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Contracting Around the Hague Service Convention

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Publication: *University of California Davis Law Review Online*

Recommended Citation

Coyle, John F.; Efron, Robin J.; and Gardner, Maggie, "Contracting Around the Hague Service Convention" (2019). *Faculty Publications*. 513.

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UC DAVIS LAW REVIEW ONLINE

VOL. 53



OCTOBER 2019

Contracting Around the Hague Service Convention

*John F. Coyle,[†] Robin J. Effron^{**} & Maggie Gardner^{***}*

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When a plaintiff wishes to commence an action against a non-resident foreign defendant in an American forum, it may need to serve that defendant with process abroad. The Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters¹ (“Hague Service Convention” or “Convention”) provides a mechanism for achieving that goal. Under the terms of this treaty —

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¹ Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361 [hereinafter Hague Service Convention].

which has been ratified by 75 nations² — each signatory is required to maintain a central authority that will serve process upon local defendants at the request of U.S. plaintiffs.³ In practice, however, the act of serving process upon defendants in particular foreign countries may present challenges. In Russia, for example, it is currently impossible for a U.S. plaintiff to serve process upon a defendant because that nation's central authority refuses to accept requests from the United States.⁴ In China, the central authority sometimes takes more than a year to serve process on local defendants.⁵

These complications raise the question of whether it is possible for private actors to contract around the Hague Service Convention so as to avoid the need to interact with central authorities in foreign nations. The California Supreme Court will soon take up this issue when it hears oral argument in *Rockefeller Technology Investments (Asia) VII v. Changzhou SinoType Technology Company, Ltd.*⁶ In this Essay, we first discuss how that particular case should be resolved. We explain that while it is *possible* to contract around the Convention, the language in the parties' contract in *SinoType* failed to do so. We then discuss alternative drafting strategies that future parties might utilize in order to succeed where the parties in *SinoType* failed.

I. SINOType: AN EASY CASE

The facts of *SinoType* are straightforward. In 2008, Rockefeller, a partnership based in New York, and SinoType, a company headquartered in China, signed a four-page memorandum of

² *Status Table: Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, HAGUE SERV. CONVENTION, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=17#nonmem> (last visited Oct. 10, 2019).

³ Hague Service Convention, *supra* note 1, at art. II.

⁴ See Aaron Lukken, *Service of Process in Russia...Probably Not Going to Happen*, HAGUE L. BLOG (Feb. 29, 2016), <https://www.haguelawblog.com/2016/02/service-of-process-in-russia-probably-not/>.

⁵ See Aaron Lukken, *How to Serve Process in China*, HAGUE L. BLOG (Jan. 12, 2017), <https://www.haguelawblog.com/2017/01/serve-process-china/>.

⁶ The California Supreme Court granted certiorari on the following question: "Can private parties contractually agree to legal service of process by methods not expressly authorized by the Hague Convention?" See News Release, Supreme Court Cal., Summary of Cases Accepted and Related Actions During the Week of September 24, 2018 (Sept. 28, 2018), <https://www.courts.ca.gov/documents/ws092418.pdf>. The answer to this question, as we explain below, is a qualified yes.

understanding stating their intent to form a new company.⁷ This memorandum contained a provision stating that 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.”⁸ SinoType listed a Chinese address.⁹ The memorandum also stipulated that the parties “consent to service of process in accord with the notice provisions above.”¹⁰

In 2012, Rockefeller filed a demand for arbitration in Los Angeles. SinoType did not appear.¹¹ After hearing Rockefeller’s evidence, the arbitrator ordered SinoType to pay approximately \$414 million to Rockefeller.¹² In 2014, Rockefeller filed a petition to confirm the award in California state court.¹³ Rockefeller sent a copy of the summons to SinoType via Federal Express at the Chinese address listed in their agreement.¹⁴ Although it received the Federal Express envelope in China, SinoType did not appear at the hearing in California.¹⁵ The state court subsequently confirmed the award and ordered SinoType to pay Rockefeller the roughly \$414 million plus interest.¹⁶

In 2016, SinoType filed a motion to set aside the judgment and to quash service.¹⁷ It argued that because it was a Chinese company, any service provided to it had to comply with the Hague Service Convention.¹⁸ Since that Convention does not permit Chinese nationals to be served via Federal Express, it argued, the company had never been properly served with the summons nor the petition to confirm the arbitral award, which meant that the state court lacked personal jurisdiction over SinoType.¹⁹ In response, Rockefeller argued that because it had served the summons and petition on SinoType in the manner contemplated in their agreement, the Convention was

⁷ See *Rockefeller Tech. Invs. (Asia) VII v. Changzhou SinoType Tech. Co., Ltd.*, 24 Cal. App. 5th 115, 121 (2018).

⁸ *Id.*

⁹ See *id.* at 123.

¹⁰ *Id.* at 121.

¹¹ *Id.* at 122.

¹² *Id.* at 123.

¹³ *Id.*

¹⁴ See *id.*

¹⁵ *Id.*

¹⁶ *Id.*; see also *Rockefeller Tech. Invs. (Asia) VII v. Changzhou SinoType Tech. Co., Ltd.*, No. BS149995, 2014 WL 12669294 (Cal. Super. Oct. 23, 2014) (trial court order).

¹⁷ *Rockefeller Tech. Invs. (Asia) VII*, 24 Cal. App. 5th at 123.

¹⁸ *Id.*

¹⁹ *Id.* at 133.

inapplicable.²⁰ The superior court ruled in favor of Rockefeller, but the California Court of Appeal reversed the judgment of the superior court and ruled in favor of SinoType.²¹ Rockefeller then appealed this decision to the California Supreme Court, where it is currently pending.²²

Given U.S. Supreme Court precedent interpreting the Hague Service Convention, this should be an easy case. SinoType should prevail. Article 1 of the Hague Service Convention provides that the Convention “shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.”²³ As the Supreme Court explained in *Volkswagenwerk Aktiengesellschaft v. Schlunk*, “[t]his language is mandatory.”²⁴ Service must be completed in accordance with the Hague Service Convention “in all cases to which it applies.”²⁵ The Convention applies when serving process “require[s] the transmittal of documents abroad.”²⁶

The practical question is thus not whether parties can contract *out* of the Convention — they cannot — but how they might contract *around* it. The memorandum between Rockefeller and SinoType did not manage this feat. In equating service of process with the sending of documents to SinoType’s address in China, the memorandum still required “the transmittal of documents abroad.” The Convention thus applies by its terms. Since the only proper means of serving process upon a Chinese defendant via the Convention is through the Chinese central authority, and since this was never done, it follows that SinoType was never properly served and that the California superior court therefore lacked personal jurisdiction over it.

II. A BETTER SOLUTION: APPOINT A LOCAL AGENT

Although the clause in *SinoType* failed to contract around the Hague Service Convention, there is a simple drafting solution through which this goal may be achieved — the parties may agree to appoint a local

²⁰ *Id.* at 128.

²¹ *Id.* at 136-37.

²² *Rockefeller Tech. Invs. (Asia) VII v. Changzhou SinoType Tech. Co., Ltd.*, 238 Cal. Rptr. 3d 118 (2018).

²³ Hague Service Convention, *supra* note 1, at art. I.

²⁴ *See Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988).

²⁵ *See id.*; *accord Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 1507 (2017) (stating that the Hague Service Convention “pre-empts inconsistent methods of service” when it applies).

²⁶ *Schlunk*, 486 U.S. at 700.

agent to accept service of process on behalf of each foreign party.²⁷ In *Schlunk*, state law allowed service of process on a foreign corporation's local subsidiary.²⁸ Because such service could be completed within the United States, the Court held, the Hague Service Convention did not apply.²⁹ Similarly, a Chinese company contracting with a U.S. company could agree that service upon a particular agent based within the United States would constitute proper service. There would then be no need to send service abroad, and the Hague Service Convention by its terms would not apply. Such a contractual provision might look something like this:

The parties agree that any dispute arising under this Agreement shall be resolved exclusively in the state and federal courts in the State of California. [Foreign Party] hereby appoints [Acme Corporation], a U.S. corporation, as agent for service of process in California. Such appointment shall be irrevocable until a successor shall have been appointed as [Foreign Party's] agent and such successor shall have accepted such appointment. [Foreign Party] agrees that it will at all times maintain an authorized agent to receive service in the State of California. The failure of the authorized agent to give [Foreign Party] notice of the service of any process shall not affect the validity of any proceeding based on that process or any judgment obtained pursuant to it.

This approach would also be sufficient as a matter of domestic law.³⁰ In federal courts, service of a corporation is outlined in Federal Rule of Civil Procedure 4(h), which provides that a “foreign corporation, or a partnership or other unincorporated association” can be served with process within “a judicial district of the United States” by “delivering a copy of the summons and of the complaint to an . . . agent authorized by appointment . . . to receive service of process.”³¹ Only if a corporation is served “at a place *not within any judicial district* of the United States”

²⁷ See Maggie Gardner, *Parochial Procedure*, 69 STAN. L. REV. 941, 996 (2017) (“[I]f the law of the relevant U.S. state allows for substituted service on a foreign defendant’s local agent and if that service can be completed domestically, the Convention does not apply.” (citing *Schlunk*, 486 U.S. at 707)).

²⁸ See *Schlunk*, 486 U.S. at 704.

²⁹ *Id.* at 707-08.

³⁰ See *Menon*, 137 S. Ct. at 1513 (noting that service of process must also accord with the internal law of the forum).

³¹ FED. R. CIV. P. 4(h) (emphasis added).

does Rule 4(f) apply, which points explicitly to the Hague Service Convention.³²

State rules also typically allow for such substituted service on corporations.³³ A California appeals court in 2009, considering service on a domestic subsidiary of a foreign corporation, concluded that so long as service of process within the territory of California was permissible, there was no conflict with the Hague Service Convention.³⁴ That case, like *Schlunk*, involved service on an involuntarily appointed agent (the domestic subsidiary).³⁵ If service on an involuntarily appointed agent is acceptable under state and federal law, then service on a voluntarily appointed agent — pursuant to a clause like the one above — should likewise be sufficient.

III. A RISKIER ALTERNATIVE: WAIVE SERVICE

Alternatively, the parties may each agree to waive service of process altogether. If neither party is required to provide the other with formal service upon filing a lawsuit, then there is no need to transmit a document abroad, and the Convention is inapplicable.³⁶ We do not recommend this approach, however, as it may not hold up in court. Even if it does, a judgment premised on such a waiver may prove unenforceable in other countries.

Contractual provisions waiving service outright, while rare, are not unknown under U.S. law. The U.S. Supreme Court has upheld the use of so-called “cognovit” or “confession of judgment” clauses in limited circumstances.³⁷ These clauses are typically found in debt agreements and allow the creditor to obtain a default judgment against the debtor when the debtor is in default on the loan. In other words, the debtor has waived his or her right to notice and opportunity to be heard, such that the entire proceeding for default judgment can take place without

³² *Id.* at 4(f) (emphasis added).

³³ In California, a corporation may be served “by delivering a copy of the summons and the complaint” to a “person authorized by the corporation to receive service of process.” CAL. CIV. PROC. CODE § 416.10(b) (2019).

³⁴ See *Yamaha Motor Co., Ltd. v. Superior Court*, 174 Cal. App. 4th 264, 267 (2009).

³⁵ See *id.* at 267; see also *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988).

³⁶ See *Alfred E. Mann Living Tr. v. ETIRC Aviation S.a.r.l.*, 910 N.Y.S.2d 418, 422 (N.Y. App. Div. 2010) (“We conclude that [the defendant’s] waiver of personal service freed plaintiff from the requirements of law that would otherwise dictate the manner in which to serve [the defendant] with process . . . under the Hague Convention.”).

³⁷ See *D. H. Overmyer Co. Inc., of Ohio v. Frick Co.*, 405 U.S. 174, 184-88 (1972).

the debtor's knowledge.³⁸ Such cognovit clauses may be *sui generis* to the debt collection context, where the plaintiff seeks damages for a sum certain set out in the debt instrument.³⁹ Given the severity of these consequences, several U.S. states have banned the use of cognovit clauses, and several other states that permit cognovit clauses have a variety of extra criteria that the parties must use to demonstrate that the agreement was knowing and voluntary.⁴⁰

Setting aside the defensibility of cognovit clauses, any waiver of service in the context of foreign defendants should *not* include a waiver of notice, both as a policy matter and in keeping with the Supreme Court's observation in *Schlunk* that foreign nationals are not excepted from the protection of the Due Process Clause.⁴¹ "Under that Clause," the Court explained, "foreign nationals are assured of either personal service, which typically will require service abroad and trigger the Convention, or substituted service that provides 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'"⁴²

Even a limited waiver of service of process (as distinct from notice), however, may not be compatible with Rule 4(d) and similar state rules that provide for *ex post* waiver of service.⁴³ The process for obtaining a waiver of service of process in a federal court is a highly regulated procedure meant to ensure that the adverse party is aware of the action and that certain statutorily or rule-mandated information has been communicated.⁴⁴ Because "the language of Rule 4 is mandatory," it may be that "the Rules do not authorize the parties to contract around the

³⁸ *See id.*

³⁹ Even in that context, the Supreme Court upheld their use only in a case in which it emphasized that the contract was between two sophisticated corporate parties and was negotiated at arm's length. *Id.* at 183 (stating that the clause was "the product of negotiations carried on by corporate parties with the advice of competent counsel").

⁴⁰ *See* Drew J. Gentsch & Danya M. Keller, *The Use of Confession of Judgment Clauses Within Indemnity Agreements*, FIDELITY & SURETY L. COMMITTEE NEWSL. (ABA Tort Trial & Insurance Practice Section, Chicago, Ill.), Fall 2015, at 1, 17-21 (summarizing state-specific laws regulating or prohibiting the use of confession of judgment clauses).

⁴¹ *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 706 (1988).

⁴² *Id.* at 705 (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)).

⁴³ *See, e.g.*, 735 ILL. COMP. STAT. § 5/2-213 (2011) ("[w]aiver of service"); VA. CODE ANN. § 8.01-286.1 (2011) ("[s]ervice of process; waiver, duty to save costs, request to waive, how served").

⁴⁴ For example, the names of the parties, the forum in which it is pending, and copies of the complaint itself. *See* FED. R. CIV. P. 4(d).

waiver requirements.”⁴⁵ In other words, parties may not be free to make *ex ante* contracts regarding alternative methods for service of process because procedural rules already contemplate an explicit waiver procedure for parties. To allow parties to contract around that waiver procedure would be redundant to the existing waiver procedure, and it may be constitutionally suspect to the extent that Rule 4(d) includes the procedural safeguards necessary to ensure compliance with the constitutional notice standard under *Mullane*.⁴⁶

Finally, even if a U.S. court were to accept an *ex ante* waiver of service of process, the plaintiff might find any resulting judgment hard to enforce in other countries, especially if the plaintiff cannot establish actual notice.

Parties might nonetheless use their contracts to avail themselves of this existing structure for waiving service of process, and thus the Hague Service Convention procedures, once the action has been initiated. Rule 4(d) explicitly contemplates foreign parties, which suggests that the ability to waive service of process does not terminate at the U.S. border.⁴⁷ Courts that have considered this question have suggested that “[Rule] 4(d)(2) does provide an *alternative to service* under the Hague Convention,”⁴⁸ including vis-à-vis Chinese defendants.⁴⁹ The Fifth Circuit has similarly noted that Rule 4(d) “permits the use of the mail to *reach* individuals and corporations outside the United States,” leading

⁴⁵ *Bozell Group, Inc. v. Carpet Co-Op of Am. Ass’n*, No. 00 Civ. 1248, 2000 U.S. Dist. LEXIS 15088, at *11 (S.D.N.Y. Oct. 13, 2000). *But see Masimo Corp. v. Mindray DS USA Inc.*, No. SACV 12-02206, 2013 U.S. Dist. LEXIS 197706, at *12 (C.D. Cal. Mar. 18, 2013) (complaining that the *Bozell* court did not cite any authority for its holding). For its part, the *Masimo* court asserted that “[t]he majority of courts to have considered the issue have determined that parties may contract around Rule 4’s requirements, which is consistent with Supreme Court precedent holding that parties may waive their right to receive notice,” but ironically did not cite any authority for this proposition. *See id.*

⁴⁶ *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

⁴⁷ *See* FED. R. CIV. P. 4(d)(2) (limiting penalties for failure to waive formal service to “defendant[s] located in the United States” who do not provide “good cause” (emphasis added)).

⁴⁸ *Rodriguez v. M/V Wash. Rainbow II*, No. H-05-1129, 2006 U.S. Dist. LEXIS 25210, at *3 (S.D. Tex. Mar. 21, 2006) (emphasis added). This statement is dicta, however, because the plaintiff in that case had not actually made a Rule 4(d) request of the foreign party. *See id.* at *3-4.

⁴⁹ *See Lexmark Int’l, Inc. v. Ink Techs. Printer Supplies, LLC*, No. 1:10CV564, 2013 U.S. Dist. LEXIS 200012, at *23 (S.D. Ohio Aug. 21, 2013) (holding that a refusal to waive formal service of process did not constitute evasion of service of process).

it to conclude that such a rule “do[es] not require immediate resort to the Hague Convention.”⁵⁰

In sum, while it is possible to waive service via a formal rule-based mechanism once an action has been initiated, the ability to “waive the waiver requirements” is contrary to the logic of rules like Rule 4(d). The weak contract solution suggested here would simply pre-commit the parties to using the *ex post* waiver provisions under existing rules.

CONCLUSION

The memorandum between Rockefeller and SinoType required the transmittal of documents abroad to provide service. As such, it comes within the mandatory ambit of the Hague Service Convention, as interpreted by the Supreme Court. But there is a simple way to avoid the Convention: require the foreign party to appoint a local agent. As long as the U.S. jurisdiction allows for substituted service, the appointment of local agents obviates the need to send documents abroad, with the result that the Convention will not apply.

⁵⁰ See *Lozano v. Bosdet*, 693 F.3d 485, 488 (5th Cir. 2012).