No. S249923

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

REPLY TO ANSWER TO 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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ROCKEFELLER TECHNOLOGY INVESTMENTS (ASIA) VII

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INTRODUCTION

The decision below makes it impossible to require foreign companies from some of the largest economies in the world, including China, Japan, Germany, U.K., India, Korea, Russia and Mexico - countries that objected to Article 10 of the Hague Convention permitting service by mail - to show up in a California court based on notice provided by mail, courier (FedEx), or email, even if the parties agreed to such forms of notice in their contract, and even when the method of service is not prohibited by the Hague Convention (e.g., email).

This decision will have profound consequences for California companies with global supply chains, investment funds with foreign investors, engineering and construction companies that procure materials and handle projects around the world, and any California company that imports or exports goods to or from the United States.

A. The Contitutional Right to Contract

The Court of Appeal erred in ruling that the Hague Convention does not allow parties to set the method of service by contract. The freedom to contract is a constitutional right. (United States Constitution, Article I, section 10, clause 1.) The parties contracted for California choice of law and for service, jurisdiction, and arbitration in California. In the absence of a direct conflict with a

federal statute, the parties' choice of law provision controls in an arbitration agreement. *Volt Information Sciences, Inc. v. Bd of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

That is why Sinotype's reliance on *Kott v. Superior Court* (1996) 45 Cal.App.4th 1126, is misplaced. In *Kott*, the parties did not enter into an arbitration agreement by which they consented to California law, service, and jurisdiction.

B. The Hague Convention's Implementing Legislation Supports the Right to Contract

The Court of Appeal erred in holding that plaintiff 's service upon defendant violated due process and was void because it did not conform to means of service of process congruent with those identified in the Hague Convention. The Hague Convention is a treaty and a treaty has the legal status of a federal statute. The Convention's only substantial requirement for signatory nations is that each of them must establish a "Central Authority" through which to manage and direct service of process from abroad. Treaties require Congress' implementing legislation to effect their terms. (Vazquez, The Four Doctrines of Self-Executing Treaties, 89 Am. J. Inter'l L. 695-723 (1995).) In the absence of implementing legislation the treaty has no power and its reach and scope is

provided by the terms of the implementing legislation, not the language of the treaty.

The treaty implementing legislation for the Hague Convention is 42 U.S.Code section 11606. The legislation establishes in the U.S., the Office of International Judicial Assistance ("OIJA"), which serves as the Central Authority required by the Hague Convention. It has no power to compel parties to pursue service of process according to the Hague Convention or to prohibit parties from contracting for specific methods of service. In other words, the role of the Hague Convention in American law is very limited.

The Hague Convention is also governed by 28 U.S. Code section 2072, which provides that the treaty's implementation "shall not abridge, enlarge, or modify any substantive right" guaranteed by the Constitution. Therefore, the court cannot implement the Hague Convention in order to take away the rights of parties to write their own contracts on the methods of service of process.

C. Federal Rule of Civil Procedure, Rule 4(f)

Under federal law, a plaintiff may petition courts to order a foreign defendant to accept service via methods that fall outside the scope of the Hague Convention, such as email, when the plaintiff establishes that these methods would provide actual notice. Federal Rules of Civil Procedure ("FRCP") 4(f).

FRCP 4 states that a defendant in a foreign country may be served at a place not within a judicial district of the United States "by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention ... if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice ... or by other means not prohibited by international agreement, as the court orders." Pursuant to FRCP 4, federal courts have frequently permitted service on foreign defendants by email, which is not prohibited by the Hague Convention. *Rio Properties, Inc v. Rio In't Interlink*, 284 F.3d 1007, 1017 (9th Cir, 2002); *FTC v. PCCare*, 247 2013 WL 8410317 (SDNY 2013); *Bullex v. Yoo*, 2011 U.S. District Court Lexis 35628 (D. Utah 2011); *Bank Julius Baer & Co. Ltd v. Wikileaks*, 2008 WL 413737 (N.D. Cal 2008); *Williams-Sonoma Inc. v. Friendfinder Inc.*, 2007 WL 1140639 (N.D. Cal).

If courts can order service methods such as email, then parties should be allowed to ***agree*** on the same methods of service in a private contract, especially when, as here, the methods of service provided actual notice to the foreign defendant.

D. The Service on Sinotype Did Not Violate Due Process

The service on Sinotype did not violate due process because (a) the parties contracted to allow service by mail, FedEx, and email, (b) email is not a method of service prohibited by the Hague Convention, and (c) the record shows that Sinotype received actual notice via mail, FedEx, and email.

The destructive consequences of the Court of Appeal's decision are multifold. First, the decision increases the cost, delay, and uncertainty of doing business with parties abroad, especially in the growing economies of China, India, and Russia. Second, the decision eliminates the efficient role of Party Autonomy as identified by the Hague Convention itself. Third, the decision puts California law out of step with the laws of other state and federal jurisdictions (i.e., New York, federal, including the Ninth Circuit) that allow parties to privately contract to methods for service of process and to serve foreign defendants by email when it provides actual notice. See e.g. *Alfred E. Mann v. Etri*c, A.D.3d 137 (2010); *Masimo Corp. V Mindray DS USA, Inc.* (C.D. Cal. 2013 WL 1213723). Fourth, the burden will be especially hard felt by California institutions such as the IFTA which has required all arbitration parties specifically to waive the Service provsions of the Hague convention as a prerequiste

to the administration of hundreds of cases which it has arbitrated. Fifth, the decision is incongruent with the legislature's objective in enacting SB 766 to make California a international arbitration center. Parties to an arbitration agreement would not want to submit themselves to California law and bear the risk that their expenditure of time and resources will produce at best nothing but a summons that can be ignored and a judgment that can be challenged for several years after confirmation. Sixth, the decision below upends decades of contractual obligations and could potentially unravel thousands of past arbitration awards and judgments. The Court of Appeal's decision, if not reversed, would allow foreign parties to simply return to their country in order to avoid contractual obligations.

This was what happened here. Sinotype and its CEO Curt Huang bamboozled Rockefeller Asia. For more than two years the parties conducted business per the 2008 joint venture agreement, a period of phenomenal growth in the worldwide Personal Communication Devices industry. However, Sinotype and Mr. Huang stole Rockefeller Asia's money and went into hiding in China to avoid the legal consequences. Even though Sinotype and Mr. Huang had actual notice of the arbitration and state court proceedings (JAMs alone served Mr. Huang with 7 separate notices),

they hid in silence for seven years before finally showing up in American courts to attack Rockefeller's hard won judgment. Having induced Rockefeller Asia to enter a contract by agreeing to methods of service that fall outside the scope of the Hague Convention, Sinotype has turned around and argued that the same contract violates the Hague Convention. This reflects a deliberate strategy to flaunt the authority of California courts to which the parties mutually agreed to be bound. The Court of Appeal's decision, if not reversed, would expressly sanction Sinotype's bad faith conduct and make it nearly impossible for California companies enforce contractual terms against foreign parties.

THE COURT OF APPEAL'S DECISION CONFLICTS WITH A LONG LINE OF CASE AND STATUTORY LAW

"By virtue of the Supremacy Clause, U.S. Const., Art. VI, the Hague Convention pre-empts inconsistent methods of service prescribed by state law in all cases ***to which it applies***." *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 48 U.S. 694, 698 (1988) (emphasis added).

The Court of Appeal erred in holding that the Hague Convention is an impervious and immutable stone wall that must

"apply" to forbid private parties from contracting for specific methods of service of process.

Sinotype claims that the Court of Appeal's decision "is not controversial" and does not "conflict" with any precedents. (Answer at pp. 3, 9.) Wrong. As shown below, the Court of Appeal's decision conflicts with a long line of legal precedents holding that the Hague Convention does not apply and that both courts and private parties should have the autonomy to order or contract for specific methods of service.

First, the Foreign Sovereign Immunities Act pre-empts the Hague Convention. 28 USC 1608(a)(1) &(b)(2). It allows an agreement between U.S. parties and foreign governments to include language that contracts around the requirements of the Hague Convention. Given such language in the parties' agreement, the service of process may be effectuated by the delivery of a copy of the summons and complaint in accord with any arrangement for service between the plaintiff and the defendant set forth in the agreement.

Second, Federal Rules of Civil Procedure Rule 4 also pre-empts the Hague Convention's mandate. Under this rule, a foreign defendant is permitted to enter an agreement with a U.S. plaintiff to waive formal service of process. The Convention's requirements are not implicated when a defendant voluntarily agrees to waive formal

service. (See 1993 Advisory Committee Notes to FRCP 4(d); *Hoffman La Roche v. Invamed, Inc.*, 183 F.R.D. 157, 159 (D.N.J. 1998). FRCP 4(f)(3) provides that service upon an individual in a foreign country may be perfected by any "means not prohibited by international agreement, as the court orders." Even though no provision of the Hague Convention permits such an agreement, no court has ever held that service effectuated pursuant to voluntary agreements under FRCP 4 violates due process.

Third, in a recent case applying FRCP 4, *FTC v. PCCare247* (SDNY March 7, 2013) 2013 WL 841- 037, the plaintiff was allowed to serve a summons and complaint on five Indian Defendants via email and overnight mail. Like China, India signed the Hague Convention and objected to Article 10(a). Nonetheless, the court allowed service of process to be effected without recourse to the Central Authorities mandated by the Hague Convention. Apparently the private companies in India had proven "elusive" due to the "deliberate response" of the India Central Authority. Judge John Keenan's order that service be performed via overnight and email (two of the exact forms of service of process to which Sinotype had agreed and consented) clearly and plainly overrode the Hague mandate.

Fourth, while recognizing that service of process between the U.S. and China is governed by the Hague Convention, courts have held that the Hague Convention does not prohibit "service upon a foreign defendant through its U.S.-based counsel to prevent delays in litigation." *Richmond Techs., v. Aumtech*, 2011 WL 2607158, at 13 (N.D. Cal. 2011).

Thus, in spite of the Hague Convention, the courts may step outside ithe Hague Convention's mandate to approve alternative methods of service to further the efficacy of the litigation. *Products & Ventures Int'l v. Axus Stationary (Shanghai) Ltd.*, 16-CV-00669-YGR, 2017 WL 201703, at *2 (N.D. Cal. Jan. 18, 2017) (after giving China's Central Authority 11 months to process the service, the *Axus Stationary* court allowed substituted service on the U.S. lawyers despite the fact that these lawyers no longer represented the Chinese defendants).

The method of service must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Once again, if a party can be forced to accept service of process by methods that fall outside the scope of the

Hague Convention, parties should be free to mutually consent to do so in a private contract.

Fifth, another group of cases holds that the Hague Convention does not control when service is performed on a voluntary or involuntary agent of the foreign defendant. This is California's "General Manager" rule. Under the rule, service of process is valid upon an individual who represents the foreign corporation in California. The definition of General Manager is very broad and it includes not only the foreign corporation's agents, salespersons, officers, and other employees, but also extends to persons with whom the foreign corporation enters into a contract to use and market its products in California. *Cosper v. Smith & Wesson Arms. Co.*, 53 Cal. 2d 77 (1959) . The *Cosper* court opined that "Every object of the service is obtained when the agent served is of sufficient character and rank to make it reasonably certain that the defendant will be apprised of the service made." *Cosper*, 53 Cal.2d at 83.

California codified *Cosper* by enacting a statute providing that a delivery of service or process to the "general manager in this state" of a foreign corporation shall constitute "valid service on the corporation." Cal. Corp. Code section 2110 (1976).

Sinotype's CEO Curt Huang frequently and over several years identified himself as Sinotype's General Manager when negotiating and executing Sinotype's licensing agreements in California with such companies as Adobe, Apple, and Google.

Under *Cosper*, which predates the Hague Convention, the General Manager was a mere non-exclusive sales agent. The definition of a General Manager is simply one who has had "ample regular contact" with the defendant as to make it "reasonably certain" that he would apprise the defendant of the service – hardly a challenging proposition.

The physical location of the General Manager at the time of service is not determinative of his status as General Manager. Mr. Huang's regular presence in California over many years to conduct Sinotype's business with California entities, including Rockefeller Asia, Apple, Adobe, and Google, easily meets the definition of a General Manager under California law.

Sixth, for purposes of determining the validity of the service of process, the Hague Convention is not implicated if service did not necessarily require transmittal abroad of the relevant documents. The Convention does not apply if, under state law, there is no necessity to send documents abroad to complete service – even though as a practical matter they would be sent anyway.

Thus, U.S. law makes the validity of service dependent upon the reach and applicability of state law, not of the Hague Convention. *Yamaha Motor Company, Ltd. v. Superior Court*, 174 Cal.App.4th 264 (2009). In reaching its decision that the plaintiff was not required to serve the defendant under the Hague Convention's mandate, the *Yamaha* court drew heavily from the *Cosper* case and the "General Manager" rule. The *Yamaha* court reasoned that "[i]f the Legislature wanted all service on foreign nations to be pursuant to the provisions of the Hague Convention, it could have said so. It didn't; it merely recognized that treaties trump conflicting state law." Therefore, under the *Yamaha* court's view, the Hague Convention is not a mandate covering all manner of service but only those with which it conflicts.

In summary, the discussion above clearly shows that the Court of Appeal's decision conflicts with a large body of established case law and state and federal statutes. Courts and legislatures have consistently pushed aside the Hague Convention's mandate when necessary to facilitate litigation. Thus, private parties should be afforded their constitutional right to achieve the same resuilt by contracting in advance for specific methods of service.

Californians doing international business need to have some reasonable measure of certainty that their transactions will be legally protected. The lower court has seriously impaired that assurance.

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 2,691 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

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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 August 9, 2018, I served the within **REPLY TO ANSWER TO PETITION FOR REVIEW** on the interested parties in this action by first-class mail to:

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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 August 9, 2018, at Los Angeles, California.

/s/ CHIA HENG (GARY) HO

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