No. S249923

IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

ROCKEFELLER TECHNOLOGY INVESTMENTS (ASIA) VII,
Plaintiff and Respondent

v.

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

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

Superior Court, County of Los Angeles (Case No. BS149995)
Honorable Randolph M. Hammock

OPENING BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ISSUE PRESENTED

Can private parties contractually agree to legal service of process by methods not expressly authorized by the Hague Convention?

INTRODUCTION

A. The Hague Convention and Party Autonomy

The Hague Service Convention (the "Convention") is the common name of the treaty known as the Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters of November 15, 1965. (T.I.A.S. No. 6638, 20 U.S.T. 361.) The United States executed the Convention in 1967 and it came into force in 1969. The Convention was one of the products of the Hague Conference on Private International Law (the "HCCH" or "Hague Conference"). The HCCH is an intergovernmental organization in the area of private international law that administers several international conventions, protocols, and "soft law" instruments.

The HCCH recognizes that parties to a contract may be in the best position to determine the "rules" that are most suitable for the resolution of disputes, i.e. the doctrine of party autonomy. The doctrine of party autonomy holds that contracting parties retain the power to agree in advance on the laws that will govern their contracts and the methods of resolution of disputes arising under those contracts. The doctrine of party autonomy is today the dominant principle for contract conflict resolution, having gained more ground in the 50 years since the adoption of the Convention in

1965. (See, Symeon C. Symeonides, "Party Autonomy in Contract Conflicts" (2014).)

Fifty years after adoption of the Convention, on March 19, 2015, the HCCH approved the soft law instrument entitled "The Hague Principles on International Law" (the "Principles") to encourage the use of the party autonomy doctrine. (Introduction to the Hague Principles on Choice of Law in International Commercial Contracts, Permanent Bureau of The Hague Conference on Private International Law, @1.3 (2015).) The HCCH intends the Principles, comprised in a Preamble and 12 Articles, to serve as a guide to courts and arbitrators in interpreting or supplementing rules on the party autonomy doctrine. (See, Symeon Symeonides, The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments, *American Journal of Comparative Law*, Vol 61, No.3 (2013).)

The courts using the Principles include courts in many of the Contract States of the Convention. Specifically the Principles have been adopted in the European Union by Rome I (Regulation (EC) No. 593/2008 pf the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations) and in the Organization of American States in the Mexico City Convention

(The Inter-American Conference Convention on the Law Applicable to International Contracts, 17 March 1995.)

The court below completely failed to address the doctrine of party autonomy which has been described as "perhaps the most widely accepted private international rule of our time." (See, Russell J. Weintraub, Functional Developments in Choice of Law of Contracts, 187 Recueil Descours 239, 271 (1984).) Instead, the Court of Appeal adopted an unprecedented interpretation of the Supremacy Clause of the U.S. Constitution as enforcing the Convention's expressly authorized methods of service as preemptions of any and all other means of service as set forth in the California Statutory Code of Civil Procedure and decisional law.

The Court of Appeal also went further and held that a party's performance of any actual service of process that is preempted by the Convention, even if pursuant to a voluntary agreement under the doctrine of party autonomy, was null and void *ab initio* as a violation of the receiving party's due process rights. In so ruling, the court below ignored the leading U.S. Supreme Court decision in *D. H. Overmyer Co. v. Frick Co.* (1972) 405 U.S. 174 (corporation's waiver of rights to prejudgment notice and hearing per written agreement did not violate due process requirement and did not support its motion to vacate judgment on grounds that rendering court was

without personal jurisdiction because of lack of personal service or appearance); see also *Commercial National Bank of Peoria v. Kermeen* (1990) 225 Cal. App.3d 396. In light of its overlooking not only the Doctrine of Party Autonomy but *Overmyer* and many other U.S. Supreme Court holding, the COA's interpretations of the both the Convention and of the U.S. Constitution bear very close scrutiny.[1]

The Court of Appeal's decision to void *ab initio* the admitted actual service of process on Sinotype far exceeds whatever command the Convention allegedly would present via the Supremacy Clause. The Convention's Article 16 strictly limits a court's powers in cases involving defaulted defendants. Article 16 provides that, upon the satisfaction of certain conditions, a court may relieve a defendant from the effects of the expiration of the time of appeal. The

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[1] The Convention's Article 16 requires that when "a summons or equivalent document [has been) transmitted abroad for the purpose of service, and 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 of appeal 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 shown a prima facie defense 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."*** *(emphasis added.)*

Convention empowers no court to void service *ab initio* or even *post hoc*.

The Court of Appeal's decision is unprecedented, in contravention of the doctrine of party autonomy, incongruous with the law of other nations, incongruent with the State of California's intention to serve as an international arbitration center[2], and will have a disruptive effect on California's international business activities. Most seriously, in an era of growing economic competition among Nations, the decision below promotes an unlevel "dispute resolution field" upon which plaintiffs in China and India can serve U.S. defendants in less than a week via express mail at a cost of less than $100 while U.S. plaintiffs must serve defendants in India and China through Central Authorities in no less than six months and no less of a cost than many thousands of dollars.[3]

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[2] King & Spaulding: *California's SB 766, A Step in the Right Direction for International Arbitration for California.*

[3] Rockfeller Asia's ability to enforce its arbitral award or judgment is not at issue in this case and should not have been an issue for the Court of Appeal. The answer to this question is provided by the 1958 Foreing Arbitral Awrds on the Recognition of Foreign Arbitral Awards (the "New York Convention") to which the U.S. and China are signatories as they are both to the Hague Service Convention. Substantial legal scholarship has examined the conflicting relationship of the two conventions and concluded that the service provisions of the 1958 Convention override the service provisions of the 1965 Treaty in arbitral settings as opposed to litigation settings *See,* Antonio D. Tsavdas, *Hague Service Convention Does Not Apply to Arbitration Documents,* Rokas, August 22, 2013

B. Impact on the California Economy

The Court of Appeal held that private parties cannot agree to specific forms of service of process not expressly authorized by the Hague Convention. It voided *ab initio* plaintiff and respondent Rockefeller Technology Investments (Asia) VII's ("Rockefeller Asia's") judgment against defendant and appellant Changzhou Sinotype Technology Co., Ltd. ("Sinotype") because Rockefeller Asia's petition to confirm arbitration award was served by FedEx, fax, and email pursuant to an arbitration agreement.

The decision below, if not reversed, would make it impossible for California companies to engage in arbitrations with companies from some of the largest economies in the world - China, Japan, Germany, U.K., India, Korea, Russia, and Mexico, i.e., countries that objected to Article 10 of the Hague Convention permitting service through "postal channels." This would be a disaster for California companies with global supply chains, investment funds with foreign investors, engineering and construction companies that procure materials and handle projects around the world, and any California company that imports or exports goods to or from the United States.

The rules of many California organizations that conduct international arbitrations with foreign parties contain contractual terms imposing service of process by methods not expressly

authorized by the Hague Convention. (See Independent Film and Television Alliance, Rules for International Arbitration, Rule 2.1, "The parties waive application of the Hague Convention for Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters with regard to service of process.") Over the years many foreign defendants have opted to contractually waive the Hague Convention service requirements because the Federal Rules of Civil Procedure provide foreign defendants with 90 days to file an answer to a complaint, instead of the standard 21 days, if they waive service. Fed. R. Civ. P. 4(d)(3); see also Fed. R. Civ. P. 12(a)(1)(A).

The Court of Appeal's decision therefore upends decades of contractual obligations. Even awards and judgments entered decades ago are vulnerable to attack, since the Court of Appeal held that judgments can be attacked at "any time" on the ground that the contractual "Hague waiver" violates the Hague Convention. Thousands of arbitration judgments could be brought back from the dead and voided, with huge economic consequences for California companies. If the four-year statute of limitations for confirming arbitration awards has passed, parties with voided judgments would not be able to file another petition to confirm arbitration award because it would be time-barred. The burden will be especially hard felt by California institutions such as IFTA which has required

almost all arbitration parties to agree to service of process by methods not authorized by the Hague Convention.

The Court of Appeal erred because nothing in the Hague Convention allows courts to void service actually performed pursuant to a private contract. In fact, as shown above, the Hague Convention expressly supports the concept of ***"party autonomy"*** to determine the choice of law.

The language of the Hague Convention must not be read in a vacuum, but in conjunction with its three stated objectives. First, the Hague Conference intended to create a simple and expeditious procedure for service of process in an effort to encourage international judicial cooperation. (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, 658 U.N.T.S. 163.) Second, the Convention attempts to prescribe means of service that would withstand attack in later suits to enforce a foreign judgment. *Id.*; Note, The Hague Service Convention and Agency Concepts: Lamb v. Volkswagenwerk Aktiengesellschaft, 20 CORNELL INT'L L.J. 391, 396 (1987). Third, the Conference sought to ensure actual and timely notice of lawsuits. *Id.*

These objectives --to facilitate the completion of international litigation in the spirit of cooperation – strongly suggest that the

Convention would allow private parties to agree to service of process by methods not expressly authorized by the Hague Convention as long as they provide actual notice.

Further, rulings in the federal courts have shown that the Hague Convention's service provisions are not sacrosanct when alternative methods provide actual notice. Federal district courts have been ordering forms of service of process not enumerated in the Hague Convention with increasing frequency. See e.g., *FTC v. PCCare247, Inc.*, 2013 WL 841037 (S.D.N.Y. March 7, 2013) (court ordered defendants in India served by email); *Rio Properties, Inc v. Rio In't Interlink*, 284 F.3d 1007, 1017 (9th Cir, 2002). If courts can order waivers of Hague Convention requirements, then private parties should be allowed to agree to service of process by methods not authorized by the Hague Convention.

Equally important, China International Economic and Trade Arbitration Commission (CIETAC), an arbitration association founded and operated by the Chinese government, ***allows service by mail in its own arbitration agreements***, in spite of China's objection to Article 10(a). CIETAC Arbitration Rules, Art. 8. This proves that the Chinese government does not consider private agreements to service by mail to be an infringement on its sovereignty.

Here, even though Sinotype agreed to service by FedEx, fax, and email, the Court of Appeal voided Rockefeller Asia's service of summons in direct contravention of three judges (the late Justice Richard Neal, Judge Ralph Ongkeko, and Judge Randolph Hammock) who expressly found that Rockefeller Asia properly served Sinotype pursuant to their arbitration agreement.

Instead of making it easier for Californians to do business with Chinese parties – i.e., allowing them to enter into JAMS or CIETAC agreements with Hague waivers - the Court of Appeal decision encourages Chinese parties to engage in strategic behavior designed to undermine contracts in California and the jurisdiction of California courts. To allow foreign parties to enter into a contract, and then proceed to unilaterally disregard the contract's service of process and consent to jurisdiction provisions, would allow foreign parties to simply return to their country in order to avoid contractual obligations.

This is exactly what happened in this case. Even though Sinotype and its CEO Curt Huang had ***actual notice*** of the arbitration and state court proceedings (JAMs alone served Mr. Huang with seven separate notices), it hid in silence for seven years before showing up in American courts to attack Rockefeller Asia's hard-won judgment.

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

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

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

Unfortunately, the Court of Appeal has endorsed Mr. Huang's strategy to the detriment of Hague Convention's stated objective to "simplify[] and expedit[e] the procedure by which documents are served abroad." Its decision, if upheld, will drastically curtail the freedom of people in California to do business with people from around the world, which is critically important to the state economy. (See U.S. News, "These 5 States Trade the Most With China," March 23, 2018 ["the State of California does more business with China than any other state in America."])

Parties to an arbitration agreement would not want to submit themselves to California law and bear the risk that their expenditure of time and resources will produce at best nothing but a summons that can be ignored and a judgment that can be challenged for several years after confirmation.

As shown below, this result is not supported by the Hague Convention's language and legislative history supporting party autonomy, nor by a long line of state and federal precedents permitting service of process on foreign defendants by methods not expressly authorized by the Hague Convention.

STATEMENT OF FACTS

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

The 2008 Agreement contained the following provisions:

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

Sinotype subsequently breached the 2008 Agreement. In 2012, Rockefeller Asia submitted its claims against Sinotype to binding arbitration at JAMS before the late Justice Richard Neal, who had served for ten years on the Court of Appeal for the State of California. JAMS and Rockefeller Asia both sent arbitration notices and documents directly to Sinotype in the exact manner specified in the 2008 Agreement (via FedEx, fax, and email). Even though Sinotype had both formal and actual notice of the arbitration, it did not appear or participate in any manner in the arbitration

proceedings. After extensive hearing and briefing, Justice Neal issued a detailed written decision against Sinotype and entered an arbitration award for Rockefeller Asia. In the written decision, Justice Neal made extensive findings about how Sinotype had been properly served with arbitration notices and documents by JAMS and Rockefeller Asia.

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

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

Sinotype finally decided to specially appear in this case in January 2016 to attack the judgment.

Sinotype claimed that the service methods it had agreed to in the 2008 Agreement violated the Hague Convention. Judge Randolph Hammock rejected Sinotype's arguments. Judge Hammock specifically found that Rockefeller Asia and Sinotype agreed to waive the Hague Convention requirements and to serve and accept process by FedEx, fax, and email and that Rockefeller Asia fully complied with these contractual service requirements.

Judge Hammock also found that Sinotype had actual notice of more than seven years of arbitration and state court proceedings but simply decided not to show up until judgment enforcement began. He stated in his opinion that "Mr. Huang's claim that he 'ignored' all of the notices and documents he actually received by 'not opening' any of them until March 2015, is simply not believable. Mr. Huang is a highly-educated, sophisticated and successful businessman/CEO of a multi-national corporation which has considerable assets. Indeed, he has an advanced degree from U.C. Berkeley, and most interesting of all, he is the actual designated 'Agent for Service of Process' for the defendant's subsidiary corporation in California. Clearly, Mr. Huang understands the legal importance of documents which are mailed, via federal express, to your main corporate offices and which are also

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

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

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

THE HAGUE CONVENTION SUPPORTS THE RIGHT TO CONTRACT

The Court of Appeal struck down the parties' contractual Hague waiver on the ground that the Hague Convention does not allow private parties to contract around its requirements. 233 Cal.Rptr.3d 825-826. This was error. The Court of Appeal failed to cite any relevant language from the Hague Convention. As the appellate court in New York in *Alfred E. Mann Living Trust v. ETIRC Avaiaiton S.a.r.l.* (2010) 78 A.D.3d 137 (*Mann*) held, there is "no reason why the requirements of the [Hague] Convention may not be waived by contract." 78 A.D.3d 137, 141.

A. Contractual Hague Waivers are Consistent with the Hague Convention's Purpose of Ensuring Actual Notice and Facilitating Litigation

The Convention is divided into three sections that deal with judicial documents, extrajudicial documents, and general matters "in all . . . civil or commercial matters. . . . " Under the section dealing with judicial documents, Article 2 requires each signatory to designate a Central Authority to handle service requests from other signatory nations. Article 5 indicates that the Central Authority may authorize service by the internal law of the nation or in a manner requested by the party attempting to serve if not inconsistent with the internal law. Article 10, however, provides alternative methods of service that do not require the assistance of the Central Authority. A party is free "to send judicial documents, by postal channels, directly to persons abroad." These alternatives apply so long as a signatory nation does not object in accordance with Article 21 of Chapter III. Service Convention, supra note 42, at art. 2, 20 U.S.T. at 362-63.

The Hague Convention's service provisions must be read in conjunction with its three stated objectives. First, the Hague Conference intended to create a simple and expeditious procedure for service of process in an effort to encourage international judicial

cooperation. (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, 658 U.N.T.S. 163.) Second, the Convention attempts to prescribe means of service that would withstand attack in later suits to enforce a foreign judgment. *Id.*; see also Note, The Hague Service Convention and Agency Concepts: Lamb v. Volkswagenwerk Aktiengesellschaft, 20 CORNELL INT'L L.J. 391, 396 (1987). Third, the Conference sought to ensure actual and timely notice. *Id.*

In *Newport Components v. NEC Home Electronics*, 671 F. Supp. 1525 (C.D. Cal. 1987), California electronic equipment distributors brought state and federal antitrust claims against a Japanese corporation in federal court. Plaintiffs served the Japanese corporation via first class mail. The defendant in turn sought to dismiss the case for defective service based on Japan's objection to mail service under the Convention.

The court refused to dismiss for insufficiency of service. The court stated that the purposes of the Convention are not at odds with permitting service by methods unavailable under the Convention:

> If it be assumed that the purpose of the convention is to establish one method to avoid the difficulties and controversy attendant to the use of other methods . . . ,

> it does not necessarily follow that other methods may not be used if effective proof of delivery can be made. *Id.* at 1542

Reading the Hague Convention as an exclusive source of service procedure is not consistent with the Convention's object and purpose. The Hague Conference drafted and adopted the Hague Service Convention to facilitate expeditious service and reduce the number of default judgments. The Convention's main goal is to ensure that the complexities of service abroad do not impede fair and efficient litigation among parties from different nations.

The Convention 's Preamble states that its Signatory States are desiring (1) "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;" and (2) to promote such purpose by "simplifying and expediting the procedure by which documents are served abroad " Thus, the plain language of the Convention shows that its intent and purpose is to create new means of service that will simplify and expedite the procedure by which documents are served abroad. The objective is to assure that defendants sued in foreign jurisdictions receive actual and timely notice of suit and to facilitate proof of service abroad.

Situations therefore will arise where the provisions of the Convention will not facilitate effective service and will fail to guarantee an enforceable judgment. Permitting resort to other service procedures by private agreement ensures that domestic law can be used to fill gaps in the Convention and thereby guarantee enforceable judgments free from collateral attack.

Interpreting the Convention to preclude resort to any other provisions which grant broader and more generous service would not advance the successful and simple resolution of international litigation in cases where the Convention's procedures do not effect timely and adequate service.

Moreover, the Hague Convention has been plagued by conflicting interpretations and uncertainties. Only a year ago did the U.S. Supreme Court resolve a split among federal and state courts as to whether the Hague Convention actually permits the service of process via "postal channels." Courts in different states still cannot agree on whether FedEx and other private couriers fall within "postal channels." And it remains unclear whether email technology – which did not exist when the Hague Convention was first adopted in 1965 - is prohibited. Given the risks of noncompliance, commercial parties like Rockefeller Asia and Sinotype therefore have attempted to deal with the Hague Convention's legal uncertainties *ex ante*

through contract before any dispute arises. It simply makes no sense for California courts to upend the contracting parties' agreements and expectations when the courts cannot agree on what the Hague Convention actually requires.

B. The Hague Conference Enacted the Principles of Party Autonomy in 2015

In 2015, the Hague Conference adopted the "Principles on Choice of Law in International Commercial Contracts." The Principles clearly recognize that private parties have the "party autonomy" to negotiate and agree on terms for service of process and jurisdiction in order to avoid conflicting judicial interpretations of Hague Convention requirements and to provide clarity in business transactions. They state:

> I.1 When parties enter into a contract that has connections with more than one State, the question of which set of legal rules governs the transaction necessarily arises. The answer to this question is obviously important to a court or arbitral tribunal that must resolve a dispute between the parties but it is also important for the parties themselves, in planning the transaction and performing the contract, to know the set of rules that governs their obligations.
>
> I.2 Determination of the law applicable to a contract without taking into account the expressed will of the parties to the contract can lead to unhelpful uncertainty because of differences between solutions from State to State. For this reason, among others, the

concept of "party autonomy" to determine the applicable law has developed and thrived.

I.3 Party autonomy, which refers to the power of parties to a contract to choose the law that governs that contract, enhances certainty and predictability within the parties' primary contractual arrangement and recognises that parties to a contract may be in the best position to determine which set of legal principles is most suitable for their transaction. Many States have reached this conclusion and, as a result, giving effect to party autonomy is the predominant view today. However, this concept is not yet applied everywhere.

I.4 The Hague Conference on Private International Law ("the Hague Conference") believes that the advantages of party autonomy are significant and encourages the spread of this concept to States that have not yet adopted it, or have done so with significant restrictions, as well as the continued development and refinement of the concept where it is already accepted.

I.5 Accordingly, the Hague Conference has promulgated the Hague Principles on Choice of Law in International Commercial Contracts ("the Principles"). The Principles can be seen both as an illustration of how a comprehensive choice of law regime for giving effect to party autonomy may be constructed and as a guide to "best practices" in establishing and refining such a regime.

These Principles of Party Autonomy have been adopted in the European Union by Rome I (Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations) and, more important, in the Organization of American States in the Mexico City Convention, of which the United States is a member. ("The Inter-American

Convention on the Law Applicable to International Contracts and the Furtherance of its Principles in the Americas.")

Here, Rockefeller Asia and Sinotype exercised "party autonomy" in accordance with the 2015 Principles to choose California law to govern their contract ("The Parties hereby submit to the jurisdiction of the Federal and State courts in California.")

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

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

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

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

C. The Vienna Convention of the Law of Treaties

The Vienna Convention of the Law of Treaties (the "VCLT") can be helpful in interpreting the language of the Convention. The VCLT is recognized as the authoritative guide regarding the rules for interpretation of treaties.[4] The Vienna Treaty's most fundamental

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[4] The United States signed the treaty on 24 April 1970. The U.S. Senate has not given its advise and consent to the treaty. The United

rule is stated in its Article 31(1): "A treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of the object and purpose."[5] The Vienna Treaty's methods can aid in interpreting the Convention's meaning, intent, and purpose.

The Convention 's Preamble states that its Contracting States are desiring (1) "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; and (2) to promote such purpose of bringing such documents to the notice of the addressee in sufficient time by simplifying and expediting the procedure by which documents are served abroad."[6] Thus, the plain language of the Convention shows that its intent and purpose is to create, i.e. to bring into being, new means of service that will simplify and expedite the procedure by which documents from abroad are served within the contracting state – not to make the process more burdensome.

States considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties. The Office of Website Management, Bureau of Public Affairs for Information Management of the U.S. Department of State.

[5] See, *International Law: A Handbook for Judges*. David J. Bederman with Christopher J. Borgen and David A. Martin (2003).

[6] Preamble of the Convention.

This interpretation is congruent with the Convention's sole requirement that each Contracting State must establish and operate a Central Authority – a *"New Means" (emphasis added)* of "simplifying and expediting" service requests from abroad to its domestic litigants. The Convention does not require the Central Authorities of the United States or any other of its Contracting States to manage outbound service requests of its domestic litigants. The Convention imposes no other duties or constraints on the United States, its agencies, its courts, its legislatures, or its individuals. It provides no constraints on U.S. persons from serving foreign parties by any method, either domestically or abroad.[7]

The Convention's purpose of creating and imposing *New Means* of service should be reasonably interpreted as it is seeking to improve the opportunity of defendants that are sued in foreign

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[7] The U.S. Department of Justice 's Office of International Judicial Assistance ("OIJA") bears the authority for managing the U.S. commitments of establishing and operating a Central Authority under the Convention. The OIJA has contracted to a private corporation in Seattle, ABC Litigation, the responsibility of handling foreign litigants requests to the Central Authority for service of process in civil and commercial matters in the United States pursuant to the Convention. The OIJA reminds us that it has no role in assisting domestic persons to send service abroad and that foreigner generating incoming service should understand that a foreigner's use of the U.S. Central Authority is optional. Domestically generated service for foreign recipients will be returned to the sender.

jurisdictions to receive actual and timely notice of suit and to facilitate return proof of such foreign service to the senders. Accordingly no weight should be assigned to speculations that the Convention's failure to expressly authorize means of service that were not commercially available in 1965 - including electronic means of transmission such as facsimile, email, or even Facebook - is somehow intentional. Such a narrow interpretation would render electronic methods of service unavailable to litigants in Contracting States, even with the litigants' written consent and when actual delivery can be confirmed by the sender and the courts or arbitral forums. No language in the Convention requires or encourages its Contracting States to prohibit or to penalize its domestic litigants who pursue methods of service that are more efficient or more effective than those expressly authorized in the Convention, particularly when the individual litigants of the Contracting States are acting with the encouragement of the HCCH's Principles of Party Autonomy.

The Convention's lack of intent to penalize litigants' use of methods of service that are not expressly authorized is obvious from its omission from its roster of the very common and historically established (but poorly effective) method of service through publication. Article One of the Convention specifically excludes from

the application of the Convention any service "where the address of the person to be served with the document is not known." This language clearly applies to service by publication which is available by statute in California and other jurisdictions even when the target is abroad and is resident in a foreign Contracting State.[8]

Thus a literal interpretation of the Convention would "outlaw" publication as means of service of process when the document is intended "for service abroad" and ignore it when it was not. Under the Court of Appeal's reasoning, a litigant who successfully used the publication method for service abroad and secured a default judgment could for many years risk the spectre of a special appearance by the defaulting defendant demanding that the service be voided ab inito. Such as result is not consistent with the Convention's objective of facilitating service and increasing certainty.

D. *Volkswagen Aktiengesellschaft v. Schlunk*

Justice O'Conner explained that the seemingly unrestricted application of the Convention in Article I to "all cases, in civil or

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[8] *Kott v. Superior Court (1996),* 45 Cal App. 4th 1126, concerns a California Plaintiff who served a Canadian Defendat by publication when the Plaintiff was unable to secure the defendant's address. The Superor Court held that that the service was valid because no address was available. The Court of Appeals reversed because of what it saw as plaintiff's lack of diligence in securing the address.

commercial matters" is not of unlimited reach because its language nowhere defines the circumstances in which there is "occasion to transmit" a complaint "for service abroad." *Volkswagen Aktiengesellschaft v. Schlunk,* 480 U.S. 694, 700 (1988). Therefore her opinion explained that the meaning of those terms must be found in the "internal law of the forum state." *Schlunk,* 480 U.S. at 700.

This reasoning led the U.S. Supreme Court to hold that an Illinois litigant's service of a German[9] defendant through its domestic subsidiary was valid because the service was performed in accordance with the internal law of the forum state, Illinois, and therefore was not within the scope of Hague Service Convention. *Schlunk* recognized that the internal law of the forum state, including its statutes and decisional laws stating the allowable methods of service of process, constituted a limit on the reach of the Convention, even in cases in which the parties had not consented to service of process outside of the Convention. By analogy the limiting internal law in this commercial case is the law of the State of California (which includes the law of the United States government),

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[9] Germany, like China, is a Contracting State that posted a reservation to the Convention's Article 10(a).

to which the parties consented along with its authorized methods of service.

Schlunk was an automobile accident case. Therefore its application to private autonomy cases in which litigants have previously agreed to a system of dispute resolution is neither obvious nor frequent. However many cases apply its reasoning to validate service even in the absence of the party autonomy doctrine. For example, *New York State Freeway Authority v. Fenech and Graham Corporation* (NYAD3, Slip Opinion 01167, February 11, 2012) drew upon the the Court's opinion in *Schlunk.* In *Fenech,* also an automobile accident case, the New York plaintiff brought an action against the Canadian defendants and served the Canadians via mail pursuant to New York Vehicle and Traffic Law Sec. 253. The mail service was performed without utilizing Canada's Central Authority, which the Convention required Canada, as a contracting state, to establish for the processing of incoming service requests. The Canadian defendants moved to dismiss the complaint contending that the service was void and outside the Convention because the plaintiff did not use the Central Authority that Canada was bound to establish and operate. The Supreme Court of New York (the trial court) granted the defendant's motion.

The New York Appellate Division reversed. Quoting *Schunk*, the court wrote that the Hague Convention is "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." *Schlunk. 486 US at 698.* The court saw nothing in the Hague Convention that required a court to void service of litigants who did not utilize the required method of service – such a result would have been inconsistent with the Convention's purpose of improving international process service. A commercial case that falls outside the Private Autonomy doctrine because the parties' agreement did not contain a dispute resolution provision as to law and service is *Sabaro Inc. v Tukdan Holdings,* (2011), 921 N.Y.S.2d 837. In *Sabaro,* a New York corporation commenced an action against Tukdan, an Israeli corporation, and an Israeli individual, by personally serving them in Israel according to Israeli law and by registered mail in Israel. Like Sinotype, the defendants, although they had received actual notice, failed to answer the complaint or otherwise appear. Subsequently the defendants moved to dismiss the complaint on the grounds that they were not properly served according to the Hague Service Convention and that the only permissible method of service was through Israel's Central Authority. The court denied the motion because the use of

the Central Authority required by the Convention of Israel as a contracting state was not mandatory and that the defendants had been properly served under Article 19 .

The Convention's Article 19 reads "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 effect such provisions." Thus Article 19's language shows that the Convention's permissible methods of service are not limited to those expressly authorized in the Convention but includes methods of service not expressly authorized in the Convention but allowed within Contracting State.

Article 19 is relevant to the present case. In contravention of the Court of Appeal's statement that China does not allow its citizens to receive service from abroad other than though China's Central Authority stands China's statement of its own laws and practices for dispute resolution. A portion of the internal law of China relevant to permitted methods of service of process is found in the Peoples' Republic of China's establishment of CIETAC. CIETAC's Article 3: "Jurisdiction" states that it reaches trade and investment disputes between domestic parties as well as between domestic and foreign parties. CIETAC's Article 8: Service of Documents provides that all

documents, notices, and written materials "may be delivered in person or sent by registered mail or express mail. fax, or by other means considered proper" by the court or tribunal.[10] Therefore the use in China of such methods not expressly authorized in the Convention evokes China's congruence with the Principles of Party Autonomy and removes any barrier to the methods use by litigants in other Contract States for serving process to Chinese defendants by the enumerated methods. Therefore, under this analysis, none of the features of Rockefeller Asia's service of Sinotype were non-conforming to the Convention.

E. The Convention's Trauvaux

Going beyond these holdings, the Court of Appeal's theory that the Convention demands and empowers California's courts to vitiate otherwise legal methods of service that are not expressly authorized in the Convention turns us toward an examination of Convention's "trauvaux", i.e. materials in the process engaged prior to its adoption as a treaty. Of value in this analysis is the evidence

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[10] In *Animal Science Product, Inc. v. Heibei Welcome Pharamaceutical* (2018) 138 S. Ct 1865, the U.S. Suprem,e Court demonstrates the appropriate role to be played by various kinds of evidence as to foreign law. Here China publishes in both Chinese and English the CIETUS rules regarding allowable means of service. In contrast, the Court of Appeal's conclusion as to the force of China law upon litigants is neither clear nor irrefutable.

submitted to the U.S. Senate as part of the Constitutional process of Advise and Consent. This evidence before the Senate indicates that the Convention's ratification did not alter the principle of Party Autonomy, especially regarding choice of law, including permitted methods of service of process. As then Secretary of State Dean Rusk's Letter of Submittal to the Senate stated : "The most significant aspect of the Convention is that it requires so little change in the present procedures in the United States." S. Exec. Doc. C, at 20. "The Convention makes no basic changes in U.S. practices. Id. at 20. In the words of Phillip W. Amram, Chief Negotiator of the U.S. Delegation: "By our internal law ... we already give to foreign litigants all that this Convention would require us to provide." S. Execu. Rep No. 6, at 11. This evidence from the Convention's ratification process in the U.S. Senate underscores the limitations on the Convention's scope.

Chief Negotiator Amran further clarified that the Convention only may require "a minor change in some of our states with regard to long arm statutes and automobile accident cases." S. Exec. Rep. No. 6, at 15. However "long arm statutes and automobile cases" deal with service of process issues related to "unplanned transactions" not to Party Autonomy. The foreseeable possibility of some "minor changes " in no way supports an interpretation of the Convention

that requires federal and state courts in the U.S. to void *ab initio* service of process achieved via private agreement as to methods of service not expressly authorized in the Constitution.

As shown in a later section, the rulings of many state and federal courts in the United States expressly order service of process by methods not expressly authorized in the Convention. These methods that are not explicitly authorized in the Convention have included facsimile, email, and even Facebook in cases in which actual service can be verified with reasonable certainly. These ruling are consistent with a teleological interpretation of the Convention that seeks to effectuate the purpose of the Convention as expressed in its preamble "to create means" to bring "notice to the addressee in sufficient time" by "simplifying and expediting the procedure by which documents are served abroad."

In recognition and pursuit of these goals of the Convention, the U.S. Department of Justice states the Convention is an agreement among countries not individuals. Pursuant to FRCP 4, U.S. plaintiffs filing actions against foreign defendants, including those residents in Contracting States of the Convention that entered reservations to Article 10(a), are permitted to obtaine waivers of service from foreign defendants *ex post*. Certainly such waivers

would be as valid if the parties' consent was provided *ex ante.*[11] In cases in which such waivers were not granted, federal courts have frequently granted plaintiff's motion to proceed with service of process via email – a method of service that is neither expressly authorized nor prohibited. The cases include: *Rio Properties, Inc. v. Rio In't Interlink*, 284 .3d 1007, 1017 (9th Cir. 2002); *FTC v. PCCCare*, 247 2013 WL 8410317 (SDNY); *Bullex v. Yoo*, 2011 U.S. District Court Lexis 35628 (D. Utah 2011); *Bank Julius Baer & Co., Ltd v. Wikileaks*, 2008 WL 413737 (N.D. Cal 2008); *Williams – Sonoma Inc. v. Friendfinder Inc.*, 2007 WL 1140639 (N.D. Cal).

These cases demonstrate that the Convention does not require the invalidation of methods of service that it does not expressly authorize in its language. In none of these cases were defendants empowered to use the Convention to escape service much less to motivate courts to void service on due process grounds when a defendant actually received service in time to appear and to be

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[11] FRCP 4 states that a defendant in a foreign county may be served at a place not within a judicial district of the United States "by any internationally agreed means of service that is reasonably calculated to give notice , such as those authorized by the Hague Convention ... if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice ... or by other means *not prohibited* (emphasis added) by international agreement, as the court orders."

heard. Logically then Convention does not dissolve the parties' right to exercise Party Autonomy through which the parties, *inter alia,* voluntarily bind themselves to methods of service of process beyond those expressly authorized in the Convention.

F. The Constitutional Limits on Enforcement of the Hague Convention

The Court of Appeal opinion states that the Convention is a treaty and is the Supreme Law of the Land under the U.S. Constitution's Supremacy Clause, which reads: "This Constitution and the laws of the United States which shall be made in pursuant thereof; and all treaties made under the authority of the United States shall be the law of the land." (Article VI, Clause 2.) The Court of Appeal interpreted this Constitution clause to imbue the language of the Convention, as a treaty, with a power superior to all other national institutions and, through the national institutions, superior to the institutions of the 50 states and territories. Accordingly, the Court of Appeal held that the California judgment, despite its confirmation of an arbitral award after a full arbitral process under JAMS, must be set aside a violation of Sinotype's U.S. due process rights. The violation emerged because the methods of service of process to which the parties had agreed and had actually received and which were congruent with the due process requirements

established by the U.S. Supreme Court were nonetheless void *ab initio* in the Court of Appeal's view. The Court of Appeal found that methods of service were void *ab initio* because they had not been processed through the China Central Authority, the only method of service in the Convention to which China had agreed to accept under the Convention. The Court of Appeal voided the service *ab initio* without providing any period of stay for reservice and any tolling of the relevant statutes of limitation.

Rockefeller respectfully disagrees with the Court of Appeal. It does not dispute that the Supremacy Clause, Article VI, clause 1 of the Constitution establishes that the Constitution, federal laws made under it, and treaties made under its authority constitute the Supreme Law of the Land. However, in case of a conflict between federal and state law, the federal law must be applied. In essence the Supremacy Clause is a conflict of laws rule, specifying that certain federal acts take priority over state law that conflicts with federal law. (*See*: William Burham , Introduction to the Law and Legal System of the United States (2006).)

Putting aside cases involving statutory exercises of the police power, the Constitution's Impairment of Contracts Clause, Article I, section 10, clause 1, joined with the due process clauses of the Fifth and Fourteenth Amendments, protect the right of private parties to

contractually agree to legal service of process of their own design and prohibit government impairment of the contracts of private parties. This right is enhanced by applicable federal legislation under the Commerce Clause. Article I, Section 8, Clause 3.

Sinotype's argument proposes that that the Convention, as a treaty in force, supercedes the Supreme Court's interpretation of the Constitution in favor of the provisions of the Convention. Sinotype's dubious theory is without legal authority either within or without the language of the Convention. It points to none of the Convention's provisions as setting standards in the United States for the validating or voiding of methods of service of process. No legislation indicates that the Convention constitutes a "Super" Constitution, or even a *sub silentio* abbreviation of Article V's amendment power.

As a treaty, the Convention is a contract between two nations, not a legislative act with domestic consequences. While legislation usually effects the object to be accomplished, a treaty is regarded in courts of justice as equivalent to an act of the legislature with domestic consequences only with the aid of an implementing legislative provision. Therefore, the meaning of treaties, as of statutes, is determined by the courts. [12]

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[12] *See,* Robert Kolb, *The Law of Treaties: An Introduction* (2016)

For example, the Supreme Court in *Sanchez-Ulmas v. Oregon,* 548 U.S. 331 (2006), in examining the issue of whether Article 36 of the Vienna Convention on Consular Affairs grants rights that may be invoked by individuals in a judicial proceedings, wrote and cited to Justice John Marshall's opinion in *Marbury v.Madison,* 5 U.S. (1 Cranch) 137 (1803): "If treaties are to be given effect as federal law under our legal system, determining their meaning under federal law is emphatically the province and duty of the judicial department." *Sanchez –Ullmas* v. *Oregon,* 548 U.S. 331, 353-54 (2006) (right and remedy of individual to enforce Article 36 of Vienna Convention on Consular Relations is the province of the judicial system). Thus the domestic interpretation of a the Hague Service Convention must be determined by the courts.

In *Medellin v. Texas,* 552 US 491 (2008), the U.S. Supreme Court held that even if an international treaty may constitute an international commitment among its signatories, it is not binding domestic law unless Congress has enacted statutes implementing it or the treaty itself conveys an intention that it is "self-executing." Relying upon *Sanchez- Llamas* , the Supreme Court in *Medellin* held that, absent a clear and express statement to the contrary in the relevant treaty, domestic procedural rules govern a treaty's implementation. Neither the language of the ratified Hague Service

Convention nor its implementing federal legislation meets those standards.

In *Missouri v. Holland*, 252 U.S. 416 (1920), the Supreme Court, in a opinion by Justice Oliver Wendell Holmes, held that the Supremacy Clause required that a U.S. Treaty with Great Britain, The Migrant Bird Treaty that Congress had effectuated in 40 Stat 755 (1918), regarding migratory bird supervision, supersedes the State of Missouri's Constitutional Rights of the Tenth Amendment as regards Missouri's management of wildlife. However, subsequent Supreme Court rulings have held that the Supremacy Clause does not permit a treaty to which the U.S. is a party to supersede an individual's rights under the U.S. Constitution. In such cases involving individual rights, a treaty stands the equivalent of a legislative act and is subject to the same examination.

The two U.S. Supreme Court cases of *Bond v. U.S.*, 134 S.Ct 2077 (2014) and *Bond v. U.S.*, 568 US 211 (2011), concern the prosecution of a U.S. individual accused of deadly intentional use of a chemical weapon in violation of the Chemical Warfare Act Treaty. Doubtless a U.S. individual's treaty transgression through intentionally deadly use of a outlawed chemical weapon possesses a higher concern than an alleged treaty transgression, as in the instant case, by two private parties agreeing to service of process via fedex,

fax, and email. Nonetheless the Supreme Court ruled that individuals as well as states had standing to argue the issues raised in a treaty's conflict with the Tenth Amendment. However, because the Court found that Bond's actions did not fall under the Chemical Warfare Act Treaty ("CWA"), the court did not reach the issue of whether the Treaty ("CWA") interfered with the Constitutional civil rights of an individual such as Bond. Similarly the parties in this case performed no act prohibited to them by the Hague Service Convention. Indeed the Convention places no prohibition on private parties and no parties should be punished under it.

The Court's role in subjecting treaties to its scrutiny also emerges in *Reid v. Covert* 354 U.S. 1 (1957). This was a case dealing with the Constitutional rights of individuals in which the Supreme Court held that international treaties and laws made pursuant to them must comply with the Constitution. *Reid* was distinct from the *Holland* case that focused on the rights of the one of the states of the U.S. In *Reid*, the Supreme Court stated that no treaty can come in direct violation with individuals' rights under the U.S. Constitution. Justice Frankfurter's opinion found nothing in the Supremacy Clause that intimates that treaties and laws enacted pursuant to them do not have to comply with provisions of the Constitution. He continued that to construe Article VI as permitting the United States

to exercise power under an international agreement without observing Constitutional prohibitions would be alien to United States history and traditions and would, if effect, permit amendment of the Constitution in a manner not sanctioned by Article V. Noting that an Act of Congress is on full parity with a treaty, Frankfurter wrote that when a subsequent statute is inconsistent with a treaty, "The statute to the extent of conflict renders the treaty null."

Just as the Supreme Court decisions show that no treaty can punish an individual through an abrogation of an individual's Constitutional rights, the decisions also demonstrate that a treaty, being a compact between signatory nations, confers no enforcement rights upon individuals in the absence of specific statutory legislation implementing to an individual such rights. Thus, as cited above in *Medellin*, the Supreme Court held that an individual, in the absence of specific implementing legislation, had no personal rights under a treaty to assert and to challenge his conviction alleging that Texas had breached his personal rights accrued under United States treaty obligations.

A review of these Supreme Court precedents uniformly demonstrate that the Convention empowered Sinotype with no authority or right to enforce against Rockefeller Asia the terms and aspirations of the Convention much less to command the force of the

judiciary in its favor. Moreover the Convention has no Constitutional role in the municipal law of the Country.

THE FEDERAL ARBITRATION ACT AND THE HAGUE CONVENTION

As discussed above, parties' rights under the doctrine of Party Autonomy are strongest when visited in cases involving international arbitration.[13] With growing force, the U.S. Supreme Court has protected individual rights, including parties' right to set the terms of an arbitration dispute contract, as Rockefeller Asia and Sinotype did in this case, without interference from judicial instrusion. As a federal statute, the Federal Arbitration Act ("FAA" or "Act"), 9 U.S.C. 1 *et. seq.*, has rank and power equal to a treaty under the Supremacy Clause of the Constitution because it "rests upon Congress authority under the Commerce Clause," *Southland v. Keating,* 465 U.S.1, at 16 (1984) as one of "the laws of the United States made pursuant thereof." Therefore the Act's intent and focus is of great value in the proper interpretation of treaties, especially as to their domestic force, as well as to their power to impose limits on state laws, including state legislation and judicial decisions.

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[13] See, Sunday A. Fagbemi, the Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality.

The FAA establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution. "The Act, which rests upon Congress' authority under the Commerce Clause, calls for the application in state as well as federal courts, of federal substantive law regarding arbitration." *Southland,* 465 U.S. at 16. In *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440 (2006), the Court clarified that, when parties agree to arbitrate all disputes arising under their contract, as Rockefeller Asia and Sinotype did in this case, "questions concerning the validity of the entire contract are to be resolved by the arbitrator in the first instance, not by a federal or state court."

In the instant case, the entire contract included the parties' consent to method of service of process, application of California law, and arbitration by the Los Angeles office of JAMS, according to JAMS arbitral rules. Thus any issues arising as to validity of the agreeing parties' whole contract, as well as the validity of any portion of the agreeing parties' whole contract, such as method of service or process, were to be resolved by the JAMS arbitration forum pursuant to the arbitration process, not by subsequent proceedings in a federal or state court.

In January 2019, the U.S. Supreme Court in *Henry Schein, Inc. et al v. Archer and White Sales, Inc.*, 586 U.S. – (2019), issued a

decision confirming the broad power of arbitrators, such as JAMS, and the strict enforcement of arbitration agreements, such as the one to which the parties contracted in the instant case. In a unanimous opinion, the *Schein* Court quotes Section 2 of the Federal Aviation Act (the "FAA"), which provides: "A written provision in ...a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising under such contract....shall be valid, irrevocable, and enforceable ..." Under the FAA, the opinion continued, "arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms." Slip Op. at 4.

As a Federal statute equal to the authority of a treaty, the FAA's intent and focus is of great value in determining the proper interpretation of the Convention as well as of the limits of state legislatures and courts. The *Henry Schein* decision is the most recent in a long string of U.S. Supreme Court decisions confirming the broad scope of the FAA in state courts' enforceability of arbitration agreements. The purpose of the FAA is "the enforcement ... of privately negotiated arbitration agreements." *Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213, 219 (1985). Because the thrust of the FAA is strictly a matter of contract, the parties to an arbitration agreement should be "at liberty to choose the terms under which they will arbitrate" *Volt Inf. Sciences v. Stanford*

University, 489 U.S. 468, 472 (1989). State law is pre-empted when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52 (1941).

STATE AND FEDERAL COURTS HAVE ALLOWED SERVICE BY METHODS UNAVAILABLE UNDER THE HAGUE CONVENTION

A. *Alfred Mann*

Alfred E. Mann Living Trust v. ETIRC Aviation S.a.r.l. (2010) 78 A.D. 3d 137, is a leading commercial cases demonstrating the strength of the doctrine of Party Autonomy in a case in which the litigants had entered into contracts with provisions governing their choice of law, forum, and methods of service.

Defendant Pieper, a resident of the Netherlands, had entered into a personal guarantee of a $10 million note payable by a borrowing corporation of which defendant was managing director. Defendant waived personal service in the guaranty which further provided that notice or service could be effected by email to the defendant's addresses set forth in the loan document. When borrower defaulted on the loan plaintiff emailed process to

defendant. The court granted plaintiff's summary judgment motion. Defendant appealed on grounds of improper service of process.

The New York Court of Appeals, New York's highest state court, observed that in none of the Convention cases advanced by defendant Pieper had the foreign party entered into an agreement to waive Hague's service requirements. The court concluded that Pieper's entering into the contractual provision "directing the manner in which plaintiff was to communicate with Pieper" foreclosed "Pieper's challenge to service on him by email." Therefore the lower court had "correctly concluded that the parties contract authorized and justified service by email on Pieper." The Court of Appeals continued "Consequently, service of process at that [email] address was by definition, 'reasonably calculated' to apprise Pieper of the action and thus comports with the requirements of due process." The court held that precluding a waiver of service of process "would allow people to unilaterally negate their clear and unambiguous written waivers of service by the simple expedient of leaving the country." *Id.* at 141. Such a result would turn contract law on its head and make many commercial agreements with foreign parties impossible to enforce.

The reasoning in *Mann* should be applied in this case. Sinotype consented to personal jurisdiction and agreed to be served

by FedEx, fax, and email, methods that Sinotype knew were not authorized by the Hague Convention. Sinotype should not be allowed to now claim that it is not subject to the jurisdiction of California courts because it was not served by additional methods under the Hague Convention.

Moreover, California and New York courts should interpret contractual provisions on waiver of service of process in a uniform fashion. Companies that do business in both California and New York should not have to cope with different interpretations of the same contractual terms or waivers.

Mann's logic, position and result have been followed in subsequent federal court decisions which held that a plaintiff may petition courts to order a foreign defendant to accept service via methods that fall outside the scope of the Hague Convention, such as mail or email, when the plaintiff establishes that these methods would provide actual notice.

In *Masimo Corp. v. Mindray DS USA Inc.*, 2013 WL 12131723 (C.D. Cal. Mar. 18, 2013), the court honored party autonomy and the parties' decision to waive typical service requirements and agree to receive notice in ways not expressly authorized by the Convention.

In *Masimo*, a U.S. company sued a Chinese company for patent infringement in the U.S. District Court for the Central District

of California. In accord with its Purchasing and Licensing Agreement with Mindray, Masimo served copies of the complaint to Mindray via registered mail. Like Sinotype, Mindray argued that the service was invalid on the ground that the Convention does not allow service via postal channels to Chinese parties. The court disagreed with Mindray's assertion. It cited decisions in which parties had mutually agreed to deviate from the Hague's service requirements, instead choosing another method of service or even waiving service of process completely. Such an agreement among the parties generated no due process issues in the court's mind. The court relied on *Nat'l Equip. Rental, Ltd. v. Szukhent,* 375 U.S. 311, 316 (1964), which held that "[P]arties 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 all together." Moreover the Supreme Court demonstrated that Parties pursuing the doctrine of Party Autonomy and entering into an agreement regulating methods of service, law, and forum face should expect no due process issues if the methods of service agreed upon actually occur and result in actual service of the party. Since the respondent did in fact receive complete and timely notice of the lawsuit pending against them, no question of due process is reached or decided." *Nat. Equipment,* 375 U.S. at 315.

In ignoring *Overmyer* and *National Equipment,* the Court of Appeal incorrectly applied due process analysis to cases of Party Autonomy in which, like Sinotype, the parties to a voluntary agreement received actual notice in sufficient time for an opportunity to be heard.

The doctrine of Party Autonomy also appears in the case of *Voltage Pictures, LLC v. Gulf Film, LLC, 2018 WL 2110937 (C.D. Ca. April 17, 2018),* U.S. company, Voltage Pictures, entered into a number of distribution agreements with a company located in the United Arab Emirates (the "UAE"). Each agreement contained a provision that that provided for arbitration under the Independent Film & Television Alliance (the "IFTA") International Arbitration Rules and allowed for service pursuant to California law.

A dispute arose and Voltage initiated arbitration per the agreement. The arbitration extended over a period of months and resulted in a final award in favor of Voltage. Voltage then sought to confirm its arbitration award in Federal court and sent a Notice for Confirmation via postal channels to Gulf Film office in the UAE. Gulf Film moved to quash the service. The court denied the motion to quash because Parties had agreed to the IFTA Arbitration Rules in which the parties agreed to service of process in accord with California law and Voltage had served Gulf by postal channels in

accord with CCP 415.40. Again respecting the doctrine of Private Autonomy, the court recognized that a service method outlined in an arbitration agreement, or in the service rules of a arbitration forum to which parties consent in their agreement, can function without obstruction from the Hague Convention.

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

FRCP 4 prescribes the adequacy and manner of service of process in United States federal courts by stipulating when a party has authority to serve and what methods that party may employ to effect service. It expressly allows service by methods not authorized by the Hague Convention.

FRCP 4(i) was part of a comprehensive plan to adapt federal law to the increasing need for international judicial cooperation: "The extensive increase in international, commercial and financial transactions involving both individuals and governments and the resultant disputes, leading sometimes to litigation, has pointedly demonstrated the need and desirability for a comprehensive study of the extent to which international judicial assistance can be obtained." S. REP. No. 2392, supra note 4, at 3, reprinted in 1958 U.S. CODE CONG. & ADMIN. NEWS at 5202-03. After finding "existing means for serving judicial documents abroad . . . to be cumbersome or insufficient," Id. at 2, reprinted in 1958 U.S. CODE

CONG. & ADMIN. NEWS at 5202, Congress empowered the Commission to study judicial assistance between the United States and other nations and to recommend improvements that would aid the settlement of international disputes in these new commercial contexts. Id. at 1-2, reprinted in 1958 U.S. CODE CONG. & ADMIN. NEWS at 5201. The Commission ultimately recommended what is now FRCP 4(i). Amram, supra note 14, at 650.

FRCP 4(i) provides five alternative methods for serving foreign parties abroad. A party may serve a foreign defendant (1) in a manner provided by the foreign nation for service involving litigation within its own courts of general jurisdiction; (2) as directed by a foreign authority's response to a letter rogatory, so long as the method is reasonably calculated to give actual notice; (3) by personal service to the party, an officer of a corporate party, or the party's agent; (4) by forms of mail requiring a signed receipt; or (5) in a manner prescribed by an order of the district court. FED. R. CIV. P. 4(i)(1).

In *International Controls Corporation v. Vesco*, 593 F.2d 166 (2d Cir. 1979), respondents served petitioner, a resident of the Bahamas, by mail, in accordance with FRCP 4(i)(1)(E) "as directed by order of court." Petitioner sought dismissal on grounds that the Hague Service Convention did not authorize this manner of service.

Though the court held the Convention inapplicable, as the Bahamas was not a signatory, the court nonetheless commented on the interplay between the Convention and FRCP 4. The court noted in dictum that "the Convention was not intended to abrogate the methods of service prescribed by Federal Rule of Civil Procedure 4." Id. at 179-80. See also *Saez Rivera v. Nissan Mfg. Co.*, 788 F.2d 819, 821 (1st Cir. 1986) (service upon Japanese defendant) ("Service could have been had upon Nissan, in Japan pursuant to FED. R. CIV. P. 4(i)") (emphasis added).

Similarly, in a case involving a good faith but failed attempt to abide by the Hague Service Convention, another court noted that the Convention does not circumscribe the judicial discretion and flexibility contemplated by Rule 4(i):

> The Hague Convention carefully articulates the procedure which a litigant must follow in order to perfect service abroad, but it does not prescribe the procedure for the forum court to follow should an element of the procedure fail. Rule 4 stresses actual notice rather than strict formalism ... There is no indication from the language of the Hague Convention that it was intended to supercede [sic] this general and flexible scheme, particularly where no injustice or prejudice is likely to result to the party located abroad, or to the interests of the affected signatory country." *Fox v. Regie Nationale Des Usines Renault*, 103 F.R.D. 453, 455 (W.D. Tenn. 1984).

Thus, reading the Hague Convention as an exclusive source of service procedure is inconsistent with Rule 4(i). Where the Convention will not work when the procedures are not equipped to effect timely service in a particular situation, federal courts have held that the Convention does not prohibit the use of broader state or federal procedures by an American upon a foreigner. The Convention would permit resort to domestic service provisions where the Convention would not effect service and thereby deprive a plaintiff of the ability to sue.

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

Thus, if courts can order *ex post* methods of service of process not authorized by the Hague Convention, then private parties should be allowed contract *ex ante* for such methods of service of process.

CHINESE LAW SUPPORTS PARTY AUTONOMY

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

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

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

The principle that the Convention does not require courts to void methods of service of process not expressly authorized by the Convention is recognized within China, regardless of China's

objectionsm to Article 10(a). This is evidenced by the Peoples Republic of China's establishment of the China International Economic and Trade Commission ("CIETAC") to resolve trade and investment disputes between domestic parties as well as between domestic and foreign parties. See *China Nat. Metal Products Imp./Exp. Co. v. Apex Digital, Inc.*, 379 F.3d 796, 800 (9th Cir.2004); *Calbex Mineral Ltd. v. ACC Res. Co., L.P.*, 90 F.Supp.3d 442, 449–50 (W.D. Pa.2015).

China International Economic and Trade Arbitration Commission CIETAC Arbitration Rules state in part:

> **Article 8 Service of Documents and Periods of Time**
>
> 1. ***All documents, notices and written materials in relation to the arbitration may be delivered in person or sent by registered mail or express mail, fax, or by any other means considered proper by the Arbitration Court or the arbitral tribunal.***
>
> 2. The arbitration documents referred to in the preceding Paragraph 1 shall be sent to the address provided by the party itself or by its representative(s), or to an address agreed by the parties. Where a party or its representative(s) has not provided an address or the parties have not agreed on an address, the arbitration documents shall be sent to such party's address as provided by the other party or its representative(s).
>
> 3. Any arbitration correspondence to a party or its representative(s) shall be deemed to have been properly served on the party if delivered to the addressee or sent to the addressee's place of business, place of registration, domicile, habitual residence or mailing

> address, or where, after reasonable inquiries by the other party, none of the aforesaid addresses can be found, the arbitration correspondence is sent by the Arbitration Court to the addressee's last known place of business, place of registration, domicile, habitual residence or mailing address by registered or express mail, or by any other means that can provide a record of the attempt at delivery, including but not limited to service by public notary, entrustment or retention.

These CIETAC rules indicate that China law - as is consistent with Hague Convention's stated objectives and U.S. federal law – allows private parties to contract to service of process by methods not authorized by the Hague Convention.

CONCLUSION

For the foregoing reasons, the decision below deserves to be reversed.

Respectfully submitted,

BLUM COLLINS, LLP
STEVEN A. BLUM
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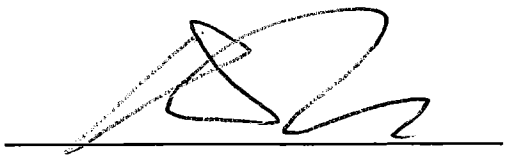

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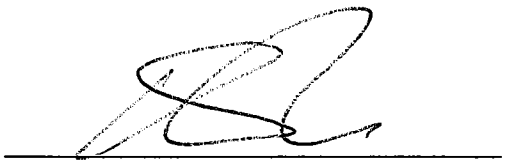
X. CERTIFICATE OF COMPLIANCE WITH WORD COUNT

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I certify that the attached Opening Brief on the Merits is proportionally spaced, has a Georgia 13-point typeface, and contains 13,574 words, excluding the face sheet, table of contents and table of authorities. I determined the word count by using the automatic Word Count feature of Microsoft Word 2017.



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PROOF OF SERVICE

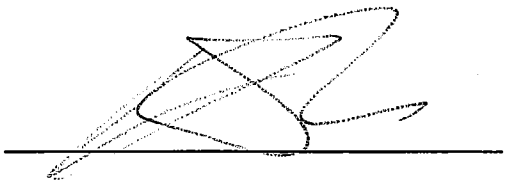
I am over the age of 18 and not a party to the above entitled action; my business address is 707 Wilshire Blvd., Suite 4880, Los Angeles, California 90017.

On Feburary 19, 2019, I served the within **OPENING BRIEF ON THE MERITS** on the interested parties in this action by first-class mail to:

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

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

Executed February 19, 2019, at Los Angeles, California.



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