued by a tribunal of the Court of Arbitration of the International Chamber of Commerce. 9 U.S.C.A. §§ 203, 207; Convention on the Recognition and Enforcement of

Foreign Arbitral Awards, Art. I, subd. 1, 9 U.S.C.A. § 201 note.

2. Arbitration ⇐32.6

Individual's decision not to attend arbitration proceeding in England because he was afraid of being taken into custody for extradition to face criminal charges in the United States was not an inability to attend the proceedings so as to preclude confirmation of the award.

3. Arbitration ⇐7.5

Agreement to arbitrate applied to dispute over the proper disposition of assets following dissolution of business, where arbitration provision stated that it covered matters "arising out of or relating to" the parties' memorandum of agreement, which included a discussion of the 50–50 nature of the parties' joint venture.

4. Arbitration ⇐4

Individual or entity can be party to arbitration agreement by virtue of status as an alter ego of a signer of the agreement.

5. Arbitration ⇐85

Time for individual to argue that he could not be compelled to submit to arbitration because he was neither a party to the memorandum of agreement nor an alter ego of such a party was in the action to compel him to arbitrate, and he could not wait until action to enforce arbitration award to raise that claim.

6. Interest ⇐39(2.20)

Party seeking enforcement of arbitration award was entitled to interest on the amount owed to it which accrued between the issuance of the arbitration award and the date of entry of judgment in action to enforce.

Jones, Day, Reavis & Pogue (Fredrick E. Sherman, of counsel), New York City, for petitioner.

Sidley & Austin (Steven M. Bierman, of counsel), New York City, for respondent.

ORDER AND DECISION

MILTON POLLACK, Senior District Judge.

Petitioner National Development Company ("NDC") moves for summary judgment confirming an award issued by a tribunal of the Court of Arbitration of the International Chamber of Commerce, rendered on April 12, 1989, against respondent Adnan M. Khashoggi ("Khashoggi") in the amount of $4,441,180.47. The motion also requests that the Court grant NDC post-award, prejudgment interest on the award at the statutory rate. The Court finds that the Award of the Court of Arbitration, and the proceedings from which it issued, fully satisfy all the requirements of the Convention pertaining to confirmation, and that Khashoggi's objections to it are frivolous and diversionary. NDC's motion for summary judgment is granted in its entirety.

Facts

In 1983 or 1984, NDC, a corporation wholly owned by the Government of the Phillipines, and Triad Holding Company ("Triad Holding"), along with its 100% shareholder Khashoggi, entered into negotiations for the establishment of a joint venture trading company. On May 16, 1984, NDC, Triad Holding and the joint venture company, Triad Asia, Ltd. ("Triad Asia"), executed a Shareholders Agreement, by which NDC and Triad Holding each subscribed to one-half of Triad Asia's stock. The Agreement provided that upon winding up of Triad Asia, NDC and Triad Holding would each receive a pro rata share of the assets after payments of all the liabilities. On November 22, 1984, NDC and Triad Holding entered into a further Memorandum of Agreement providing for arbitration if any disputes between the parties arose.

On March 17, 1986, NDC and Triad Holding agreed to dissolve Triad Asia. NDC directed Triad Asia's bank to transfer the entire proceeds of Triad Asia's account to Triad Holding's account. Triad Holding was then supposed to transfer NDC's one-half share to the account of Philippine Associated Smelting & Refining Corp., anoth-

er NDC company. Triad Holding never transfered the funds.

In August 1986, NDC requested that Triad Holding and Khashoggi submit to arbitration of NDC's claim for one-half of Triad Asia's $7 million, relying on the arbitration clause in the Memorandum of Agreement between NDC and Triad Holding. As prescribed in the Memorandum of Understanding, the arbitration would take place before a panel in London, England under the auspices of the International Chamber of Commerce.

In October 1986, NDC filed a complaint in this Court, seeking to compel Khashoggi to arbitrate. A default judgment was entered on October 15, 1987, on a September 23, 1987 decision, directing Khashoggi to arbitrate his dispute with NDC before the Court of Arbitration of the International Chamber of Commerce. The order, judgment and decree so entered reads:

> ORDERED, ADJUDGED AND DECREED: that defendant Adnan Khashoggi shall arbitrate his dispute with plaintiff in Case No. 5731/BGD (*National Development Company v. Triad Holding Corporation, et al.*) pending before the Court of Arbitration, the International Chamber of Commerce and that plaintiff shall have judgment against defendant Adnan M. Khashoggi in the amount of $80.00 for its costs and disbursements in this action.
>
> Dated: New York, New York
> September 23, 1987
>
> John Sprizzo
> U.S.D.J.

The arbitration was held in London, England in February 1989 before a panel of three arbitrators chosen in accordance with the Memorandum of Agreement, and conducted under the procedures of the International Chamber of Commerce. NDC asserted that, following the agreement by NDC and Triad Holding to dissolve Triad Asia, Triad Holding converted NDC's 50 percent portion of the distribution of Triad Asia's assets, and that Khashoggi was jointly and severally liable with Triad Holding because he was Triad Holding's alter ego. Khashoggi did not appear at or participate in the arbitration.

On April 12, 1989, the Arbitral Tribunal of the ICC rendered an Award in favor of NDC and against Khashoggi. In the Award, the Arbitral Tribunal held, first, that the dispute was one to which the parties had intended the arbitration clause of the Memorandum of Agreement to apply, and second, that Khashoggi was the alter ego of Triad Holding Co. and therefore could be considered a party to the Memorandum of Agreement.

The Tribunal found Triad Holding and Khashoggi to be jointly and severally liable to NDC for the following sums:

1.	Principal damages in the amount of	$3,450,000.00
2.	Interest on the principal amount of the Award from March 31, 1986 to April 12, 1989	$ 787,644.99
3.	Costs of the arbitration	$ 203,536.47
	TOTAL:	**$4,441,180.47**

Award Sentence, *National Development Co. v. Triad Holding Corp. and Adnan M. Khashoggi*, Case No. 5731/RP/BGD, at p. 37.

Khashoggi moved to vacate this Court's judgment of October 15, 1987, compelling arbitration, on the ground of invalid service of process. On June 1, 1990, after an evidentiary hearing, the Court denied the motion in respect to the original summons and complaint served in the case. *National Development Co. v. Triad Holding Corp., Adnan M. Khashoggi, et al.*, 131 F.R.D. 408 (S.D.N.Y.1990). The Court of Appeals for the Second Circuit affirmed on

April 15, 1991, stating, after a discussion of the issue of service, that:

> Since service was properly effected on Khashoggi, his motion pursuant to Rule 60(b)(4) to vacate the default judgment entered on the original complaint for want of personal jurisdiction was properly denied. Accordingly, we affirm.

National Development Co. v. Triad Holding Corp., Adnan Khashoggi, et al., 930 F.2d 253, 258 (2d Cir.1991). On November 18, 1991, the Supreme Court of the United States denied Khashoggi's petition for *certiorari* without comment. — U.S. —, 112 S.Ct. 440, 116 L.Ed.2d 459 (1991).

Analysis

[1] This summary judgment motion is made pursuant to Rule 56, F.R.Civ.P., section 207 of the Arbitration Act, 9 U.S.C.A. § 207 (West Supp.1991), and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. 6997, 330 U.N.T.S. 38, reprinted as a note following 9 U.S.C.A. § 201 (West Supp.1991). Section 207 of the Arbitration Act provides that this Court must grant the petition to confirm the Award if it satisfies all the requirements of the Convention. Section 207 states that:

> Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

9 U.S.C.A. § 207 (West Supp.1991). The Court has jurisdiction over NDC's petition to confirm and enforce the Award of the ICC, based on section 203 of the Arbitration Act, which provides that: "An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States ... shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy." 9 U.S.C.A. § 203 (West Supp.1991)

The Award clearly falls under the Convention. Article I(1) of the Convention provides that it:

> shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal.

Since England is a signatory of the Convention, this Award satisfies the further requirement, adopted by the United States, that the State in which the arbitration award is rendered must be one that reciprocates the confirmation of arbitration awards.

[2, 3] None of the grounds specified in the Convention for refusal or recognition of the Award has been established by Khashoggi, whose objections to notice, to his inability to attend the arbitration proceeding, and to the authority of the Arbitral Tribunal to resolve the issues in dispute are diversionary and frivolous. In regard to notice, in affirming this Court's denial of Khashoggi's motion to vacate the judgment compelling him to submit to arbitration, the Second Circuit observed that notice of the commencement of the arbitration was given to Khashoggi. *National Development Company v. Triad Holding Corp.*, 930 F.2d at 255. Khashoggi's decision not to attend the arbitration proceeding in England because he was afraid of being taken into custody for extradition to face criminal charges in the United States does not constitute an *inability* to attend the proceedings. Finally, the Arbitral Tribunal's determination that the agreement to arbitrate applied to the parties' dispute as to the proper distribution of the assets of Triad Asia following its dissolution was well-founded. The general language of the arbitration provision states that it covers matters "arising out of or relating to" the Memorandum of Agreement, which includes discussion of the 50–50 nature of the parties' joint venture.

[4] Also to no avail is Khashoggi's claim that the Award should not be confirmed because Khashoggi was not a party to the Memorandum of Agreement and therefore never agreed to submit to arbitration. An individual or entity can be a party to an arbitration agreement by virtue of its status as alter ego of a signer of the agreement. See *Fisser v. International Bank*, 282 F.2d 231, 234–35 (2d Cir.1960) (holding that "the judge erred in ruling that the respondent was not bound by the arbitration clause merely because it had not signed the charter" and that "respondent's amenability to arbitration could be solved only by determining whether [the party that signed] did so as the respondent's *alter ego*"); *Interbras Cayman Co. v. Orient Victory Shipping Co., S.A.*, 663 F.2d 4, 6–7 (2d Cir.1981); *Interocean Shipping Co. v. National Shipping & Trading Corp.*, 523 F.2d 527, 539 (2d Cir.1975), *cert. denied*, 423 U.S. 1054, 96 S.Ct. 785, 46 L.Ed.2d 643 (1976).

[5] The time for Khashoggi to argue that he could not be compelled to submit to arbitration because he was neither a party to the Memorandum of Agreement nor the alter ego of a party, was in NDC's action to compel him to arbitrate. See *Hidrocarburos y Derivados, C.A. v. Lemos*, 453 F.Supp. 160, 177 (S.D.N.Y.1977) (holding that the leading Second Circuit cases on the subject "require that the alter ego theory, and any other theory determinative of the identity of parties to an arbitration agreement, be tested by an action to compel arbitration under [9 U.S.C.] § 4, prior to the arbitration hearings"). The issue of whether Khashoggi was bound by the arbitration agreement was resolved by the October 15, 1987 judgment of this Court ordering him to submit to arbitration by the ICC on the dispute between him and NDC, and the denial of Khashoggi's motion to vacate that judgment for a deficiency in service.

[6] NDC is also entitled to interest on the amount owed to it by Khashoggi accruing between the issuance of the Arbitral Award and the date of entry of judgment in this action. Khashoggi has not presented any persuasive reasons for opposing the grant of pre-judgment interest "that would overcome our presumption in favor of pre-judgment interest." *Waterside Ocean Navigation Co., Inc. v. International Navigation, Ltd.*, 737 F.2d 150, 154 (2d Cir.1984). Interest is at the rate set forth in 28 U.S.C. § 1961(a) for money judgments.

Accordingly, the Arbitral Award of the Court of Arbitration of the International Chamber of Commerce, rendered on April 12, 1989 is confirmed, and interest is awarded for the post-award, pre-judgment period. Summary judgment for the plaintiff is granted accordingly.

SO ORDERED.

Floyd Murray BRUCE, Petitioner,

v.

William SLATTERY, District Director of the Immigration & Naturalization Service for the District of New York, Respondent.

No. 91 Civ. 5439 (CHT).

United States District Court,
S.D. New York.

Nov. 4, 1991.

Unadmitted alien petitioned for habeas corpus following denial of alien's second parole request by the Immigration and Naturalization Service. The District Court, Tenney, J., held that: (1) two and one-half year detention was "temporary" pending exclusion rather than indefinite; (2) denial of alien's first parole request was not unreasonable in light of repeated misrepresentations of identity and nationality; and (3) denial of second parole request was not abuse of discretion given that alien was subject to final order of exclusion.

Denied.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL DEVELOPMENT COMPANY,

Petitioner,

-against-

ADNAN M. KHASHOGGI,

Respondent.

89 Civ. 7457 (MP)

17

ORDER AND DECISION

APPEARANCES:

For Plaintiffs:

JONES, DAY, REAVIS & POGUE
599 Lexington Avenue
New York, NY 10022

Of Counsel -

Fredrick B. Sherman

For Defendants:

SIDLEY & AUSTIN
875 Third Avenue
New York, NY 10022

Of Counsel -

Steven M. Bierman

Milton Pollack, Senior United States District Judge

Pollack, Senior District Judge

Petitioner National Development Company ("NDC") moves for summary judgment confirming an award issued by a tribunal of the Court of Arbitration of the International Chamber of Commerce, rendered on April 12, 1989, against respondent Adnan M. Khashoggi ("Khashoggi") in the amount of $4,441, 180.47. The motion also requests that the Court grant NDC post-award, pre-judgment interest on the award at the statutory rate. The Court finds that the Award of the Court of Arbitration, and the proceedings from which it issued, fully satisfy all the requirements of the Convention pertaining to confirmation, and that Khashoggi's objections to it are frivolous and diversionary. NDC's motion for summary judgment is granted in its entirety.

Facts

In 1983 or 1984, NDC, a corporation wholly owned by the Government of the Phillipines, and Triad Holding Company ("Triad Holding"), along with its 100% shareholder Khashoggi, entered into negotiations for the establishment of a joint venture trading company. On May 16, 1984, NDC, Triad Holding and the joint venture company, Triad Asia, Ltd. ("Triad Asia"), executed a Shareholders Agreement, by which NDC and Triad Holding each subscribed to one-half of Triad Asia's stock. The Agreement provided that upon winding up of Triad Asia, NDC and Triad Holding would each receive a pro rata share of the assets after payments of all the liabilities. On November 22, 1984, NDC and Triad Holding entered into a further Memorandum of Agreement providing for arbitration if any disputes between the parties arose.

On March 17, 1986, NDC and Triad Holding agreed to dissolve Triad Asia. NDC directed Triad Asia's bank to transfer the entire proceeds of Triad Asia's account to Triad Holding's account. Triad Holding was then supposed to transfer NDC's one-half share to the account of Philippine Associated Smelting & Refining Corp., another NDC company. Triad Holding never transfered the funds.

INTERNATIONAL ARBITRATION REPORT

In August 1986, NDC requested that Triad Holding and Khashoggi submit to arbitration of NDC's claim for one-half of Triad Asia's $7 million, relying on the arbitration clause in the Memorandum of Agreement between NDC and Triad Holding. As prescribed in the Memorandum of Understanding, the arbitration would take place before a panel in London, England under the auspices of the International Chamber of Commerce.

In October 1986, NDC filed a complaint in this Court, seeking to compel Khashoggi to arbitrate. A default judgment was entered on October 15, 1987, on a September 23, 1987 decision, directing Khashoggi to arbitrate his dispute with NDC before the Court of Arbitration of the International Chamber of Commerce. The order, judgment and decree so entered reads:

> ORDERED, ADJUDGED AND DECREED: that defendant Adnan Khashoggi shall arbitrate his dispute with plaintiff in Case No. 5731/BGD (National Development Company v. Triad Holding Corporation, et al.) pending before the Court of Arbitration, the International Chamber of Commerce and that plaintiff shall have judgment against defendant Adnan M. Khashoggi in the amount of $80.00 for its costs and disbursements in this action.
>
> Dated: New York, New York
> September 23, 1987
>
> John Spizzo
> U.S.D.J.

The arbitration was held in London, England in February 1989 before a panel of three arbitrators chosen in accordance with the Memorandum of Agreement, and conducted under the procedures of the International Chamber of Commerce. NDC asserted that, following the agreement by NDC and Triad Holding to dissolve Triad Asia, Triad Holding converted NDC's 50 percent portion of the distribution of Triad Asia's assets, and that Khashoggi was jointly and severally liable with Triad Holding because he was Triad Holding's alter ego. Khashoggi did not appear at or participate in the arbitration.

On April 12, 1989, the Arbitral Tribunal of the ICC rendered an Award in favor of NDC and against Khashoggi. In the Award, the Arbitral Tribunal held, first, that the dispute was one to which the parties had intended the arbitration clause of the Memorandum of Agreement to apply, and second, that Khashoggi was the alter ego of Triad Holding Co. and therefore could be considered a party to the Memorandum of Agreement.

The Tribunal found Triad Holding and Khashoggi to be jointly and severally liable to NDC for the following sums:

1.	Principal damages in the amount of	$3,450,000.00
2.	Interest on the principal amount of the Award from March 31, 1986 to April 12, 1989	$ 787,644.99
3.	Costs of the arbitration	$ 203,536.47
	TOTAL:	$4,441,180.47

Award Sentence, National Development Co. v. Triad Holding Corp. and Adnan M. Khashoggi, Case No. 5731/RP/BGD, at p. 37.

Khashoggi moved to vacate this Court's judgment of October 15, 1987, compelling arbitration, on the ground of invalid service of process. On June 1, 1990, after an evidentiary hearing, the Court denied the motion in respect to the original summons and complaint served in the case. National Development Co. v. Triad Holding Corp., Adnan M. Khashoggi, et al. 131 F.R.D. 408 (S.D.N.Y. 1990). The Court of Appeals for the Second Circuit affirmed on April 15, 1991, stating, after a discussion of the issue of service, that:

> Since service was properly effected on Khashoggi, his motion pursuant to Rule 60(b)(4) to vacate the default judgment entered on the original complaint for want of personal jurisdiction was properly denied. Accordingly, we affirm.

National Development Co. v. Triad Holding Corp., Adnan Khashoggi, et al., 930 F.2d 253, 258 (2d Cir. 1991). On November 18, 1991, the Supreme Court of the United

INTERNATIONAL ARBITRATION REPORT

VOL. 7, #2, 2/92 - NDC

States denied Khashoggi's petition for certiorari without comment. ___ U.S.___, 112 S.Ct. 440 (1991).

Analysis

This summary judgment motion is made pursuant to Rule 56, F.R.Civ.P., section 207 of the Arbitration Act, 9 U.S.C.A. § 207 (West Supp. 1991), and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. 6997, 330 U.N.T.S. 38, reprinted as a note following 9 U.S.C.A. § 201 (West Supp. 1991). Section 207 of the Arbitration Act provides that this Court must grant the petition to confirm the Award if it satisfies all the requirements of the Convention. Section 207 states that:

> Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

9 U.S.C.A. § 207 (West Supp. 1991). The Court has jurisdiction over NDC's petition to confirm and enforce the Award of the ICC, based on section 203 of the Arbitration Act, which provides that: "An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States...shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy." 9 U.S.C.A. § 203 (West Supp. 1991)

The Award clearly falls under the Convention. Article I(1) of the Convention provides that it:

> shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal.

Since England is a signatory of the Convention, this Award satisfies the further requirement, adopted by the United States, that the State in which the arbitration award is rendered must be one that reciprocates the confirmation of arbitration awards.

None of the grounds specified in the Convention for refusal or recognition of the Award has been established by Khashoggi, whose objections to notice, to his inability to attend the arbitration proceeding, and to the authority of the Arbitral Tribunal to resolve the issues in dispute are diversionary and frivolous. In regard to notice, in affirming this Court's denial of Khashoggi's motion to vacate the judgment compelling him to submit to arbitration, the Second Circuit observed that notice of the commencement of the arbitration was given to Khashoggi. National Development Company v. Triad Holding Corp., 930 F.2d at 255. Khashoggi's decision not to attend the arbitration proceeding in England because he was afraid of being taken into custody for extradition to face criminal charges in the United States does not constitute an *inability* to attend the proceedings. Finally, the Arbitral Tribunal's determination that the agreement to arbitrate applied to the parties' dispute as to the proper distribution of the assets of Triad Asia following its dissolution was well-founded. The general language of the arbitration provision states that it covers matters "arising out of or relating to" the Memorandum of Agreement, which includes discussion of the 50-50 nature of the parties' joint venture.

Also to no avail is Khashoggi's claim that the Award should not be confirmed because Khashoggi was not a party to the Memorandum of Agreement and therefore never agreed to submit to arbitration. An individual or entity can be a party to an arbitration agreement by virtue of its status as alter ego of a signer of the agreement. See Fisser v. International Bank, 282 F.2d 231, 234-35 (2d Cir. 1960) (holding that "the judge erred in ruling that the respondent was not bound by the arbitration clause merely because it had not signed the charter" and that "respondent's amenability to arbitration could be solved only by determining whether [the party that signed] did so as the respondent's alter ego"); Interbras Cayman Co. v. Orient Victory Shipping Co., S.A., 663 F.2d 4, 6-7 (2d Cir. 1981); Interocean Shipping Co. v. National Shipping & Trading Corp., 523 F.2d 527, 539 (2d Cir. 1975), cert. denied, 423 U.S.

1054 (1976).

The time for Khashoggi to argue that he could not be compelled to submit to arbitration because he was neither a party to the Memorandum of Agreement nor the alter ego of a party, was in NDC's action to compel him to arbitrate. See Hidrocarburos y Derivados, C.A. v. Lemos, 453 F.Supp. 160, 177 (S.D.N.Y. 1977) (holding that the leading Second Circuit cases on the subject "require that the alter ego theory, and any other theory determinative of the identity of parties to an arbitration agreement, be tested by an action to compel arbitration under [9 U.S.C.] § 4, prior to the arbitration hearings"). The issue of whether Khashoggi was bound by the arbitration agreement was resolved by the October 15, 1987 judgment of this Court ordering him to submit to arbitration by the ICC on the dispute between him and NDC, and the denial of Khashoggi's motion to vacate that judgment for a deficiency in service.

NDC is also entitled to interest on the amount owed to it by Khashoggi accruing between the issuance of the Arbitral Award and the date of entry of judgment in this action. Khashoggi has not presented any persuasive reasons for opposing the grant of pre-judgment interest "that would overcome our presumption in favor of pre-judgment interest." Westerlide Ocean Navigation Co. Inc. v. International Navigation, Ltd., 737 F.2d 150, 154 (2d Cir. 1984). Interest is at the rate set forth in 28 U.S.C. § 1961(a) for money judgments.

Accordingly, the Arbitral Award of the Court of Arbitration of the International Chamber of Commerce, rendered on April 12, 1989 is confirmed, and interest is awarded for the post-award, pre-judgment period. Summary judgment for the plaintiff is granted accordingly.

SO ORDERED.

Date: January 23, 1992
New York, New York

Milton Pollack
Senior District Judge

INTERNATIONAL ARBITRATION REPORT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL DEVELOPMENT COMPANY,
Petitioner,
-against-
ADNAN M. KHASHOGGI,
Respondent.

89 CIVIL 7457 (MP)
JUDGMENT
92,0347

Petitioner National Development Company ("NDC") having moved for summary judgment confirming an arbitration award issued by a tribunal of the Court of Arbitration of the International Chamber of Commerce, rendered on April 12, 1989, against respondent Adnan M. Khashoggi ("Khashoggi") in the amount of $4,441,180.47, petitioner having also requested post-award, prejudgment interest on the award at the statutory rate, and the said motion having come before the Honorable MILTON POLLACK, Senior United States District Judge, and the Court thereafter on January 23, 1992, having rendered its order and decision; granting in its entirety petitioner's motion for summary judgment, and confirming the Arbitral Award of the Court of Arbitration of the International Chamber of Commerce, rendered on April 12, 1989, and awarding interest for the post-award, prejudgment period, it is,

ORDERED, ADJUDGED AND DECREED: That petitioner's motion for summary judgment be and it is hereby granted in its entirety, and it is further,

ORDERED, that the Arbitral Award of the Court of Arbitration of the International Chamber of Commerce, rendered on April 12, 1989, be and it is hereby confirmed, and it is further,

ORDERED, that interest be and it is hereby awarded for the post-award, prejudgment period, and it is further,

ORDERED, that petitioner, National Development Company, have judgment as against respondent, Adnan M. Khashoggi, in the amount of $4,441,180.47 plus post-award, prejudgment interest at the rate of 9.51% from April 12, 1989 through February 3, 1992, in the amount of $1,362,359.66 for a total of $5,803,540.13.

DATED: NEW YORK, NEW YORK
February 3, 1992

James M. Parver
Clerk

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON _____

"All disputes or differences arising out of the Contract ... shall be determined as follows: (a) One or both of the parties shall notify the Superintendent in writing that a dispute ... has arisen ... and the Superintendent shall ... give his determination to both parties to the Contract. (b) If either party is dissatisfied with the determination given by the Superintendent ..., the dissatisfied party may ... give notice in writing to the other party requiring that the matter at issue be referred to arbitration ... ."

In November 1989, Novacoal requested a determination of the dispute from the superintendent. The determination did not fully adopt either party's position, and neither party proceeded to give notice of arbitration. However, when Allied brought suit seeking some $868,000 it claimed it was owed by Novacoal, Novacoal moved to stay the proceedings under section 53(1) of the Commercial Arbitration Act 1984, which provides for a stay where the parties have entered into an arbitration agreement unless "sufficient reason" exists not to order a stay. In response, Allied contended (among other things) that: (i) there was no arbitration agreement, and (ii) even if an agreement existed, there were sufficient reasons why the dispute must remain in court.

Clause's Opening Language Is Key

Justice Giles said that Allied's first argument ignored the opening language of the clause: all disputes "shall be determined" in the prescribed manner. The rest of the clause, he explained, was simply "a machinery" for effecting that agreement. Thus, a party wishing to continue the process beyond the first stage of the superintendent's determination must pursue the matter by arbitration "if it is to be pursued at all," he said.

Acknowledging that Australian courts have disagreed on this issue, Justice Giles approvingly cited *Elders CED Ltd v. Dravo Corporation* (1984) 59 ALR 206, which interpreted an identical clause as a binding arbitration agreement. He concluded that "an agreement to arbitrate disputes under which there is an election to refer a dispute to arbitration or to let the matter rest is an agreement to refer future disputes to arbitration."

The fact that the clause's arbitration machinery had not been activated was not a "sufficient reason" for declining a stay, Justice Giles continued. He said it was Allied's obligation "to set the machinery in motion"; it could not advance "its own failure to adhere to the agreement that all disputes shall be determined in the manner prescribed" by the clause "as a ground on which the court should decline to hold it to that agreement."

The court also rejected Allied's contention that the dispute involved legal issues of contract interpretation that should be decided by a judge rather than an arbitrator. "That a question of law will arise is not of itself reason to refuse a stay," Justice Giles observed, "because by their agreement the parties committed both fact and law to the decision of the arbitrator." *Qantas Airways Ltd v. Dillingham Corporation*, (1985) 4 NSWLR 113. The application for a stay was granted.

Enforcement of Awards

ARBITRAL AWARD AGAINST KHASHOGGI IS CONFIRMED UNDER N.Y. CONVENTION

The U.S. District Court for the Southern District of New York has confirmed a $4.5 million award against Saudi Arabian businessman Adnan Khashoggi issued in London in 1989 by an ICC International Court of Arbitration panel. Senior District Judge Milton Pollack found Khashoggi's objections to enforcement of the award "diversionary and frivolous". *National Development Co. v. Khashoggi*, USDC SDNY, 89 Civ. 2547 (MP), January 23, 1992.

The dispute stemmed from the dissolution of Triad Asia Ltd., a joint venture formed by National Development Co., a state-owned Philippines concern, and Triad Holding Corp., owned by Khashoggi. When Triad Asia dissolved, Triad Holding kept all the assets, rather than transferring to NDC its half share.

Khashoggi did not participate in the arbitration in London, even though the court in New York had entered a default judgment two years earlier directing him to arbitrate in accordance with the parties' agreement. On April 12, 1989, the ICC tribunal issued its award finding Triad Holding and Khashoggi jointly liable to NDC for $4,441,180.47. Khashoggi then sought unsuccessfully to vacate the 1987 default judgment on grounds of invalid service of process. *National Development Co. v. Triad Holding Corp.*, 930 F2d 253, 2 WAMR 130 (CA 2, 1991).

According to Judge Pollack, "[n]one of the grounds specified in the [New York] Convention for refusal of recognition of the Award has been established by Khashoggi, whose objections to notice, to his inability to attend the arbitration proceeding, and to the authority of the Arbitral Tribunal to resolve the issues in dispute are diversionary and frivolous."

Judge Pollack said that the issue of notice had already been settled in the Second Circuit's opinion affirming the denial of Khashoggi's motion to vacate the default judgment (930 F2d at 255). Moreover, "Khashoggi's decision not to attend the arbitration proceeding in England because he was afraid of being taken into custody for extradition to face criminal charges in the United States does not constitute an *inability* to attend the proceedings," Judge Pollack observed.

Khashoggi argued that he could not be compelled to submit to arbitration because he was not the alter ego of Triad Holding, the signatory to the arbitration agreement. Judge Pollack said this argument should have been raised earlier, in response to National Development's action to compel arbitration. In addition to confirming the award, Judge Pollack awarded NDC post-award, pre-judgment interest "at the rate set forth in 28 USC §1961(a) for money judgments." This rate is tied to the rate on U.S. Treasury bills.

Frederick E. Sherman (Jones, Day, Reavis & Pogue), New York, represented National Development Company; Steven M. Bierman (Sidley & Austin), New York, represented Adnan M. Khashoggi.

WORLD ARBITRATION AND MEDIATION REPORT
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appears at all possible that the plaintiff can correct the defect"). Thus, in vacating a dismissal with prejudice for, *inter alia*, failure to state a claim and lack of subject matter jurisdiction, we have noted that "[w]hen a motion to dismiss is granted, 'the usual practice is to grant leave to amend the complaint.' ... Although the decision whether to grant leave to amend is within the discretion of the district court, refusal to grant leave must be based on a valid ground." *Ronzani v. Sanofi S.A.*, 899 F.2d 195, 198 (2d Cir.1990) (quoting 2A *Moore's Federal Practice* ¶ 12.14, at 12-99 (2d ed.1989)). Where the possibility exists that the defect can be cured and there is no prejudice to the defendant, leave to amend at least once should normally be granted as a matter of course.

[6] We are unpersuaded by defendants' contentions (1) that Oliver never asked for leave to amend the complaint, and (2) that an amendment would be futile because of their defense of qualified immunity. Though prior to the dismissal Oliver did not precisely articulate a desire to file an amended complaint, its desire to do so was easily inferable from counsel's statement to the court, in the context of the Eleventh Amendment discussion, that the "nomenclature" problem "could be taken care of." Further, Oliver's desire to amend was hardly a surprise to the defendants, who from the outset indicated their opposition to any grant of leave to amend. Finally, in its motion for reconsideration, Oliver expressly requested leave to amend its complaint in this respect. Since Oliver's desire to pursue a claim against the individual defendants in their personal capacities was clear, the court should have granted leave to amend even without an explicit motion.

[7] As to the qualified immunity hurdle, it may be that, as defendants contend, Oliver will ultimately be unable to prevail because of that defense. That possibility is not a valid basis for denying leave to amend the complaint, however, for such immunity is an affirmative defense that the defendants have the burden of raising in their answer and establishing at trial or on a motion for summary judgment. *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S.Ct. 1920, 1923, 64 L.Ed.2d 572 (1980).

CONCLUSION

For the foregoing reasons, we affirm so much of the judgment as dismisses the complaint against HESC; we vacate so much of the judgment as dismisses the complaint against the individual defendants and direct that a new judgment be entered stating that the latter dismissal is without prejudice to the filing of an amended complaint, within such reasonable period as the district court shall allow, asserting claims against the individual defendants in their personal capacities.

NATIONAL DEVELOPMENT COMPANY, Plaintiff-Appellee,

v.

TRIAD HOLDING CORPORATION; Adnan Khashoggi; Triad Financial Establishment; Triad America Corporation; Triad International Marketing; Akorp, N.V.; Ekorp, N.V.; A.K. Holdings, S.A.; A.K. Holdings Ltd.; Triad Foundation; Triad Condas; Edgington Oil Company; Handlingair Ltd.; Uni-Triad Enterprises; John Doe Khashoggi Entities 1-50, Defendants,

Adnan Khashoggi, Defendant-Appellant.

No. 1163, Docket 90-7906.

United States Court of Appeals,
Second Circuit.

Argued March 5, 1991.

Decided April 15, 1991.

Joint venturer filed initial petition to compel arbitration of dispute arising from dissolution of joint venture, and supplemental petition to confirm arbitration award. Subsequent to entry of default judgments

against individual who controlled other joint venturer, the United States District Court for the Southern District of New York, Milton Pollack, J., 131 F.R.D. 408, denied individual's motion to vacate default judgment entered on initial petition, but granted motion to vacate default judgment entered on supplemental petition. Individual appealed. The Court of Appeals, McLaughlin, Circuit Judge, held that New York apartment of individual, who was Saudi Arabian citizen, was "dwelling house or usual place of abode," within meaning of rule permitting service by leaving copies of summons and complaint at individual's "dwelling house or usual place of abode."

Affirmed.

1. Federal Civil Procedure ⇐420

Person can have two or more "dwelling houses or usual places of abode" for purpose of rule permitting service by leaving copies of summons and complaint at person's "dwelling house or usual place of abode." Fed.Rules Civ.Proc.Rule 4(d)(1), 28 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

2. Federal Civil Procedure ⇐420

Saudi Arabian citizen's New York apartment constituted his "dwelling house or usual place of abode," and therefore service was properly effected by leaving copy of summons and complaint at apartment, even though he stayed at apartment for only 34 days during year, where he was actually living in apartment on date of service, had spent considerable amount of money remodeling apartment to fit his lifestyle, and listed apartment as one of his residences in bail application. Fed.Rules Civ.Proc.Rule 4(d)(1), 28 U.S.C.A.

Steven M. Bierman, New York City (Mark N. Parry, Sidley & Austin, New York City, of counsel), for defendant-appellant.

Fredrick E. Sherman, New York City (Thomas L. Abrams, Jones, Day, Reavis & Pogue, New York City, of counsel), for plaintiff-appellee.

Before KEARSE, PRATT and McLAUGHLIN, Circuit Judges.

McLAUGHLIN, Circuit Judge:

For more than a half-century, the Federal Rules of Civil Procedure have permitted service upon an individual by leaving a summons and complaint "at the individual's dwelling house or usual place of abode." For a half-century before that, Equity Rule 13 had the same provision. With approximately 1.16 billion passengers annually engaging in international airline travel, *see* Washington Times, Jan. 1, 1991, at C1 col. 1, and an estimated five million people with second homes in the United States, *see* Stern, *Steal This House*, Forbes, Oct. 1, 1990, at 81, determining a person's "dwelling house or usual place of abode" is no longer as easy as in those early days of yesteryear.

We ponder this problem upon review of an order of the United States District Court for the Southern District of New York (Milton Pollack, *District Judge,*) refusing, under Fed.R.Civ.P. 60(b)(4), to vacate a default judgment entered against defendant-appellant Adnan Khashoggi ("Khashoggi"). In essence, Khashoggi argues that, although he has numerous residences world-wide, his "dwelling house or usual place of abode" is in Saudi Arabia and, absent personal delivery, service of process pursuant to Rule 4(d)(1) is proper only at his compound there. Therefore, he concludes that a purported service at his apartment at the Olympic Tower in New York was void and conferred no jurisdiction. We disagree and affirm the order of the district court.

BACKGROUND

Plaintiff-appellee National Development Company ("NDC") is a corporation wholly-owned by the Republic of the Philippines. The dispute between NDC and Khashoggi arose from the dissolution of Triad Asia, Ltd. ("Triad Asia"), a joint venture formed by NDC and Triad Holding Corporation

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("Triad Holding"), a company controlled by Khashoggi. NDC claims that Khashoggi converted approximately $3.5 million of Triad Asia's assets that should have been distributed to NDC when the joint venture was dissolved.

On August 25, 1986, pursuant to an arbitration clause in a Memorandum of Agreement between NDC and Triad Holding, NDC delivered a Request for Arbitration to the International Chamber of Commerce ("ICC") and sent a copy of the request, along with a Notice of Commencement of Arbitration, by registered or certified mail to each of the defendants, including Khashoggi. The Memorandum of Agreement provided that "any dispute or difference between the parties" concerning the joint venture be "finally settled under the Rules of Conciliation and Arbitration of the [ICC]." Return mail receipts were received from each of the defendants including Khashoggi. The ICC subsequently sent copies of the Request for Arbitration to the defendants on two occasions and received return mail receipts from each defendant, including Khashoggi, for both mailings. Neither Khashoggi nor any of the other defendants responded. NDC then commenced this action seeking to compel Khashoggi to arbitrate.

It is the service of the summons and complaint on Khashoggi on December 22, 1986 that forms the basis of this appeal. On that day, NDC handed a copy of the summons and complaint to Aurora DaSilva, a housekeeper at Khashoggi's Olympic Tower condominium apartment on Fifth Avenue. Service on Triad Holding, which was not disputed, was effected pursuant to letters rogatory by Swiss judicial authorities. On September 23, 1987, after Khashoggi failed to appear in the district court action, a default judgment was entered compelling him to arbitrate NDC's claim.

The ICC arbitration was commenced and a hearing was held on February 16, 1989 without an appearance from any of the defendants. Robert G. Morvillo, Khashoggi's criminal counsel in an unrelated matter, *United States v. Marcos*, 87 Crim. 598 (JFK), however, sent a letter dated February 22, 1989 to the Chairman of the ICC tribunal, informing him that "[b]ecause of [the pending criminal matter], we think it would be inadvisable for Mr. Khashoggi to appear in [the arbitration]."

On April 12, 1989, the ICC tribunal issued a final award finding that Triad Holding was Khashoggi's alter ego and finding Triad Holding and Khashoggi jointly and severally liable to NDC in an amount over $3.4 million plus costs, interest and attorneys' fees.

NDC thereupon returned to the district court and received leave to file a "supplemental complaint" to confirm the award pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201 *et seq.* NDC served the supplemental complaint upon Khashoggi by mailing a copy to him at his Olympic Tower apartment and a copy to Mr. Morvillo. On August 4, 1989, after Khashoggi again failed to appear, a default judgment was entered confirming the arbitration award. NDC then took steps to enforce the judgment, including serving Khashoggi personally in August 1989 with post-judgment discovery requests.

On October 25, 1989, Khashoggi filed a motion pursuant to Fed.R.Civ.P. 60(b)(4) to vacate both the 1987 default judgment compelling him to arbitrate and the 1989 default judgment confirming the ICC arbitration award. Khashoggi complains that both default judgments are void for lack of personal jurisdiction inasmuch as the summons, complaint and supplemental complaint were improperly served upon him. Taking a belt and suspenders approach, NDC immediately commenced a second action in the district court to confirm the award.

The district court held an evidentiary hearing on the service of process issue, at which Khashoggi and his housekeeper, Ms. DaSilva, testified. Ms. DaSilva confirmed that Khashoggi was in New York and staying at his Olympic Tower apartment from December 15 through December 23, 1986. The parties stipulated that Ms. DaSilva accepted delivery of a copy of the summons and complaint on December 22, 1986. Ms.

DaSilva testified that during 1986, Khashoggi stayed at his Olympic Tower apartment for a total of 34 days.

To call it an apartment is perhaps to denigrate it. Valued at approximately $20–25 million, containing more than 23,000 square feet on at least two floors, the Olympic Tower apartment contains a swimming pool, a sauna, an office and four separate furnished "apartments" to accommodate guests and Khashoggi's brother. The complex requires the attention of two full-time and three part-time staff persons.

Khashoggi testified that he is a citizen of Saudi Arabia and resides in a ten-acre, six-villa compound in its capital city, Riyadh. In 1986, Khashoggi stayed in the Riyadh compound for only three months. During the remaining nine months, Khashoggi travelled throughout the world, staying another two months at a "home" in Marabella, Spain. Khashoggi testified that he purchased the Olympic Tower apartment in 1974. Shortly thereafter, Khashoggi transferred ownership to Akorp, N.V., a company that is wholly owned by A.K. Holdings, Ltd., which, in turn, is wholly owned by Khashoggi. Before Khashoggi transferred ownership of the Olympic Tower apartment to Akorp, he personally hired contractors to complete a remodeling project costing over $1 million. The results of the remodeling project were prominently featured in the June 1984 issue of *House and Garden*.

With regard to the NDC lawsuit, Khashoggi testified that he first learned of it in 1989, when NDC personally served him with its post-judgment discovery requests.[1] Khashoggi was in New York at that time, following extradition from Switzerland, to face unrelated criminal charges, for which Mr. Morvillo was his counsel. Khashoggi claimed, however, that Mr. Morvillo was never retained to represent him in the civil suit brought by NDC.

In an opinion dated June 11, 1990, the district court denied Khashoggi's motion to vacate the default judgment entered on the original complaint (to compel arbitration), but granted his motion to vacate the default judgment entered on the supplemental complaint (to confirm the arbitration award). *See National Development Co. v. Triad Holding Corp.*, 131 F.R.D. 408 (S.D. N.Y.1990). With regard to the motion to vacate the original complaint, the only order that is before us, the district court found that the Olympic Tower apartment was not a "dwelling house or usual place of abode" for purposes of either Fed.R.Civ.P. 4(d)(1) or N.Y.C.P.L.R. § 308(2), but that service was nevertheless proper because Khashoggi had actual notice. We reject the notion that "actual notice" suffices to cure a void service, but we affirm the district court because we conclude that the Olympic Tower apartment is properly characterized under Rule 4(d)(1) as Khashoggi's "dwelling house or usual place of abode," and service at that location was therefore valid.

DISCUSSION

Rule 4(d)(1) permits service

> [u]pon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein ...

Fed.R.Civ.P. 4(d)(1).

There is no dispute that Ms. DaSilva, with whom the papers were left, is a "person of suitable age and discretion then residing" at the Olympic Tower apartment. We are called upon only to determine whether the Olympic Tower apartment was Khashoggi's "dwelling house or usual place of abode", terms that thus far have eluded "any hard and fast definition." 2 J. Moore, Moore's Federal Practice ¶ 4.11[2] at 4–128 (2d ed. 1990). Indeed, these quaint terms are now archaic and survive only in religious hymns, romantic sonnets and, unhappily, in jurisdictional statutes.

1. The Morvillo letter of February 22, 1989 casts a pall over Khashoggi's lament that he never heard of the NDC arbitration until August 1989.

The phrase "dwelling house or usual place of abode" to describe where service can be made has its origin in Equity Rule 13. Yet, "[d]espite the length of time the language ... has been a part of federal practice, the decisions do not make clear precisely what it means." 4A C. Wright & A. Miller, Federal Practice and Procedure § 1096, at 73 (2d ed. 1987). We do not here intend to reconcile decades of conflicting authority. Instead, we decide this case on the facts presented with a recognition of the realities of life in this the winter of the twentieth century.

As leading commentators observe, "[i]n a highly mobile and affluent society, it is unrealistic to interpret Rule 4(d)(1) so that the person to be served has only one dwelling house or usual place of abode at which process may be left." *Id.* at 79–80 (footnote omitted). This case presents a perfect example of how ineffectual so wooden a rule would be.

Khashoggi is a wealthy man and a frequent intercontinental traveller. Although he is a citizen of Saudi Arabia and considers the Riyadh compound his domicile, he spent only three months there in 1986. Khashoggi testified that the Olympic Tower apartment was only one of twelve locations around the world where he spends his time, including a "home" which he owns in Marabella, Spain, and "houses" in Rome, Paris and Monte Carlo. The conclusion that only *one* of these locations is Khashoggi's "usual place of abode", since he does not "usually" stay at any one of them, commends itself to neither common sense nor sound policy.

[1] There is nothing startling in the conclusion that a person can have two or more "dwelling houses or usual places of abode," provided each contains sufficient indicia of permanence. State courts construing state statutes containing similar language have arrived at this result where the defendant maintained one residence for certain days of the week or certain months of the year and another residence for the balance of his time. *See, e.g., Mangold v. Neuman*, 87 A.D.2d 780, 449 N.Y.S.2d 232 (1st Dep't), *aff'd*, 57 N.Y.2d 627, 454 N.Y.S.2d 58, 439 N.E.2d 867 (1982) (a defendant with a house in Wayne, Pennsylvania, an apartment in Philadelphia, a house in Palm Beach and an apartment in a New York City hotel had a "dwelling place," but not a "residence" in New York); *Clegg v. Bishop*, 105 Conn. 564, 136 A. 102 (1927); *Dorus v. Lyon*, 92 Conn. 55, 101 A. 490 (1917). Some courts have expressly required that the defendant sought to be served be actually living at the residence at the time service is effected. *See, e.g., State ex rel. Merritt v. Heffernan*, 142 Fla. 496, 195 So. 145 (1940); *Feigman v. Sobers*, 84 N.J.L. 575, 87 A. 636 (Super.Ct.1913), *aff'd*, 86 N.J.L. 356, 91 A. 1068 (1914); *Camden Safe–Deposit & Trust Co. v. Barbour*, 66 N.J.L. 103, 48 A. 1008 (Super.Ct.1901); *Mygatt v. Coe*, 63 N.J.L. 510, 44 A. 198 (Super.Ct.1899); *Stout v. Leonard*, 37 N.J.L. 492 (1874); *Grant v. Lawrence*, 37 Utah 450, 108 P. 931 (1910); *see also* J. Moore, Moore's Federal Practice ¶ 4.11[2], at 132 ("Where a party has several residences which he permanently maintains, occupying one at one period of the year and another at another period, service is valid when made at the dwelling house in which the party is then living.") (footnote omitted).

Although federal practice under Rule 4(d)(1) has not produced consistent results, *compare Capitol Life Ins. Co. v. Rosen*, 69 F.R.D. 83 (E.D.Pa.1975) (service at defendant's brother's house sufficient where defendant frequently journeyed but kept a room and personal belongings at brother's house and paid rent therefor) *and Blackhawk Heating & Plumbing Co. v. Turner*, 50 F.R.D. 144 (D.Ariz.1970) (service at house in Arizona deemed proper where evidence suggested that defendant was living at the time in California but received actual notice) *with First Nat'l Bank & Trust Co. v. Ingerton*, 207 F.2d 793 (10th Cir.1953) (usual place of abode was hotel in New Mexico notwithstanding defendant's temporary stay in Denver) *and Shore v. Cornell–Dubilier Elec. Corp.*, 33 F.R.D. 5 (D.Mass. 1963) (service on defendant who divided his time between residences in New York and New Jersey improper where made at a house he owned in Massachusetts that was used by him only when conducting business

there), we believe that application of the rule to uphold service is appropriate under these facts.

[2] It cannot seriously be disputed that the Olympic Tower apartment has sufficient indicia of permanence. Khashoggi owned and furnished the apartment and spent a considerable amount of money remodelling it to fit his lifestyle. Indeed, in July 1989, Khashoggi listed the Olympic Tower apartment as one of his residences in a bail application submitted in connection with the criminal proceedings. Since Khashoggi was actually living in the Olympic Tower apartment on December 22, 1986, service there on that day was, if not the most likely method of ensuring that he received the summons and complaint, reasonably calculated to provide actual notice of the action. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). Surely, with so itinerant a defendant as Khashoggi, plaintiff should not be expected to do more.

We conclude, therefore, that service of process on Khashoggi should be sustained under Rule 4(d)(1) because the Olympic Tower apartment was a "dwelling house or usual place of abode" in which he was actually living at the time service was effected. We express no opinion upon the validity of service had Khashoggi not been actually living at the Olympic Tower apartment when service was effected.

CONCLUSION

Since service was properly effected on Khashoggi, his motion pursuant to Rule 60(b)(4) to vacate the default judgment entered on the original complaint for want of personal jurisdiction was properly denied. Accordingly, we affirm.

The INTEGRAL INSURANCE COMPANY, Plaintiff–Appellant,

v.

LAWRENCE FULBRIGHT TRUCKING, INC.; Charles S. Klutz; A.L.C. Transportation, Inc.; Valley Transportation of Vale, Inc.; Kathleen McGoldrick; Patricia McGoldrick, Defendants–Appellees.

No. 1142, Docket 90–9022.

United States Court of Appeals, Second Circuit.

Argued March 6, 1991.

Decided April 15, 1991.

Insurer brought declaratory judgment action seeking determination that it was not obligated to indemnify its insured pursuant to federally mandated endorsement included in trucker's policy for insured's liability for accident in which insured trailer was involved. The United States District Court for the Southern District of New York, Lawrence M. McKenna, J., entered summary judgment in favor of accident victim, declaring that insurer was obligated to indemnify. Appeal was taken. The Court of Appeals, McLaughlin, Circuit Judge, held that federally mandated endorsement, under which insured was required to pay any judgment recovered against insured for liability resulting from negligence in "operation, maintenance, or use" of motor vehicle, required insurer to indemnify even where its insured was not actively negligent.

Affirmed.

1. **Insurance** ⇐435.27

Plain meaning of federally mandated endorsement to trucker's policy, requiring insurer to pay any filed judgment recovered against insured for public liability resulting from negligence in operation, maintenance or use of motor vehicle, does not require insured's own active negligence.