No. S249923

IN THE SUPREME COURT OF CALIFORNIA

ROCKEFELLER TECHNOLOGY INVESTMENTS (ASIA) VII,

Plaintiff and Respondent,

v.

CHANGZHOU SINOTYPE TECHNOLOGY CO., LTD.,

Defendant and Appellant.

After A Decision By The Court Of Appeal,
Second Appellate District, Division Three, Case No. B272170
Los Angeles County Superior Court, Case No. BS149995,
The Honorable Randolph M. Hammock, Judge Presiding

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF, AND PROPOSED BRIEF OF AMICUS CURIAE CALIFORNIA INTERNATIONAL ARBITRATION COUNCIL, IN SUPPORT OF PLAINTIFF AND RESPONDENT ROCKEFELLER TECHNOLOGY INVESTMENTS (ASIA) VII

GIBSON, DUNN & CRUTCHER LLP

*DANIEL M. KOLKEY (SBN 79102)
DKolkey@gibsondunn.com
555 Mission Street
Suite 3000
San Francisco, CA 94105-2933
Telephone: (415) 393-8200
Facsimile: (415) 393-8206

Attorneys for Amicus Curiae, California International Arbitration Council

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Facsimile: (415) 393-8206

Attorneys for Amicus Curiae, California International Arbitration Council

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The California International Arbitration Council ("CIAC") respectfully requests permission to file the attached amicus curiae brief in support of Plaintiff and Respondent, Rockefeller Technology Investments (Asia) VII ("Rockefeller Technology"), pursuant to California Rules of Court, rule 8.520(f).

CIAC is a non-profit, section 501(c)(3) organization designed to encourage and promote increased international arbitration in California, given the State's sophisticated legal and economic infrastructure, cultural diversity, commitment to the rule of law, and proximity to Asia, Canada, and Latin America.

CIAC was founded in 2018 immediately following the enactment of California Senate Bill No. 766, which was the result of a report prepared in 2017 by the California Supreme Court International Commercial Arbitration Working Group – which the Chief Justice had appointed to evaluate whether foreign and out-of-state attorneys should be authorized to represent their clients in international commercial arbitrations held in California. That report led to the introduction and passage of California Senate Bill No. 766, which authorizes foreign and out-of-state attorneys to represent their clients in international commercial arbitrations sited in California under broadly defined conditions. This legislation removed a

significant impediment to the selection of California as a venue for international commercial arbitrations.

Taking advantage of this development, CIAC pursues its objectives through educational, promotional, and organizational initiatives and programs, and seeks to collaborate with leading companies, law firms, institutions, universities, and alternative dispute resolution providers worldwide in pursuit of its goal of promoting international arbitration in California.

CIAC submits this amicus curiae brief because a ruling in this case against Rockefeller Technology would interfere with the principle of party autonomy that is at the core of private dispute resolution in international commerce. Under the principle of party autonomy, parties can draft their own international arbitral procedures, including convenient and expeditious methods for serving demands for arbitration and petitions to enforce the resulting arbitral awards. If, contrary to the decisions of other jurisdictions, California prevents freely contracting parties from expressly waiving the more cumbersome service provisions of the Hague Service Convention and from agreeing to mutually convenient forms of service, such a decision would adversely impact the perception of California as a hospitable legal environment for hosting international commercial arbitrations.

Accordingly, CIAC respectfully requests leave to file this amicus brief in order to address the following points: (1) The Hague Service

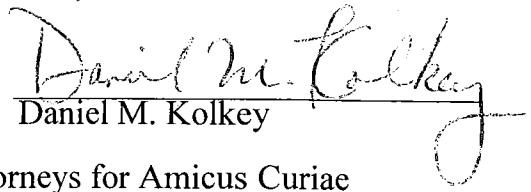
Convention does *not* apply to demands for arbitration, and (2) the Hague Service Convention's provisions can be voluntarily waived by private parties wishing to do so.

CIAC notes that the views expressed in this brief are those of CIAC and do not necessarily reflect the views of individual directors or members of CIAC.[1]

Dated: August 22, 2019

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: 
Daniel M. Kolkey

Attorneys for Amicus Curiae
California International Arbitration Council

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[1] No party or counsel to a party in this appeal contributed, or authored, in whole or in part, this amicus brief. And no person or entity made a monetary contribution to fund this brief other than the amicus curiae or its counsel. (See Cal. Rules of Court, rule 8.520(f).)

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PROPOSED BRIEF OF AMICUS CALIFORNIA INTERNATIONAL ARBITRATION COUNCIL IN SUPPORT OF PLAINTIFF AND RESPONDENT ROCKEFELLER TECHNOLOGY INVESTMENTS (ASIA) VII

GIBSON, DUNN & CRUTCHER LLP

*DANIEL M. KOLKEY (SBN 79102)
DKolkey@gibsondunn.com
555 Mission Street
Suite 3000
San Francisco, CA 94105-2933
Telephone: (415) 393-8200
Facsimile: (415) 393-8206

Attorneys for Amicus Curiae, California International Arbitration Council

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I. INTRODUCTION

The Court of Appeal's decision below turns 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 (the "Hague Service Convention" or "Convention") into something it was never meant to be: an opportunistic shield against the enforcement of arbitral awards issued in private international arbitrations.

Party autonomy to draft international dispute resolution arrangements is the cornerstone of international commercial arbitration, one purpose of which is to adjudicate disputes outside of either party's court system and minimize judicial challenges to the ensuing awards. A decision that the California courts will not respect the parties' contractual arrangements for service of process will adversely impact California's climate for hosting international commercial arbitrations, particularly given that other respected jurisdictions for international arbitration, like New York, have rejected the claim that the Hague Service Convention cannot be waived.

Fortunately, properly construed, the Hague Service Convention does not apply to demands for arbitration and can be waived by agreement of the parties for purposes of enforcing, or challenging, international arbitral awards.

First, the Hague Service Convention only applies to "judicial and extrajudicial documents." (Hague Service Convention, art. 1, *supra,* 20 U.S.T. at p. 362.) A demand or request for arbitration is neither, but a private document, often served by a private arbitral organization.

Second, parties may agree to waive the requirements for service under the Hague Service Convention. The right to waive the Convention's provisions conforms with the purposes of the treaty, its drafting history,

general principles of international, constitutional, and federal law, and the case law. Indeed, numerous courts have ruled that the Convention can be waived; only the Court of Appeal below has ruled to the contrary.

This brief will (1) explain the importance of the fundamental principle of party autonomy in drafting international commercial arbitration agreements, particularly in light of the time that service of process can take under the Hague Service Convention, (2) demonstrate that requests or demands for arbitration are not subject to the Hague Service Convention, and (3) establish that parties may freely contract for permissible methods of service, and thus waive the requirements of the Hague Service Convention.

II. INTERNATIONAL ARBITRATION RELIES ON THE PARTIES' AUTONOMY TO DRAFT AND ADOPT THEIR DISPUTE RESOLUTION PROCEDURES, INCLUDING THOSE FOR SERVICE OF PROCESS.

"A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." (*Scherk v. Alberto-Culver Co.* (1974) 417 U.S. 506, 516 (*Scherk*).)

"Party autonomy is the guiding principle in determining the procedure that must be followed in international commercial arbitration." (Rampall & Feehily, *The Sanctity of Party Autonomy and the Powers of Arbitrators to Determine the Applicable Law: The Quest for an Arbitral Equilibrium* (2018) 23 Harv. Negot. L. Rev. 345, 354.) Recently, the Hague Conference on Private International Law has confirmed that "giving effect to party autonomy is the predominant view today" since the "parties to a contract may be in the best position to determine which set of legal principles is most suitable for their transaction." (Hague Conference on Private International

Law, Principles of Choice of Law in International Commercial Contracts (Mar. 19, 2015) at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=135>.)

For these reasons, international arbitration agreements "merit great deference, since they operate as both choice-of-forum and choice-of-law provisions, and offer stability and predictability regardless of the vagaries of local law." (*Republic of Nicaragua v. Standard Fruit Co.* (9th Cir. 1991) 937 F.2d 469, 478.)

Conversely, "[a] parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages. . . . [It would] damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements." (*Scherk, supra,* 417 U.S. at pp. 516-517.)

Accordingly, mechanically applying the service provisions of the Hague Service Convention in lieu of the parties' private agreement governing the methods for service of demands to arbitrate or petitions to enforce the resulting arbitral awards would undermine the certainty and predictability that international arbitration agreements are meant to offer.

Significantly, it may even be *necessary* to contract out of the Hague Service Convention in order to comply with state and federal requirements for the service of petitions to vacate or correct arbitral awards. In practice, service abroad under the Hague Service Convention can take a minimum of three months, if not significantly longer. (Strong, *Navigating the Borders Between International Commercial Arbitration and U.S. Federal Courts: A Jurisprudential GPS* (2012) J. Disp. Resol. 119, 187-188.)

But under the Federal Arbitration Act ("FAA"), "[n]otice of a motion to vacate, modify, or correct an award must be served upon the adverse party

or his attorney within three months after the award is filed or delivered." (9 U.S.C. § 12.) Similarly, under the California Arbitration Act (Code Civ. Proc., § 1280 et seq.), "[a] petition to vacate an award or to correct an award shall be served and filed not later than 100 days after the date of the service of a signed copy of the award on the petitioner" (*id.*, § 1288).[2] In short, preventing parties from contracting out of the Hague Service Convention would effectively bar parties from timely seeking to vacate or correct arbitral awards on many occasions.

This mathematical dilemma is not theoretical. In *Argentine Republic v. Nat'l Grid Plc.* (D.C. Cir. 2011) 637 F.3d 365, the District of Columbia Circuit Court of Appeals confronted a case in which the Republic of Argentina lost an arbitral decision and sought to move to vacate the award under the FAA. Argentina sought to extend the FAA's three-month service deadline, arguing that "it would be impossible to complete service of notice within the three-month period because National Grid was headquartered in the United Kingdom, and under the Hague Service Convention, proper service in the U.K. required using a central governmental authority." (*Id.* at p. 367.) The court refused to allow the extension of time or recognize a stipulation to service that National Grid signed a few days after the deadline. (*Id.* at pp. 368-369.)

Thus, if California rules that the Hague Service Convention nullifies the service of process rules agreed by the parties in their international arbitration agreements, future parties will be wary of holding their international arbitrations in California, contrary to the California Legislature's intent in enacting Senate Bill No. 766, which was designed to

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[2] These provisions for vacating or correcting an award apply to awards rendered under California's international arbitration code (Code Civ. Proc., § 1297.11 et seq.) because that code expressly does not supersede those particular provisions. (*Id.*, § 1297.17.)

"position California as a leading market for international arbitration proceedings ... [thus] not only bring[ing] advantages to California, [its] businesses, and the statewide economy, but [also] provid[ing] a sophisticated legal market for businesses and attorneys participating in international arbitration proceedings." (Chris Poole, *JAMS President and CEO's Statement on the Passing of SB 766 Re: International Arbitration in California* (July 5, 2018) at< https://www.jamsadr.com/news/2018/chris-poole-jams-president-and-ceos-statement-on-the-passing-of-sb-766-in-california>.)

III. THE HAGUE SERVICE CONVENTION DOES NOT APPLY TO THE ARBITRATION PROCEEDING ITSELF.

This Court granted review of the question whether "private parties [can] contractually agree to legal service of process by methods not expressly authorized by the Hague Convention."

There are two stages in an arbitration proceeding to which this issue might be argued to apply – the arbitral proceeding itself, and the subsequent judicial proceeding in which the resulting arbitral award is sought to be confirmed, recognized, and enforced, or set aside, vacated, or corrected. (Code Civ. Proc., §§ 1285 *et seq.*; 9 U.S.C. §§ 9-11, 207-08, 302, 307; United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, arts. 4-5, Sept. 30, 1970, 3 U.S.T. 2517, T.I.A.S. No. 6697.)

The Court of Appeal in this case noted that "the propriety of the service of the arbitration demand is not before us, and thus we do not reach the issue [of whether the demand for arbitration was properly served]." (*Rockefeller Technology Investments (Asia) VII v. Changzhou Sinotype Technology Co., Ltd.* (2018) 24 Cal.App.5th 115, 122, fn. 2 (*Rockefeller*).)

Accordingly, while this Court may not reach that question either, it is important that this Court be aware that the demand (or request) for arbitration is not subject to the requirements of the Hague Service Convention.

Article 1 of the Hague Service Convention sets forth the scope of the Convention: "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." (Hague Service Convention, *supra*, 20 U.S.T. at p. 362, italics added.)

Accordingly, the document must be "judicial or extrajudicial" in order to be covered by the Convention. Demands for arbitration are not "judicial" or "extrajudicial" documents for the following reasons:

First, the demand for arbitration is not a "judicial" document. "The vast majority of international commercial arbitrations proceed from start to finish without any court intervention. Most are commenced simply by following the procedures set forth in the applicable arbitration rules." (Kolkey et al., Practitioner's Handbook on International Arbitration and Mediation (3rd ed. 2012) § 3.01, p. 59.) Generally speaking, "[t]he party commencing arbitration need not apply to a court to commence the proceedings. One simply follows the procedures for requesting arbitration set forth in the applicable rules." (*Id.*, § 3.03[1][a], p. 74.)

For instance, the international arbitration rules for the International Centre for Dispute Resolution ("ICDR") (which is a division of the American Arbitration Association) are commenced by serving the request for arbitration on the ICDR and the opposing party. (ICDR, *Int'l Dispute Resolution Procs.*, art. 2 (June 1, 2014) https://www.adr.org/sites/default/files/ICDR%20Rules_0.pdf.) Alternatively, a party wishing to commence an arbitration under the auspices

of the International Chamber of Commerce ("ICC") transmits the request for arbitration to the ICC Secretariat in Paris. The Secretariat provides a copy of the request to the opposing party. (Kolkey et al., Practitioner's Handbook on International Arbitration and Mediation, *supra*, § 3.03[4][a], pp. 80-81.)

In the underlying action, the parties agreed to arbitrate pursuant to the streamlined procedures of the Judicial Arbitration & Mediation Service ("JAMS"). (*Rockefeller*, *supra*, 24 Cal.App.5th at p. 121.) Those rules provide that the arbitration is commenced when JAMS issues a "Commencement Letter" to the opposing party. (JAMS, *JAMS Streamlined Arb. Rules & Procs.*, Rule 5 (July 1, 2014) at https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_streamlined_arbitration_rules-2014.pdf.) Since JAMS is a private organization, the "Commencement Letter" is not a judicial document.

In short, arbitration "pursuant to [a] written agreement" "involves private or nonjudicial arbitration" proceedings (*Elden v. Superior Court* (1997) 53 Cal.App.4th 1497, 1507) and "is not a product of public law or state [court] proceedings" (*Rifkind & Sterling, Inc. v. Rifkind* (1994) 28 Cal.App.4th 1282, 1292). Thus, the document that triggers the arbitration is not a judicial document.

Second, the demand for arbitration is not an "extrajudicial" document. The only provision in the Hague Service Convention that addresses the treatment of extrajudicial documents is Article 17.

Article 17 provides: "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." (Hague Service Convention, *supra*, art. 17, 20 U.S.T. at p. 365, italics added.)

Thus, an extrajudicial document must "emanat[e] from authorities and judicial officers of a Contracting State." (Hague Service Convention, art. 17, *supra*, 20 U.S.T. at p. 4.) But transmittal of a demand for arbitration by a private party, or by a private arbitral organization, like the American Arbitration Association, JAMS, or the ICC, is not a transmittal from "authorities and judicial officers of a Contracting State." Since courts interpret treaties by beginning with "the text of the treaty and the context in which the written words are used" (*Water Splash, Inc. v. Menon* (2017) 137 S.Ct. 1504, 1508-1509 (*Water Splash*)), the text of Article 17 of the Convention should be dispositive.

The Senate drafting history of the Hague Service Convention further confirms that the meaning of "'extrajudicial" "do[es] not [encompass] private documents" emanating from "private individuals." (S. Exec. Rep. No. 6, 90th Cong., 1st Sess., p. 14 (App.) (1967) [statement of State Department Attorney at Law Philip W. Amram].) Rather, the "history of the [Hague Service C]onvention indicates that ... [the addition of extrajudicial documents] [was] intended to include the *official* documents *of [U.S.] administrative agencies and commissions*" with quasi-judicial authority. (*Ibid.*, italics added.)

And if there is any doubt that the Hague Service Convention does not apply to arbitration proceedings, the Practical Handbook on the Operation of the Service Convention ("Practical Handbook") – a tool used by the U.S. Supreme Court to determine the signatories' application of the Convention (*Water Splash, supra,* 137 S.Ct. at p. 1511) – confirms it: The Handbook observes that across signatory nations, "requests for service of documents issued in arbitration proceedings" by a Central Authority was "uncommon in practice" "because such documents are typically served in accordance with

the arbitration rules chosen by the parties." (Hague Conference on Private Int'l Law, Practical Handbook on the Operation of the Service Convention (4th ed. 2016) ¶ 87, p. 94.) The "few courts [that] have considered whether the Service Convention applied to arbitration proceedings, ultimately ... [have concluded] that it did not." (Practical Handbook, *ibid.*)[3]

Accordingly, service of demands or requests for arbitration do not fall under the Hague Service Convention.

IV. PARTIES CAN WAIVE APPLICATION OF THE HAGUE SERVICE CONVENTION BY CONTRACT.

A. The Hague Service Convention

We now turn to whether parties can waive the requirements for service under the Hague Service Convention for purposes of enforcing or challenging an arbitral award. In order to analyze this issue, the provisions of the Hague Service Convention must be summarized.

The preamble to the Hague Service Convention sets forth its purpose: "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 organization of mutual judicial assistance for that purpose by simplifying and expediting the procedure, [¶] Have resolved to conclude a Convention to this effect and have agreed upon the

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[3] For instance, in *Federation Francaise d'etudes et de sports sous-marins v. Societe Cutner & Associates P.C.* (CA Paris, Chamber I, 25 February 2010) No. 08/22780, "the Court of Appeal of Paris rejected an argument that the execution of an arbitral award should be refused on the basis that, inter alia, the arbitration had not been notified according to the Hague Service Convention. The Court of Appeal noted that the parties had agreed by contract to resolve their disputes according to the rules of the American Arbitration Association (AAA), which included rules on service of documents, and that the Service Convention therefore did not apply." (Practical Handbook, *supra*, ¶ 87, p. 94, fn. 131.)

following provisions." (Hague Service Convention, preamble, *supra*, 20 U.S.T. at p. 362.)

Thus, the Convention is designed to (1) ensure that judicial and extra-judicial documents that are served abroad be brought to the attention of the addressee in a timely fashion and (2) improve mutual judicial assistance to simplify and expedite the process. This purpose does not suggest that private parties are precluded from waiving the requirements of the Hague Service Convention in favor of an agreed method for service of process that simplifies and expedites service in a way that affords timely notice.

Article 1 of the Convention sets forth its scope: "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. . . ." (Hague Service Convention, art. 1, *supra,* 20 U.S.T. at p. 362.)

As will be discussed further herein, the fact that the Convention applies in all cases where a judicial or extrajudicial document is served does not mean that the parties cannot waive those provisions.

Instead, "[t]he 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," which is set up in Article 2. (*Volkswagenwerk Aktiengesellschaft v. Schlunk* (1988) 486 U.S. 694, 698 (*Schlunk*).) Under Article 5, "[o]nce 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." (*Id.* at p. 699.) Article 5 also provides that the document "may always be served by delivery to an addressee who accepts it voluntarily" unless "such method is incompatible with the law of the State addressed." (Hague Service Convention, *supra*, 20 U.S.T. at p. 362.) In

short, when service is made *pursuant to the Convention*, delivery can be made in any fashion the addressee voluntarily accepts unless that method is prohibited by the law of the State of destination. Again, this does not suggest that parties cannot agree to waive the Convention's requirements and accept service outside the purview of the Convention.

Article 8 provides an alternative to use of the Central Authority. It permits a Contracting State "to effect service of judicial documents upon persons abroad . . . directly through its diplomatic or consular agents," but "[a]ny 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." (Hague Service Convention, *supra*, 20 U.S.T. at p. 363.)

Article 10 affords additional options to permit service, including by mail (presumably if permitted by the originating State) or by the judicial officers, officials, or competent persons of the State of destination, but only provided the State of destination has not objected: "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," or "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," or "the freedom of any person interested in a judicial proceeding" to effect service in the same fashion, namely, "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.) As discussed further herein, this article does not preclude the parties'

right to expressly contract for service outside of the provisions of the Convention.

Article 11 allows "two or more Contracting States" to agree "to permit, for the purpose of service of judicial documents, channels of transmission other than those provided for in the preceding Articles" of the Convention. (Hague Service Convention, *supra*, 20 U.S.T. at pp. 363-364.)

Article 15 provides an additional protection where the document is served *pursuant to the Convention*, but the defendant *does not appear*: "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." (*Id.* at p. 364, italics added.)

Article 17 addresses the transmittal of "extrajudicial documents" under the Convention's provisions: "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." (Hague Service Convention, *supra*, 20 U.S.T. at p. 365.)

B. Federal Law Recognizes That The Mandatory Requirements Of The Hague Service Convention Can Be Waived.

The Court of Appeal here construed the Convention's methods of service to be "*mandatory*" in all cases. (*Rockefeller*, *supra*, 24 Cal.App.5th at p. 131.) Invoking the language in Article 1, it reasoned: "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'" and "[t]his language 'is mandatory.'" (*Ibid.*)

But the fact that the Convention's terms are mandatory for purposes of service of process abroad does not mean that parties may not agree to intentionally waive those provisions as a matter of federal law (of which the Convention is part). Instead, the fact that the Convention's terms are mandatory only means that "the Convention preempts inconsistent methods of service prescribed by state law in all cases to which it applies." (*Schlunk, supra,* 486 U.S. at p. 699; *Honda Motor Co. v. Superior Court* (1992) 10 Cal.App.4th 1043, 1049.) But the fact that the Convention preempts contrary state law does not mean that its service provisions cannot be waived. To the contrary, federal law specifically acknowledges that rights related to due process, and more specifically, the service requirements under the Convention, *can be waived.*

First and fundamentally, "[t]he due process rights to notice and hearing prior to a civil judgment are subject to waiver" by agreement. (*D.H. Overmyer Co., Inc., of Ohio v. Frick Co.* (1972) 405 US 174, 185.) As the U.S. Supreme Court observed in *National Equipment Rental, Ltd. v. Szukhent* (1964) 375 U.S. 311, 315-316, "it 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."

Second, federal law specifically acknowledges that the service requirements *under the Convention* can be waived. Specifically, the Federal Rules of Civil Procedure, which acknowledge the Hague Service Convention as a means of service in rule 4(f)(1) of the Federal Rules of Civil Procedure, not only permit, but *encourage*, parties to agree to waive formal service. (See Fed. Rules Civ. Proc., rule 4(d), 28 U.S.C.)

Federal Rule 4(d) provides that "[a]n individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the summons" and must consider "waiver" of service of the summons. (Fed. Rules Civ. Proc., rule 4(d), 28 U.S.C.) In turn, Federal Rule 4(f) – one of those rules under which waiver of the service of the summons must be considered – addresses "Serving an Individual in a Foreign Country," and provides that unless federal law provides otherwise, an individual may be served "by an internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents." (*Id.*, rule 4(f)(1).) The Advisory Committee to the rule recognized the efficiency generated by such waiver agreements, particularly where, as here, the defendant is in a foreign country "where formal service will be otherwise costly or time-consuming." (Advisory committee's note to 1993 amendments to Fed. Rules Civ. Proc., rule 4(d), 28 U.S.C.)

Significantly, when parties waive formal service, and notice is provided by alternate means, such notice is *outside* the purview of international agreements governing service. Instead, a party's notice and waiver under Federal Rule 4(d) is a "private nonjudicial act" that "does not purport to effect service." (Advisory Committee's note to 1993 amendments

to Fed. Rules Civ. Proc., rule 4(d)), 28 U.S.C.; see also *Grant v. C.R. England, Inc.* (S.D. Tex., Mar. 8, 2011, No. H-10-3649) 2011 WL 835880, at p. *4 [quoting same].)

Because the Hague Service Convention addresses the "[transmission of] a judicial or extrajudicial document for service abroad" (Hague Service Convention, *supra*, 20 U.S.T. at p. 362), the Convention is *inapplicable* where the parties have *waived formal service*. (Advisory Committee's note to 1993 amendments to Fed. Rules Civ. Proc., rule 4(d) [notice and waiver "will not offend foreign sovereignties, even those that have withheld their assent to formal service by mail"].) After all, "Article 1 [of the Convention] refers to service of process in the technical sense" (*Schlunk, supra*, 486 U.S. at p. 700), and an informal, contractually agreed arrangement, does not qualify.

Once waiver is established under the federal rules, the method of notice is flexible so long as it comports with constitutional requirements of due process. Under Federal Rule 4(f), which also permits courts to order service outside the formal channels of the Hague Service Convention, courts have held that email, telex, publication, and even Facebook are methods that satisfy due process. (See *FTC v. PCCare247, Inc.* (S.D.N.Y., March 7, 2013, No. 12-CV-7189) 2013 WL 841037, at p. *6 [authorizing service by Facebook and email on India-based defendants]; *New England Merch. Nat'l Bank v. Iran Power Generation and Transmission Co.* (S.D.N.Y. 1980) 495 F.Supp.2d 73, 81 [authorizing service by telex].) "[U]nshackle[d] ... from anachronistic methods of service," courts instead focus on the likelihood that a particular method will result in the defendant actually receiving the notice. (*Rio Props., Inc. v. Rio Intern. Interlink* (9th Cir. 2002) 284 F.3d 1007, 1017.) In *Rio Properties*, the Ninth Circuit authorized email service of a corporate

defendant, noting that within the business community, communication over email and the internet "has been zealously embraced." (*Ibid.*) And in *FTC v. PCCare247*, the Southern District of New York determined that service via email and Facebook was "highly likely to reach defendants" where "defendants run an online business, communicate with customers via email, and advertise their business on their Facebook pages." (*FTC v. PCCare247, supra,* 2013 WL 841037, at p. *6.)

Accordingly, the mandatory requirements of the Hague Service Convention do not preclude a private, voluntary waiver. Otherwise, a foreign party that even made an appearance in court following a contractually agreed notice could subsequently claim that the failure to follow the methods for service under the Hague Service Convention nullified the judgment in the proceeding.[4]

We will now demonstrate that the principles of treaty interpretation also establish that the parties can contract out of the requirements of the Hague Service Convention.

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[4] In ruling that parties could not contract around the Hague Service Convention, the Court of Appeal below noted that in *Societe Nationale Industrielle Aerospatiale v. U.S. District Court* (1987) 482 U.S. 522, 534, the U.S. Supreme Court distinguished the Hague Service Convention, which it said had mandatory language, from the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, whose "preamble does not speak in mandatory terms." (See *Rockefeller*, *supra*, 24 Cal.App.5th 115, 131, fn. 5.) But this distinction merely meant that the latter convention on the taking of evidence did not preempt existing federal laws authorizing discovery, and instead afforded optional procedures for obtaining evidence abroad. (*Societe Nationale Industrielle Aerospatiale, supra,* 482 U.S. at pp. 539-540.) The distinction between preemptive and non-preemptive treaties does not suggest that mandatory provisions, in the sense of preempting contrary state law, could never be waived by the parties.

C. The Principles Of Treaty Interpretation Confirm That Parties By Contract May Waive Application Of The Hague Service Convention.

As recently reiterated by the U.S. Supreme Court in *Water Splash, supra,* 137 S.Ct. 1504, the Hague Service Convention's meaning must be evaluated under the "traditional tools of treaty interpretation." (*Id.* at p. 1511.)

A court interpreting a treaty must look to four primary sources to determine the meaning and impact of a treaty: (1) the treaty's "text"; (2) its "purposes"; (3) the "drafting history"; and (4) "the practical construction" of the parties after the treaty's adoption. (*Id.* at pp. 1511-1512.)

In light of these four sources of treaty interpretation and general principles of federal law already mentioned, it is clear that parties may agree to waive application of the Hague Service Convention.

1. The Convention's Text and Purpose Support the Right of the Parties To Waive Its Service Methods.

Courts naturally "begin with the text of the treaty and the context in which the written words are used." (*Water Splash, supra*, 137 S.Ct. at pp. 1508-1509, quoting *Schlunk*, *supra*, 486 U.S. at p. 699.) That text must be given its "ordinary meaning" in its "context" (*id.* at p. 1510), and "where the text [of a treaty] is clear, ... [the court] h[as] no power to insert an amendment." (*Chan v. Korean Air Lines, Ltd.* (1989) 490 U.S. 122, 134.)

Moreover, a treaty's text *must* be assessed in light of the treaty's purposes. (*Water Splash*, *supra*, 137 S.Ct. at p. 1509; accord, e.g., Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [a treaty is interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light

of its object and purpose"]; Rest. 4th, Foreign Relations Law of the United States (2018) § 306(1) ["A treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of its object and purpose"].)

Here, the mandatory language in Article 1, when coupled with the Convention's purposes, simply means that the Convention applies where the parties have not voluntarily agreed to a form of private notice.

Specifically, the express text of the Convention's preamble makes clear that the Convention's purposes are to: (1) protect the residents of the signatory States by providing adequate and timely notice and (2) improve the arrangements for mutual assistance among the signatory States to accomplish this goal. Neither purpose is undermined by allowing parties to voluntarily and intelligently waive the Convention's provisions for a better way of providing timely and adequate notice.

As one California court has reasoned: "If it be assumed that the purpose of the [Hague Service C]onvention 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." (*Newport Components, Inc. v. NEC Home Elecs. (U.S.A.), Inc.* (C.D. Cal. 1987) 671 F. Supp. 1525, 1542.)

Conversely, treaty interpretations that are at odds with the treaty's expressly stated purposes are not permitted. (*Water Splash*, *supra*, 137 S.Ct. at p. 1509; e.g., *E. Airlines, Inc. v. Floyd* (1991) 499 U.S. 530, 552 [favoring treaty "construction" of Warsaw Convention provision that "better accords with the Warsaw Convention's stated purpose of achieving uniformity of rules governing claims arising from international air transportation"]; *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng* (1999) 525 U.S. 155, 176 [court must

evaluate treaty interpretation that accords with the treaty's "underlying purpose"].)

Here, the Convention's preamble makes clear that the Hague Service Convention's enumerated methods of service were adopted (1) "to create" a way for parties "to ensure that" covered documents "be brought to the notice of the addressee in sufficient time" and (2) "to simplify[] and expedit[e] the procedure" for service across nations. (Hague Service Convention, *supra,* 20 U.S.T. at p. 362.)

Recognizing that parties may waive the application of the Hague Service Convention by agreement furthers both of those goals: An agreement specifying a more convenient form of alternative service "ensure[s]" that the parties receive timely notice "in a sufficient time" because the method of notice is agreed upon by the parties beforehand.

On the other hand, barring parties from agreeing to their own methods, and requiring them to resort to a country's Central Authority *hinders* the Convention's purposes of simplifying and expediting service abroad. The methods of services in the Convention, for instance, can take months and even years with a Central Authority. (E.g., *Sulzer Mixpac AG v. Medenstar Indus. Co.* (S.D.N.Y. 2015) 312 F.R.D. 329, 332 [noting that the plaintiff had submitted materials to the Chinese Central Authority eight months prior, "however, plaintiff has no indication on when service might be effectuated"]; *FTC v. PCCare247*, *supra*, 2013 WL 841037, at p. *6 ["Despite having submitted these [service] documents to the Indian Central Authority ... more than five months ago ... the FTC has received no indication that defendants have been served."].) A written agreement jettisons this uncertainty.

In addition, prohibiting waiver of the cumbersome requirements of the Hague Service Convention creates an opportunity for bad actors to evade

their obligations. As one court noted, "*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. 2010) 78 A.D.3d 137, 141 [910 N.Y.S.2d 418] (*Alfred E. Mann*).)

The other articles in the Convention do not change this analysis that the Hague Service Convention was not meant to preclude parties from contracting out of it. For instance, Article 5 provides that the Central Authority may always serve the document "by delivery to an addressee who accepts it voluntarily" unless "such method is incompatible with the law of the State addressed." (Hague Service Convention, *supra*, 20 U.S.T. at p. 362.) But that qualification applies to what the Central Authority may do, not what the parties may do pursuant to a private agreement.

Likewise, Article 8 permits a Contracting State to effectuate service through its diplomatic or consular agents, unless the State of destination declares that it is opposed to such service within its territory. (Hague Service Convention, *supra*, 20 U.S.T. at p. 363.) Again, this provision addresses an alternative under the Convention and not what private parties may agree to.

Article 10 has been invoked in this litigation as an impediment to a private agreement. It provides that the Convention does not interfere with the transmittal of judicial documents "by postal channels, directly to persons abroad," "[p]rovided the State of destination does not object." (Hague Service Convention, art. 10, *supra*, 20 U.S.T. at p. 363.) While it suggests a greater concern over use of postal channels when a foreign State of origin

permits service abroad by mail under Article 10, it says nothing about the right of private parties to waive altogether the protections of the Convention.[5]

In other words, the Convention allows service by mail pursuant to the originating State's statutes, provided the State of destination does not object, but does not address the right of parties to contract out of the Convention.

In this sense, the added protections of Article 15 of the Convention, which apply when a document is served *pursuant to the Convention* but the defendant does not appear, make more sense. In those circumstances, the parties have not entered a mutually agreeable private contract for service of process, and service might have been effectuated by mail (if the State of destination had not objected) or a competent person of the originating State effected service through a competent person of the State of destination pursuant to Article 10. In those and other cases where the document was served pursuant to the Convention but the defendant did not appear, Article 15 requires proof that the document was served by a method prescribed by the *internal law* of the *State of destination*, or that the document was "actually delivered to the defendant" by "another method provided for by this Convention" and that delivery was sufficient to enable the defendant to defend itself. (Hague Service Convention, *supra*, 20 U.S.T. at p. 364.)

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[5] Moreover, as the majority of courts have held, Article 10's plain text (which would bar service through "postal channels") does not encompass the service by email, as effected in this case. (E.g., *Fourte Int'l Ltd. BVI v. Pin Shine Indus. Co., Ltd.* (S.D. Cal. Jan. 17, 2019, No. 18-CV-00297-BAS-BGS) 2019 WL 246562, at pp. *2-3 ["China's objection to Article 10 does not prohibit ... email service"]; *WhosHere, Inc. v. Orun* (E.D. Va. Feb. 20, 2014) 2014 WL 670817, at p. *3 [finding that Turkey's objection to Article 10 did not prohibit service through email and social media websites].) Indeed, email is a more reliable and expeditious form of notice than mail.

In sum, none of the articles in the Convention imply that parties cannot intentionally waive its provisions and provide for a mutually agreeable method of service.

2. The Convention's Drafting History Also Supports the Parties' Right to Waive Its Service Provisions.

In the face of "ambigu[ity]" in a treaty's text and context, a treaty's meaning is also informed by "the [treaty's] drafting history." (*Water Splash*, *supra*, 137 S.Ct. at p. 1511; *ibid.* [noting "[d]rafting history has often been used in treaty interpretation" and using Convention history to inform the meaning of a provision]; Vienna Convention on the Law of Treaties, art. 32, 1155 U.N.T.S. [treaty interpretation involves "the preparatory work of the treaty and the circumstances of its conclusion"].)

The Senate Report's analysis of the Convention confirms that it does not disrupt contracted-for arrangements for service and notice: "[T]he convention is an enabling convention, designed to create benefits where none now exist, *and is not a restricting convention which would, in any manner, limit the existing or future procedures in any signatory state if they are more liberal than the convention.*" (S. Exec. Rep. No. 6, 90th Cong., 1st Sess., p. 14 (App.) (1967) (S. Exec. Rep.) [statement of State Department Attorney at Law Philip W. Amram], italics added.)

In that way, "the convention set[] up the minimum standards of international judicial assistance," but was *not* meant to "invade" or alter the "law in the United States" which already offers such protections. (S. Exec. Rep. No. 6, 90th Cong., 1st Sess., pg. 13.) This clarification to the U.S.'s decision to adhere to the Convention means that it was not ratified to preclude private parties from agreeing to waive formal service.

D. The Court Of Appeal Is The Only Court To Hold That Parties Cannot Waive Application Of The Hague Service Convention.

Every court to address the issue regarding the right to waive the Convention's provisions has concluded that "parties may ... waive by contract the service requirements of the Hague [Service] Convention." (*Masimo Corp. v. Mindray DS USA Inc.* (C.D. Cal. Mar. 18, 2013, No. 12-CV-2206) 2013 WL 12131723, p. *3 (*Masimo Corp.*); *Alfred E. Mann, supra*, 78 A.D.3d at p. 141; *see also Camphor Techs., Inc. v. Biofer, S.P.A.* (Super. Ct. 2007) 50 Conn.Supp. 227, 233-234 [suggesting that if the parties had "modif[ied] any notice requirements for service of process" by agreement, the Hague Service Convention would not apply].)

Those courts recognize that "[t]he [defendant's] waiver of personal service free[s] [the] plaintiff from the requirements of law that would otherwise dictate the manner in which to serve [defendant] with process," including the process outlined "under the Hague Convention." (*Alfred E. Mann, supra*, 78 A.D.3d 137, 140.)

For instance, in *Masimo Corp., supra*, 2013 WL 12131723, the parties' agreement called for service of process by mail. (*Id.* at p. *1.) The plaintiff executed service pursuant to that agreement (by mail), and the defendant claimed that service in China violated the "mandatory" "provisions of the Hague [Service] Convention." (*Id.* at p. *3.) But the court upheld the method of service under the well-recognized ability of parties to contract for their own methods of service (or waive service entirely). (*Id.* at p. *3.)

The same principles should uphold the service in this case pursuant to the parties' agreement. The parties were explicit that they were both submitting to the jurisdiction of the federal and state courts in California *and* consenting to service of process pursuant to their own notice provisions.

The MOU provided, "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." (*Rockefeller, supra,* 24 Cal.App.5th at p. 121.) Those notice provisions, in turn, provided: "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." (*Ibid.*)

As in *Masimo Corp.*, the agreement provided for a specific form of service and "give[s] no indication that the parties intended for ... the Hague [Service] Convention or any of its requirements" to apply. (*Masimo Corp., supra*, 2013 WL 12131723 at p. *4.)

In *Alfred E. Mann, supra*, 78 A.D.3d 137, the parties' agreement contained a blanket waiver of personal service of process, and yet, the foreign defendant attempted to argue the service (by email) violated the Hague Service Convention. The Appellate Division of the New York Supreme Court upheld party autonomy, concluding that "[b]y definition[] ... waivers render inapplicable the statutes that normally direct and limit the acceptable means of serving process on a defendant" (*id.* at p. 140), and that the Hague Service Convention could likewise be waived. (*Id.* at p. 141.)

SinoType likewise waived the default modes of service of process provided in the Hague Service Convention or in the California Code of Civil Procedure by agreeing to receive notice pursuant to the Agreement (via "FedEx and email"). That notice thus constituted adequate notice to subject SinoType to the jurisdiction of the California state court to whose jurisdiction it had expressly consented.

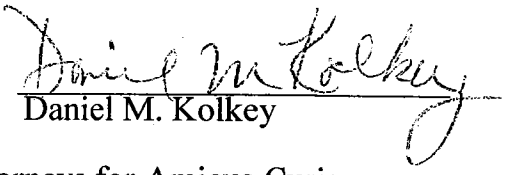
V. CONCLUSION

For all the foregoing reasons, CIAC requests that the Court reverse the judgment of the Court of Appeal and rule that parties may voluntarily waive the service requirements of the Hague Service Convention.

Dated: August 22, 2019

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: 
Daniel M. Kolkey

Attorneys for Amicus Curiae
California International Arbitration Council

CERTIFICATE OF WORD COUNT

In accordance with rule 8.520(c) of the California Rules of Court, the undersigned hereby certifies that this Brief of Amicus Curiae California International Arbitration Council in Support of Plaintiff and Respondent Rockefeller Technology Investment (Asia) VII contains 7,095 words, as determined by the word processing system used to prepare this brief, excluding the cover information, the tables, the signature block and this certificate, according to the word count generated by the computer program used to produce this document.

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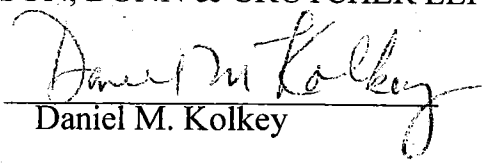
By: 
Daniel M. Kolkey

Attorneys for Amicus Curiae
California International Arbitration Council

PROOF OF SERVICE

I, Kendall Wright, declare as follows:

I am employed in the County of San Francisco, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 555 Mission Street, suite 3100, San Francisco, CA 94105 in said County and State. On August 22, 2019, I served the following documents:

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF, AND PROPOSED BRIEF, OF AMICUS CURIAE CALIFORNIA INTERNATIONAL ARBITRATION COUNCIL, IN SUPPORT OF PLAINTIFF AND RESPONDENT ROCKEFELLER TECHNOLOGY INVESTMENTS (ASIA) VII

to the persons named below at the address shown, in the manner described below:

Steve Qi Qi Law Offices of Steve Qi & Associates 388 East Valley Blvd. Suite 200 Alhambra, CA 91801	Attorney for Defendant Changzhou Sinotype Technology Co., Ltd.
Steven L. Sugars Law Offices of Steven L. Sugars 388 East Valley Blvd. Suite 200 Alhambra, CA 91801	Attorney for Defendant Changzhou Sinotype Technology Co., Ltd.
Steven A. Blum Blum Collins, LLP 707 Wilshire Blvd. Suite 4880 Los Angeles, CA 90017	Attorney for Plaintiff Rockefeller Technology Investments (Asia) VII
David B. Goodwin Covington & Burling, LLP 415 Mission Street San Francisco, CA 94105	Attorneys for amicus Professors of International Litigation
Clerk California Court of Appeal	

Second Appellate District, Division 3
Ronald Reagan State Building
300 S. Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013

Judge Randolph Hammock
Dept. 47
Los Angeles Superior Court
111 North Hill Street
Los Angeles, CA 90012

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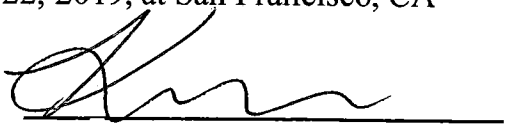

Kendall Wright