APPENDIX A

IN THE SUPREME COURT OF CALIFORNIA

Case No. S249923

[Filed: April 2, 2020]

ROCKEFELLER TECHNOLOGY INVESTMENTS (ASIA) VII,
Plaintiff and Respondent,
v.
CHANGZHOU SINOTYPE TECHNOLOGY CO., LTD.,
Defendant and Appellant.

Second Appellate District, Division Three
B272170

Los Angeles County Superior Court
BS149995

Justice Corrigan authored the opinion of the Court, in which Chief Justice Cantil-Sakauye and Justices Chin, Liu, Cuéllar, Kruger, and Groban concurred.

Opinion of the Court by Corrigan, J.

The parties here, sophisticated business entities, entered into a contract wherein they agreed to submit to the jurisdiction of California courts and to resolve disputes between them through California arbitration.

They also agreed to provide notice and "service of process" to each other through Federal Express or similar courier. The narrow question we address is whether the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, November 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638 (Hague Service Convention or "the Convention") preempts such notice provision if the Convention provides for a different method of service. Consistent with United States Supreme Court authority, we conclude that the Convention applies only when the law of the forum state requires formal service of process to be sent abroad. We further conclude that, because the parties' agreement constituted a waiver of formal service of process under California law in favor of an alternative form of notification, the Convention does not apply. We reverse the Court of Appeal's contrary decision.

I. BACKGROUND

Changzhou SinoType Technology Co., Ltd. (SinoType) is based in China and specializes in developing Chinese graphical fonts. During 2007 and 2008, its chairman, Kejian "Curt" Huang, discussed forming a new company with Faye Huang, president of Rockefeller Technology Investments (Asia) VII (Rockefeller).[1] In February 2008, they signed a Memorandum of Understanding (MOU). The MOU reflected an intent to form the new company, allocate interests and responsibilities between the two existing

[1] Because Curt Huang and Faye Huang have the same surname, we refer to them by their first names.

companies and transfer assets to the new entity. The MOU provided that the parties would, "with all deliberate speed, within 90 days if possible," attempt to draft "long form agreements carrying forth the agreements made" in the MOU. The MOU also stated, "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 provided:

"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 who shall have ten years judicial service at the appellate level, pursuant to California law, and who shall issue a written, reasoned award. The Parties shall share equally the cost of the arbitration. Disputes shall include failure of the Parties to come to Agreement as required by this Agreement in a timely fashion."

Eventually, negotiations broke down and the "long form agreements" were never finalized. In February 2012, Rockefeller sought arbitration. The arbitrator[2] found that SinoType received notice on numerous occasions and "all materials were sent both by email and Federal Express" to the Chinese address listed for it in the MOU.[3] SinoType neither responded nor appeared. In November 2013, the arbitrator concluded Rockefeller was entitled to an award of $414,601,200. His written decision was sent to SinoType by Federal Express and e-mail.

Rockefeller petitioned to confirm the award (Code Civ. Proc., § 1285), and transmitted the petition and summons to SinoType through Federal Express and e-mail. SinoType did not appear and the award was confirmed in October 2014. In November 2015, Rockefeller sought assignment of various future royalty payments that several companies owed to SinoType.

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[2] Richard C. Neal, former justice of the Court of Appeal, Second Appellate District, Division Seven, served as arbitrator.

[3] Specifically, the arbitrator found: "Written proofs of service in the JAMS [Judicial Arbitration and Mediation Service] file, prepared and signed by JAMS Case Managers, confirm that Respondent was given due written notice of all of the events mentioned above, including submission of the demand for arbitration, commencement of the arbitration, appointment of the Arbitrator, the preliminary telephone conference, the hearing scheduled for September 14, 2012, continuance of the hearing to February 4, 2013, and the Interim Order requiring additional submissions. Notices and copies of all materials were sent both by email and Federal Express to Respondent's Chairman Kejiang 'Curt' Huang, Changzhou Sinotype [sic] Technology Co.[,] Ltd[.], Niutang Town, Changzhou, Jiangsu 213168, China."

(See Code Civ. Proc., § 708.510.) SinoType specially appeared and moved "to quash and to set aside default judgment for insufficiency of service of process." (See Code Civ. Proc., § 473, subd. (b).) SinoType asserted that it did not receive actual notice of any proceedings until March 2015 and argued that Rockefeller's failure to comply with the Hague Service Convention rendered the judgment confirming the arbitration award void. In a declaration supporting the motion, chairman Curt acknowledged that, in January 2012, he had received a letter from Faye that "mentioned arbitration." He further declared that "[s]ince Faye Huang and others had harassed me previously, and because I did not believe there was any binding agreement between SinoType and [Rockefeller], I decided to ignore the letter and subsequent FedEx packages and emails. I did not open them." Curt claimed that he only opened the Federal Express packages in March 2015 after a client told him Rockefeller claimed SinoType owed it money. The motion to set aside the judgment was denied,[4] but the Court of Appeal reversed. (See *Rockefeller Technology Investments (Asia) VII v. Changzhou SinoType Technology Co., Ltd.* (2018) 24 Cal.App.5th 115, review granted Sept. 26, 2018, S249923 (*Rockefeller Technology Investments*).)

II. DISCUSSION

A. *The Hague Service Convention*

As to the superior court proceeding to confirm the arbitration award, SinoType argues the Hague Service

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[4] Los Angeles County Superior Court Judge Randolph M. Hammock ruled on the motion.

Convention applies because notice of the proceeding was sent abroad to China, where defendant is based. Mirroring the Court of Appeal's reasoning below, SinoType contends that China's objection to Article 10 of the Convention precludes service in China through Federal Express. SinoType was never properly served, and the judgment confirming the arbitration award is void for lack of personal jurisdiction. (See *Rockefeller Technology Investments*, *supra*, 24 Cal.App.5th at pp. 133-135.) To address this contention, we examine the language of the Hague Service Convention and pertinent United States Supreme Court authority.

The Convention is "a multilateral treaty that was formulated in 1964 by the Tenth Session of the Hague Conference of Private International Law . . . [and] was intended to provide a simpler way to serve process abroad, to assure that defendants sued in foreign jurisdictions would receive actual and timely notice of suit, and to facilitate proof of service abroad." (*Volkswagenwerk Aktiengesellschaft v. Schlunk* (1988) 486 U.S. 694, 698 (*Volkswagenwerk*).) The United States was an original signatory, and China adopted it in 1992. (*Kott v. Superior Court* (1996) 45 Cal.App.4th 1126, 1134-1135 (*Kott*); *Hyundai Merchant Marine v. Grand China Shipping* (S.D.Ala. 2012) 878 F.Supp.2d 1252, 1262, fn. 5; see also *Volkswagenwerk*, at p. 698.)

Article 1 of the Convention states it "shall apply in all cases, in civil and 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.) The Convention requires each member state to "designate

a Central Authority which will undertake to receive requests for service coming from other contracting States and to proceed in conformity with the provisions of articles 3 to 6." (*Ibid.*) "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." (*Ibid.*) "The primary innovation of the Convention is that it requires each state to establish a central authority to receive requests for service of documents from other countries. [Citation.] Once a central authority receives a request in the proper form, it must serve the documents by a method prescribed by the internal law of the receiving state or by a method designated by the requester and compatible with that law. [Citation.] The central authority must then provide a certificate of service that conforms to a specified model."[5] (*Volkswagenwerk*, *supra*, 486 U.S. at pp. 698-699.)

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[5] Submitting a request to a central authority is not, however, the only method of service approved by the Convention. For example, Article 8 permits service through diplomatic and consular agents; Article 11 provides that any two states can agree to methods of service not otherwise specified in the Convention; and Article 19 clarifies that the Convention does not preempt any internal laws of its signatories that permit service from abroad via methods not otherwise allowed by the Convention." (*Water Splash, Inc. v. Menon* (2017) 581 U.S.__, __ [137 S.Ct. 1504, 1508] (*Water Splash*).)

As relevant here, article 10 of the Convention states: "Provided the State of destination does not object, the present Convention shall not interfere with— [¶] *(a) the freedom to send judicial documents, by postal channels, directly to persons abroad*, [¶] (b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination, [¶] (c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination." (Hague Service Convention, *supra*, 20 U.S.T. at p. 363, italics added.) "Each signatory nation may ratify, or object to, each of the articles" of the Convention. (*Honda Motor Co. v. Superior Court* (1992) 10 Cal.App.4th 1043, 1045 (*Honda Motor*).) When it adopted the Convention, China objected to article 10.[6] (See *Zhang v. Baidu.com Inc.* (S.D.N.Y. 2013) 932 F.Supp.2d 561, 567.) By its objection, the nation of China declined to embrace article 10's alternative service methods.

The question here is whether China's objection estops its citizens from agreeing to notification

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[6] The objection has been noted by the Hague Conference on Private International Law, which administers the Convention. (Hague Conference on Private International Law, Declaration/Reservation/ Notification<https://www.hcch.net/en/instruments/conventions/ statustable/notifications/?csid=393&disp=resdn> [as of April 2, 2020]; the Internet citation in this opinion is archived by year, docket number, and case name at <http://www.courts.ca.gov/ 38324.htm>.)

arguably covered by article 10. Two United States Supreme Court cases inform the application of the Convention. In *Volkswagenwerk*, the high court addressed whether a foreign corporation could properly be served through a wholly-owned domestic subsidiary. The court acknowledged that article 1 of the Convention stated it " 'shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.' " (*Volkswagenwerk*, *supra*, 486 U.S. at p. 699.) However, the high court observed that "[t]he Convention does not specify the circumstances in which there is 'occasion to transmit' a complaint 'for service abroad.' But at least the term 'service of process' has a well-established technical meaning. Service of process refers to a formal delivery of documents that is legally sufficient to charge the defendant with notice of a pending action. [Citations.] The legal sufficiency of a formal delivery of documents must be measured against some standard. The Convention does not prescribe a standard, so we almost necessarily must refer to the internal law of the forum state. If the internal law of the forum state defines the applicable method of serving process as requiring the transmittal of documents abroad, then the Hague Service Convention applies." (*Id*. at p. 700.) *Volkswagenwerk* relied upon the negotiating history of the Convention to support its view that "Article 1 refers to service of process in the technical sense" (*ibid*.), and "whether there is service abroad must be determined by reference to the law of the forum state" (*id*. at p. 701).

While noting that "compliance with the Convention is mandatory in all cases to which it applies"

(*Volkswagenwerk*, *supra*, 486 U.S. at p. 705), and "the Convention pre-empts inconsistent methods of service prescribed by state law in all cases to which it applies" (*id.* at p. 699), the high court concluded the Illinois long-arm statute at issue authorized service of a foreign corporation through a domestic subsidiary. (*Id.* at p. 706.) As such, under the law of the forum state, "this case does not present an occasion to transmit a judicial document for service abroad within the meaning of Article 1. Therefore the Hague Service Convention does not apply, and service was proper." (*Id.* at pp. 707-708.)

Water Splash resolved "a broader conflict among courts as to whether the Convention permits service through postal channels." (*Water Splash*, *supra*, 581 U.S. at p. __ [137 S.Ct. at p. 1508].) The court concluded that article 10(a) does not *preclude* service by mail but warned: "To be clear, this does not mean that the Convention affirmatively *authorizes* service by mail. Article 10(a) simply provides that, as long as the receiving state does not object, the Convention does not 'interfere with . . . the freedom' to serve documents through postal channels. In other words, in cases governed by the Hague Service Convention, service by mail is permissible if two conditions are met: first, *the receiving state has not objected to service by mail*; and second, service by mail is authorized under otherwise applicable law." (*Id.* at p. __ [137 S.Ct. at p. 1513], second italics added.)

We discern three relevant principles. First, the Hague Service Convention applies only to "service of process in the technical sense" involving "a formal

delivery of documents." (*Volkswagenwerk*, *supra*, 486 U.S. at p. 700.) The distinction between formal service and mere notice appears consistent with the Practical Handbook on the Operation of the Service Convention, published by the Permanent Bureau of the Hague Conference on Private International Law for guidance regarding the Convention's application. "[T]he Convention cannot—and does not—determine which documents need to be served. It is a matter for the *lex fori* to decide *if* a document needs to be served and *which* document needs to be served. Thus, if the law of the forum states that a notice is to be somehow directed to one or several addressee(s), without requiring *service*, the Convention does not have to be applied." (Practical Handbook on the Operation of the Service Convention (4th ed. 2016) par. 54, p. 23, fn. omitted; see *Denlinger v. Chinadotcom Corp.* (2003) 110 Cal.App.4th 1396, 1402 [the Convention involves "the concept of formal service of process"].)

Second, *whether* "there is occasion to transmit a judicial or extrajudicial document for service abroad" (Hague Service Convention, *supra*, 20 U.S.T. at p. 362) is determined by reference to the law of the sending forum, in this case California. (*Volkswagenwerk*, *supra*, 486 U.S. at pp. 700-701.) *Volkswagenwerk* concluded there that the sending forum, Illinois, did not require service abroad because its long-arm statute authorized domestic service through a subsidiary. (*Id.* at pp. 706-708.) Thus, because international service was not required, the Hague Service Convention did not apply.

Third, if formal service of process is required under the law of the sending forum, international

transmission of service documents must comply with the Convention. "[T]he preemptive effect of the Hague Convention as to service on foreign nationals is beyond dispute." (*Honda Motor*, *supra*, 10 Cal.App.4th at p. 1049.) Thus, *if* the Convention applied here, and assuming service by Federal Express constitutes a species of service by mail,[7] China's objection to foreign mail service under article 10(a) would preclude direct service via Federal Express, regardless of whether California law authorized such service.[8] (See *Water Splash*, *supra*, 581 U.S. at p. __ [137 S.Ct. at p. 1513].) "Failure to comply with the Hague Service Convention procedures voids the service even though it was made in compliance with California law. [Citation.] This is true even in cases where the defendant had actual notice of the lawsuit." (*Kott*, *supra*, 45 Cal.App.4th at p. 1136.)

For the reasons discussed below, we conclude that the parties' agreement constituted a waiver of formal service of process under California law. The parties waived formal service in favor of informal notification

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[7] Many of the cases refer to postal or mail service, while the agreement here provided for service through Federal Express, a private courier company. The parties do not argue that there is any relevant difference between a governmental postal service or private courier company. For purposes of this dispute, we assume the Convention's mail service provisions would apply in the same manner to both.

[8] At least one case has suggested that service via Federal Express does not comport with California law because it does not require a signed return receipt. (See *Inversiones Papaluchi S.A.S. v. Superior Court* (2018) 20 Cal.App.5th 1055, 1066-1067.)

through Federal Express or similar courier. Accordingly, the Convention does not apply in this case.

B. *Jurisdiction, Service of Process and Waiver*

As we recognized over 160 years ago: "To sustain a *personal* judgment the Court must have jurisdiction of the subject-matter, and of the person. [Citation.] Where the jurisdiction of the Court as to the *subject-matter* has been limited by the Constitution or the statute, the consent of parties cannot confer jurisdiction. But when the limit regards *certain persons, they* may, if competent, waive their privilege, and this will give the Court jurisdiction." (*Gray v. Hawes* (1857) 8 Cal. 562, 568.) "Jurisdiction of the subject matter cannot be given, enlarged or waived by the parties. . . . However, if the court has jurisdiction of the subject matter, the rule is otherwise, and a party may voluntarily submit himself to the jurisdiction of the court, or may, by failing to seasonably object thereto, waive his right to question jurisdiction over him. Process is waived by a general appearance, in person or by attorney, entered in the action, or by some act equivalent thereto, such as the filing of a pleading in the case *or by otherwise recognizing the authority of the court to proceed in the action*." (*Harrington v. Superior Court* (1924) 194 Cal. 185, 188-189, italics added.)

" 'Process' signifies a writ or summons issued in the course of a judicial proceeding." (Code Civ. Proc., § 17, subd. (b)(7).) " 'Service of process is the means by which a court having jurisdiction over the subject matter asserts its jurisdiction over the party and brings home to him reasonable notice of the action.' " (*Kappel v. Bartlett* (1988) 200 Cal.App.3d 1457, 1464, quoting

Judicial Council of Cal., com., reprinted at 14 West's Ann. Code Civ. Proc. (1973 ed.) foll. § 413.10, p. 541; cf. *Meza v. Portfolio Recovery Associates, LLC* (2019) 6 Cal.5th 844, 854.)

Thus, formal service of process performs two important functions. From the court's perspective, service of process asserts jurisdiction over the person. "Unless a named defendant agrees to waive service, the summons continues to function as the *sine qua non* directing an individual or entity to participate in a civil action or forgo procedural or substantive rights." (*Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.* (1999) 526 U.S. 344, 351.) "The consistent constitutional rule has been that a court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant." (*Zenith Corp. v. Hazeltine* (1969) 395 U.S. 100, 110.) From the defendant's perspective, "[d]ue notice to the defendant is essential to the jurisdiction of all courts, as sufficiently appears from the well-known legal maxim, that no one shall be condemned in his person or property without notice, and an opportunity to be heard in his defence." (*Earle et al. v. McVeigh* (1875) 91 U.S. 503, 503-504.) Service of process thus protects a defendant's due process right to defend against an action by providing constitutionally adequate notice of the court proceeding.

Cases have recognized that one may waive both personal jurisdiction and notice aspects of service. "[I]t is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or

even to waive notice altogether." (*National Rental v. Szukhent* (1964) 375 U.S. 311, 315-316.)

With respect to personal jurisdiction, " ' "[d]ue process permits the exercise of personal jurisdiction over a nonresident defendant . . . ," ' inter alia, when the defendant consents to jurisdiction. [Citations.] 'A party, even one who has no minimum contacts with this state, may consent to jurisdiction in a particular case.' [Citations.] . . . [¶] Agreeing to resolve a particular dispute in a specific jurisdiction, for example, is one means of expressing consent to personal jurisdiction of courts in the forum state for purposes of that dispute." (*Szynalski v. Superior Court* (2009) 172 Cal.App.4th 1, 7-8.) "While subject matter jurisdiction cannot be conferred by consent, personal jurisdiction can be so conferred, and consent may be given by a contract provision." (*Berard Construction Co. v. Municipal Court* (1975) 49 Cal.App.3d 710, 721.) As the high court has recognized: "Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived. . . . A variety of legal arrangements have been taken to represent express or implied consent to the personal jurisdiction of the court. In *National* [] *Rental*[] *v. Szukhent*, [*supra*,] 375 U.S. [at p.] 316 [], we stated that 'parties to a contract may agree in advance to submit to the jurisdiction of a given court,' and in *Petrowski v. Hawkeye-Security Co.*, 350 U.S. 495 (1956), the Court upheld the personal jurisdiction of a District Court on the basis of a stipulation entered into by the defendant. In addition, lower federal courts have found such consent implicit in agreements to arbitrate. [Citations.] Furthermore, the Court has upheld state

procedures which find constructive consent to the personal jurisdiction of the state court in the voluntary use of certain state procedures." (*Insurance Corp. v. Compagnie Des Bauxites* (1982) 456 U.S. 694, 703-704; see also *Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 472, fn. 14.)

Similarly with respect to notice, it has long been settled that "[t]he due process rights to notice and hearing prior to a civil judgment are subject to waiver." (*D. H. Overmyer Co. v. Frick Co.* (1972) 405 U.S. 174, 185.) The high court in *Overmyer* affirmed the constitutionality of cognovit clauses, "the ancient legal device by which the debtor consents in advance to the holder's obtaining a judgment without notice or hearing" (*id.* at p. 176). *Overmyer* reasoned that, "[e]ven if, for present purposes, we assume that the standard for waiver in a corporate-property-right case of this kind is the same standard applicable to waiver in a criminal proceeding, that is, that it be voluntary, knowing, and intelligently made, [citations], or 'an intentional relinquishment or abandonment of a known right or privilege,' [citations], and even if, as the Court has said in the civil area, '[w]e do not presume acquiescence in the loss of fundamental rights,' [citation], that standard was fully satisfied here." (*Id.* at pp. 185-186.) California courts have since applied the voluntary, knowing, and intelligent standard to similar waiver provisions. (See *Isbell v. County of Sonoma* (1978) 21 Cal.3d 61, 70; *Capital Trust, Inc. v. Tri-National Development Corp.* (2002) 103 Cal.App.4th 824, 829-831; *Commercial Nat. Bank of Peoria v. Kermeen* (1990) 225 Cal.App.3d 396, 401.)

C. *California Statutes Regarding Service of Process*

"A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." (Code Civ. Proc., § 410.10; see Cal. Const., art. VI, § 10; *Donaldson v. National Marine, Inc.* (2005) 35 Cal.4th 503, 512.) Generally, "[e]xcept as otherwise provided by statute, the court in which an action is pending has jurisdiction over a party from the time summons is served on him as provided by Chapter 4 (commencing with Section 413.10)." (Code Civ. Proc., § 410.50, subd. (a).) Code of Civil Procedure[9] section 413.10 provides that "[e]xcept as otherwise provided by statute, a summons shall be served on a person: [¶] . . . [¶] (c) Outside the United States, as provided in this chapter or as directed by the court in which the action is pending, or, if the court before or after service finds that the service is reasonably calculated to give actual notice, as prescribed by the law of the place where the person is served or as directed by the foreign authority in response to a letter rogatory. These rules are subject to the provisions of the Convention on the 'Service Abroad of Judicial and Extrajudicial Documents' in Civil or Commercial Matters (Hague Service Convention)." (§ 413.10, subd. (c).) "A summons may be served on a person outside this state in any manner provided by this article or by sending a copy of the summons and of the complaint to the person to be served by first-class mail, postage prepaid, requiring a return receipt." (§ 415.40; see § 415.30 [service by mail].) Other

[9] Subsequent statutory references are to the Code of Civil Procedure unless otherwise noted.

prescribed statutory methods of service include personal service (§ 415.10) and leaving documents at an office, dwelling, or mailing address (combined with a subsequent mailing) (§ 415.20). A corporation may be served by presenting documents to its president or chief executive officer, among others. (§ 416.10, subd. (b).)

The present case arises out of Rockefeller's attempt to confirm an arbitration award. "Any party to an arbitration in which an award has been made may petition the court to confirm, correct or vacate the award. The petition shall name as respondents all parties to the arbitration and may name as respondents any other persons bound by the arbitration award." (§ 1285; see §§ 1288 [time limits for serving and filing petitions], 1290 ["A proceeding under this title in the courts of this State is commenced by filing a petition"].) "If a petition or response under this chapter is duly served and filed, the court shall confirm the award as made, whether rendered in this state or another state, unless in accordance with this chapter it corrects the award and confirms it as corrected, vacates the award or dismisses the proceeding." (§ 1286.) "A petition under this title shall be heard in a summary way in the manner and upon the notice provided by law for the making and hearing of motions . . . ." (§ 1290.2; see § 1005, subd. (b) [service of motions].)

Of particular relevance here are sections 1290.4 and 1293. Section 1290.4, subdivision (a) requires that "[a] copy of the petition and a written notice of the time and place of the hearing thereof and any other papers upon which the petition is based shall be *served in the*

manner provided in the arbitration agreement for the service of such petition and notice." (Italics added.) Subdivision (b) provides that if an arbitration agreement "does not provide the manner in which such service shall be made and the person upon whom service is to be made has not previously appeared in the proceeding," a person in California shall be served "in the manner provided by law for the service of summons in an action," or upon a person outside the state "by mailing the copy of the petition and notice and other papers by registered or certified mail."[10] (§ 1290.4, subd. (b).)

Under section 1293, "[t]he making of an agreement in this State providing for arbitration to be had within this State shall be deemed a consent of the parties thereto to the jurisdiction of the courts of this State to enforce such agreement by the making of any orders provided for in this title and by entering of judgment on an award under the agreement." This statute codified our decision in *Frey & Horgan Corp. v. Superior Court* (1936) 5 Cal.2d 401, which involved a California corporation's attempt to enforce a contractual arbitration agreement against an out-of-state corporation. *Frey* reasoned: "The contracts having been made with direct affirmative reference to the right of arbitration, and particularly with reference to the laws of California, the provisions of [former] section 1282 of the Code of Civil Procedure [pertaining to petitions to compel arbitration] should be read into the contracts as

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[10] Section 1290.4, subdivision (c) concerns service where an arbitration agreement does not specify a method of service but the person has previously made an appearance or been served.

part thereof. The agreement to submit the dispute to the arbitration committee is an agreement to cooperate in that proceeding. It is presumed that the contract was made in good faith. Therefore it was an agreement to submit to the jurisdiction within which the arbitration must operate in order to give it the effect contemplated by the contract and by the law." (*Frey & Horgan Corp.*, at pp. 404-405.) A later case clarified that *Frey*'s reasoning applied to proceedings to confirm an arbitration award: "That 'effect' [noted in *Frey*], we are satisfied, includes not only the enforcement of arbitration agreements and the conduct of arbitration proceedings, but the enforcement of the award resulting from such arbitration in the manner provided by California law. To hold otherwise would be tantamount to a refutation of the principle of the *Frey & Horgan* case, and would amount to an emasculation and frustration of the purpose and objectives of the arbitration laws of this state." (*Atkins, Kroll & Co. v. Broadway Lbr. Co.* (1963) 222 Cal.App.2d 646, 653.)

D. *The Parties Waived Formal Service of Process Under California Law*

As discussed *ante*, formal service of process involves two aspects: service as a method of obtaining personal jurisdiction over a defendant and formalized notification of court proceedings to allow a party to appear and defend against the action. For the reasons discussed below, we conclude the parties here, by agreeing to the MOU, waived both aspects.

With respect to personal jurisdiction, paragraph 7 of the MOU expressly stated "[t]he Parties hereby submit to the jurisdiction of the Federal and State

Courts in California . . . ." Further, in paragraph 8, the parties agreed to submit all disputes "to the Judicial Arbitration & Mediation Service in Los Angeles for exclusive and final resolution . . . pursuant to California law . . . ." "Code of Civil Procedure section 1293 . . . gives California courts personal and subject matter jurisdiction to enforce arbitration agreements formed in California." (*Boghos v. Certain Underwriters at Lloyd's of London* (2005) 36 Cal.4th 495, 504.) The parties' agreement to exclusively arbitrate any disputes in California constituted consent to submit to the jurisdiction of California courts to enforce that agreement, including "by entering of judgment on an award under the agreement." (§ 1293.)

With respect to notice, paragraph 6 of the MOU stated 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," while paragraph 7 clarified the parties "consent to service of process in accord with the notice provisions above." Construed in tandem, these provisions leave little doubt the parties intended to supplant any statutory service procedures with their own agreement for notification via Federal Express. Section 1290.4, subdivision (a) gives effect to such an agreement by requiring that documents "be served in the manner provided in the arbitration agreement for the service of such petition and notice." That is, section 1290.4, subdivision (a) authorizes parties to an arbitration agreement to waive otherwise applicable statutory requirements for service of summons in connection with a petition to confirm an arbitration award and agree instead to an alternative form of notification,

which is exactly what the parties did in paragraph 6 of the MOU.

The MOU's language confirms the parties' intent to replace "service of process" with the alternate notification method specified in the agreement. This circumstance distinguishes *Abers v. Rohrs* (2013) 217 Cal.App.4th 1199, which construed section 1290.4, subdivision (a). *Abers* involved leases with arbitration clauses that included a provision stating notices could be sent by mail. The homeowners in that case filed a petition to vacate an arbitration award and mailed it to the opposing party. *Abers* rejected the homeowners' claim that the mailing satisfied section 1290.4, subdivision (a): "Their argument fails because it conflates the concept of *providing notice* with the concept of *serving process*." (*Abers*, at p. 1206.) "Because paragraph 16 of the parties' leases governs only *notice*, and not *service*, it does not qualify as a provision which specifies the manner in which a petition to vacate an arbitration award may be *served*. Consequently, the homeowners' reliance on those notice provisions as a means of demonstrating proper service of the petition necessarily fails." (*Id*. at pp. 1206-1207.) By contrast here, the MOU not only contemplated that notifications be sent via Federal Express, but also that such notifications would take the place of formal service of process.

It is true that section 1290.4, subdivision (a) refers to "service," but we do not agree the mere use of that word controls whether the statute is referencing formal service of process. *In re Jennifer O.* (2010) 184 Cal.App.4th 539 (*Jennifer O.*), which involved a

juvenile dependency proceeding, faced an analogous issue. The father, who lived in Mexico, was mailed a notice of a hearing. Noting that Welfare and Institutions Code section 293, subdivision (e) required "[s]ervice of the notice," the father argued compliance with the Hague Service Convention was required. *Jennifer O.* rejected the claim, observing that the high court in *Volkswagenwerk* "held that despite the provision's broad language, the Convention applied only to service of process in the technical sense . . . ." (*Jennifer O.*, at p. 549.) Noting that the father had already made a general appearance in the case, *Jennifer O.* concluded that, notwithstanding the statutory language, "[s]ervice of notice on appellant of the six-month review hearing by first-class mail fully complied with California law . . . ." (*Id.* at p. 550; see *Kern County Dept. of Human Services v. Superior Court* (2010) 187 Cal.App.4th 302, 308-311 (*Kern County*).)

Our conclusions as to California law are narrow. When parties agree to California arbitration, they consent to submit to the personal jurisdiction of California courts to enforce the agreement and any judgment under section 1293. When the agreement also specifies the manner in which the parties "shall be served," consistent with section 1290.4, subdivision (a), that agreement supplants statutory service requirements and constitutes a waiver of formal service in favor of the agreed-upon method of notification. If an arbitration agreement fails to specify a method of service, the statutory service requirements of section 1290.4, subdivisions (b) or (c) would apply, and those statutory requirements *would* constitute formal service

of process. We express no view with respect to service of process in other contexts.

E. *The Hague Service Convention Does Not Apply*

As the high court clarified, "[t]he only transmittal to which the Convention applies is a transmittal abroad that is required as a necessary part of service." (*Volkswagenwerk*, *supra*, 486 U.S. at p. 707.) Whether transmittal abroad is required as a necessary part of service depends on state law. Because the parties agreed to waive formal service of process under California law in favor of informal notification, "this case does not present an occasion to transmit a judicial document for service abroad within the meaning of Article 1" of the Hague Service Convention. (*Id.* at pp. 707-708; see *Kern County*, *supra*, 187 Cal.App.4th at pp. 308-311; *Jennifer O.*, *supra*, 184 Cal.App.4th at pp. 549-550.)

Contrary to SinoType's arguments, this conclusion does not authorize circumventing the Hague Convention where the Convention would otherwise apply. We merely recognize that this case falls "outside the scope of its mandatory application," as the Convention has been interpreted in *Volkswagenwerk*. (*Volkswagenwerk*, *supra*, 486 U.S. at p. 706.) SinoType's arguments are similar to the arguments for broader mandatory application of the Convention made in *Volkswagenwerk*. The high court rejected those arguments, as do we. (See *id.* at pp. 702–705.)

Holding that the Convention does not apply when parties have agreed to waive formal service of process in favor of a specified type of notification serves to

promote certainty and give effect to the parties' express intentions. Conversely, to apply the Convention under such circumstances would sow confusion and encourage gamesmanship and sharp practices. As one court observed, "precluding a contractual waiver of the service provisions of the Hague Convention would allow people to unilaterally negate their clear and unambiguous written waivers of service by the simple expedient of leaving the country." (*Alfred E. Mann Living Trust v. ETIRC Aviation S.A.R.L.* (N.Y.App.Div. 2010) 78 A.D.3d 137, 141; see *Masimo Corp. v. Mindray DS USA Inc.* (C.D.Cal. Mar. 18, 2013, No. SACV 12-02206- CJC(JPRx)) 2013 U.S.Dist.LEXIS 197706, at pp. *13-14.) Nothing in the language or history of the Convention suggests any intent for the treaty to be abused in such a manner.

Likewise, our conclusion promotes California's "long-established and well-settled policy favoring arbitration as a speedy and inexpensive means of settling disputes. [Citation.] This policy is reflected in the comprehensive statutory scheme set out in the California Arbitration Act. (§ 1280 et seq.) The purpose of the act is to promote *contractual arbitration*, in accordance with this policy, as a more expeditious and less expensive means of resolving disputes than by litigation in court. [Citation.] 'Typically, those who enter into arbitration agreements expect that their dispute will be resolved without necessity for any contact with the courts.' " (*Hightower v. Superior Court* (2001) 86 Cal.App.4th 1415, 1431; see *Mercury Ins. Group v. Superior Court* (1998) 19 Cal.4th 332, 342.) Requiring formal service abroad under California law where sophisticated business entities have agreed to

arbitration and a specified method of notification and document delivery would undermine the benefits arbitration provides. Uncertainty with respect to service would require court intervention to resolve, increase the time and cost of dispute resolution, and potentially call into question long-final arbitration awards. Such a result appears contrary to the Legislature's attempts to position California as a center for international commercial arbitration. (See *Credit Lyonnais Bank Nederland, N.V. v. Manatt, Phelps, Rothenberg & Tunney* (1988) 202 Cal.App.3d 1424, 1434.)

III. DISPOSITION

The judgment of the Court of Appeal is reversed. The matter is remanded for the resolution of unadjudicated issues.

CORRIGAN, J.

We Concur:

CANTIL-SAKAUYE, C.J.
CHIN, J.
LIU, J.
CUÉLLAR, J.
KRUGER, J.
GROBAN, J.

APPENDIX B

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

Case No. B272170
(LOS ANGELES COUNTY SUPERIOR COURT NO. BS149995)

[Filed: June 1, 2018]

ROCKEFELLER TECHNOLOGY INVESTMENTS (ASIA) VII, Plaintiff and Respondent, v. CHANGZHOU SINOTYPE TECHNOLOGY CO., LTD., Defendant and Appellant.	)

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

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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.

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 4 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:

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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.

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.

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 10 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 12 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 13 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]

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.

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

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 15 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. 16 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. 17 (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].) <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 nonresident 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 19 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. 20 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

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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.)

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 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 22 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

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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.)

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 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.)

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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."].)

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."]; *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.

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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.)

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.) 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 28 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

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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.)

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]

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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[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.

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

APPENDIX C

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

Case No. BS149995

[Filed: April 15, 2016]

ROCKEFELLER TECH. INC. (ASIA) VII, Plaintiff,	)
v.	)
CHANGZHOU SINOTYPE TECH. CO., LTD., Defendant.	)

ORDER DENYING MOTION TO QUASH AND SET ASIDE JUDGMENT

[Assigned for all purposes to Judge Randolph M. Hammock]

It is a Maxim of Jurisprudence that "[t]he law helps the vigilant, before those who sleep on their rights." Civil Code §3527. In this case, the defendant not only slept on its rights, it was in a self-induced coma. As will be discusses infra, since the defendant received *actual* notice back in early 2012 of the plaintiff's demand and notice of intent to seek binding arbitration, none of the defendant's subsequent actions (or inactions) were reasonable or diligent, and as such, the defendant is

not entitled to the relief it is now belatedly seeking. It is simply too little and too late.

Interestingly enough, the actual material facts for purposes of the motion for relief are undisputed. To wit, in February of 2008, the parties signed and entered into a written "Memorandum of Understanding." This agreement essentially stated, in part, that the "Parties hereby submit to the jurisdiction of the Federal and State Courts in California," that any "disputes arising between the Parties to this Agreement" must be submitted to binding arbitration at the Judicial Arbitration & Mediation Service ("JAMS") in Los Angeles, and moreover, any notices between the parties must be "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. . ." See, Memorandum of Understanding (hereinafter the "2008 Agreement") Paras. 6-8.

A dispute arose between the parties sometime in 2010 in which the defendant purportedly breached and repudiate the 2008 Agreement over the previously-negotiated stock shares. Declaration of Faye Huang, Paras. 15-17. Indeed, at that time the defendant's CEO allegedly stated to plaintiff that defendant was "a Chinese company," and was "immune to any legal remedies that the [plaintiff] might secure from U.S.

courts and that [defendant] would ignore and not participate in any U.S. legal process." Id. at Para. 18.[1]

In short, beginning in early 2012 a considerable series of formal notices and documents were sent to the defendant at its agreed-upon offices in China, and in the exact manner contained in the 2008 Agreement. These documents involved both the arbitration, as well as the court notices and pleadings in this case. The fact that the defendant *actually received* each and every one of these notices and documents, and in the manner proscribed in the agreement, is undisputed.

In March, 2012, this contractual dispute was submitted by the plaintiff to a binding arbitration hearing at the Los Angeles office of JAMS, before a retired Justice of the California Court of Appeals (who had at least 10 years of service as a Justice), as expressly allowed and required by Paragraph 8 of the 2008 Agreement. Despite the fact that defendant received actual notice of that hearing in a timely manner, the defendant did not appear nor participate in any manner in that binding arbitration. After hearing all of the evidence, the Arbitrator issued a detailed written decision in favor of the plaintiff, and against the defendant, for the total sum of $414.601,200. In that decision the Arbitrator specifically found that the defendant had been given proper written notice of all of the events pertinent to the arbitration, including submission of the demand,

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[1] Whether these statements were actually made remains to be seen, however, the substance of these statements have certainly turned out to be true.

appointment of the Arbitrator, and all hearings and conferences both in the manner proscribed in the agreement, as well as the rules and procedures of JAMS International Rules. Additionally, the Arbitrator expressly found that the Memorandum of Understanding was an enforceable agreement, and that the damages awarded were not speculative, and that they were based upon an adequate showing of evidence and law.

Notice of this ruling was properly given to the defendant in November, 2012. Despite these facts, defendant continued to do nothing.

In August, 2014, plaintiff filed the instant action in which it sought to confirm this arbitration award. Defendant was served with all of the required documents, including the Summons and Petition, by federal express and email, in accordance with the 2008 Agreement, and pursuant to CCP §1290.4 These facts are undisputed.

Once again the defendant failed to timely respond, nor make any appearance (special or otherwise) in this case. As such, in October, 2014, this court confirmed the binding arbitration award, without objection, and entered a judgment in favor of plaintiff and against defendant for $414,601,200 (the exact amount of the arbitration award). Shortly thereafter, Defendant was served with notice of this judgment in the same agreed-upon manner. These facts are undisputed.

As such, despite the fact that in late 2014 the defendant had actual notice that a judgment had been entered against it for almost a half-a-billion dollars, the

defendant continued to do nothing. However, not surprisingly, once the plaintiff began to attempt to execute on this judgment against some of the defendant's considerable assets in the United States in November, 2015, the defendant finally decided to specially appear in this case in January, 2016, and attempt to take some action to attack the judgment.[2]

It is well settled that a court's jurisdiction over the parties depends on (1) minimum contacts with the state; (2) notice and opportunity for a hearing; and (3) compliance with statutory jurisdictional requirements for service of process. Goldman v. Simpson (2008) 160 Cal.App.4th 255, 263. As will be discussed infra, this court finds that it has properly asserted jurisdiction over the defendant in this case as of August, 2014, and that the defendant had been properly served with the Summons and Petition in this action.

As to the Petition to Confirm the Arbitration Award itself, it is also well settled that courts may not review the merits of the arbitration award; the findings of fact and law are conclusive unless an error of law appears on the face of the ruling and if that error would result in substantial injustice. Mocharsh v. Heily & Vlase (1992) 3 Cal.4th 1, 8.

"If an award is confirmed, judgment shall be entered in conformity therewith. The judgment so entered has the same force and effect as, and is subject

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[2] This, of course, is quite typical of a judgment debtor who had intentionally defaulted: Do nothing until and unless the judgment creditor actually can take your money and/or seize your assets.

to all the provisions of law relating to, a judgment in a civil action of the same jurisdictional classification; and it may be enforced like any other judgment of the court in which it is entered, in an action of the same jurisdictional classification." Code Civ. Proc., §1287.4.

Since no such "error of law" appears on the face of the arbitration award, the defendant's only attack against this judgment is to contend that it was not properly served with process in this case. Hence, it has filed the instant Motion to Quash and Set Aside Default Judgment.

In short, the defendant submits that this judgment is void, as opposed to "voidable," since it now claims it was not properly served in this case for several reasons: (1) The 2008 Agreement was not a valid and/or enforceable agreement, since under Chinese law or custom, it was merely "an agreement to enter into an agreement." ("Bei wang lu"); (2) Additionally, under Chinese law or custom the mere fact that a legal document is actually received by mail does not formally effectuate service until and unless the recipient actually opens and reviews the document;[3] and

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[3] 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. First, Mr. Huang is not some simple country bumpkin. He 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 Process of Service" 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

(3) Even if the 2008 Agreement was valid, the service was improper under Chinese and/or International law, since China has expressly objected to Article 10(a) of the Hague Convention of 1965, and as such, service could not be properly effectuated in the manner agreed upon in this case.

With all due respect to Chinese law and culture, this court does not agree with the defendant's contentions as to these first two arguments. This is a California court, which is generally guided by California law, unless otherwise required to apply the laws of another state of foreign country pursuant to a conflict-of-law analysis. The 2008 Agreement was entered into by parties who have substantial contacts with the State of California. Moreover, the parties expressly agreed to submit any and all disputes to this agreement "to the jurisdiction of the Federal and State Courts in California." Indeed, the parties also expressly agreed that any such disputes must be submitted to binding arbitration at the JAMS offices in Los Angeles, California.

No matter how you slice or spin it, under any "interest" or conflict-of-law analysis it is abundantly clear that California law applies in this case – not Chinese law.

The Arbitrator expressly found that the 2008 Agreement was an enforceable contract, and so does this court.

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which are also sent via email (which he has never denied also receiving). It simply stretches one's credulity to suggest otherwise.

As to the purported failure to serve the Summons and Petition in this case pursuant to Chinese or International Law, since China clearly has objected to Article 10(a) of the Hague Convention of 1965, this presents the only *potentially*-viable legal argument the defendant may have in order to obtain its requested relief.

The critical issue is thus: Despite the fact that China has expressly objected to Article 10(a), can the parties in this case still agree to be served with legal process in the manner expressly contained in the 2008 Agreement? For the reasons discussed infra, the short answer is "Yes."

There appears to be no binding California precedent on this specific issue, and as such, this may be a case of first impression. Be that as it may, there are other non-binding cases which address these specific issues which this court has found instructive and persuasive. See, e.g. Alfred E. Mann Living Trust v. ETIRC Aviation S.a.r.l. (2010) 78 A.D.3d 137, 140-41 [Parties are free to contractually waive Hague Convention service provisions.]

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 the plaintiff in its opposition, this would essentially result in anarchy and turn entire international arbitration law on its head. This court respectfully declines to do so.

Another federal case in the Southern District of New York takes a similar position, stating that the parties in the action contemplated a means of appropriate extraterritorial service and waived any objection to it. Marine Trading LTD. v. Naviera Commercial Naylamp S.A. (1995) 879 F.Supp. 389, 391. The court in Marine emphasizes that the standards for service in arbitration proceedings are to be liberally construed. Id. at 392. Furthermore, this court cannot find (and defendant 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.

Additionally, Chinese law expressly allows "the parties to a contract involving foreign interests [to] choose the law applicable to settlement of their contractual disputes." People's Republic of China , Civil Law Article 145. The only exceptions involve "marital, adoption, guardianship, support and succession disputes," which must be handled by China's administrative bodies. People's Republic of China, Arbitration Law Article 3.

As such, even under Chinese law there is no logical and/or legal reason why Chinese companies should not be able contractually agree to a manner of service as was in the instant case.

As to the pending motion for relief, under CCP § 473(d) "the court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of

either party after notice to the other party, set aside any void judgment or order." The court has power to set aside a judgment that is void as a matter of law based upon several defects, including: 1) Lack of subject matter jurisdiction; 2) Lack of personal jurisdiction; 3) Lack of actual or constructive notice of proceedings (e.g., because papers served on defendant's attorney who had been suspended by State Bar and thus had no authority to represent defendant). [Lovato v. Santa Fe Int'l Corp. (1984) 151 Cal App 3d 549, 553]; 4) Lack of or improper service of summons. However, substantial compliance with the service of summons statutes is sufficient to defeat a motion under CCP § 473(d). Gibble v. Car-Lene Research, Inc. (1998) 67 Cal.App.4th 295, 313; Ellard v. Conway (2001) 94 Cal App 4th 540, 544; 5) Default improperly entered—e.g., without service on defendant of CCP § 425.11 statement of damages required in personal injury and death actions. Heidary v. Yadollahi (2002) 99 Cal App 4th 857, 862; or 6) Default judgment exceeding amount demanded in complaint.

Per Rappleyea v. Campbell (1994) 8 Cal. 4th 975, "after six months from entry of default, a trial court may still vacate a default on equitable grounds even if statutory relief is unavailable. The appellate courts reviews a challenge to a trial court's order denying a motion to vacate a default on equitable grounds as the Court would a decision under CCP § 473: for an abuse of discretion. One ground for equitable relief is extrinsic mistake--a term broadly applied when circumstances extrinsic to the litigation have unfairly cost a party a hearing on the merits. Extrinsic mistake is found when (among other things) a mistake led a

court to do what it never intended." Relief is generally available only for extrinsic fraud or mistake. But these terms are given a broad interpretation and cover almost any circumstance by which a party has been deprived of a fair hearing. Estate of Sanders v. Sutton (1985) 40 C.3d 607, 614. There need be no actual fraud or mistake in the strict sense.

Be that as it may, assuming for the sake of argument that somehow the plaintiff was actually required to serve the Summons and Petition in this action upon the defendant in the manner suggested by defendant (to wit, vis-á-vis the protocols established by the Chinese government), once the defendant was "served" with the Summons and Petition in the manner which actually occurred in this case it had an obligation to 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. Rappleyea v. Campbell, supra., 8 Cal.4th at 982. See also, Witkin, Cal. Procedure (5th Ed.), Attack on Judgment in Trial Court, §238. Thus, to the extent that the defendant is also seeking to have this court to 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 after discovery of the facts back in 2012 (as to the arbitration) and/or after discovery of the facts back in 2014 (as to this case).

Since the defendant is not legally nor equitably entitled to the relief requested, its pending motions are DENIED in their entirety.

Clerk to give notice.

IT IS SO ORDERED.

Dated: April 15, 2016

/s/ Hon. Randolph M. Hammock
Hon. Randolph M. Hammock
Judge of the Superior Court

APPENDIX D

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

Case No. BS149995
Assigned to the Honorable Rafael Ongkeko (Dept. 73)

[Filed: October 23, 2014]

ROCKEFELLER TECHNOLOGY INVESTMENTS (ASIA) VII, Petitioner,	)
v.	)
CHANGZHOU SINOTYPE TECHNOLOGY CO., LTD., Respondent.	)

JUDGMENT AND ORDER CONFIRMING ARBITRATION AWARD

The petition of Rockefeller Technology Investments (Asia) VII for an order confirming an arbitration award came on regularly for hearing by the court on October 23, 2014, Petitioner Rockefeller Technology Investments (Asia) VII appeared by its attorney of record Gary Ho of Blum Collins, LLP. Respondent Changzhou Sinotype Technology Co., Ltd. did not appear at the hearing.

Proof having been made to the satisfaction of the court that the petition should be granted, IT IS ORDERED that the award of Justice Richard C. Neal (Ref.), Arbitrator, Judicial Arbitration & Mediation Service ("JAMS"), dated November 6, 2013, is confirmed in all respects and that judgment be entered in conformity therewith.

IT IS ADJUDGED that petitioner Rockefeller Technology Investments (Asia) VII, recover from respondent Changzhou Sinotype Technology Co., Ltd., the sum of FOUR HUNDRED FOURTEEN MILLION SIX HUNDRED AND ONE THOUSAND AND TWO HUNDRED DOLLARS ($414,601,200), together with interest thereon at the rate of ten (10) percent per year from November 6, 2013.

Dated: OCT 23 2014

RAFAEL A. ONGKEKO, JUDGE
JUDGE OF THE SUPERIOR COURT

APPENDIX E

JAMS ARBITRATION NO. 1220044102

[Filed: November 6, 2013]

ROCKEFELLER TECHNOLOGY INVESTMENTS (ASIA) VII, CLAIMANT	)
V.	)
CHANGZHOU SINOTYPE TECHNOLOGY CO., LTD., RESPONDENT.	)

FINAL AWARD

Introduction. In this arbitration, Claimant Rockefeller Technology Investments Asia (VII) asserts claims for breach of its written Memorandum of Understanding agreement (MOU) dated February 18, 2008, with Respondent Changzhou Sinotype Technology Co. Ltd, pursuant to which the Claimant and Respondent were to from a new company to exploit the latter's typeface technology.

As further explained below, Respondent has failed to appear in the arbitration, despite notice and an opportunity to appear and be heard. Accordingly, consistent with the applicable rules, the case is submitted and decided based on evidence and arguments presented by Claimant, all as further described below.

The following are the Arbitrator's statement of reasons and award.

Statement of the Case.

Arbitrability. Paragraph 8 of the MOU specifies that either party may submit any dispute arising between them to JAMS in Los Angeles for conclusive and final resolution. The claims presented concern a dispute between the two parties, and accordingly, the dispute is arbitrable.

Summary of Proceedings. Claimant submitted its demand in arbitration to JAMS in Los Angeles on February 27, 2012. JAMS commenced the arbitration on March 15, 2012. JAMS appointed the undersigned Arbitrator April 6, 2012. A first telephonic Preliminary Arbitration Management Conference was noticed for and conducted May 30, 2012. Claimant appeared by its then counsel John Gaimes (Mr. Blum has subsequently replaced Mr. Gaimes as Claimant's counsel). Respondent did not appear.

After the conclusion of the Preliminary Conference, the Arbitrator issued Preliminary Conference Order No. 1, which set the arbitration for plenary hearing September 14, 2012, at 1:00 PM at the JAMS Santa Monica California Resolution Center. The order further addressed the subject of the correct rules for the arbitration. The Agreement specifies the "streamlined procedures," but the JAMS Streamlined Rules apply only to domestic cases where the amount in controversy is $250,000 or less. The demand seeks damages far in excess of that sum, and the Respondent resides in China. The applicable JAMS Rules for this

case, and the rules which will govern the arbitration, are the JAMS International Arbitration Rules, which apply when, as here, the parties are located in different sovereign states and have agreed to arbitrate before JAMS (see Article 1.1, 1.4).

On September 4, 2012, at the request of Claimant, the hearing scheduled for September 14, 2012, was continued to February 4, 2013, at 1:00PM at the JAMS Santa Monica Resolution Center. Claimant appeared before the Arbitrator on the date and time and submitted declarations and documentary evidence in support of its request for an award in its favor.

Following the February 4th hearing, the Arbitrator issued an Interim Order for Briefing. The order noted that Claimant had not submitted a memorandum on February 4th explaining its claims that the governing rules require that in a default setting the Arbitrator may not make an award without receiving adequate proof and determining the validity of the claim. The Arbitrator further raised certain specific questions about the claims.

Several months then elapsed. Claimant eventually submitted a memorandum explaining its claims, support by various additional evidence further detailed below, and an addendum addressing the specific questions raised in the interim order.

Written proofs of service in the JAMS file, prepared and signed by JAMS Case Managers, confirm that Respondent was given due written notice of all of the events mentioned above, including submission of the demand for arbitration, commencement of the

arbitration, appointment of the Arbitrator, the preliminary telephone conference, the hearing scheduled for September 14, 2012, continuance of the hearing to February 4, 2013, and the Interim Order requiring additional submissions. Notices and copies of all materials were sent both by email and Federal Express to Respondent's Chairman Kejiang "Curt" Huang, Changzhou Sinotype Technology Co. Ltd, Niutang Town, Changzhou, Jiangsu 213168, China.

At no time has Respondent appeared at or participated in any of the hearings or proceedings described above. Respondent did not appear for the hearing conducted on February 4, 2013, or submit any opposition to Claimant's demand and proofs, nor any response to Claimant's subsequently submitted memorandum.

Further, Claimant's submission includes testimony that Respondent's Mr. Huang affirmatively communicated that Respondent would not appear or participate in this proceeding, and that in his view Claimant will have great difficulty pursuing a remedy in China.

By reason of Respondent's failure to appear and participate in the proceeding, the case will proceed to conclusion under Article 27 of the JAMS International Rules, which authorizes the tribunal to proceed by default where one party has failed to appear or respond or defend.

Claims and Evidence. The parties to the MOU are Claimant Rockefeller Technology Investments (Asia) VII (RockAsia7), headquartered in New York, New

York, and Changzhou Sinotype Technology Co., Ltd., (Changzhou) headquartered in Changzhou, Jianshu Province, China. The first sentence of the agreement states that its purpose is to create, operate and fund an enterprise between Claimant and Respondent. The parties agree to organize a new company, to be known as World Wide Type or the Company, or Newco, with principal offices in the Silicon Valley, California. Each party is to contribute the entire interest in its business to the New Company. In return for this contribution, Claimant is to receive a 12.5% interest in Newco, and Respondent, an 87.5% interest. It is agreed that Kejian (Curt) Huang, a principal of Respondent, will serve as President and CEO of Newco for a minimum of five years. The board of directors of Newco is to have between 3 and 11 directors, with at least one director appointed by Claimant, two if there are five or more directors. All major decisions require unanimous approval of the board. Claimant's 12.5% interest cannot be diluted. The parties agree to proceed with all deliberate speed, within 90 days if possible, to draft and execute long form agreements carrying for the agreements in the MOU, together with "any and all documents in furtherance of the agreements." The MOU further provided that "upon execution by the parties, this Agreement shall be in full force and effect and shall constitute the full understanding of the parties. . .the parties may modify this [MOU]. . .only through a written agreement signed by all parties."

Claimant RockAsia7 is a partnership and is one of a number of special purpose entities organized to provide capital to support high tech companies in Asia. The partners in RockAsia7 include Rockefeller Fund

Management Co. LLC. Faye Huang is the President of both entities (she is not related to Mr. Curt Huang).

Respondent Changzhou has been a leading developer, marketer and licensor of font software in China since 1991. Claimant offers evidence that Changzhou is "one of the leading producers of font software in the world, with vast industry and market experience, and widespread brand recognition for its cutting edge technology and artistic appeal;" its customers include Apple, IBM, HP, and Adobe; Apple licenses its software and uses it in every one of its products sold around the world; it is the exclusive licensor to the People's Republic of China for official use.

Claimant alleges that Respondent breached a number of provisions of the MOU. Respondent told Claimant that it was unilaterally abrogating Claimant's 12.5% ownership share in Newco, as well as the other minority shareholder rights in MOU sections II (2), (5), and (6). Respondent declined to pay $595,000 in promotional expenses incurred by Claimant under section III(9). Claimant further alleges that Respondent breached the covenant of good faith by demanding that Claimant reduce its ownership interest to 3% and give up minority shareholder protections, and by abrogating the MOU when Claimant refused to do so. Claimant further alleges that Respondent and Curt Huang breached fiduciary duties owed to Claimant as minority shareholder, and converted Claimant's property. These allegations are supported by Ms. Huang's declaration, and of course are not controverted by the non-appearing Respondent.

Claimant offers evidence that it was funded at the time of formation of the new enterprise with 200,000 unrestricted shares of AIG with a New York Stock Exchange public share value of $58.70 per share, a total of $9.65 million as of January 2008. These were assigned to Respondent upon execution of the MOU.

Claimant assisted Respondent during the winter of 2010 in seeking additional financial investors to buy a 10% interest in Newco. The best of three offers, obtained in May 2010, was to pay $60 million for this interest.

Ms. Huang declares that following receipt of the $60 million offer Mr. Huang told her that Respondent had greatly overvalued the 12.5% interest given to Claimant in return for $9.65 million. He insisted that Claimant agree to a reduction of its interest to 3%, and give up its minority protections. When Claimant refused, Respondent on July 10, 2010, unilaterally abrogated the MOU.

Ms. Huang's declaration further attests Mr. Curt Huang told her that Respondent was immune from any remedies which might be sought in U.S. courts and that Claimant's hope of any redress in China was futile.

Claimant urges that any attempt at specific performance relief will be futile. Claimant seeks as damages compensation for loss of its 12.5% interest in the New Company, plus the $595,000 expended in promotional activities authorized under MOU III(9), plus half of the arbitration costs.

The damages for the loss of the 12.5% interest are the big-ticket item. Claimant presents the expert declaration of Alfred Zhong, a 30-year veteran finance professional with experience in the U.S., U.K., and China markets. He served for several years on the faculty of the Shanghai University of Finance and Economics, and on the boards of six Chinese firms which progressed from start up to public ownership. He is a graduate of the Sorbonne (degree in Law and Economics) and the Institut European D' Administration D'Affairs (Masters in Business).

Zhong opines that Claimant's damages for loss of its 12.5% include three components: value of the shares, plus value of the Claimant's share of the control premium enjoyed by Curt Huang, plus value of the non-dilution provision in the MOU. He values Claimant's control premium share at 10% of total company value, and the anti-dilution clause value at 6.25%. Applied to the $600 million valuation indicated by the July 2010 offer of $60 million for 10%, these three components add up to $172 million in damages. To this Claimant asks be added $595,000 in reimbursable expenses and half of JAMS total fees of $15,717, or $7,858.

But Claimant has a further argument. It says the value of Claimant's interest in Newco should be assessed as of a date later than July 2010, the time of breach. Claimant concedes the general rule calls for valuation as of the time of breach. But it cites the "New York Rule," which allows selection and application of a later date for valuation, a "reasonable time after the breach," the reasonable time being selected by the tribunal. The rule responds to the perverse incentive

possessed by defendants in a rising market to breach, in the knowledge that damages are capped as of the time of breach.

Claimant proposes that the time of valuation be set at February 2012, the date this arbitration was commenced. It acknowledges the difficulty of computing Respondent's value, since there is no public market for its shares. Expert Zhong uses the "wave" method for this purpose, which assumes that Respondent's value has grown over the same interval at the same rate as other firms "riding the same economic wave." Zhong selects Apple as the comparator firm, and proposes to extrapolate Respondent's July 2010 value to February 2012 by growing it in the same proportion as Apple during the same interval–240%. This inflator increases Claimant's claimed damages for loss of the share interest and attendant rights to $414 million—28.5% of the estimated total value of Respondent of $1.440 billion, using the wave method.

Discussion. Claimant has allayed the concerns noted in the Interim Order, and made out a clear case of breach. The MOU is definite in its obligations, and expressly intended to be binding. Claimant performed, contributing the value it had agreed to contribute. Respondent repudiated the MOU, in a clear attempt to retrade the agreed terms.

Claimant also establishes its other claims for breach of fiduciary duty and conversion.

The Arbitrator accepts the evidence presented through expert Zhong concerning the percentage values of the control premium and the anti-dilution clause.

The Arbitrator also finds this to be an appropriate case for application of the New York Rule, and adopts Claimant's proposal to set the date of valuation at February 2012. Claimant's arguments are plausible and credible. Respondent agreed to address disputes by arbitration in Los Angeles, but has breached that obligation as well, and in so doing, deliberately forfeited the opportunity to appear and present counter evidence and arguments which might have persuaded this tribunal to reach a different result.

Final Award. Claimant is entitled to an award in the amount of $414,601,200, which includes damages for the interest in the business of $414 million, plus $595,000 in expenses, plus $7,856 constituting half of the arbitration fees.

This Final Award is rendered November 6, 2013, and is intended to be subject to confirmation by a competent court.

The Case Manager, Jose Patino, is requested to promptly serve this Award on the parties.

By: /s/ Richard C. Neal
Hon. Richard C. Neal (Ret.)
Arbitrator

APPENDIX F

HCCH
HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW
CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ

14. CONVENTION ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS[1]

(Concluded 15 November 1965)

The States signatory to the present Convention, Desiring to create 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,

Desiring to improve the organisation of mutual judicial assistance for that purpose by simplifying and expediting the procedure,

[1] This Convention, including related materials, is accessible on the website of the Hague Conference on Private International Law (www.hcch.net), under "Conventions" or under the "Service Section". For the full history of the Convention, see Hague Conference on Private International Law, *Actes et documents de la Dixième session (1964)*, Tome III, *Notification* (391 pp.).

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1

The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.

This Convention shall not apply where the address of the person to be served with the document is not known.

CHAPTER I – JUDICIAL DOCUMENTS

Article 2

Each Contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other Contracting States and to proceed in conformity with the provisions of Articles 3 to 6.

Each State shall organise the Central Authority in conformity with its own law.

Article 3

The authority or judicial officer competent under the law of the State in which the documents originate shall forward to the Central Authority of the State addressed a request conforming to the model annexed to the present Convention, without any requirement of legalisation or other equivalent formality.

The document to be served or a copy thereof shall be annexed to the request. The request and the document shall both be furnished in duplicate.

Article 4

If the Central Authority considers that the request does not comply with the provisions of the present Convention it shall promptly inform the applicant and specify its objections to the request.

Article 5

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.

Subject to sub-paragraph *(b)* of the first paragraph of this Article, the document may always be served by delivery to an addressee who accepts it voluntarily. If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed.

That part of the request, in the form attached to the present Convention, which contains a summary of the

document to be served, shall be served with the document.

Article 6

The Central Authority of the State addressed or any authority which it may have designated for that purpose, shall complete a certificate in the form of the model annexed to the present Convention.

The certificate shall state that the document has been served and shall include the method, the place and the date of service and the person to whom the document was delivered. If the document has not been served, the certificate shall set out the reasons which have prevented service.

The applicant may require that a certificate not completed by a Central Authority or by a judicial authority shall be countersigned by one of these authorities.

The certificate shall be forwarded directly to the applicant.

Article 7

The standard terms in the model annexed to the present Convention shall in all cases be written either in French or in English. They may also be written in the official language, or in one of the official languages, of the State in which the documents originate.

The corresponding blanks shall be completed either in the language of the State addressed or in French or in English.

Article 8

Each Contracting State shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents. Any State may declare that it is opposed to such service within its territory, unless the document is to be served upon a national of the State in which the documents originate.

Article 9

Each Contracting State shall be free, in addition, to use consular channels to forward documents, for the purpose of service, to those authorities of another Contracting State which are designated by the latter for this purpose.

Each Contracting State may, if exceptional circumstances so require, use diplomatic channels for the same purpose.

Article 10

Provided the State of destination does not object, the present Convention shall not interfere with –

a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,

c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

Article 11

The present Convention shall not prevent two or more Contracting States from agreeing to permit, for the purpose of service of judicial documents, channels of transmission other than those provided for in the preceding Articles and, in particular, direct communication between their respective authorities.

Article 12

The service of judicial documents coming from a Contracting State shall not give rise to any payment or reimbursement of taxes or costs for the services rendered by the State addressed. The applicant shall pay or reimburse the costs occasioned by –

a) the employment of a judicial officer or of a person competent under the law of the State of destination,

b) the use of a particular method of service.

Article 13

Where a request for service complies with the terms of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security. It may not refuse to comply solely on the ground that, under its internal law, it claims exclusive jurisdiction over the subject-matter of the action or that its internal

law would not permit the action upon which the application is based.

The Central Authority shall, in case of refusal, promptly inform the applicant and state the reasons for the refusal.

Article 14

Difficulties which may arise in connection with the transmission of judicial documents for service shall be settled through diplomatic channels.

Article 15

Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that –

a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or

b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention, and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

Each Contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this Article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled –

a) the document was transmitted by one of the methods provided for in this Convention,

b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,

c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed. Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.

Article 16

When a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled –

a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal, and

b) the defendant has disclosed a *prima facie* defence to the action on the merits.

An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment.

Each Contracting State may declare that the application will not be entertained if it is filed after the expiration of a time to be stated in the declaration, but which shall in no case be less than one year following the date of the judgment.

This Article shall not apply to judgments concerning status or capacity of persons.

CHAPTER II – EXTRAJUDICIAL DOCUMENTS

Article 17

Extrajudicial documents emanating from authorities and judicial officers of a Contracting State may be transmitted for the purpose of service in another Contracting State by the methods and under the provisions of the present Convention.

CHAPTER III – GENERAL CLAUSES

Article 18

Each Contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence. The

applicant shall, however, in all cases, have the right to address a request directly to the Central Authority. Federal States shall be free to designate more than one Central Authority.

Article 19

To the extent that the internal law of a Contracting State permits methods of transmission, other than those provided for in the preceding Articles, of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions.

Article 20

The present Convention shall not prevent an agreement between any two or more Contracting States to dispense with –

a) the necessity for duplicate copies of transmitted documents as required by the second paragraph of Article 3,

b) the language requirements of the third paragraph of Article 5 and Article 7,

c) the provisions of the fourth paragraph of Article 5,

d) the provisions of the second paragraph of Article 12.

Article 21

Each Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the following –

a) the designation of authorities, pursuant to Articles 2 and 18,

b) the designation of the authority competent to complete the certificate pursuant to Article 6,

c) the designation of the authority competent to receive documents transmitted by consular channels, pursuant to Article 9.

Each Contracting State shall similarly inform the Ministry, where appropriate, of –

a) opposition to the use of methods of transmission pursuant to Articles 8 and 10,

b) declarations pursuant to the second paragraph of Article 15 and the third paragraph of Article 16,

c) all modifications of the above designations, oppositions and declarations.

Article 22

Where Parties to the present Convention are also Parties to one or both of the Conventions on civil procedure signed at The Hague on 17th July 1905, and on 1st March 1954, this Convention shall replace as between them Articles 1 to 7 of the earlier Conventions.

Article 23

The present Convention shall not affect the application of Article 23 of the Convention on civil procedure signed at The Hague on 17th July 1905, or of Article 24 of the Convention on civil procedure signed at The Hague on 1st March 1954.

These Articles shall, however, apply only if methods of communication, identical to those provided for in these Conventions, are used.

Article 24

Supplementary agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention, unless the Parties have otherwise agreed.

Article 25

Without prejudice to the provisions of Articles 22 and 24, the present Convention shall not derogate from Conventions containing provisions on the matters governed by this Convention to which the Contracting States are, or shall become, Parties.

Article 26

The present Convention shall be open for signature by the States represented at the Tenth Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 27

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 26.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 28

Any State not represented at the Tenth Session of the Hague Conference on Private International Law may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 27. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for such a State in the absence of any objection from a State, which has ratified the Convention before such deposit, notified to the Ministry of Foreign Affairs of the Netherlands within a period of six months after the date on which the said Ministry has notified it of such accession.

In the absence of any such objection, the Convention shall enter into force for the acceding State on the first day of the month following the expiration of the last of the periods referred to in the preceding paragraph.

Article 29

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification referred to in the preceding paragraph.

Article 30

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 27, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years. Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 31

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 26, and to the States which have acceded in accordance with Article 28, of the following –

a) the signatures and ratifications referred to in Article 26;

b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 27;

c) the accessions referred to in Article 28 and the dates on which they take effect;

d) the extensions referred to in Article 29 and the dates on which they take effect;

e) the designations, oppositions and declarations referred to in Article 21;

f) the denunciations referred to in the third paragraph of Article 30.

In witness whereof the undersigned, being duly authorised thereto, have signed the present Convention.

Done at The Hague, on the 15th day of November, 1965, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Tenth Session of the Hague Conference on Private International Law.

APPENDIX G

SUMMONS
(CITACION JUDICIAL)

Case No. BS149995

[Filed: August 5, 2014]

NOTICE TO DEFENDANT: *(AVISO AL DEMANDADO):* Changzhou Sinotype Technology Co., Ltd.	)
YOU ARE BEING SUED BY PLAINTIFF: *(LO ESTÁ DEMANDANDO EL DEMANDANTE):* Rockefeller Technology Investments (Asia) VII	)

NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (*www.courtinfo.ca.gov/selfhelp*), your county law

library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (*www.lawhelpcalifornia.org*), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association. NOTE: The court has a statutory lien for waived fees and costs on any settlement or arbitration award of $10,000 or more in a civil case. The court's lien must be paid before the court will dismiss the case. ***¡AVISO!*** *Lo han demandado. Si no responde dentro de 30 días, la corte puede decidir en su contra sin escuchar su versión. Lea la información a continuación.*

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más

información en el Centro de Ayuda de las Cortes de California (www.sucorte.ca.gov), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puedo llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), *en el Centro de Ayuda de las Cortes de California,* (www.sucorte.ca.gov) *o poniéndose en contacto con la corte o el colegio de abogados locales. AVISO: Por ley, la corte tiene derecho a reclamar las cuotas y los cosios exentos por imponer un gravamen sobre cualquier recuperación de $10,000 ó más de valor recibida mediante un acuerdo o una concesíon de arbitraje en un caso de derecho civil. Tiene que pagar el gravamen de la corte antes de que la corte pueda desechar el caso.*

The name and address of the court is:
(El nombre y dirección de la carte es):
Los Angeles Superior Court
111 North Hill Street
Los Angeles, California 90012

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:
(El nombre, la dirección y el numero de teléfono del abogado del demandante, o el demandante que no tiene abogado, es):

Gary Ho,
Blum Collins, LLP,
707 Wilshire Blvd., Suite 4880,
Los Angeles, California 90017

DATE:
*(Fecha)*_____

Clerk, by
(Secretario) /s/ SHERRI R. CARTER

Deputy
(Adjunto)

NOTICE TO THE PERSON SERVED:
You are served.

☑ on behalf of *(specify)*: Changzhou Sinotype Technology Co., Ltd.

☑ other *(specify)*: business organization, form unknown

APPENDIX H

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

CASE NO. BS149995

[Filed: January 28, 2016]

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ROCKEFELLER TECHNOLOGY INVESTMENTS (ASIA) VII,

Petitioner,

v.

CHANGZHOU SINOTYPE TECHNOLOGY CO., LTD.,

Respondent.

SPECIALLY APPEARING DEFENDANT CHANGZHOU SINOTYPE TECHNOLOGY CO., LTD.'S NOTICE OF MOTION AND MOTION TO QUASH AND TO SET ASIDE DEFAULT JUDGMENT FOR INSUFFICIENCY OF SERVICE OF PROCESS (C.C.P. SECTION 473); DECLARATION OF KEJIAN ("CURT") HUANG; DECLARATION OF HOWIE LAN

[Filed concurrently: [Proposed] Order and Notice of Lodging of Non-California Authorities in Support of Motion to Quash and to Set Aside Default Judgment for Insufficiency of Service of Process]

Date: February 24, 2016
Time: 1:30PM
Judge: Hon. Randolph Hammock
Dept.: 77
RES ID: 160114096940

* * *

(pp. 10-12)

I. <u>Curt Huang and SinoType Learn of the Default Judgment</u>

Because he was never served with formal process, Curt did not learn of the arbitration award of more than $414 million or the default judgment confirming the award until March 2015. *(Id.,* ¶90.) Curt, and SinoType, learned of the proceedings only when a client advised that there were enforcement proceedings against it in Santa Clara Superior Court. *(Id.)*

III. SERVICE OF SUMMONS MUST BE QUASHED AND DEFAULT SET ASIDE

Code of Civil Procedure section 473(d) provides that a court "may, on motion of either party after notice to the other party, set aside any void judgment." A default judgment is void under section 473 if "service was improper." *Strathvale Holdings v. E.B.H,* 126 Cal. App. 4th 1241, 1250 (2005). A motion to quash pursuant to Code of Civil Procedure section 418.10 may be brought concurrently, as a part of a motion to set aside a default, and the movant may do so through a special appearance. Civ. Proc. Code §§ 418.10(d), 473(d).

Because California law "strongly favors trial and disposition on the merits[,] . . . any doubts in applying section 473 must be resolved in favor of the party seeking relief from default." *Parage v. Couedel*, 60 Cal. App. 4th 1037, 1041 (1997); *Davis v. Kay,* 34 Cal. App. 3d 680, 683 (1973). Thus, when a defendant brings a motion to challenge service of process, the Petitioner bears the burden of proving that service was valid. *Dill v. Berquist Constr. Corp.,* 24 Cal. App. 18 4th 1426, 1439-40 (1994). Petitioner's service by FedEx and email was invalid. It did not comply with, and SinoType never waived, the protections of the Hague Convention. The purported "arbitration agreement" or MOU attached to the Proof of Service is a void and 21 unenforceable document, and does not constitute a waiver of service. (Dkt. No. 3.)

A. Service of the Summons By Mail Was Not Proper

China is a party to the Hague Convention,[2] thus, SinoType, a Chinese company, must be served with process pursuant to its terms. *Volkswagenwerk Aktiengesellschaft v. Schlunk,* 486 U.S. 694,699 (1988) (compliance with Hague Convention is mandatory); *Superior Court v. Beachport Entm't Corp.*, 45 Cal. App. 4th 1126, 1133, 1136 (1996). To serve a Chinese party under the Hague Convention, a Petitioner must submit the summons and other documents to China's Central Authority, including both the original documents and Chinese translations. Hague Convention, arts. 2 & 5 (Notice of Lodgment of Non-California Authorities ("NOL"), Exh. A)[3] Service is then effected by the Chinese authority. Importantly, China prohibits service of a summons by mail.[4] *In re LDK Solar Secs. Litig.,* No. C07-05182, 2008 WL 2415186, at *1 (N.D. Cal. Jun. 12, 2008) ("Service, therefore cannot be effected by postal channels" in China.)[5]

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[2] See the Hague Conference on Private Int'l Law's status table regarding parties to the Hague Convention, http://www.hcch.net/index_en.php?act=conventions.status&cid=17.

[3] *See also* China- Central Authority & Practical Information, *available at* http://www.hcch.net/index_en.php?act=authorities.details&aid=243.

[4] *See* Hague Convention, China Declaration Notification, 3, *available at* http://www.hcch.net/index_en.php?act=status.comment&csid=393&disp=resdn.

[5] A Federal District Court's interpretation of federal. Law including any international treaty, is properly considered by

There is no question that Rockefeller did not comply with the Hague Convention when it served the Summons. Rockefeller did not submit any documents to China's Central Authority and did not provide SinoType with translations of the documents in Mandarin. Instead, Rockefeller sent the documents to SinoType *via* FedEx and email-methods not permitted by 11 China. *In re LDK Solar Secs. Litig.,* 2008 WL 2415186, at *1.

Rockefeller's attempts to sanction its deficient service are invalid. Rockefeller justified its deficient service at the time by stating that California Code of Civil Procedure Section 1290.4 allows service in the manner provided in the arbitration agreement. (Dkt. No. 3, Attachment to Proof of Service.) However, the Hague Convention preempts any state and federal laws governing service. *Beachport,* 45 Cal. App. 4th at 1133-36. Moreover, the purported "notice" and "service" provisions of the MOU upon which Petitioner relied do not constitute a valid waiver of service of process, as discussed below.

B. SinoType Did Not Waive Service of Process

1. SinoType Did Not Knowingly or Voluntarily Agree to Service by Mail

A waiver of service of process must be "voluntary, knowing, and intelligently made." *D.H Overmyer Co. v. Frick Co.,* 405 U.S. 174, 184-85 (1972).

California state courts. *Landstar Global Logistics, Inc. v. Robinson & Robinson, Inc.,* 216 Cal. App. 4th 378,389 (2013).

SinoType did not voluntarily, knowingly, or intentionally waive the service requirements under the Hague Convention. The "service" provision in the MOU, or, "arbitration agreement" as it is identified in the Proof of Service, does not even reference the Hague Convention. (Dkt. 4 No.3.) Further, when Curt signed the MOU, he did not intend to waive any protections of the Hague Convention. (Huang Decl., ¶¶28-29.) Curt did not even know the MOU had a provision 6 relating to alternate service. *(Id.,* ¶¶28.) Relying on Faye's repeated misrepresentations that the MOU was a "bèi wàng lù" and Curt's experience with business contracts and negotiations in China and the United States, Curt did not believe that the MOU was legally binding, let alone that SinoType waived its legal right to formal service of process. *(Id.,* ¶¶26-29.) For all of these reasons, there was no knowing, voluntary, or intentional waiver of service.

2. The MOU and Its Service Provision Are Void & Unenforceable

SinoType's purported waiver of service is also invalid because the entire MOU is void and unenforceable. The MOU is not a legally binding document but an amorphous "agreement to agree." To the extent Rockefeller and Faye Huang contend otherwise, Curt's signature on the document was induced by fraud.

a. The MOU Is Void as an "Agreement to Agree"

The MOU is unenforceable on the face of the document because it omits key terms and provisions

which would manifest an intent to be bound. California precludes the enforcement of a contract when it cannot be determined what terms the parties agreed upon. *Terry v. Conlon,* 131 Cal. App. 4th 1445, 1459 (2005). "The terms of the contract must be reasonably certain" to be enforced. *Id.* at 602. Vague agreements to a mutual "goal" or "agreements to agree" at some later date are not enforceable. *Terry,* 131 Cal. App. 4th at 1459 (agreement to reach a goal not enforceable); *Bustamante v. Intuit, Inc.,* 141 Cal. App. 4th 199, 209 (2006) (agreement to agree or negotiate not enforceable). Courts therefore review the provisions of a term sheet or memorandum to determine whether there is an intention to create a binding obligation on the parties. *Cedar Fair, L.P. v. City of Santa Clara,* 194 Cal. App. 4th 1150, 1172 (2011) (finding no intent to create a binding contract in the parties' term sheet).

Here, the MOU lacks essential terms and is too uncertain to create a binding obligation.

* * *

APPENDIX I

COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

NO. BS149995

CERTIFIED COPY

[Dated February 24, 2016; April 6, 2016]

ROCKEFELLER TECHNOLOGY INVESTMENTS (ASIA) VII,	)
PLAINTIFF-RESPONDENT,	)
VS.	)
CHANGZHOU SINOTYPE TECHNOLOGY CO., LTD.,	)
DEFENDANT-APPELLANT.	)

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

HONORABLE RANDOLPH M. HAMMOCK, JUDGE PRESIDING

REPORTERS' TRANSCRIPT ON APPEAL

FEBRUARY 24, 2016; APRIL 6, 2016

APPEARANCES:

FOR THE RESPONDENT:
SHEPPARD, MULLIN, RICHTER & HAMPTON, LL
BY: FRED R. PUGLISI, ESQ.
1901 AVENUE OF THE STARS
SUITE 1600
LOS ANGELES, CALIFORNIA 90067-6055

FOR THE APPELLANT:
LAW OFFICES OF STEVE QI & ASSOCIATES
BY: STEVE QI, ESQ.
388 EAST VALLEY BOULEVARD
SUITE 200
ALHAMBRA, CALIFORNIA 91801

SHAWNDA R. DORN, CSR NO. 11387
MARCO NEILLY, CSR NO. 13564
OFFICIAL REPORTERS PRO TEMPORE

* * *

(pp. 23-24)

THE COURT: THAT'S THE ONLY ONE THAT CAN SAVE THE DAY FOR THEM AS FAR AS I'M CONCERNED. BECAUSE IF THEY'RE TECHNICALLY CORRECT, THEN MY DECISION WILL BE DIFFERENT. BUT IF YOU TECHNICALLY SERVED IT CORRECT UNDER THE AGREEMENT OF THE PARTIES, AND YOU ARE ALLOWED TO DO SO, YOU ARE GOING TO PREVAIL IN THIS MOTION.

MR. PUGLISI: I KNOW THAT CHINA IS A SIGNATORY TO THE HAGUE CONVENTION. I DO

NOT KNOW EVERYTHING THEY HAVE AGREED TO. HOWEVER, FOR PURPOSES OF WHAT WE DO HERE, THAT IS IRRELEVANT.

THE COURT: TELL ME WHY.

MR. PUGLISI: BECAUSE YOU ARE ALLOWED -- AS PART OF INTERNATIONAL ARBITRATION GENERALLY, TWO CONTRACTING PARTIES ARE ALLOWED TO AGREE ON THE WAY IN WHICH THEY'RE GOING RESOLVE THEIR DISPUTES. THAT'S WHAT INTERNATIONAL ARBITRATION IS ALL ABOUT.

THE COURT: THIS IS WHAT I NEED. I WOULD LIKE – – I KNOW THIS IS GOING TO DISAPPOINT YOU. I WOULD LIKE A BRIEF SUPPLEMENTAL BRIEFING. BRIEF. I'M GOING TO LIMIT IT TO TEN PAGES. I DON'T WANT -- I WANT TO KNOW WHAT IMPACT, IF ANY, THE FACT THAT CHINA ALLEGEDLY -- FIRST OF ALL, YOU HAVE TO PROVE TO ME THAT CHINA OBJECTED TO 10(A), ALL RIGHT, AND THEN WHAT IMPACT, IF ANY, IS THAT STILL GOING TO RESOLVE -- AFFECT THIS CASE. IN OTHER WORDS, JUST BRIEF IT AND GIVE ME YOUR POSITION. THAT'S THE ONLY ISSUE I WANT TO HEAR ABOUT. PROVE TO ME THAT CHINA HAS OBJECTED TO 10(A), AND SHOW ME THAT EVEN IF THEY OBJECTED, THEIR POSITION IS SO WHAT, YOU KNOW. YOU COULD STILL -- YOU COULD STILL AGREE TO DO IT EVEN THOUGH THAT CHINA HAS OBJECTED TO IT. I DON'T KNOW. I DON'T KNOW ENOUGH ABOUT INTERNATIONAL LAW AND THE THINGS THAT HE IS TALKING ABOUT WHICH HAVE THE

RING OF TRUTH TO IT. I DON'T KNOW HOW IT AFFECT THINGS.

SO THE FACT THAT -- LET'S ASSUME THAT IT'S A FACT THAT CHINA HAS FORMALLY -- THEY'RE A SIGNATOR. THEY'RE LIKE EVERYTHING ELSE BUT lO(A), ALL RIGHT. DOES THAT MEAN THAT YOU CAN NEVER SERVE A CHINESE COMPANY BY MAIL -- BY AGREEMENT OF THE PARTIES? THERE HAS GOT TO BE -- IF THAT'S THE CASE, THERE HAS GOT TO BE SOMETHING OUT THERE, EVEN IN THE INTERNATIONAL ARBITRATION LAW FIELD, THAT WOULD ANSWER THAT QUESTION FOR ME.

MR. PUGLISI: ACTUALLY, I DON'T THINK YOU ARE LIKELY TO FIND IT BECAUSE TT'S SO SELF-EVIDENT THAT YOU ARE NOT LIKELY TO FIND A CASE. WHAT I COULD DO IS TAKE YOU TO THE INTERNATIONAL CHAMBER OF COMMERCE AND GIVE YOU A THOUSAND CASES THAT WERE FILED IN THE LAST YEAR.

THE COURT: OKAY. I WANT TO BE SAFE THAN SORRY. SO I'M GOING TO ALLOW THE PARTIES TO SUPPLEMENTAL BRIEF MAXIMUM TEN PAGES. WE'LL COME BACK IN A COUPLE OF WEEKS. AND THEN UNLESS YOU COULD PERSUADE ME -- BECAUSE YOU STILL HAVE A HEAVY BURDEN, ONE, BECAUSE YOU ARE GOING TO LOSE ON ALL THOSE OTHER ARGUMENTS. YOU DON'T BRIEF THEM AGAIN. THE FOCUS IS YOUR FIRST ARGUMENT -- AND IF YOU WANT TO EXPAND THE FRCP, YOU MAY GO RIGHT AHEAD, BUT I'M NOT OVERLY -- BUT

MAYBE YOU WILL FIND SOMETHING THAT I NEED TO CONSIDER.

* * *

APPENDIX J

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

CASE NO. BS149995

[Filed: March 8, 2016]

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ROCKEFELLER TECHNOLOGY INVESTMENTS (ASIA) VII,	)
Petitioner,	)
v.	)
CHANGZHOU SINOTYPE TECHNOLOGY CO., LTD.,	)
Respondent.	)

SPECIALLY APPEARING RESPONDENT CHANGZHOU SINOTYPE TECHNOLOGY CO., LTD.'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO QUASH AND TO SET ASIDE DEFAULT JUDGMENT FOR IN SUFFICIENCY OF SERVICE OF PROCESS

Date: April 6, 2016
Time: 1:30PM
Judge: Hon. Randolph Hammock
Dept.: 77

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Specially appearing Respondent CHANGZHOU SINOTYPE TECHNOLOGY CO., LTD. (Sinotype), hereby submits the following supplemental brief in support of its Motion to Quash and to Set Aside Default Judgment.

* * *

(pp. 3-4)

of the Convention to the less compelling state service requirements. *Ibid.* Therefore, where the Hague Convention provides a rule of decision, that rule is dispositive of the issue and contrary state laws regarding service of process or waiver need not be considered.

California in fact mandates compliance with the Hague Convention in Code of Civil Procedure section 413.10(c). Failure to comply with the Hague Service Convention procedures voids the service even though it

was made in compliance with California law. *Kott v. Superior Court*, 45 Cal.App.4th 1126, 1136 (1996). *See also Porsche v. Superior Court* 123 Cal.App.3d 8 755, 760-762 (1981) (a California court may not exercise jurisdiction in violation of an international treaty. Failure to comply with the Hague Convention was controlling and even a showing of actual notice is insufficient to avoid the effect of noncompliance). Therefore, this Court may not exercise jurisdiction in violation of the Hague Convention which clearly provides that Chinese defendants may not be served through postal channels, a mandate which is dispositive of the issue at hand and not subject to interference by California state law.

III. CHINA'S OBJECTION TO ARTICLE 10(a) OF THE HAGUE CONVENTION IS DISPOSIVE AND DEFENDANT CANNOT BE SERVED THROUGH POSTAL CHANNELS

As have already been stated in Respondent's moving papers, service cannot be effected by postal channels in China. China objected to the entire Article 10 of the Hague Convention, including 10(a), and service therefore cannot be effected by postal channels in China. *In re LDK Solar Securities Litigation*, 2008 WL 2415186, *1.[1] Moreover, any attempt to distinguish email and facsimile from the "postal channels" referred to in the text of Article 10 is unavailing. *Agha v.*

[1] *See also* Hague Convention, China Declaration Notification, 3, *available at* http://www.hcch.net/index_en.php?act=status.comment&csid=393&disp=resdn; *See* also China - Central Authority & practical information, *available at* https://www.hcch.net/en/states/authorities/details3/?aid=243.

Jacobs, 2008 WL 2051061, *2. Service by email, as the Petitioner also attempted to do here, is therefore considered to be a type of postal channel, and equally unacceptable when it comes to serving Defendant of a country which is a member of the Hague Convention and which objected to Article 10(a).Respondent must be served through the Chinese Central Authority. All documents and evidence to be served must also be written in Chinese or to have Chinese translations attached.[2]

Mail service is only an option in Hague countries that have not objected to Article 10(a). If the Hague Convention is applicable, its provisions preempt inconsistent methods of service prescribed by state law. *Volkswagenwerk Aktiengesellschaft,* 486 U.S. 694 at 699. Petitioner in the instant case utterly failed to even attempt to serve the Respondent as mandated by the Hague Convention. Moreover, no Chinese translations were attached to any of the documents sent from the Petitioner to the Respondent. Petitioner's disregard for the Convention's mandates and its failure to properly serve a Chinese company has consequences that it cannot argue away with baseless assumptions.

China's objection to Article 10(a) of the Hague Convention is dispositive on the issue and Petitioner failed to cite **any case** holding that the Hague Convention Service Provision can be waived contractually, let alone any case indicating that the alleged waiver in this case was in fact valid. Because

---

[2] *See* China - Central Authority & practical information, available at https://www.hcch.net/en/states/authorities/details3/?aid=243.

the Hague Convention is the supreme law of the land, any state law regarding waiver would be irrelevant because state service rules are not "substantial" enough to override federal rule. *See Hanna v. Plumer,* 380 U.S. 460; *Morse v. Elmira County Club,* 752 F.2d 35, 38 17 (same).

IV. NO EXCEPTIONS TO THE HAGUE SERVICE CONVENTION ARE AVAILABLE TO THE PETITIONER UNDER CALIFORNIA OR FEDERAL LAW

1. The Only Method of Service Under California Law Which Does Not Require The Transmission of Documents Abroad, and Consequently Does Not Implicate The Hague Service Convention Is Service of Summons By Publication

Article 1 of the Convention states that "[t]his Convention shall not apply where the address of the person to be served with the document is not known." Appen. to Fed. Rules Civ. Proc., rule 4, 28 U.S.C. Under California law, the only method of service with regards to serving a foreign defendant which does not require the transmission of documents abroad, and

APPENDIX K

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT, DIVISION 3

2ND Dist. Civil No.: B272170

Los Angeles Superior Court No.: BS149995

Judicial Officer Information: The Honorable Randolph Hammock, Presiding in Dept. 47 [(213) 633-0647]

[Filed: August 18, 2017]

Changzhou Sinotype Technology Co., Ltd.	)
	)
Appellant/Defendant,	)
	)
vs.	)
	)
Rockefeller Technology Investments (Asia),	)
	)
Respondent/Plaintiff.	)
	)

APPELLANT'S OPENING BRIEF

Appeal From the Order of the Superior Court of California, in and for the County of Los Angeles, Entered April 15, 2016, by the Honorable Randolph Hammock, Judicial Officer Presiding, Superior Court

Case No.: BS149995, Denying a Motion to Vacate a Default Judgment.

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* * *

(pp. 30-35)

the defendant had actual notice of the lawsuit. [Citations.]" (Kott, 45 Cal.App.4th at 1136.)

The Hague Convention is a multilateral treaty formulated in 1964 by the Tenth Session of the Hague Conference of Private International Law. (Kott, 45 Cal.App.4th at 1133.) The 1964 version was intended to

provide a simpler way to serve process abroad, to assure defendants sued in foreign jurisdictions would receive actual and timely notice of suit, and to facilitate proof of service abroad. (Id., citing Volkswagenwerk Aktiengesellschaft v. Schlunk (1988) 486 U.S. 694, 698).

Article 1 of the Hague Convention declares that the Convention "shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." Article 10(a) provides that, as long as the "State of destination" does not object, the Convention "shall not interfere with the freedom to send judicial documents, by postal channels, directly to persons abroad." The People's Republic of China has objected to Article 10. See Hague Convention, China Declaration Notification, 3, available at http://www.hcch.net/index_en.php?act=status.comment&csid=393&disp=resdn (declaring "to oppose the service of documents in the territory of the People's Republic of China by the methods provided by Article 10 of the Convention").

The Convention entered into force in the United States on February 10, 1969. China became signatory to the Hague Service Convention on March 2, 1991 and entered into force on January 1, 1992 with objections to service pursuant to Articles 8, 10, 15 and 16 of the Convention. With reservation to service in accordance with Article 8, China only permits direct service through the requesting state's diplomatic or consular agents when there is an attempt to serve process on their nationals. Service of process via postal channels, through judicial officers or other competent persons

and interested persons specified in Article 10(a)(b)(c) is prohibited in China under the Hague Service Convention. See U.S. Dep't of State, Country Specific U.S. State Department Circulars, Judicial Assistance - China, in International Business Litigation & Arbitration 2005, Litigation and Administrative Practice Course Handbook Series, PLI Order No. 5929, 721 PLI/Lit 1311, 1311, 1313 (Practising Law Institute ed., March 2005). Under current Chinese civil procedure law, service of process is regarded as a "judicial" or "sovereign" act that may not be performed by a private person. The People's Republic of China in Articles 260 and 261 of its Civil Procedure Law, which was in effect in the year 2012 when the Petition to Confirm the Arbitration Award was allegedly served by mail, and which remains in force today, although re-codified as Articles 276 and 277, has detailed the sole means for foreign litigants to obtain international judicial assistance in China. See People's Republic of China Civil Procedure Law, arts. 260 & 261, subject of a Motion for Judicial Notice in this case, filed contemporaneously with this Appellant's Opening Brief (hereinafter the "MJN").

Then effective Article 260 of the Civil Procedure Law of the People's Republic of China (translated into English) (see MJN) provides, in pertinent part:

> "Article 260 A people's court and a foreign court may mutually request each other for service of documents, investigation, evidence collection and other litigation acts on their respective behalf in accordance with the international treaties concluded or acceded to by the People's

> Republic of China or according to the principle of reciprocity.
>
> If any matter for which a foreign court requests assistance harms the sovereignty, security or social public interest of the People's Republic of China, a people's court shall refuse to enforce the matter."

Then effective Article 261 of the Civil Procedure Law of the People's Republic of China (translated into English) (see MJN) (hereinafter "Article 261" provides, in pertinent part:

> "Article 261. A request for and the provision of judicial assistance shall be conducted through channels stipulated in the international treaties concluded or acceded to by the People's Republic of China, and in the absence of treaty relations, shall be conducted through diplomatic channels.
>
> An embassy or consulate of a foreign country in the People's Republic of China may serve documents on, investigate, or collect evidence from the citizens of that country, provided, however, that the laws of the People's Republic of China are not violated and that no compulsory measures are adopted.
>
> Except for the circumstances specified in the preceding paragraph, **no foreign agency or individual may serve documents**, conduct investigations or collect evidence **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." [Emphasis added]

Article 261 states that any request for judicial assistance "shall be conducted through channels stipulated in the international treaties concluded or acceded to by the People's Republic of China" or through diplomatic channels. People's Republic of China Civil Procedure Law, arts. 260 & 261 (see MJN). The Hague Service Convention is precisely the international treaty contemplated by Article 261 to which China has acceded with the intention of channeling all requests for judicial assistance through the mechanism provided by the treaty and China's implementing legislation in compliance with the Hague Service Convention. In acceding to the Hague Service Convention, China took a limited reservation with regard to service of process by mail, further indicating its determination to control the intrusion of foreign legal process on Chinese judicial sovereignty. Indeed, according to the U.S. State Department's website, service of process by mail should NOT be used in China. Bureau of Consular Affairs, U.S. Dep't of State, China Judicial Assistance, https://travel.state.gov/content/travel/en/legalconsiderations/judicial/country/china.html.

> "China . . .
> Party to Hague Service Convention? Yes
> Party to Hague Evidence Convention? Yes
> Party to Hague Apostille Convention? Yes
> Party to Inter-American Convention? No
> Service of Process by Mail? No"

Although the Hague Convention "liberalized service of process in international civil suits," (see Brockmeyer v. May, (9th Cir. 2004) 383 F.3d 798, 801), it does not, by itself, provide an affirmative answer to what specific types of service are allowed in a particular case.

The English text of Article 10 of the Convention reads as follows:

"Provided the State of destination does not object, the present Convention shall not interfere with—

(a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

"(b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,

"(c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination."

In Water Splash, Inc. v. Menon, (2017) 137 S. Ct. 1504, 1508 ("Water Splash"), a unanimous United States Supreme Court, recently resolved a split between the Second Circuit and Eighth Circuit Court of Appeals and held that the Convention does not prohibit service by mail but also held, "this does not mean that the Convention affirmatively authorizes service by mail."(Id.) The Court then went on to state that, "in cases governed by the Hague Service

Convention, service by mail is permissible if two conditions are met: **first, the receiving state has not objected to service by mail**; and second, service by mail is authorized under otherwise-applicable law." [emphasis added] (Id.)

Service on a Chinese company by mail is not effective in California or anywhere else in the United States, as California and other U.S. courts have held that formal objections to service by mail under Article 10(a) of the Convention are valid. (Dr. Ing H.C. F. Porsche A.G. v. Superior Court, (1981) 123 Cal. App. 3d 755, 761 (rejecting attempt to serve a German defendant by mail where Germany had objected to Article 10(a) of the Convention)). "By virtue of the supremacy clause, the [Hague Service Convention] overrides state methods of serving process abroad that are objectionable to the nation in which the process is served."(See DeJames v. Magnificence Carriers, Inc., (3d Cir. 1981) 654 F.2d 280).

It is beyond reasonable dispute that China has objected to service by mail since China has objected to Article 10 which is the Article providing for service by mail. It is also beyond dispute that China views attempts to serve its citizens by mail as an insult to its sovereignty and a violation of the treaty it entered into with the United States. It is beyond dispute, also, that China does not recognize or permit informal service on its citizens even by their own consent under Article 5 of the Convention.

* * *

APPENDIX L

No. S249923

IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

[Filed: May 21, 2019]

Changzhou Sinotype Technology Co., Ltd.,	)
	)
Appellant/Defendant,	)
	)
vs.	)
	)
Rockefeller Technology Investments (Asia),	)
	)
Respondent/Plaintiff.	)
	)

Second Appellate District Court of Appeal
Civil No.: B272170
Los Angeles Superior Court
Case No.: BS149995
Judicial Officer Information:
The Honorable Randolph Hammock, Presiding
in Dept. 47 [(213) 633-0647]

ANSWER BRIEF ON THE MERITS

On Review of a Published Opinion of the Second District Court of Appeal, Division Three
Case No. B272170

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* * *

(pp. 29-43)

IV. ARGUMENT

A. THE MOTION TO VACATE THE DEFAULT JUDGMENT AFFIRMING THE ARBITRATION AWARD SHOULD HAVE BEEN GRANTED BECAUSE THE JUDGMENT IS VOID FOR FAILING TO COMPLY WITH THE HAGUE CONVENTION.

Failure to comply with the Hague Convention renders any attempt at service of process void, even if the defendant has actual notice of the lawsuit. (See Floveyor Internat., LTD. vs. Superior Court (1997) 59 Cal.App.4th 789, 795, citing Honda Motor Co. vs. Superior Court (1992) 10 Cal.App.4th 1043, 1049, and Dr. Ing. H.C.F. Porsche A.G. vs. Superior Court (1981) 123 Cal.App.3d 755, 762 ("Dr. Ing.")). The cases in this area specifically hold that such service is VOID AB INITIO, not merely voidable. The distinction between *void ab initio* and merely "voidable" is, of course, that a judgment which is void ab initio is a nullity, may be ignored and may be set aside at any time by any court, either a trial court or a reviewing court. (Stowe vs. Matson, (1954) 94 Cal.App.2d 678.) "A judgment or order that is invalid on the face of the record is subject to collateral attack. [Citation.] It follows that it may be set aside on motion, with no limit on the time within which the motion must be made." (8 Witkin, Cal. Procedure (5th ed. 2016) Attack on Judgment in Trial Court, § 207, p. 812; see, also, Peralta vs. Heights Medical Center, (1988) 485 U.S. 80,85-87 (proceeding to vacate default held timely though filed 6 years after judgment was entered where default was void)).

Such a motion to vacate a void judgment may be made under Code of Civil Procedure Section 473(d), which provides, in pertinent part:

> "(d) The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order."

In Kott vs. Superior Court (1996) 45 Cal.App.4th 1126 (Kott), the Court of Appeal held that "[f]ailure to comply with the Hague Service Convention procedures voids the service even though it was made in compliance with California law. [Citation.] This is true even in cases where the defendant had actual notice of the lawsuit. [Citations.]" (Kott, 45 Cal.App.4th at 1136.)

The Hague Convention is a multilateral treaty formulated in 1964 by the Tenth Session of the Hague Conference of Private International Law. (Kott, 45 Cal.App.4th at 1133.) The 1964 version was intended to provide a simpler way to serve process abroad, to assure defendants sued in foreign jurisdictions would receive actual and timely notice of suit, and to facilitate proof of service abroad. (Id., citing Volkswagenwerk Aktiengesellschaft v. Schlunk (1988) 486 U.S. 694, 698).

Article 1 of the Hague Convention declares that the Convention "shall apply in all cases, in civil or commercial matters, where there is occasion to

transmit a judicial or extrajudicial document for service abroad." Article 10(a) provides that, as long as the "State of destination" does not object, the Convention "shall not interfere with the freedom to send judicial documents, by postal channels, directly to persons abroad." The People's Republic of China has objected to Article 10. See Hague Convention, China Declaration Notification, 3, available at http://www.hcch.net/index_en.php?act=status.comment&csid=393&disp=resdn (declaring "to oppose the service of documents in the territory of the People's Republic of China by the methods provided by Article 10 of the Convention").

The Convention entered into force in the United States on February 10, 1969. China became signatory to the Hague Service Convention on March 2, 1991 and entered into force on January 1, 1992 with objections to service pursuant to Articles 8, 10, 15 and 16 of the Convention. With reservation to service in accordance with Article 8, China only permits direct service through the requesting state's diplomatic or consular agents when there is an attempt to serve process on their nationals. Service of process via postal channels, through judicial officers or other competent persons and interested persons specified in Article 10(a)(b)(c) is prohibited in China under the Hague Service Convention. See U.S. Dep't of State, Country Specific U.S. State Department Circulars, Judicial Assistance - China, in International Business Litigation & Arbitration 2005, Litigation and Administrative Practice Course Handbook Series, PLI Order No. 5929, 721 PLI/Lit 1311, 1311, 1313 (Practising Law Institute ed., March 2005). Under current Chinese civil procedure law, service of process is regarded as a

"judicial" or "sovereign" act that may not be performed by a private person. The People's Republic of China in Articles 260 and 261 of its Civil Procedure Law, which was in effect in the year 2012 when the Petition to Confirm the Arbitration Award was allegedly served by mail, and which remains in force today, although re-codified as Articles 276 and 277, has detailed the sole means for foreign litigants to obtain international judicial assistance in China. See People's Republic of China Civil Procedure Law, arts. 260 & 261, subject of a Motion for Judicial Notice in the Second Appellate District Court of Appeal, filed contemporaneously with Appellant's Opening Brief in the Court of Appeal which was granted by the Court of Appeal (hereinafter the "MJN").

CA Rules of Court, Rule 8.500(c)(2), provides, in pertinent part, as follows:

> "A party may petition for review without petitioning for rehearing in the Court of Appeal, but as a policy matter the Supreme Court normally will accept the Court of Appeal opinion's statement of the issues and facts unless the party has called the Court of Appeal's attention to any alleged omission or misstatement of an issue or fact in a petition for rehearing."

See, e.g., People v. Peevy (1998) 17 Cal.4th 1184, 1205-1206 and People v. Bransford (1994) 8 Cal.4th 885, 893, fn. 10.

No Petition for Rehearing was filed in the Court of Appeal in this case. Therefore, apparently, this Court

should accept the matters of fact which were accepted by the Court of Appeal in its granting of the Motion for Judicial Notice.

Then effective Article 260 of the Civil Procedure Law of the People's Republic of China (translated into English) (see MJN) provides, in pertinent part:

> "Article 260 A people's court and a foreign court may mutually request each other for service of documents, investigation, evidence collection and other litigation acts on their respective behalf in accordance with the international treaties concluded or acceded to by the People's Republic of China or according to the principle of reciprocity.
>
> If any matter for which a foreign court requests assistance harms the sovereignty, security or social public interest of the People's Republic of China, a people's court shall refuse to enforce the matter."

Then effective Article 261 of the Civil Procedure Law of the People's Republic of China (translated into English) (see MJN) (hereinafter "Article 261" provides, in pertinent part:

> "Article 261. A request for and the provision of judicial assistance shall be conducted through channels stipulated in the international treaties concluded or acceded to by the People's Republic of China, and in the absence of treaty relations, shall be conducted through diplomatic channels.

> An embassy or consulate of a foreign country in the People's Republic of China may serve documents on, investigate, or collect evidence from the citizens of that country, provided, however, that the laws of the People's Republic of China are not violated and that no compulsory measures are adopted.
>
> Except for the circumstances specified in the preceding paragraph, **no foreign agency or individual may serve documents**, conduct investigations or collect evidence **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." [Emphasis added]

Article 261 states that any request for judicial assistance "shall be conducted through channels stipulated in the international treaties concluded or acceded to by the People's Republic of China" or through diplomatic channels. People's Republic of China Civil Procedure Law, arts. 260 & 261 (see MJN). The Hague Service Convention is precisely the international treaty contemplated by Article 261 to which China has acceded with the intention of channeling all requests for judicial assistance through the mechanism provided by the treaty and China's implementing legislation in compliance with the Hague Service Convention. In acceding to the Hague Service Convention, China took a limited reservation with regard to service of process by mail, further indicating its determination to control the intrusion of foreign legal process on Chinese judicial sovereignty. Indeed,

according to the U.S. State Department's website, service of process by mail should NOT be used in China. Bureau of Consular Affairs, U.S. Dep't of State, *China Judicial Assistance*, https://travel.state.gov/content/travel/en/legalconsiderations/judicial/country/china.html.

"China . . .
Party to Hague Service Convention? Yes
Party to Hague Evidence Convention? Yes
Party to Hague Apostille Convention? Yes
Party to Inter-American Convention? No
Service of Process by Mail? No"

Although the Hague Convention "liberalized service of process in international civil suits," (see Brockmeyer v. May, (9th Cir. 2004) 383 F.3d 798, 801), it does not, by itself, provide an affirmative answer to what specific types of service are allowed in a particular case.

The English text of Article 10 of the Convention reads as follows:

"Provided the State of destination does not object, the present Convention shall not interfere with—

(a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

"(b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,

"(c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination."

In Water Splash, Inc. v. Menon, (2017) 137 S. Ct. 1504, 1508 ("Water Splash", a unanimous United States Supreme Court, recently resolved a split between the Second Circuit and Eighth Circuit Court of Appeals and held that the Convention does not prohibit service by mail but also held, "this does not mean that the Convention affirmatively authorizes service by mail."(Id.) The Court then went on to state that, "in cases governed by the Hague Service Convention, service by mail is permissible if two conditions are met: **first, the receiving state has not objected to service by mail**; and second, service by mail is authorized under otherwise-applicable law." [emphasis added] (Id.)

Service on a Chinese company by mail is not effective in California or anywhere else in the United States, as California and other U.S. courts have held that formal objections to service by mail under Article 10(a) of the Convention are valid. (Dr. Ing H.C. F. Porsche A.G. v. Superior Court, (1981) 123 Cal. App. 3d 755, 761 (rejecting attempt to serve a German defendant by mail where Germany had objected to Article 10(a) of the Convention)). "By virtue of the supremacy clause, the [Hague Service Convention] overrides state methods of serving process abroad that are objectionable to the nation in which the process is

served." (See DeJames v. Magnificence Carriers, Inc., (3d Cir. 1981) 654 F.2d 280).

It is beyond reasonable dispute that China has objected to service by mail since China has objected to Article 10 which is the Article providing for service by mail. It is also beyond dispute that China views attempts to serve its citizens by mail as an insult to its sovereignty and a violation of the treaty it entered into with the United States. It is beyond dispute, also, that China does not recognize or permit informal service on its citizens even by their own consent under Article 5 of the Convention.

The English text of Article 5 of the Convention reads as follows:

> "Article 5 - 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**.
>
> Subject to sub-paragraph (b) of the first paragraph of this Article, the document may always be served by delivery to an addressee who accepts it voluntarily.

> If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed.
>
> That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document." [emphasis added]

Proper service under the Hague Convention is effected through the designated Chinese Central Authority in Beijing, which is the "Bureau of International Judicial Assistance, Ministry of Justice of the People's Republic of China". A Plaintiff, which includes a Plaintiff that is suing in a California Court, seeking to sue a company which resides within the territorial boundaries of the People's Republic of China must submit the following to the Ministry of Justice:

a. A completed United States Marshals Service Form USM-94

b. The original English version of the documents to be served (the summons must have the issuing court' seal)

c. The Chinese translation of all documents to be served.

d. A photocopy of each of these documents. (See below.)

The U.S. State Department's website provides, as follows:

"China is a party to the Hague Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil and Commercial Matters. Complete information on the operation of the Convention, including an interactive online request form are available on the Hague Conference website. Requests should be completed in duplicate and submitted with two sets of the documents to be served, and translations, directly to China's Central Authority for the Hague Service Convention. The person in the United States executing the request form should be either an attorney or clerk of court. The applicant should include the titles attorney at law or clerk of court on the identity and address of applicant and signature/stamp fields. In its Declarations and Reservations on the Hague Service Convention, China formally objected to service under Article 10, and does not permit service via postal channels. For additional information see the Hague Conference Service Convention website and the Hague Conference Practical Handbook on the Operation of the Hague Service Convention. See also China's response to the 2008 Hague Conference questionnaire on the practical operation of the Service Convention."

Bureau of Consular Affairs, U.S. Dep't of State, *China Judicial Assistance*, https://travel.state.gov/content/travel/en/legalconsiderations/judicial/country/china.html

In the written response of the People's Republic of China to the Hague Service Convention Questionnaire, Questions for Contracting States, China specifically indicates that it does not permit its citizens to agree to informally accept service without involvement of the Central Authority and without the documents being translated into the Chinese language. See Hague Service Convention Questionnaire, Questions for Contracting States (2008), at: http://www.hcch.net/upload/wop/2008china14.pdf, at page "19" thereof:

> "c. Informal delivery (Art. 5(2))
>
> [question] (i) Does the law of your State provide for informal delivery of documents (understood to be a method of service where the documents to be served are delivered to an addressee who accepts them voluntarily)?
>
> . . . .
>
> [answer] [X] NO"

and see, also, Hague Service Convention Questionnaire, Questions for Contracting States (2008), at:

http://www.hcch.net/upload/wop/2008china14.pdf, at page "21" thereof:

> "C. Translation requirements (Art. 5(3)) 30) Please indicate if your State, as a requested State, imposes any language or translation requirements for documents to be served in your State under Article 5(1) (see Conclusions and Recommendations Nos 67 and 68 of the 2003 Special Commission):
>
> . . . .

[X] YES - please indicate what these requirements are, in each of the following set of circumstances:

a. Formal service (Art. 5(1) a)):

In circumstances where the/ a Central Authority of your State, as a requested State, is in a position to assess the content and nature of the request for service based on the "Summary" section of the Model Form and where there is evidence that the addressee is fluent in the language in which the document to be served is written. Would your State then still insist, under Article 5(1) a), that the document be translated into another language (i.e., one of the official languages of your State)?

[X] YES - please indicate why:

According to the domestic law, the documents to be served must be in Chinese language."

Completely ignoring the rules of service of process required by the Hague Convention, Respondent Rockefeller in this case obtained the Default Judgment described above by transmitting the Petition to confirm the arbitration award to SinoType in China via postal channels without complying with the Hague Convention in any way. This Court should find that Parties may not waive due process procedures created by the Hague Convention in the manner in which Rockefeller has claimed was done in this instance. China does not permit parties to informally waive their rights to service of legal documents under Article 5 of the Convention. China does not permit legal documents to be served unless they are translated into Chinese

and served formally by the Central Authority in China. China does not permit legal documents to be served by mail. Therefore, the Petition to confirm the award, the award, and, indeed, the arbitration notices themselves, were not properly served in compliance with the Convention, and the Default Judgment is void ab initio since the attempted service violated a treaty of the United States with the People's Republic of China under Dr. Ing. and Kott, and, indeed, under the U.S. Supreme Court's recent decision in Water Splash wherein it was held that, for service by mail under the Convention to be effective, it must be something that "he receiving state has not objected to" (Dr. Ing., 123 Cal. App. 3d at 761; Kott, 45 Cal.App.4th at 1136; and Water Splash, 137 S. Ct. at 1508.)

B. CONTRARY TO ROCKEFELLER' POSITION, THERE IS NO EXCEPTION TO THE HAGUE CONVENTION FOR PRIVATE CONTRACTS WHICH WOULD BAR CHINA FROM DECIDING HOW ITS CITIZENS ARE TO BE SERVED WITH JUDICIAL AND EXTRAJUDICIAL DOCUMENTS.

In its Opening Brief on the Merits, Plaintiff and Respondent argues that general provisions of the Hague Conference on Private International Law (the "HCCH") which purport to allow private parties to make their own rules for litigation somehow trump or supersede express prohibitions of the Hague Convention on service of process. This is the so called "personal autonomy" argument. There is no merit to the argument in this context. China wants its citizens to be served in a certain way, i.e. documents translated into Chinese and delivered by the central authority so

that the government can control the process in that way. The United States government agreed to abide by that treaty. International Treaties are the law of the land. Due process requires that the law be followed. Failure to abide by the Hague Convention renders any default judgment obtained *void ab initio*. (Dr. Ing., 123 Cal. App. 3d at 761; Kott, 45 Cal.App.4th at 1136; and Water Splash, 137 S. Ct. at 1508.) This is not controversial, despite Rockefeller's refusal to acknowledge this and citation to other areas of law where there is more ambiguity. Rockefeller still does not offer any "plausible textual footing" (Water Splash, 137 S. Ct. at 1509-1510) for the proposition that parties may contract around the Hague Service Convention.

Rockefeller cites D. H. Overmyer Co. v. Frick Co. (1972) 405 U.S. 174 which stands for the proposition that corporations can waive their rights to notices and hearings in the United States. That case and the concept 43 behind it are totally irrelevant. The U.S. government, in this instance, has agreed with China that its citizens, in China, will only be served in a certain way. That is nonwaivable right. One might ask, "How does one know it's a non-waivable right?" Because China, itself, takes that position in the treaty and in the questionnaire wherein it is asked whether its citizens can simply consent to service. In effect, fundamentally, it is not even a just a right of the litigants that we are discussing here, it is a right of sovereignty of the Chinese government guaranteed to it by a treaty. Nothing in any case cited by Rockefeller suggests that treaties can be ignored.

Rockefeller also asserts that there is something unfair or oppressive about litigants having to re-write their contracts in such a way that they are legally enforceable, and with the ability of litigants in "India" and "China" to take advantage of liberal service of process policies in the United States, but nevertheless, forcing U.S. litigants suing people residing in India and China to serve their process through the central authorities there. It is not China's or India's fault that the drafters of contracts in the United States don't bother to read and understand international treaties. Respectfully, Rockefeller should take these disputes up with India and China.

Perhaps most appallingly, in a desperate attempt to circumvent this Court's own statement as to what the one single issue is in this Review, Rockefeller argues in footnote 3, on page 6 of it Brief on the Merits, that