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Contracts with Foreign Companies May Require a Rewrite

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A recent California case may force companies doing business with foreign entities to reconsider—and maybe rewrite—their contracts. In *Rockefeller Tech. Invs. (Asia) VII v. Changzhou Sinotype Tech. Co.*, No. B272170, 2018 WL 2455092 (Cal. App. June 1, 2018), the California Court of Appeal held that parties may not contract around the formal service requirements of the Convention on the Service Abroad of Judicial and Extrajudicial Documents, commonly referred to as the Hague Service Convention. The decision could have profound implications for international business.

When a U.S. company conducts business with foreign companies, it typically requires the foreign company to resolve its dispute in U.S. courts or in some arbitral forum. The *Rockefeller* decision arguably makes it impossible to require foreign companies from some of the largest economies including China, Japan, Germany, U.K., India, Korea, Russia and Mexico, to show up in a California court based on notice provided by mail, courier (FedEx), or email even if the parties agreed to such forms of notice in their contract. This will have profound consequences for companies with global supply chains such as Apple and GM, for investment funds with foreign investors, for engineering and construction companies that procure materials and handle projects around the world, such as AECOM, and potentially for any company that imports or exports goods to or from the United States. Contract drafters beware!

The court in *Rockefeller* held that parties cannot enter into a private agreement to circumvent the official service requirements set forth in the Hague Service Convention. The Convention was created to allow and regulate service of process in a foreign country, ensuring that service is in compliance with the Convention would be valid, and that service was reasonably calculated to provide actual notice. Service under the Convention requires transmission of court documents through the “Central Authority” of the requesting and receiving countries, with the latter to arrange actual service on the foreign party. Not surprisingly, Hague service is expensive and cumbersome; it often takes many months to complete.

Article 10 of the Convention allows contracting states to permit service by mail; and it allows them to object to service by mail. Many commercially important countries, including the eight big economies listed above, submitted objections to Article 10 when they joined the Convention, meaning service in those countries generally cannot be accomplished by mail. In the U.S., parties often agreed to allow notification in accordance with contractual notice provisions. After *Rockefeller*, such contract

language is no longer enforceable, at least in California.

In *Rockefeller*, Rockefeller Technology Investments (Asia) VII (a U.S. company) wanted to enforce its $414M arbitration award in California state court. SinoType (a Chinese company), although aware of the proceedings, did not participate in the arbitration or the court case, and the California trial court granted recognition of the award. Fifteen months later, SinoType moved to set aside the recognition judgment on the basis of improper service. The trial court denied the motion, acknowledging that service had not complied with the Convention, but concluding that the parties had privately agreed to accept service by mail.

The Court of Appeal reversed, explaining that the Hague Service Convention does not permit service by mail in countries that have objected to Article 10, and China, where SinoType was served, has filed an Article 10 objection. The court rejected Rockefeller's argument that private parties may establish terms of service by contract, finding that the language of the Convention refers explicitly to the rights of each *State*, not its citizens, and as such, private parties cannot contract around the treaty.

The Court also rejected Rockefeller's argument that the judgment remained valid due to SinoType's actual notice of the proceedings and failure to timely move to set aside the judgment. The court held that personal jurisdiction requires valid service of process, and any judgment rendered without proper service is "void as violating fundamental due process," and void judgments can be challenged at any time. (The Court did not address the validity of service for the underlying arbitration or potential defenses to enforcement of the award.)

For existing contracts with foreign companies, the *Rockefeller* decision means parties should review them carefully to identify and evaluate provisions that purport to bypass Hague service requirements, including assessment of whether the foreign contracting party might have to be served in a country that objected to Article 10 of the Convention.

For future contracts, the decision puts companies doing business with foreign parties on notice that attempts to contract around Hague Service Convention are likely to be ineffective. At the least, U.S. parties should provide in their contracts that the foreign party will pay for the costs of service if the foreign party does not appear voluntarily. (The Convention does not prohibit a foreign party from appearing in litigation voluntarily.)

Finally, the full import of the *Rockefeller* decision remains to be seen. Although purporting to interpret an international treaty as a matter of federal law (under the Supremacy Clause), a decision of the California Court of Appeal does not bind federal courts or courts in other states—and it may be subject to review by the Supreme Court of California. But for now, the *Rockefeller* decision makes it harder to get foreign parties into a court in the U.S. by providing notice by mail, courier or email.

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