SUPREME COURT OF CALIFORNIA
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Supreme Court of California
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No. S________

IN THE SUPREME COURT
FOR THE STATE OF CALIFORNIA

ROCKEFELLER TECHNOLOGY INVESTMENTS (ASIA) VII,
Plaintiff and Respondent

v.

CHANGZHOU SINOTYPE TECHNOLOGY CO., LTD.,
Defendant and Appellant

PETITION FOR REVIEW

After a Published Opinion
of the Second District Court of Appeal Division Three
Case No. B272170

Superior Court of California
County of Los Angeles
Hon. Randolph M. Hammock
Case No. BS149995

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TABLE OF CONTENTS

SUMMARY OF REASONS WHY REVIEW SHOULD BE GRANTED... 1

QUESTIONS PRESENTED 10

STATEMENT OF FACTS..11

SINOTYPE SHOULD BE BOUND BY ITS CONTRACTUAL WAIVER OF HAGUE CONVENTION'S SERVICE REQUIREMENTS.............14

THE HAGUE CONVENTION DOES NOT PROHIBIT CONTRACTUAL WAIVERS OF ITS REQUIREMENTS...................16

CHINESE LAW DOES NOT PROHIBIT CONTRACTUAL WAIVERS OF HAGUE CONVENTION'S REQUIREMENTS.............................20

CERTIFICATE OF COMPLIANCE WITH WORD COUNT 24

PROOF OF SERVICE 25

TABLE OF AUTHORITIES

Cases

Alfred E. Mann Living Trust v. ETIRC Avaiaiton S.a.r.l.
(2010) 78 A.D.3d 137 ....15, 16

Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical (2018) 138 S.Ct. 1865.....................................22

Brisbane Lodging, L.P. v. Webcor Builders, Inc.
(2013) 216 Cal.App.4th 1249..19

Carma Developers Inc. v. Marathon Development California
(1992) 2 Cal.4th 484..4

D.H. Overmyer Co., Inc., of Ohio v. Frick Co.
(1972) 405 US 174..18

FTC v. PCCare247, Inc., 2013 WL 841037
(S.D.N.Y. March 7, 2013) 7

Moncharsh v. Heily & Blase (1992) 3 Cal.4th 1 4

Rio Properties, Inc v. Rio In't Interlink,
284 F.3d 1007, 1017 (9th Cir, 2002) 7

Statutes

Code Civ. Proc., § 1280...4

Fed. R. Civ. P. 4(d)(3) 4

Fed. R. Civ. P. 12(a)(1)(A) 4

People's Republic of China, Civil Law Article 145...................6, 20

People's Republic of China, Civil Procedure Law
Articles 262-263...21

Principles on Choice of Law in International Commercial Contracts (approved by the Hague Conference on March 19, 2015) 6, 18

TO THE HONORABLE TANI GORRE CANTIL-SAKAUYE,

CHIEF JUSTICE OF CALIFORNIA,

AND THE HONORABLE ASSOCIATE JUSTICES OF

THE CALIFORNIA SUPREME COURT:

Plaintiff and respondent Rockefeller Technology Investments (Asia) VII ("Rockefeller Asia") hereby petitions for review of the published decision of the California Court of Appeal, Second Appellate District, Division Three, and prays that, upon review, the decision be reversed.

SUMMARY OF REASONS WHY REVIEW SHOULD BE GRANTED

On June 1, 2018, the Court of Appeal issued a decision that undermined the legal effectiveness of every arbitration agreement that California companies have entered into with Chinese parties. The decision struck down four standard features of an arbitration agreement with a foreign party -- to arbitrate any disputes in California (for example, with JAMS), to submit to the jurisdiction of California courts, to waive service of process under the Hague Convention, and to accept notice of any U.S. proceedings by mail, FedEx, or email.

The Court of Appeal held that private parties cannot contractually waive the Hague Convention's service requirements or agree to specific forms of service of process not expressly authorized by the Hague Convention. The Court of Appeal voided Rockefeller Asia's judgment against defendant and appellant Changzhou Sinotype Technology Co., Ltd. ("Sinotype") because Rockefeller Asia's petition to confirm arbitration award was served by FedEx and email pursuant to a contractual waiver of Hague Convention requirements. The decision's practical effect makes it nearly impossible for California companies to engage in arbitrations with Chinese parties with the expectation of being able to enforce an arbitration award.

Parties wishing to initiate an arbitration must spend serious time and money to serve process through China's law enforcement agencies. Service under the Hague Convention is lengthy and expensive. The Hague Convention sets no time limits for completing service after the appropriate papers have been submitted to foreign authorities. See Frederick S. Longer, Service of Process in China, ABA Section of Litigation 2012 Section Annual Conference, ABA Chinese Drywall Panel, at 2 (April 18-20, 2012) (with reference to service of process in China: "The papers to be served must first be presented to the Chinese Central Authority, which then is supposed

to transmit the documents to local authorities for service upon the individual defendant. ***This takes time. Lots of it.***" Emphasis added.)

Under the Court of Appeal's decision, parties who already have an arbitration award or a judgment can now find their award or judgment voided at any time on grounds of improper service of process. If the four-year statute of limitations for confirming arbitration awards has passed, parties with voided judgments would not be able to file another petition to confirm arbitration award because it would be time-barred. Even judgments entered decades ago are vulnerable to attack, since the Court of Appeal held that judgments can be attacked at "any time" on the ground that the contractual "Hague waiver" violates the Hague Convention. Thousands of arbitration judgments could be brought back from the dead, with huge economic consequences, especially for the intellectual property rights of California companies.

The impact of the decision below is far-reaching. The rules of many California organizations that conduct international arbitrations with foreign parties contain contractual Hague waivers. See Independent Film and Television Alliance, Rules for International Arbitration, Rule 2.1, "The parties waive application of the Hague Convention for Service Abroad of Judicial and

Extrajudicial Documents in Civil or Commercial Matters with regard to service of process." Over the years many foreign defendants have opted to contractually waive the Hague Convention requirements because the Federal Rules of Civil Procedure provide foreign defendants with 90 days to file an answer to a complaint, instead of the standard 21 days, if they waive service. Fed. R. Civ. P. 4(d)(3); see also Fed. R. Civ. P. 12(a)(1)(A).

The Court of Appeal's decision therefore upends decades of contractual obligations and expectations and could potentially unravel thousands of arbitration awards and judgments. To allow foreign parties to enter into a contract, and then proceed to unilaterally disregard the contract's service of process and consent to jurisdiction provisions, would allow foreign parties to simply return to their country in order to avoid contractual obligations. This would result in anarchy and turn international arbitration law on its head.

The Court of Appeal's decision shatters two pillars of California law – i.e., private parties' fundamental freedom to contract (*Carma Developers Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 48) and the State's longstanding public policy supporting the use of private arbitration to resolve disputes (Code Civ. Proc., § 1280 et seq.; *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9; *Jones v. Humanscale Corp.* (2005) 130

Cal.App.4th 401, 407) – in deference to an international treaty (Hague Convention) that's been plagued by conflicting interpretations and uncertainties.

Only a year ago did the U.S. Supreme Court resolve a split among federal and state courts as to whether the Hague Convention actually permits the service of process via "postal channels." Courts in different states still cannot agree on whether FedEx and other private couriers fall within "postal channels." And it remains unclear whether email technology – which did not exist when the Hague Convention was first adopted in 1965 - is prohibited.

Given the risks of noncompliance, commercial parties like Rockefeller Asia and Sinotype therefore have attempted to deal with the Hague Convention's legal uncertainties *ex ante* through contract before any dispute arises. It simply makes no sense for California courts to upend the contracting parties' agreements and expectations when the courts cannot agree on what the Hague Convention actually requires.

In fact, the Hague Conference in 2015, adopted the "Principles on Choice of Law in International Commercial Contracts," which recognized the concept of "party autonomy" to determine the choice of law. According to the Hague Conference, "Party autonomy, which refers to the power of parties to a contract to choose the law that

governs that contract, enhances certainty and predictability within the parties' primary contractual arrangement and recognizes that parties to a contract may be in the best position to determine which set of legal principles is most suitable for their transaction. Many States have reached this conclusion and, as a result, giving effect to party autonomy is the predominant view today." Principles on Choice of Law in International Commercial Contracts, approved by the Hague Conference on March 19, 2015), I.3.

Applying these Hague Principles to this case, the Court of Appeal erred in disregarding Rockefeller Asia and Sinotype's choice of California law in their contract. Even though Sinotype agreed to submit to the jurisdiction of California courts, the Court of Appeal applied Chinese law to quash Rockefeller Asia's service of summons in direct contravention of three judges (the late Justice Richard Neal, Judge Mel Recana, and Judge Randolph Hammock) who expressly found Rockefeller Asia properly served Sinotype pursuant to their contract.

The Court of Appeal's reliance on China's Civil Procedure Article 261 to claim that Chinese law bars Hague waivers is misplaced because Chinese law does not apply in this case. As shown below, the Court of Appeal's decision is also based on a blatantly false misreading of China's Civil Procedure Article 261, as

perpetrated by Sinotype's American lawyers. In fact, as discussed further below, Chinese law (Civil Law Article 145) expressly allows Chinese citizens to agree to have their contractual obligations determined by a non-Chinese law of their choice.

Moreover, rulings in the federal courts have shown that the Hague Convention's service requirements are not sacrosanct. Federal district courts have been ordering forms of service of process not enumerated in the Hague Convention with increasing frequency, including email service. (See e.g., *FTC v. PCCare247, Inc.,* 2013 WL 841037 (S.D.N.Y. March 7, 2013) (court ordered defendants in India served by email); the court stated that "[a]s the Ninth Circuit has stated that the due process reasonableness inquiry 'unshackles the federal courts from anachronistic methods of service and permits them entry into the technological renaissance[,]'" quoting *Rio Properties, Inc v. Rio In't Interlink*, 284 F.3d 1007, 1017 (9th Cir, 2002).)

If courts can order waivers of Hague Convention requirements, then private parties should be allowed to contractually waive Hague Convention requirements on their own.

Instead of making it easier for Californians to do business with Chinese parties, the Court of Appeal decision encourages Chinese parties to engage in strategic behavior designed to undermine

contracts in California and the jurisdiction of California courts. This is exactly what happened in this case. Even though Sinotype and its CEO Curt Huang had actual notice of the arbitration and state court proceedings (JAMs alone served Mr. Huang with 7 separate notices), it hid in silence for seven years before showing up in American courts to attack Rockefeller Asia's hard-won judgment. Even though Sinotype and Mr. Huang had substantial contacts with California, agreed to submit to the jurisdiction of California courts, agreed to specific forms of service of process that Rockefeller Asia carefully complied with, the Court of Appeal still decided that it could not impose jurisdiction over Sinotype.

As Judge Hammock said in his trial court opinion, Sinotype's CEO Curt Huang is "no country bumpkin." He has an advanced degree from U.C. Berkeley and is Chairman, CEO, and General Manager of Sinotype China. Sinotype China is a 70% owned subsidiary of its parent, Sinotype Technology International ("Sinotype USA"), a California corporation with headquarters in San Francisco, California. For over 20 years, Mr. Huang has reported to the California Secretary of State that he is CEO of Sinotype USA, is a resident of California, and is the agent for service of process of Sinotype USA. According to Mr. Huang's published 2014 statement: "Adobe, Google, Microsoft, Apple, IBM, and now Amazon (in their

Kindle Products) are using Sinotype Fonts. Microsoft bundles ten Sinotype fonts with Microsoft Office and ST Heidi, our most popular font, is used in over 70% of set-top boxes. That is about 180 million devices." Making Type, September 18, 2014. Moreover, Sinotype China was in a joint venture with Adobe and Google in California to develop the famous CJK world-wide font. During his two decades in California, Mr. Huang negotiated and executed many agreements on behalf of Sinotype China and his other companies with their American counterparts.

Thus, Mr. Huang clearly understood what he and Sinotype were doing in hiding from U.S. arbitration and court proceedings for seven years – they bamboozled Rockefeller Asia. Having induced Rockefeller Asia to enter a contract by agreeing to waive Hague Convention requirements, Sinotype has turned around and argued that the same contract violates the Hague Convention. Sinotype's repeated failure to appear in spite of actual notice reflects a deliberate strategy to flaunt the authority of California courts, as reflected in Mr. Huang's statement to Rockefeller Asia's principals that Sinotype was "a Chinese company ... [and therefore was] immune to any legal remedies that the [plaintiff] might secure from U.S. courts and that [Sinotype] would ignore and not participate in any U.S. legal process."

Unfortunately, the Court of Appeal has endorsed Mr. Huang's strategy with its ruling, which if upheld, will drastically curtail the freedom of people in California to do business with people from around the world, which is critically important to the state economy. (See U.S. News, "These 5 States Trade the Most With China," March 23, 2018 ("the State of California does more business with China than any other state in America")). We anticipate that a number of amicus curiae letters will emphasize the extent to which these issues are important, on-going, and need to be resolved now.

The published opinion of the Court of Appeal was filed June 1, 2018. (Copy attached as Appendix A.)

QUESTION PRESENTED

1. Can private parties contract to waive the Hague Convention's service of process requirements?

2. Can private parties agree in a contract to be served with legal process by modern methods not expressly authorized in the Hague Convention, such as regular mail, FedEx, or email?

3. Does actual service of process that conforms to the waiver and written consent of the defendant constitute void service as a *per se* violation of due process?

STATEMENT OF FACTS

In 2008, Rockefeller Asia and Sinotype entered into a contract (the "2008 Agreement"). Because both Sinotype and its CEO Curt Huang had substantial contacts with California, Sinotype agreed to submit "to the jurisdiction of the Federal and State Courts in California" and to "the Judicial Arbitration & Mediation Service [JAMS] in Los Angeles for exclusive and final resolution" of all disputes with Rockefeller Asia. Both parties agreed to be served with process by three specific methods – FedEx, fax, and email.

Sinotype subsequently breached the 2008 Agreement. In 2012, Rockefeller Asia submitted its claims against Sinotype to binding arbitration at JAMS before the late Justice Richard Neal, who had served for ten years on the Court of Appeal for the State of California. JAMS and Rockefeller Asia both sent arbitration notices and documents directly to Sinotype in the exact manner specified in the 2008 Agreement (via FedEx, fax, and email); Rockefeller Asia also did the same. Even though Sinotype had both formal and actual notice of the arbitration, it did not appear or participate in any manner in the arbitration proceedings. After extensive hearing and briefing, Justice Neal issued a detailed written decision against Sinotype and entered an arbitration award for Rockefeller Asia. In the written decision, Justice Neal made extensive findings about how

Sinotype had been properly served with arbitration notices and documents by JAMS and Rockefeller Asia.

In 2014, Rockefeller Asia filed this action to confirm its arbitration award. Rockefeller Asia again served Sinotype with court notices and pleadings in the exact manner specified in the 2008 Agreement. Sinotype again failed and refused to appear. In October 2014, Los Angeles Superior Court Judge Mel Red Recana, after holding hearings and reviewing pleadings on the arbitration proceedings, service of process, and Sinotype's actual notice of arbitration and court proceedings, entered judgment confirming Rockefeller Asia's arbitration award. Rockefeller Asia served this judgment on Sinotype by the same agreed-upon methods.

Despite the fact that in late 2014 Sinotype had actual notice that a judgment had been entered against it for almost half-a-billion dollars, Sinotype continued to do nothing. However, once Rockefeller Asia began to attempt to execute on this judgment against some of Sinotype's considerable assets in the United States, Sinotype finally decided to specially appear in this case in January 2016 to attack the judgment.

Sinotype claimed that the service methods it had agreed to in the 2008 Agreement violated the Hague Convention. Judge Randolph Hammock rejected Sinotype's arguments. Judge

Hammock specifically found that Rockefeller Asia and Sinotype agreed to waive the Hague Convention requirements and to serve and accept process by FedEx and email and that Rockefeller Asia fully complied with these contractual service requirements.

Judge Hammock also found that Sinotype had actual notice of more than 7 years of arbitration and state court proceedings but simply decided not to show up until judgment enforcement began. He stated in his opinion that "Mr. Huang's claim that he 'ignored' all of the notices and documents he actually received by 'not opening' any of them until March 2015, is simply not believable. Mr. Huang is a highly-educated, sophisticated and successful businessman/CEO of a multi-national corporation which has considerable assets. Indeed, he has an advanced degree from U.C. Berkeley, and most interesting of all, he is the actual designated 'Agent for Service of Process' for the defendant's subsidiary corporation in California. Clearly, Mr. Huang understands the legal importance of documents which are mailed, via federal express, to your main corporate offices and which are also sent via email (which he has never denied also receiving). It simply stretches one's credulity to suggest otherwise."

Judge Hammock eventually denied Sinotype's motion to quash service of summons. Sinotype appealed from Judge Hammock's ruling.

SINOTYPE SHOULD BE BOUND BY ITS CONTRACTUAL WAIVER OF HAGUE CONVENTION'S SERVICE REQUIREMENTS

The Court of Appeal reversed Judge Hammock's ruling on the ground that, because Sinotype was not served with process in accordance with Hague Convention requirements, California courts did not have personal jurisdiction over Sinotype. 233 Cal.Rptr.3d 814, 827. The Court of Appeal erred in finding that Sinotype was not bound by its contractual Hague waiver.

The 2008 Agreement contained the following provisions:

> "6. The Parties shall provide notice in the English language to each other at the addresses set forth in the Agreement via Federal Express or similar courier, with copies via facsimile or email, and shall be deemed received 3 business days after deposit with the courier.
>
> "7. The Parties hereby submit to the jurisdiction of the Federal and State courts in California and consent to service of process in accord with the notice provisions above.
>
> "8. In the event of any disputes arising between the Parties to this Agreement, either Party may submit the dispute to the Judicial Arbitration & Mediation Service in Los Angeles for exclusive and final resolution pursuant to according to [sic] its streamlined procedures before a single arbitrator .... Disputes shall include failure of the Parties to come to Agreement as required by this Agreement in a timely fashion."

In Paragraph 6, the parties unambiguously waived the Hague Convention requirements – it requires service of process under the Agreement to be accomplished through FedEx, fax and email, which are not enumerated in the Hague Convention. In paragraph 7, Sinotype submitted to the jurisdiction of California courts.

These contract terms are similar to those approved by the appellate court in New York in *Alfred E. Mann Living Trust v. ETIRC Avaiaiton S.a.r.l.* (2010) 78 A.D.3d 137 (*Mann*), which is directly on-point (there is no case on-point in California). In *Mann*, the foreign defendant consented to jurisdiction in New York and agreed to be served with process by email, which the New York appellate court found was a waiver of Hague Convention requirements. The court held that precluding a waiver of service of process "would allow people to unilaterally negate their clear and unambiguous written waivers of service by the simple expedient of leaving the country." *Id.* At 141. Such a result would turn contract law on its head and make many commercial agreements with foreign parties impossible to enforce.

The reasoning in *Mann* should be applied in this case. Sinotype consented to personal jurisdiction and agreed to be served by FedEx, fax, and email, methods that Sinotype knew were not authorized by the Hague Convention. Sinotype should not be

allowed to now claim that it is not subject to the jurisdiction of California courts because it was not served by additional methods under the Hague Convention.

The inconsistency between *Mann* and the decision below furnishes an additional reason for review by this Court. California and New York courts should interpret contractual provisions on waiver of service of process in a uniform fashion. Companies that do business in both California and New York should not have to cope with different interpretations of the same contractual terms or waivers.

THE HAGUE CONVENTION DOES NOT PROHIBIT CONTRACTUAL WAIVERS OF ITS REQUIREMENTS

The Court of Appeal struck down the parties' contractual Hague waiver on the ground that the Hague Convention does not allow private parties to contract around its requirements. 233 Cal.Rptr.3d 825-826. This was error. The Court of Appeal failed to cite any relevant language from the Hague Convention. As the *Mann* court held, there is "no reason why the requirements of the [Hague] Convention may not be waived by contract." 78 A.D.3d 137, 141.

In fact, the Hague Conference in 2015, adopted the "Principles on Choice of Law in International Commercial Contracts." The

Principles clearly recognize that private parties have the "party autonomy" to negotiate and agree on terms for service of process and jurisdiction in order to avoid conflicting judicial interpretations of Hague Convention requirements and to provide clarity in business transactions. They state:

> I.1 When parties enter into a contract that has connections with more than one State, the question of which set of legal rules governs the transaction necessarily arises. The answer to this question is obviously important to a court or arbitral tribunal that must resolve a dispute between the parties but it is also important for the parties themselves, in planning the transaction and performing the contract, to know the set of rules that governs their obligations.
>
> I.2 Determination of the law applicable to a contract without taking into account the expressed will of the parties to the contract can lead to unhelpful uncertainty because of differences between solutions from State to State. For this reason, among others, the concept of "party autonomy" to determine the applicable law has developed and thrived.
>
> I.3 Party autonomy, which refers to the power of parties to a contract to choose the law that governs that contract, enhances certainty and predictability within the parties' primary contractual arrangement and recognises that parties to a contract may be in the best position to determine which set of legal principles is most suitable for their transaction. Many States have reached this conclusion and, as a result, giving effect to party autonomy is the predominant view today. However, this concept is not yet applied everywhere.

> I.4 The Hague Conference on Private International Law ("the Hague Conference") believes that the advantages of party autonomy are significant and encourages the spread of this concept to States that have not yet adopted it, or have done so with significant restrictions, as well as the continued development and refinement of the concept where it is already accepted.
>
> I.5 Accordingly, the Hague Conference has promulgated the Hague Principles on Choice of Law in International Commercial Contracts ("the Principles"). The Principles can be seen both as an illustration of how a comprehensive choice of law regime for giving effect to party autonomy may be constructed and as a guide to "best practices" in establishing and refining such a regime.

Here, Rockefeller Asia and Sinotype exercised "party autonomy" to choose California law to govern their contract ("The Parties hereby submit to the jurisdiction of the Federal and State courts in California.") In turn, California law makes clear that Sinotype is bound by its contractual waiver of Hague Convention requirements. See *D.H. Overmyer Co., Inc., of Ohio v. Frick Co.* (1972) 405 US 174, 185-186 ("The constitutional and statutory requirements re summons exist for defendant's protection and therefore are subject to waiver by defendant, provided the waiver is knowing and voluntary.") The courts should not upend the parties' contractual expectations by invalidating the Hague waiver. "[W]here the parties are on equal footing and where there was considerable sophisticated give and take over the terms of the contract, those

parties should be given the ability to enjoy the freedom of contract and to structure risk-shifting as they see fit without judicial intervention." *Brisbane Lodging, L.P. v. Webcor Builders, Inc.* (2013) 216 Cal.App.4th 1249, 1263.

Neither Sinotype nor the Court of Appeal cited a single case supporting the illogical proposition that a plaintiff must comply with the Hague Convention service requirements where there is an enforceable waiver of service. Nor did they cite a single case holding that parties to a contract are somehow prohibited from freely agreeing to waive service under the Hague Convention. Thus, there is simply no legal support for the Court of Appeal's holding that even though Sinotype waived Hague Convention requirements, Rockefeller Asia must nonetheless comply with these requirements. The Court of Appeal made a grievous error that not only affects Rockefeller Asia but also every other California company that entered a contract with a Hague waiver.

CHINESE LAW DOES NOT PROHIBIT CONTRACTUAL WAIVERS OF HAGUE CONVENTION'S REQUIREMENTS

In its opinion, the Court of Appeal held that Chinese law prohibits contractual Hague waivers.

To the contrary, like the Hague Conference's "Principles" on choice of law, Chinese law expressly allows "the parties to a contract involving foreign interests [to] choose the law applicable to the settlement of their contractual disputes." People's Republic of China, Civil Law Article 145.

China's Civil Law defines "the lawful civil rights … of citizens and legal persons …." Civil Law Article 1. Therefore, Civil Law Article 145 gives its citizens the "right" to choose California law to settle their contractual disputes and to submit to the jurisdiction of California courts. There is no logical or legal reason why Chinese companies cannot contractually agree to waive the Hague Convention's requirements.

Instead of relying on Civil Law Article 145, the Court of Appeal based its decision on Sinotype's claim that Article 261 of China's Civil Procedure Law prohibits Chinese companies from agreeing to service by FedEx, fax, or email without the Chinese government's consent.

Wrong. The Court of Appeal relies on Article 263, which it mis-numbers as Article 261. Articles 262 and 263 together state:

> Chapter XXIX Judicial Assistance
>
> Article 262 In accordance with the international treaties concluded or acceded to by the People's Republic of China or with the principle of reciprocity, the people's courts of China and foreign courts may make mutual requests for assistance in the service of legal documents, in investigation and collection of evidence or in other litigation actions.
>
> The people's court shall not render the assistance requested by a foreign court, if it impairs the sovereignty, security or social and public interest of the People's Republic of China.
>
> Article 263 The request for the providing of judicial assistance shall be effected through channels provided in the international treaties concluded or acceded to by the People's Republic of China; in the absence of such treaties, they shall be effected through diplomatic channels.
>
> A foreign embassy or consulate accredited to the People's Republic of China may serve documents on its citizens and make investigations and collect evidence among them, provided that the laws of the People's Republic of China are not violated and no compulsory measures are taken.
>
> ***Except for the conditions provided in the preceding paragraph, no foreign organization or individual may, without the consent of the competent authorities of the People's Republic of China, serve documents or make investigations and collect evidence within the territory of the People's Republic of China.***

The Court of Appeal quotes the bolded language, which is irrelevant for multiple reasons. 233 Cal.Rptr.3d 814, 826.

First, the Civil Procedure Law is inapposite because it deals with the "trial of civil cases" in China and is applied by the "[P]eople's courts" in China. Civil Procedure Law Articles 1 and 3. It has no application to contracts formed and proceedings conducted outside China.

Second, Articles 262 and 263 concern people who serve documents and conduct investigations inside China on behalf of foreign governments and assisted by the Chinese government. These Articles have nothing to do with private parties contracting outside China or the Hague Convention. (The undersigned reads Chinese and has cross-checked the English translation of China's Civil Procedure Law against the original Chinese text.)

Thus, the Court of Appeal has committed a serious error that requires reversal. This is why, in *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co.* (2018) 138 S.Ct. 1865, the U.S. Supreme Court held that courts are not bound by foreign governments' "official statements" on their own domestic laws and that American courts must look to expert testimony and other evidence to interpret foreign laws.

In that case, the U.S. Supreme Court reversed an appellate decision because the Court of Appeal in that case accorded conclusive effect to the Chinese government's statement on what its laws meant. What happened here is a lot worse - the Court of Appeal's opinion that private parties cannot agree to methods of service of process not authorized by the Hague Convention is based on a blatant mischaracterization of Chinese law perpetrated by Sinotype's American lawyers in their pleadings. Now that published opinion will, as explained above, widely disrupt California-Chinese commerce and must be corrected by this Court.

Respectfully submitted,

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/s/ CHIA HENG (GARY) HO

____

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X. CERTIFICATE OF COMPLIANCE WITH WORD COUNT

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I certify that the attached Petition for Review is proportionally spaced, has a Georgia 13-point typeface, and contains 4,620 words, excluding the face sheet, table of contents and table of authorities. I determined the word count by using the automatic Word Count feature of Microsoft Word 2013.

/s/ CHIA HENG (GARY) HO

____

CHIA HENG (GARY) HO
Attorneys for Plaintiff and Respondent
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(Asia) VII

EXHIBIT A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

COURT OF APPEAL - SECOND DIST.
FILED
JUN 01 2018
JOSEPH A. LANE Clerk
Deputy Clerk

ROCKEFELLER TECHNOLOGY INVESTMENTS (ASIA) VII, Plaintiff and Respondent, v. CHANGZHOU SINOTYPE TECHNOLOGY CO., LTD., Defendant and Appellant.	B272170 (Los Angeles County Super. Ct. No. BS149995)

APPEAL from an order of the Superior Court of Los Angeles County, Randolph Hammock, Judge. Reversed and remanded with directions.

Law Offices of Steve Qi and Associates, Steve Qi and May T. To; Law Offices of Steven L. Sugars and Steven L. Sugars for Defendant and Appellant.

Paul Hastings, Thomas P. O'Brien, Katherine F. Murray, and Nicole D. Lueddeke for Plaintiff and Respondent.

This appeal concerns an aborted international business deal between Changzhou SinoType Technology Company, Ltd. (SinoType), a Chinese company, and Rockefeller Technology Investments (Asia) VII (Rockefeller Asia), an American investment partnership. When the relationship between the two entities soured, Rockefeller Asia pursued contractual arbitration against SinoType in Los Angeles. SinoType did not appear or participate in the arbitration proceeding, and the arbitrator entered a default award in excess of $414 million against it. The award was confirmed and judgment entered, again at a proceeding in which SinoType did not participate.

Approximately 15 months later, SinoType moved to set aside the judgment on the grounds that it had never entered into a binding contract with Rockefeller Asia, had not agreed to contractual arbitration, and had not been served with the summons and petition to confirm the arbitration award in the manner required by the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638 (hereafter, Hague Service Convention or Convention). The trial court acknowledged that the service of the summons and petition had not complied with the Hague Service Convention, but concluded that the parties had privately agreed to accept service by mail. The court therefore denied the motion to set aside the judgment.

We reverse. As we discuss, the Hague Service Convention does not permit Chinese citizens to be served by mail, nor does it allow parties to set their own terms of service by contract. SinoType therefore was never validly served with process. As a result, "no personal jurisdiction by the court [was] obtained and

the resulting judgment [is] void as violating fundamental due process." (*County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1227.) The trial court therefore erred in denying the motion to set aside the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Parties and the MOU

SinoType is a Chinese company headquartered in Changzhou, China that develops and licenses Chinese fonts. Kejian (Curt) Huang (hereafter, Curt)[1], a citizen and resident of China, is SinoType's chairman and general manager.

Rockefeller Asia is an American investment partnership headquartered in New York. Faye Huang (hereafter, Faye) is Rockefeller Asia's president.

In 2007 and 2008, Curt and Faye met several times in Los Angeles to discuss forming a new company to market international fonts. On February 18, 2008, they signed a four-page Memorandum of Understanding (MOU), the legal significance of which is disputed. The MOU stated that the parties intended to form a new company, known as World Wide Type (WWT), which would be organized in California and have its principal offices in the Silicon Valley. SinoType would receive an 87.5 percent interest in WWT "and shall contribute 100% of its interests in the companies comprising Party A, i.e., Changzhou SinoType Technology." Rockefeller Asia would receive a 12.5 percent interest in WWT "and shall contribute 100% of its

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[1] Because two principals share a last name (although they are not related to one another), for clarity we refer to them by their first names.

interests in the companies comprising Party B, i.e., Rockefeller Technology Investments (Asia) VII."

The MOU provided that "[t]he parties shall proceed with all deliberate speed, within 90 days if possible, to draft and to all execute long form agreements carrying forth the agreements made in this Agreement, together with any and all documents in furtherance of the agreements." It also provided, however, that "[u]pon execution by the parties, this Agreement shall be in full force and effect and shall constitute the full understanding of the Parties that shall not be modified by any other agreements, oral or written."

The MOU contained several provisions governing potential disputes between the parties, as follows:

"6. The Parties shall provide notice in the English language to each other at the addresses set forth in the Agreement via Federal Express or similar courier, with copies via facsimile or email, and shall be deemed received 3 business days after deposit with the courier.

"7. The Parties hereby submit to the jurisdiction of the Federal and State courts in California and consent to service of process in accord with the notice provisions above.

"8. In the event of any disputes arising between the Parties to this Agreement, either Party may submit the dispute to the Judicial Arbitration & Mediation Service in Los Angeles for exclusive and final resolution pursuant to according to [*sic*] its streamlined procedures before a single arbitrator . . . . Disputes shall include failure of the Parties to come to Agreement as required by this Agreement in a timely fashion."

B. The 2013 Arbitration

The relationship between the parties soured, and in February 2012, Rockefeller Asia filed a demand for arbitration with the Judicial Arbitration & Mediation Service (JAMS) in Los Angeles.[2] SinoType did not appear at the arbitration, which proceeded in its absence.

The arbitrator issued a final award on November 6, 2013.[3] He found as follows:

Rockefeller Asia is a special-purpose entity organized to provide capital to support technology companies in Asia. Its partners include Rockefeller Fund Management Co., LLC.

In February 2008, SinoType and Rockefeller Asia entered into a MOU in which they agreed to form a new company (WWT). Each party was to contribute its entire interest in its business to WWT. In return, SinoType was to receive an 87.5 percent interest, and Rockefeller Asia was to receive a 12.5 percent interest, in WWT. In 2008, Rockefeller Asia was funded with stock worth $9.65 million.

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[2] Rockefeller Asia contends the demand for arbitration was properly served in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, codified as title 9 of the United States Code, sections 201 et seq. However, the propriety of the service of the arbitration demand is not before us, and thus we do not reach the issue.

[3] The award stated that because SinoType had not appeared, the case proceeded under Article 27 of the JAMS International Rules, which authorizes an arbitrator to proceed by default where one party has failed to appear.

In 2010, the parties sought additional investors to buy a 10 percent interest in WWT. The highest offer, obtained in May 2010, was for $60 million. After receiving this offer, SinoType insisted that Rockefeller Asia agree to a reduction of its interest. When Rockefeller Asia refused, SinoType unilaterally terminated the MOU.

Rockefeller Asia's damages expert opined that Rockefeller Asia's damages included three components: loss of its 12.5 percent interest in WWT; loss of its control premium, which the expert valued at 10 percent of WWT's total value; and loss of its anti-dilution rights, which the expert valued at 6.25 percent of WWT's total value. Thus, Rockefeller Asia's damages were equal to 28.75 percent (12.5% + 10% + 6.25% = 28.75%) of WWT's value. The expert opined that WWT's value at the time SinoType terminated the MOU was $600 million, and therefore Rockefeller Asia's damages at termination were approximately $172 million ($600,000,000 x .2875 = $172,500,000). However, the expert opined that Rockefeller's damages should be valued at the time of the arbitration, not the time of the termination. He estimated SinoType's value at the time of arbitration using "the 'wave' method . . . which assumes that [the company's] value has grown over the same interval at the same rate as other firms 'riding the same economic wave.' " The expert selected Apple Corporation as the "comparator firm," and estimated SinoType's current value by assuming a 240 percent increase between July 2010 and February 2012—i.e., the same increase that Apple experienced during a comparable period. The expert thus estimated Rockefeller Asia's damages to be $414 million, which was "28.5% of the estimated total value of [SinoType] of $1.440 billion, using the wave method."

The Arbitrator "accept[ed] the evidence presented through [Rockefeller Asia's expert] concerning the percentage values of the control premium and the anti-dilution clause," and also "adopt[ed] [Rockefeller Asia's] proposal to set the date of valuation at February 2012." Based on the foregoing, the arbitrator awarded Rockefeller Asia $414,601,200.

C. Order Confirming the Arbitration Award

Rockefeller Asia filed a petition to confirm the arbitration award. Subsequently, it filed a proof of service of summons, which declared that it had served SinoType in China by Federal Express on August 8, 2014, in accordance with the parties' arbitration agreement.

Following a hearing at which SinoType did not appear, on October 23, 2014, the trial court confirmed the arbitration award and entered judgment for Rockefeller Asia in the amount of $414,601,200, plus interest of 10 percent from November 6, 2013.

D. SinoType's Motion to Set Aside the Judgment

On January 29, 2016, SinoType filed a motion to set aside the judgment and to quash service of the summons. The motion asserted that the order confirming the arbitration award and resulting judgment were void because SinoType had not been validly served with the summons and petition to confirm. SinoType explained that because it is a Chinese company, Rockefeller Asia was required to serve the summons and petition pursuant to the Hague Service Convention. Rockefeller Asia did not do so. Instead, it served SinoType by Federal Express, which is not a valid method of service on Chinese citizens under the Convention. Moreover, the parties had not intended the MOU to be a binding agreement, and thus the MOU's provision for mail service was not enforceable.

In support of its motion, SinoType submitted the declaration of Curt Huang, which stated in relevant part as follows:

Curt met Faye in 2007. Faye introduced herself as the CEO of Rockefeller Pacific Ventures Company and offered to introduce Curt to Nicholas Rockefeller (Rockefeller), who Faye said might be interested in investing in a project. Curt met with Rockefeller in July 2007 and discussed forming a new company that would develop software with fonts in many different alphabets and languages. Rockefeller expressed interest in the project. However, "[t]he name of the Rockefeller entity which Nicholas Rockefeller proposed to do business with SinoType changed on several occasions" and Curt "grew increasingly uncomfortable about the lack of clarity as to which company Nicholas Rockefeller proposed to do business with SinoType."

The parties met several more times in 2007 and 2008, but they did not make significant progress in consummating a deal. In February 2008, Faye offered to prepare a document referred to in Chinese as a "bei wang lu." According to Curt, a "bei wang lu" is a memorandum of understanding between parties that records the current state of negotiations; it "does not necessarily reflect terms to which the parties have agreed" and "is often used where there has been no real progress in a business meeting to memorialize the discussion so that the parties can pick up on the negotiations at a later meeting." The signing of a "bei wang lu" "does not create a binding contract." In contrast, Curt said, there are three other kinds of Chinese agreements: a "yi xiang shu" is "a letter of intent and reflects the intentions of the parties to enter into an agreement before a formal contract exists;" a "xie yi" is an agreement "which is usually, but not always legally

binding;" and a "he tong" is "a formal contract, which is legally enforceable."

In February 2008, Faye presented Curt with a draft "bei wang lu." Curt said he had only about 10 minutes to review the document, but he told Faye that many of the proposed terms were unacceptable, including the designation of "Party B" as Rockefeller Asia (an entity Curt said he had never heard of), the anti-dilution protections for Rockefeller Asia, and the failure to indicate the amount of Rockefeller Asia's proposed contribution to the project. Curt was reluctant to sign the document, but was convinced to do so by Faye's assurances that the terms would be modified in a long-form agreement (or "xie yi") that would be drafted within 90 days. Curt ultimately signed the document "because I knew it was not a binding document and I wanted to see progress on the deal. I felt the MOU would push Rockefeller to draft the long form agreement within 90 days."

When he signed the MOU, Curt "had no intention to waive SinoType's right to service of process or [to] agree[] to arbitration. Because I only had ten minutes to review the MOU, I did not even know that it contained a statement saying SinoType would agree to alternate service. I believed that the 'bei wang lu' had no legal implications and all of the terms would be negotiated and modified later in the actual contract."

In February 2010, Faye and Rockefeller told Curt they wanted a 12.5 percent equity in the new venture. Curt said he would be willing to give them equity on a commission basis once they raised capital, but he would not consider giving them any equity in the new company before they had raised funds.

In June 2010, Faye emailed Curt a draft Stock Purchase Agreement and other ancillary agreements. The draft "was not

something to which [Curt] could or would ever agree." Curt told Faye he would not sign the draft documents. Communications between the parties ended in March 2011.

Curt received a letter at the end of January 2012 that referenced arbitration. He did not believe he had to respond to the letter because it was not a court document. He received subsequent FedEx packages and emails from Rockefeller, but he did not open them.

In March 2015, Curt heard from a client that Rockefeller Asia was alleging that SinoType owed it money. He then sought the advice of counsel, who opened the FedEx packages. That was when Curt learned an arbitrator had awarded Rockefeller Asia more than $414 million, which Curt said was more than 70 times SinoType's total revenue for the entire period from 2009 to 2013.

Rockefeller Asia did not transfer stock to SinoType, nor did it ever propose to do so.

E. Rockefeller Asia's Opposition to Motion to Set Aside the Judgment

Rockefeller Asia opposed SinoType's motion to set aside the judgment, urging that the motion was untimely; the 2008 MOU was valid and enforceable; and the summons and petition to confirm the arbitration award had been properly served. In support of its opposition, Rockefeller Asia submitted Faye Huang's declaration, which stated in relevant part as follows:

By the end of 2007, Rockefeller Asia and SinoType had decided to enter into a formal arrangement. On February 18, 2008, Faye and Curt executed the MOU. "At no point did I represent to Curt in either the English or the Mandarin Chinese language that the 2008 Agreement would not be considered an enforceable agreement . . . . There would be no purpose for Curt

and me to sign the 2008 Agreement if that document was to be considered a nullity. At no point did Curt state that he disagreed with a single term in the [MOU] or inform me that the . . . provisions were not exactly as we had agreed."

Upon the signing of the MOU, "an Assignment of Partnership Interests was executed by the Rockefeller Parties pursuant to which they transferred their partnership interest, which had a value of $9.65 million, to SinoType per the terms of the [MOU]."

Faye declared that "Curt and I intended the [MOU] to be effective and binding immediately, as its term provided that it could be modified only in a writing signed by both parties. However, we also anticipated that, while the short-form agreement would suffice for our mutual needs, a long-form agreement that would satisfy the very strenuous and impersonal requirements of the international investment community would be necessary to attract additional institutional investors in the future. Therefore, the [MOU] called for the parties to try to have the long-form agreement available 'with all deliberate speed,' within 90 days if possible." However, the 90-day guideline for preparing the long-form documents "proved impossible." Due to the 2008 recession, no third-party financing was on the horizon, and thus "the parties continued to operate under the binding 2008 Agreement." Throughout this time, Rockefeller Asia "continued to perform and to supply tangible and intangible resources to SinoType."

According to to Faye's declaration, SinoType survived the economic downturn in large part because of Rockefeller Asia's efforts, and by 2009 SinoType's internal evaluation showed that its then-current value approached $500 million and would

increase in five years to almost $2 billion. Ultimately, however, the relationship between the companies began to deteriorate, and in July 2010, SinoType informed Rockefeller Asia that it had abrogated the MOU and Rockefeller Asia no longer owned a 12.5 percent interest in SinoType. Further, Curt told Faye that as a Chinese company, SinoType was immune to American legal remedies and would refuse to participate in any legal process in the United States.

F. Order Denying Motion to Set Aside Judgment

On April 15, 2016, the trial court denied the motion to set aside the judgment. The court found that service by Federal Express was permitted by the MOU, which the arbitrator had found to be a binding contract. Further, although the court found that Rockefeller Asia had not properly served SinoType under the Hague Service Convention, it concluded that the parties were permitted to contract around the Convention's service requirements. It explained: "To allow parties to enter into a contract with one another and then proceed to unilaterally disregard provisions out of convenience, like the one at issue here, would allow parties to simply return to their respective countries in order to avoid any contractual obligations. As aptly noted by [Rockefeller Asia] in its opposition, this would essentially result in anarchy and turn the entire international arbitration law on its head. . . . Furthermore, this court cannot find (and [SinoType] has not provided) any case law that would indicate parties are not permitted to contractually select alternative means of service and thus they are not able to waive the service provisions within the Hague Convention."

Finally, the court said, "assuming for the sake of argument that somehow [Rockefeller Asia] was actually required to serve

the Summons and Petition in this action upon [SinoType] in the manner suggested by [SinoType] (to wit, vis-a-vis the protocols established by the Chinese government), once [SinoType] was 'served' with the Summons and Petition in the manner which actually occurred in this case it had an obligation do something – to do exactly what it is doing now – to specially appear and to file a motion to quash. This is what is called acting with 'diligence.' . . . [¶] The law is well settled that if a party is seeking to obtain relief from this court's equitable powers, it must act with reasonable diligence. [Citations.] Thus, to the extent that [SinoType] is also seeking to have this court exercise its broad equitable powers to grant the requested relief, under the totality of the circumstances it respectfully declines to grant such equitable relief due to the lack of reasonable diligence by the defendant in seeking relief . . . ."

SinoType timely appealed from the order denying the motion to set aside the judgment.[4]

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[4] SinoType has filed a request for judicial notice in connection with this appeal. Such notice is available in the trial court "and, independently, in the Court of Appeal (Evid. Code, § 459) which is not bound by the trial court's determination." (*Volkswagenwerk Aktiengesellschaft v. Superior Court* (1981) 123 Cal.App.3d 840, 852, superseded on other grounds as stated in *American Home Assurance Co. v. Societe Commerciale Toutelectric* (2002) 104 Cal.App.4th 406, 409.) We grant the request as to the Hague Service Convention and articles 260 and 261 of the Civil Procedure Law of the People's Republic of China (exhibits 3, 4, and 5), and otherwise deny it. (See *Noergaard v. Noergaard* (2015) 244 Cal.App.4th 76, 81, fn. 1 [judicial notice of Hague Convention]; *Societe Civile Succession Richard Guino v. Redstar Corp.* (2007) 153 Cal.App.4th 697, 701, superseded by statute on another ground as stated in *Hyundai Securities Co.*

DISCUSSION

SinoType contends the trial court was required to set aside the judgment because Rockefeller Asia never properly served it with the summons and petition to confirm the arbitration award. Specifically, SinoType urges that: (1) mail service in China is not authorized by the Hague Service Convention; (2) the Convention's service provisions were not superseded by the MOU; and (3) Rockefeller Asia's failure to properly serve the summons and petition rendered the judgment void and, thus, subject to being set aside at any time.

Rockefeller Asia agrees that the Convention does not permit mail service in China, but it urges that parties may *by contract* set their own terms of service. Rockefeller Asia further urges that it served the summons and petition on SinoType in the manner provided by the MOU; and, in any event, SinoType's motion to set aside the judgment was untimely.

As we now discuss, the Hague Service Convention does not permit parties to set their own terms of service by contract. Instead, it requires service on foreign parties to be carried out as specified in the Convention by the receiving country. China does not permit its citizens to be served by mail, and thus SinoType was not validly served with the summons and petition. In the absence of proper service, the trial court never obtained personal jurisdiction over SinoType, and thus the judgment against SinoType necessarily was void. Because a void judgment can be set aside at any time, SinoType's motion to set aside the

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Ltd. v. Ik Chi Lee (2013) 215 Cal.App.4th 682, 693 [judicial notice of law of a foreign nation].)

judgment necessarily was timely. The trial court therefore erred in denying SinoType's motion to set aside the judgment.

I.
Standard of Review

We review the order denying SinoType's motion to set aside the judgment for an abuse of discretion. (*J.M. v. G.H.* (2014) 228 Cal.App.4th 925, 940; *County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1225 (*Gorham*).) " ' "The abuse of discretion standard . . . measures whether, given the established evidence, the act of the lower tribunal falls within the permissible range of options set by the legal criteria." ' [Citation.] The scope of the trial court's discretion is limited by law governing the subject of the action taken. [Citation.] An action that transgresses the bounds of the applicable legal principles is deemed an abuse of discretion. [Citation.] In applying the abuse of discretion standard, we determine whether the trial court's factual findings are supported by substantial evidence and independently review its legal conclusions. [Citation.]" (*In re Marriage of Drake* (2015) 241 Cal.App.4th 934, 939–940.)

II.
Rockefeller Asia Did Not Properly Serve SinoType with the Summons and Petition to Confirm the Arbitration Award

A. The Hague Service Convention

The Hague Service Contention "is a multinational treaty formed in 1965 to establish an 'appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time.' (Hague Convention preamble, 20 U.S.T. 361, 362, T.I.A.S. No. 6638, reprinted in 28 U.S.C.A. Fed.R.Civ.P. 4, note, at 130 (West Supp.

1989).) The Hague Convention provides specific procedures to accomplish service of process. Authorized modes of service are service through a central authority in each country; service through diplomatic channels; and service by any method permitted by the internal law of the country where the service is made. (See [Hague Service Convention], arts. 2–6, 8, 19; see also discussion in *Bankston v. Toyota Motor Corp.* (8th Cir. 1989) 889 F.2d 172, 173.) Each signatory nation may ratify, or object to, each of the articles of the [Hague Service Convention]. ([Hague Service Convention], art. 21.)" (*Honda Motor Co. v. Superior Court* (1992) 10 Cal.App.4th 1043, 1045 (*Honda Motor Co.*).) Both the United States and China are signatories (sometimes referred to as "contracting States") to the Hague Service Convention. (Hague Conference on Private International Law, 14: Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Apr. 11, 2018) Status Table <https://www.hcch.net/en/instruments/conventions/status-table/?cid=17> [as of May 31, 2018].)

In the United States, state law generally governs service of process in state court litigation. However, by virtue of the Supremacy Clause, United States Constitution, Article VI, the Convention preempts inconsistent methods of service prescribed by state law in all cases to which the Convention applies. (See *Volkswagenwerk Aktiengesellschaft v. Schlunk* (1988) 486 U.S. 694, 699 [108 S.Ct. 2104, 100 L.Ed.2d 722] (*Volkswagenwerk*).) Thus, although a summons issued by a California state court generally must be served pursuant to the Code of Civil Procedure (§§ 413.10 et seq.), service in the present case was governed by the Hague Service Convention, not the Code of Civil Procedure.

(See *Honda Motor Co.*, *supra*, 10 Cal.App.4th at p. 1049 ["the preemptive effect of the Hague Convention as to service on foreign nationals is beyond dispute"].)

B. The Convention Does Not Permit Mail Service on Citizens of Countries That, Like China, Have Filed Objections to Article 10 of the Convention

Article 2 of the Convention provides that each contracting state shall designate a "Central Authority" that will receive requests for service from other contracting states. (Hague Service Convention, *supra*, 20 U.S.T. at p. 362.) Article 5 provides that the Central Authority of the state addressed "shall itself serve the document or shall arrange to have it served by an appropriate agency, either –

"(a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or

"(b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed." (Hague Service Convention, *supra*, 20 U.S.T. at pp. 362-363.)

Article 10 of the Convention provides for alternative methods of service if permitted by the "State of destination." As relevant here, it says: "*Provided the State of destination does not object*, the present Convention shall not interfere with . . . the freedom to send judicial documents, by postal channels, directly to persons abroad." (Hague Service Convention, *supra*, 20 U.S.T. at p. 363, italics added.)

China has filed a "reservation" to Article 10, which states that it "oppose[s] the service of documents in the territory of the People's Republic of China by the methods provided by Article 10

of the Convention." (Hague Conference on Private International Law, Declaration/Reservation/Notification <https://www.hcch.net/en/states/authorities/notifications/?csid=393&disp=resdn> [as of May 31, 2018].) Accordingly, foreign plaintiffs "cannot rely on Article 10's allowance for service via 'postal channels' because [China] is among the countries who have formally objected to such means of service, rendering Article 10 inapplicable." (*Prince v. Government of People's Republic of China* (S.D.N.Y. Oct 25, 2017, No. 13-CV-2106 (TPG)) 2017 WL 4861988, p. *6; see also *Zhang v. Baidu.com Inc.* (S.D.N.Y. 2013) 932 F.Supp.2d 561, 567 [mail service of summons and complaint on Chinese defendant did not constitute proper service: "[T]he Hague Convention allows for service through 'postal channels,' but only if 'the State of destination does not object.' . . . China has objected."]; and see *Pats Aircraft, LLC v. Vedder Munich GmbH* (D. Del. 2016) 197 F.Supp.3d 663, 673 ["Germany . . . has specifically objected to service by mail under the Hague Convention. [Citation.] As such, service of process upon a non-resident defendant in Germany must comply with the other relevant service provisions of the Hague Convention."]; *RSM Production Corp. v. Fridman* (S.D.N.Y May 24, 2007, No. 06 Civ. 11512 (DLC)) 2007 WL 1515068, p. *2 ["The Hague Service Convention . . . prohibits service through certified international mail or Federal Express International Priority mail on individuals residing in the Russian Federation due to that country's objection to Article 10"]; *Shenouda v. Mehanna* (D.N.J. 2001) 203 F.R.D. 166, 171 ["Article 10 permits parties to send judicial documents via postal channels or through judicial officers in the receiving nation. [Citation.] This provision, however, is inapplicable here because Egypt has objected to Article 10 in its

entirety."]; *Honda Motor Co.*, *supra,* 10 Cal.App.4th at p. 1049 ["Since the attempted mail service on Honda was improper under the Hague Convention, the trial court should have granted the motion to quash service on defendant Honda."].)

Accordingly, because China has objected to Article 10, Rockefeller Asia's mail service of the summons and petition on SinoType was not effective under the Hague Service Convention.

C. Parties May Not Contract Around the Convention's Service Requirements

Rockefeller Asia concedes that mail service on Chinese citizens by foreign litigants is not permitted under the Convention. It urges, however, that parties can "contract around" the Convention's service requirements. For the reasons that follow, we do not agree.

"In interpreting an international treaty, we are mindful that it is 'in the nature of a contract between nations,' [citation], to which '[g]eneral rules of construction apply.' [Citations.] We therefore begin 'with the text of the treaty and the context in which the written words are used.' [Citation.] The treaty's history, ' "the negotiations, and the practical construction adopted by the parties" ' may also be relevant. [Citation.]" (*Société Nat. Ind. Aéro. v. U.S. Dist. Court* (1987) 482 U.S. 522, 533–534 [107 S.Ct. 2542, 2550, 96 L.Ed.2d 461] (*Société*).)

By its own terms, the Convention applies to "*all cases,* in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." (Hague Service Convention, *supra,* 20 U.S.T. at p. 362, italics added.) This language "is *mandatory*." (*Volkswagenwerk*, *supra,* 486 U.S.

at p. 699, italics added; see also *Société*, *supra*, 482 U.S. at p. 534, fn. 15 [same].)[5]

Further, the Convention emphasizes the right of *each contracting state*—not the citizens of those states—to determine how service shall be effected. For example, Article 2 of the Convention provides that each state shall organize a Central Authority "which will undertake to receive requests for service coming from other contracting States"; Article 5 provides that each state shall effect service in the manner requested "*unless such a method is incompatible with the law of the State addressed* [i.e., the receiving state]"; and Article 11 provides that the Convention "shall not prevent two or more *contracting States* from agreeing to permit . . . channels of transmission other than those provided for in the preceding articles." (Hague Service Convention, *supra*, 20 U.S.T. at pp. 362-364, italics added.) As relevant here, Article 261 of the Civil Procedure Law of the People's Republic of China (of which we have taken judicial notice) provides that a request for judicial assistance "shall be conducted through channels stipulated to in the international

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[5] In contrast, the United States Supreme Court has held that the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Evidence Convention), 23 U.S.T. 2555, T.I.A.S. No. 7444, which does not contain analogous mandatory language, does *not* "purport to describe the procedures for all permissible transnational discovery and exclude all other existing practices." (*Société*, *supra*, 482 U.S. at p. 534.) The court found the Evidence Convention's omission of mandatory language "particularly significant in light of the same body's use of mandatory language in the preamble to the Hague Service Convention, 20 U.S.T. 361, T.I.A.S. No. 6638." (*Id.* at p. 534, fn. 15.)

treaties concluded or acceded to by the People's Republic of China. . . . Except for the circumstances specified in the preceding paragraph, no foreign agency or individual may serve documents . . . within the territory of the People's Republic of China without the consent of the in-charge authorities of the People's Republic of China." Permitting private parties to avoid a nation's service requirements by contract is inconsistent with Article 261, as well as with the Convention's stated intention to avoid infringing on the "sovereignty or security" of member states. (See Hague Service Convention, *supra*, 20 U.S.T. at p. 364.)

Finally, as we have said, the Convention expressly allows each "State of destination" to decide whether to permit mail service on its citizens by foreign defendants. (See Hague Service Convention, *supra*, 20 U.S.T. at p. 363 [Convention does not prohibit mail service "[*p*]*rovided the State of destination does not object*"], italics added.) The Convention does not include an analogous provision allowing private parties to international contracts to agree to accept service by mail.

Rockefeller Asia does not offer any "plausible textual footing" (*Water Splash, Inc. v. Menon* (2017) __ U.S. __, __ [137 S.Ct. 1504, 1509–1510, 197 L.Ed.2d 826]) for the proposition that parties may contract around the Hague Service Convention, but instead relies on two cases from other jurisdictions, neither of which is persuasive. The first, *Alfred E. Mann Living Trust v. ETIRC Aviation S.A.R.L.* (N.Y. App. 2010) 78 A.D.3d 137, 141, 910 N.Y.S. 2d 418 (*Alfred E. Mann*), provides no textual analysis to support the New York Court of Appeal's conclusion that the requirements of the Convention may be waived by contract; the court simply says that it can see "no reason why" it should reach

a contrary conclusion. The analysis of *Masimo Corp. v. Mindray DS USA Inc.* (C.D. Cal., Mar. 18, 2013) 2013 WL 12131723 is equally cursory; the district court stated: "The Court sees no reason why parties may not waive by contract the service requirements of the Hague Convention, especially given that parties are generally free to agree to alternative methods of service. [Defendant] provides no authority to the contrary, and the Court's position is in accord with [*Alfred E. Mann*]." (*Id.* at p. 3.)[6]

Consistent with the Convention's language, we therefore conclude that parties may not agree by contract to accept service of process in a manner not permitted by the receiving country. Accordingly, because service on SinoType was effected by international mail, which is not a permitted form of service on Chinese citizens under the Convention, we conclude that SinoType was not validly served with the summons and petition to confirm the arbitration award.

III.

Because SinoType Was Not Properly Served with the Summons and Petition, the Court Did Not Acquire Jurisdiction Over SinoType, and the Resulting Judgment Is Void

Having concluded that SinoType was not validly served with the summons and petition, we now consider the effect of the

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6 The two remaining cases on which Rockefeller Asia relies address the Hague Convention on Taking of Evidence Abroad, *not* the Hague Service Convention. (*Image Linen Services, Inc. v. Ecolab, Inc.* (M.D. Fla., Mar. 10, 2011) 2011 WL 862226, pp. *4–5 & fn. 6; *Boss Mfg. Co. v. Hugo Boss AG* (S.D.N.Y., Jan. 13, 1999) 1999 WL 20828, p. *1.)

invalid service. SinoType contends that because it was not properly served with the summons and petition, the trial court did not acquire jurisdiction over it, and the resulting judgment thus is void. Rockefeller Asia disagrees, contending that the judgment was valid because SinoType had actual notice of the proceedings and did not timely move to set aside the judgment. As we now discuss, SinoType is correct.

A. A Judgment Obtained in the Absence of Proper Service of Process Is Void

Compliance with the statutory procedures for service of process " ' "is essential to establish personal jurisdiction." ' [Citation.]" (*Renoir v. Redstar Corp.* (2004) 123 Cal.App.4th 1145, 1152 (*Renoir*).) Thus, in *Honda Motor Co.*, *supra*, 10 Cal.App.4th 1043, the court held that service on a Japanese corporation that did not comply with the Hague Service Convention had to be quashed even though the Japanese defendant had actually received the summons and complaint. The court explained: "[Plaintiff's] arguments share a common fallacy; they assume that in California, actual notice of the documents or receipt of them will cure a defective service. That may be true in some jurisdictions, but California is a jurisdiction where the original service of process, which confers jurisdiction, must conform to statutory requirements or all that follows is void. [Citations.] . . . [¶] . . . [¶] Plaintiff argues that it is ridiculous, wasteful and time consuming to reverse the trial court just to force plaintiff to go through the motions of a service under the convention, when there is no question but that Honda has notice of the action, its attorneys stand ready to defend it, and no practical aim can be accomplished by quashing the service. However, plaintiff cites no authority permitting a California

court to authorize an action to go forward upon an invalid service of process. The fact that the person served 'got the word' is irrelevant. [Citations.] 'Mere knowledge of the action is not a substitute for service, nor does it raise any estoppel to contest the validity of service.' [Citation.] '[O]ur adherence to the law is required if we are ever to instill respect for it.' [Citation.] The *Abrams* court[7] felt it could not rewrite the work of the California Legislature; *how much less are we able to rewrite a federal treaty*." (*Honda Motor*, *supra*, 10 Cal.App.4th at pp. 1048–1049, italics added.)

Where the defendant establishes that he or she has not been served as mandated by the statutory scheme, "no personal jurisdiction by the court will have been obtained and the resulting judgment *will be void* as violating fundamental due process. (See *Peralta* [*v. Heights Medical Center, Inc.* (1988)] 485 U.S. [80,] 84.)" (*Gorham*, *supra*, 186 Cal.App.4th 1215, 1227, italics added [reversing order denying motion to set aside a default judgment because plaintiff had not been properly served with the summons and complaint]; see also *Renoir*, *supra*, 123 Cal.App.4th at p. 1154 ["Because no summons was served on any of the defendants and the defendants did not generally appear in the proceeding, the trial court had no jurisdiction over them. Therefore, the California judgment was void, as is the order denying the motion to vacate the California judgment."];

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[7] *In re Abrams* (1980) 108 Cal.App.3d 685, 695 [annulling contempt judgment against witness because witness subpoena had not been personally served as required by statute; "the process was not served in the manner required by law and defendant may not be criminally punished for failure to obey the subpoena."].)

Lee v. An (1008) 168 Cal.App.4th 558, 564 ["[I]f a defendant is not validly served with a summons and complaint, the court lacks personal jurisdiction and a . . . judgment in such action is subject to being set aside as void."].)[8]

As we have discussed, SinoType was not served with the summons and petition in the manner required by the Hague Service Convention. Accordingly, the court did not acquire personal jurisdiction over SinoType, and the resulting judgment was void.

B. SinoType's Motion to Set Aside the Judgment Was Timely

The final issue before us is whether the trial court abused its discretion by failing to set aside the void judgment. SinoType contends that a void judgment is "void ab initio . . . a nullity" that may be set aside at any time. Rockefeller Asia disagrees, contending that " '[o]nce six months have elapsed since the entry of judgment, a trial court may grant a motion to set aside that judgment as void only if the judgment was *void on its face*.' "

There is a wealth of California authority for the proposition that a void judgment is vulnerable to direct or collateral attack " ' "*at any time*." ' " (*Strathvale Holdings v. E.B.H.* (2005) 126 Cal.App.4th 1241, 1249, italics added, quoting *People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 660.)

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[8] "A lack of fundamental jurisdiction is ' " 'an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties.' [Citation.] . . ." [¶] . . . "[F]undamental jurisdiction cannot be conferred by waiver, estoppel, or consent. Rather, an act beyond a court's jurisdiction in the fundamental sense is null and void" *ab initio*.' " (*Kabran v. Sharp Memorial Hospital* (2017) 2 Cal.5th 330, 339.)

For example, in *Gorham, supra,* 186 Cal.App.4th 1215, the Court of Appeal held that the failure to vacate a void judgment entered nearly 10 years earlier was an abuse of discretion. The court explained: "[W]here it is shown that there has been a complete failure of service of process upon a defendant, he generally has no duty to take affirmative action to preserve his right to challenge the judgment or order even if he later obtains actual knowledge of it because '[w]hat is initially void is ever void and life may not be breathed into it by lapse of time.' [Citation.] Consequently under such circumstances, 'neither laches nor the ordinary statutes of limitation may be invoked as a defense' against an action or proceeding to vacate such a judgment or order. [Citation.]" (*Id.* at p. 1229.)

In so concluding, the court specifically rejected the proposition that the judgment would be set aside only if void "on its face": "Although courts have often also distinguished between a judgment void on its face, i.e., when the defects appear without going outside the record or judgment roll, versus a judgment shown by extrinsic evidence to be invalid for lack of jurisdiction, the latter is still a void judgment with all the same attributes of a judgment void on its face. [Citation.] 'Whether the want of jurisdiction appears on the face of the judgment or is shown by evidence *aliunde*, in either case the judgment is for all purposes a nullity—past, present and future. [Citation.] ". . . All acts performed under it and all claims flowing out of it are void . . . . No action upon the part of the plaintiff, no inaction upon the part of the defendant, no resulting equity in the hands of third persons, no power residing in any legislative or other department of the government, can invest it with any of the elements of power or of vitality." [Citation.]' [Citation.] In such cases, the

judgment or order is wholly void, although described as 'voidable' because court action is required to determine the voidness as a matter of law, and is distinguishable from those judgments merely voidable due to being in excess of the court's jurisdiction. [Citation.] *Consequently, once proof is made that the judgment is void based on extrinsic evidence, the judgment is said to be equally ineffective and unenforceable as if the judgment were void on its face because it violates constitutional due process*. (See *Peralta v. Heights Medical Center*, *supra*, 485 U.S. [at p.] 84.)" (*Gorham*, *supra*, 186 Cal.App.4th at p. 1226, italics added.)[9]

Similarly, the Court of Appeal in *Falahati v. Kondo* (2005) 127 Cal.App.4th 823, held that the trial court erred in failing to grant a motion to set aside a default judgment filed 10 months after entry of judgment. It explained that although a motion for relief from a default judgment under Code of Civil Procedure sections 473, subdivision (b), or 473.5, subdivision (a), usually must be filed within six months from entry of the judgment, "[a] *void* judgment can be attacked *at any time* by a motion under

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[9] The *Gorham* court also rejected the plaintiff's contention that the trial court was not required to vacate the judgment because the defendant had actual knowledge of it: "Knowledge by a defendant of an action will not satisfy the requirement of adequate service of a summons and complaint. [Citations.] . . . [I]t has been said that a judgment of a court lacking such personal jurisdiction is a violation of due process (*Burnham v. Superior Court of Cal., Marin County* (1990) 495 U.S. 604, 609), and that 'a default judgment entered against a defendant who was not served with a summons in the manner prescribed by statute [to establish personal jurisdiction] is void.' (*Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1444.)" (*Gorham*, *supra*, 186 Cal.App.4th at pp. 1226–1227, 1229.)

Code of Civil Procedure section 473, subdivision (d)." (*Id.* at p. 830, italics added; see also *Deutsche Bank National Trust Company v. Pyle* (2017) 13 Cal.App.5th 513, 526; *Lee v. An*, *supra*, 168 Cal.App.4th at pp. 563–564.)

The present case is analogous. Because SinoType was never properly served with the summons and petition, the trial court never obtained personal jurisdiction over it. The resulting judgment—whether or not void on its face—"was . . . therefore void, not merely voidable, as violating fundamental due process." (*Gorham*, *supra*, 186 Cal.App.4th at p. 1230.) It therefore could be set aside "at any time" (*People v. American Contractors Indemnity Co.*, *supra*, 33 Cal.4th at p. 660)—including, as in this case, 15 months after entry of the judgment.[10]

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[10] Because we have found the judgment to be void, we do not address SinoType's contention that there was no binding arbitration agreement between the parties. If the parties wish to do so, they may raise this issue with the trial court in petitions to confirm/vacate the arbitration award after properly filing and serving such petitions.

DISPOSITION

The order denying the motion to set aside the judgment is reversed. The case is remanded to the trial court with directions to vacate the judgment, vacate the order granting the petition to confirm, and quash service of the summons and petition. Appellant's motion for judicial notice, filed January 2, 2018, is granted as to exhibits 3, 4, and 5, and is otherwise denied. Appellant is awarded its appellate costs.

CERTIFIED FOR PUBLICATION

EDMON, P. J.

We concur:

EGERTON, J.

DHANIDINA, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

PROOF OF SERVICE

I am over the age of 18 and not a party to the above entitled action; my business address is 707 Wilshire Blvd., Suite 4880, Los Angeles, California 90017.

On July 11, 2018, I served the within **PETITION FOR REVIEW** on the interested parties in this action by first-class mail to:

Steve Qi Qi Law Offices of Steve Qi & Associates 388 E. Valley Blvd. Suite 200 Alhambra, CA 91801	Judge Randolph Hammock Dept 47 Los Angeles Superior Court 111 North Hill Street Los Angeles, CA 90012
Steven L. Sugars Law Offices of George L. Young 2485 Huntington Drive Suite 100 San Marino, CA 91108	Second District Court of Appeal Clerk Divisions 3 Ronald Reagan State Building 300 S. Spring Street 2nd Floor, North Tower Los Angeles, CA 90013

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed July 11, 2018, at Los Angeles, California.

/s/ CHIA HENG (GARY) HO

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CHIA HENG (GARY) HO
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(Asia) VII