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California Court Holds Parties May Not Contract Around Hague Convention

By Jiyun Cameron Lee – January 3, 2018

In business transactions, parties regularly include terms specifying how their disputes will be resolved, where the actions will be brought, and what rules will apply. Among the terms often found in international contracts are terms specifying how to provide notice of a dispute or proceeding so that the parties can avoid the often time-consuming—and sometimes mysterious—rules for service of process in foreign jurisdictions.

A California appellate court, however, recently threw a wrench into these norms of practice, holding that parties may not contract around the Hague Service Convention by setting their own terms of service. *Rockefeller Tech. Invs. (Asia) VII v. Changzhou SinoType Tech. Co., Ltd.*, 24 Cal. App. 5th 115 (2018). While the long-term impact of this case is not yet known, it has the potential to wreak havoc on many current contractual relationships.

The Underlying Contract
In 2008, Rockefeller Asia, an American investment partnership, entered into a four-page memorandum of understanding (MOU) with SinoType, a Chinese company. Under the MOU, the parties set out the basic terms by which they would form a new company based in California. While the MOU contemplated that additional "long form agreements" would be prepared and signed, it also stated that upon execution, the MOU "shall be in full force and effect."

In the MOU, the parties agreed that they would provide notice to each other by Federal Express, with copies by fax or email. The parties specified that in case of disputes, they would submit to the jurisdiction of federal and state courts in California and "consent to service of process in accord with the notice provisions above." The parties further agreed that either party could submit the dispute to JAMS for binding arbitration.

The Dispute and Resulting Judgment
The parties' relationship soured, and in 2012, Rockefeller Asia filed a demand for arbitration with JAMS. Notice of the arbitration proceeding was given in accordance with the MOU. SinoType did not appear, and the arbitration proceeded in its absence. The arbitrator issued a final award in November 2013, awarding Rockefeller Asia $414 million.

Rockefeller Asia filed a petition to confirm the arbitration award and served SinoType in China by Federal Express in accordance with the terms of the MOU. Again SinoType did not appear. In October 2014, the trial court confirmed the arbitration award and entered judgment for Rockefeller Asia in the amount of $414 million.

Trial Court Rejects SinoType's Motion to Set Aside Judgment
After learning from a client that Rockefeller Asia was alleging that SinoType owed it money, SinoType filed a motion to set aside the judgment in January 2016. The trial court denied SinoType's motion, explaining that any other result would allow a party to unilaterally disregard its contractual obligations by returning to its home country. The trial court also observed that it could not find any case law indicating that parties could not contractually select alternative means of service, thereby waiving the service provisions of the Hague Service Convention.

Court of Appeal Overturns the Trial Court, Voiding the Judgment
The appellate court disagreed with Rockefeller Asia and the trial court, holding that private parties could not contract around a nation's service requirements. Relying on the language and purpose of the Hague Service Convention, the court observed that "the Convention emphasizes the right of *each contracting state*—not the citizens of those states—to determine how service shall be effected." *Rockefeller Technology*, 24 Cal. App. 5th at 132 (emphasis in original). Here, China had expressly objected to allowing alternative methods of service under the convention and established laws by which service of process was to be effected on its citizens. Because SinoType was not properly served with the summons and petition to confirm the arbitration award in accordance with the convention, the court deemed the judgment void.

Potential Impact
Rockefeller Technology appears to be the first decision rejecting the rights of private parties to waive service of process by contract. In reaching its decision, the court disagreed with the rulings of two other courts that had previously upheld the right of private parties to contract around the Hague Service Convention. *Alfred E. Mann Living Tr. v. ETIRC Aviation S.A.R.L.*, 78 A.D.3d 137, 141 (N.Y. App. Div. 2010); *Masimo Corp. v. Mindray DS USA Inc.*, No. 12-cv-02206-CJC, 2013 WL 12131723 (C.D. Cal. Mar. 18, 2013). The *Rockefeller Technology* court found these prior decisions unpersuasive, finding no textual support in the convention for allowing private parties to avoid service requirements by contract.

Rockefeller Asia, for its part, has filed a petition for review with the California Supreme Court.

For now, the decision by the California Court of Appeal calls into question the enforceability of similar notice provisions in numerous contracts between U.S. and foreign companies, at least in California. Any party with a contractual notice provision who anticipates, or is presently involved in, a dispute with a foreign company is well advised to explore all options for effecting service of process.

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