73068-1

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No. 73068-1-I

COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

DELEX INC., a New York corporation,

Plaintiff-Respondent,

v.

SUKHOI CIVIL AIRCRAFT COMPANY, a Russian Federation Closed Joint Stock Company

Defendant-Appellant.

BRIEF OF APPELLANT SUKHOI CIVIL AIRCRAFT COMPANY

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INTRODUCTION

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 [1969] (hereafter "Convention"), is a treaty in force between the United States and the Russian Federation. The Appellee Delex, Inc. (hereafter "Delex"), a New York corporation, sued the Appellant JSC "Sukhoi Civil Aircraft" (hereafter "SCAC"), a Russian corporation doing business in Russia, to collect on an alleged warehouse lease. Delex disregarded the Convention and attempted to serve SCAC in Russia by methods not permitted by that treaty. When SCAC did not appear, as was its right, Delex obtained a default judgment against SCAC without informing the Superior Court that it had not complied with the Convention, and thus the Superior Court made no findings of fact regarding the lawfulness of Delex's non-compliant service of process. Two and one-half years later, Delex attempted to execute upon aircraft parts bound from Seattle to Russia, and SCAC made a special and limited appearance for the purpose of vacating the default judgment and writ of execution. Delex then argued for the first time that the Superior Court should retroactively bless its unlawful service of process upon SCAC, claiming that service of process upon the Russian central authority, as is required by the Convention, would have been futile. In this assertion, too, Delex disregards the Convention, which specifically provides that if a plaintiff transmits translations of the summons and complaint to the Russian central authority, and the central authority does not certify within six months that service was effectuated, the court in the originating state may deem service to have occurred. Once again, because the Superior Court had no evidentiary record, the Superior Court made no findings of fact regarding the effectiveness or alleged futility of service of process under the Convention. Delex's failure to comply with the Convention may not be excused, because the Convention, by virtue of the Supremacy Clause of the Constitution, pre-empts Delex's inconsistent means of service under Washington law, and allowed the Superior Court to deem service effective without a Russian certification of service provided Delex complied. The Court should reverse and vacate the default judgment.

I. ASSIGNMENT OF ERROR

The King County Superior Court erred in denying SCAC's motion, on special and limited appearance, to vacate the writ of execution for the reason that the default judgment is invalid, thus requiring SCAC to supersede the invalid default judgment pending this appeal.

II. STATEMENT OF CASE

A. Procedural History

On March 22, 2012, Delex commenced in King County Superior

Court an action claiming more than $75,000 for breach of contract, fraudulent inducement and equitable indemnity against SCAC, a Russian corporation. Clerk's Papers (hereafter "CP") 1-6. On June 26, 2012, Delex filed an Affidavit of Service, without notarization, signed by Delex's ostensible attorney-in-fact in Russia, stating that on April 17, 2012, she had mailed, and that on April 27, 2012, she had delivered by hand, to SCAC in Moscow certain "court papers" on an itemized list. CP 22. The putative Affidavit of Service does not attest to the authenticity of, but was filed with, a Russian list of items on which four documents are mentioned in English. CP 27. Neither the putative Affidavit of Service nor the accompanying itemized list makes any reference to any translation of the summons or complaint to the Russian language. CP 27-28. SCAC did not appear in the action.

On August 3, 2012, Delex filed a Motion for Order of Default and Default Judgment seeking damages in the amount of $265,033.46 plus interest. CP 41-43. On the same date, August 3, 2012, the Superior Court entered its Order of Default and Default Judgment against SCAC in the total amount of $327,378.49 plus post-judgment interest at the rate of 12% per annum. CP 57-59.

On January 12, 2015, on Delex's motion, the superior court entered a Writ of Execution on Personal Property (CP 61-63), under which the Sheriff of Snohomish County, Washington, attached aircraft parts supplied by American manufacturers and bound for Russia. Delex purported to serve execution papers by mail from the United States to Russia. CP 65-66.

On February 15, 2015, SCAC's counsel filed in Superior Court a Notice of Special and Limited Appearance "for the limited purpose of challenging the lawfulness of the default judgment against Sukhoi Civil Aircraft Company." CP 69-70. Thereupon, on February 15, 2015, SCAC moved to shorten time in light of the sheriff's February 24, 2015, date to auction the attached property. CP 75-77. Likewise on February 15, 2015, SCAC filed a Motion by Special and Limited Appearance to Vacate Writ of Execution on Personal Property under Unlawful Judgment and to Stay of Sheriff's Sale Pending Determination of Lawfulness of Judgment. CP 85-91.

SCAC sought therein, on a shortened schedule, to vacate the Writ of Execution underpinning the auction scheduled for February 24 on the grounds that "Plaintiff elected not to comply with the Hague Service Convention, which renders the default judgment void" under CR 60. CP 88. SCAC maintained that the default judgment was prima facie invalid and that Delex would have an adequate opportunity to carry its burden of showing lawful service by suspending the impending sheriff's sale and ordering full briefing. CP 87 ("The plaintiff bears the initial burden to prove a prima facie case of sufficient service," citing *Scanlan v. Townsend*, 181 Wn.2d 838, 847, 336 P.3d 1155 (2014)), CP 89-90 (writ and sale rest on "prima facie void default judgment"). SCAC also pointed out that the aircraft parts the sheriff intended to auction included sensitive technology subject to federal export control regulations and to the intellectual property rights of American manufacturers who had licensed their use by SCAC and no one else, thus making the sheriff's sale "unlawful in other respects" besides the invalidity of the default judgment entered in disregard of the Convention. CP 90.

On February 24, 2015 – the same day of the scheduled sheriff's auction – the Superior Court signed and entered Delex's proposed Order denying SCAC's motion to vacate. CP 223-24. On the same date, shortly before the scheduled auction, SCAC filed a Notice of Appeal to Court of Appeals, Division 1, appealing from the Superior Court's denial of SCAC's Motion by Special and Limited Appearance to Vacate Writ of Execution on Personal Property under Unlawful Judgment, and seeking to stay the sheriff's sale. CP 218.

After this Court temporarily suspended the sheriff's sale, SCAC made a cash deposit in the amount determined by the Superior Court of $475,000, which Delex and SCAC stipulated "will be held by the King

County Superior Court Clerk as a bond to supersede the judgment entered in this case during the pendency of the appeal in Court of Appeals Cause No. 73068-1-I." CP 360. On March 20, 2015, the Superior Court approved the Stipulation and Order to Quash to Writ of Execution on Personal Property. CP 360-61.

Because the Superior Court denied SCAC's motion to vacate the writ of execution as resting on an invalid default judgment, this appeal seeks to prevent execution of judgment on SCAC's cash security that, by stipulation and order, supersedes that invalid judgment pending appeal.

B. Factual Background

The Russian Federation has developed its commercial aircraft manufacturing industry through various Russian companies. One of the Russian companies involved in that effort is SCAC, which is a Russian corporation headquartered in Moscow that designs, manufactures and sells the Sukhoi SuperJet 100 regional passenger jet. The SuperJet program is the result of a collaboration between SCAC and several American and European shareholders, suppliers and consultants, including Finmeccanica, Thales Group and The Boeing Company. *See* Sukhoi Superjet 100, http://www.sukhoi.org/eng/planes/projects/ssj100 (last visited June 4, 2015).

Delex is a New York corporation with business addresses in the

States of New York and Washington. According to Delex's allegations, on March 21, 2005, MCP Oleg Ardashev of Delex emailed MCP E. Bakbarev at SCAC in Moscow a proposal letter addressed to MCP Igor A. Andreev, SCAC Vice President for Procurement, "about the possibility of leasing the warehouse and office space adjacent to our suite at the Puget Sound Airfreight Building" in Seattle. CP 2, 8-9. MCP Ardashev's letter, which Delex characterizes as an "offer," states that Delex was "pleased to make the following proposal," which is described therein. CP 8. By its purported terms, the proposal called for a security deposit to be paid by SCAC within three (3) banking days of Lease Agreement signing. CP 8-9.

The alleged proposal letter expressly refers to a "Lease Agreement" that Delex has never disclosed and SCAC never signed. CP 9 ("Security Deposit" proposal). The letter refers to a security deposit payable within three days of the "Lease Agreement" that SCAC never paid. CP 9.

Because default judgment was entered without appearance by SCAC, the Court lacks certain evidence critical to evaluating the merits of Delex's Complaint and Delex's allegation that if it had complied with the Convention its efforts would have been futile. The first consists of evidence showing that allegations of fact in Delex's Complaint are wrong. In a court having personal jurisdiction upon lawful service of process, SCAC would show that MCP Andreev did not accept a lease offer from Delex, and that Delex knew that only SCAC's president, who was not MCP Andreev, is ever authorized under Russian law to sign any contract binding on SCAC. SCAC would also show that Delex's ostensible offer letter recognizes that to enter into a lease there would need to be a Lease Agreement that does not exist, a security deposit that was never made, payments of rent that never occurred, and premises that were never occupied by SCAC. SCAC would show that no such evidence of a lease exists because there was, in fact, no lease.

This Court also lacks any record evidence to support any findings of fact relating to the Russian Federation's handling generally of American requests for service of process under the Convention or whether Delex would have actually encountered futility by following the requirements of the Convention in effecting service of process. When it obtained default judgment, Delex did not inform the Superior Court about the requirements of the Convention or that its ostensible service of process did not meet the requirements of the Convention. Thus, the Superior Court had no opportunity to analyze the service of process under the Convention or to make appropriate findings under that treaty.

In opposition to SCAC's motion to vacate, Delex asserted for the first time that Russia would have refused to serve process if Russia had been asked because, according to Delex, Russia generally refuses to comply with the Convention in American cases. The burden of Delex's argument was that the Superior Court should retroactively excuse Delex's failure to follow the Convention, because it would have been futile for Delex to have done so when it filed its Complaint. *See* CP 174-79.

The Superior Court declined to stay the sheriff's sale, to vacate the writ of execution on the grounds that the default judgment is invalid for failure to comply with the Convention, or to order full briefing on the invalidity of the default judgment, but made no findings of fact on Russia's position on the Convention or the alleged futility of complying with it.

III. ARGUMENT

A. The Court's Standard of Review is De Novo.

Washington appellate courts "review[] de novo if service of process was proper." *Scanlan*, 181 Wn.2d at 847. "Whether service of process was proper is a question of law that this court reviews de novo." *Goettemoeller v. Twist*, 161 Wn. App. 103, 107, 253 P.3d 405 (2011). Moreover, "[t]he plaintiff bears the initial burden to prove a prima facie case of sufficient service." *Scanlan*, 181 Wn.2d at 847. If Delex fails to meet that burden, the Court lacks personal jurisdiction over SCAC. *Rodriguez v. James-Jackson*, 127 Wn. App. 139, 146, 111 P.3d 271

(2005). The default judgment based upon invalid service is void. *Id.*

B. The Convention Requires Transmittal to the Russian Central Authority and Pre-empts Inconsistent Methods of Service Under State law by Virtue of the Supremacy Clause of the United States Constitution.

The United States Supreme Court has held that "[b]y virtue of the Supremacy Clause, U.S. Const., Art. VI, the Convention pre-empts inconsistent methods of service prescribed by state law in all cases to which it applies." *Volkswagenwerk Aktiengesellscharft v. Schlunk*, 486 U.S. 694, 699, 108 S. Ct. 2104 (1988). Accordingly, "compliance with the Convention is mandatory in all cases to which it applies[.]" *Id.* at 705. As the Convention applies in this case, and Delex did not serve in compliance with the Convention, the default judgment does not rest on personal jurisdiction over SCAC and is therefore void.

Here the Convention applies because, according to its Article 1, it "shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." 20 U.S.T. 361-367, T.I.A.S. 6638 (Appendix A hereto). As Delex's complaint alleges breach of contract, fraudulent inducement and equitable indemnity in relation to an alleged lease of a warehouse, this is a civil or commercial matter where "there is occasion to transmit a judicial . . . document for service abroad," namely the summons and the complaint, and the Convention therefore applies.

The Convention is a treaty in force between the United States and the Russian Federation. Congress has provided by statute how United States treaties in force shall be evidenced before state courts. Under 1 U.S.C. § 112a(a), the Secretary of State of the United States is responsible for compiling, editing, indexing and publishing the official compilation entitled "United States Treaties and Other International Agreements." That compilation "shall be legal evidence of the treaties, international agreements other than treaties, and proclamations by the President of such treaties and agreements, therein contained, in all the courts of . . . the several States . . . ." 1 U.S.C. § 112a(a). The Secretary's most recent publication lists the Convention as a United States treaty in force with the Russian Federation. *See* A List of Treaties and Other International Agreements of the United States in Force on January 1, 2013, http://www.state.gov/documents/organization/218912.pdf (last visited May 29, 2015). The List's most recent supplement does not alter the status of the Convention in regards to Russia. *See* Treaties in Force 2014 – Supplement, http://www.state.gov/documents/organization/235185.pdf (last visited May 29, 2015). Thus, by federal statute, no other evidence is needed on this point that the Convention is a treaty in force with Russia.

Russia's compliance or non-compliance, or reciprocity or lack thereof, in regards to the Convention has no effect on the treaty's status as having force of law. For more than a hundred years, the Supreme Court of the United States has held that a signatory country's refusal to comply with a treaty does not negate the treaty's force of law in the United States. *See Charlton v. Kelly*, 229 U.S. 447, 469, 476, 33 S. Ct. 945 (1913) (treaty binds the United States to honor Italy's extradition demands despite Italy's refusal to honor United States extradition demands). While another country's refusal to comply may "have justified the United States in denouncing the treaty as no longer obligatory," foreign non-compliance "d[oes] not automatically have that effect." *Id.* at 473. As evidenced by the Secretary of State's publication of treaties in force, the United States has not abrogated the Convention vis-à-vis the Russian Federation whatever may be that country's posture on the treaty. SCAC has been unable to locate any case in which any court has held that the Convention has ceased to be in force between the United States and the Russian Federation.

Washington Courts, in particular, may not alter the position of the United States that the Convention remains in force. As a matter of constitutional law, the conduct of diplomacy and foreign policy is exclusively a federal, not a state, matter. Declaring that the Convention is not law in the United States vis-à-vis the Russian Federation would amount to a declaration of withdrawal from obligations the United States undertook towards that country under the Convention. A state court lacks authority to do so because "[i]f state action could defeat or alter our foreign policy, serious consequences might ensue" since "[t]he nation as a whole would be held to answer if a State created difficulties with a foreign power." *U. S. v. Pink*, 315 U.S. 203, 232, 62 S. Ct. 552 (1942) (citation omitted). Therefore, "[n]o State can rewrite [American] foreign policy to conform to its own domestic policies[,]" *id.* at 233, and "the treaty not having been abrogated, its provisions are operative against" the United States, regardless of Russia's handling of American requests to serve process under the Convention. *See Charlton*, 229 U.S. at 475.

Accordingly, as an applicable treaty of the United States in force with the Russian Federation, the Convention is a "Treat[y] made . . . under the Authority of the United States" and "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the . . . Laws of any State to the Contrary notwithstanding." *See* U.S. Const. art. VI, cl. 2. In that textually explicit manner, the preemptive effect of the Convention is clearly mandated by the Constitution, which is even more explicit in adding that treaties, like the Convention, shall be binding on "the Judges in [the State of Washington]" "notwithstanding" any Washington State laws to the contrary. The Washington Supreme Court so holds. *See Broad v. Mannesmann Anlagenbau, A.G.*, 141 Wn.2d

670, 674-75, 685-86, 10 P.3d 371 (2000) (Washington's statute of limitations is tolled when a plaintiff transmits documents to a designated central authority because the Convention preempts state law and gives control over Washington service of process to that central authority).

Thus, the Constitution of the United States places control over service in this case in the hands of the Russian central authority. *Id.*; *cf.* CR 4(i)(1) ("[t]he method for service of process in a foreign country must comply with applicable treaties, if any . . . "). Citing that very loss of control over service of process, the Washington Supreme Court deems transmittal to the designated central authority to be an act that tolls statutes of limitations. *See Broad*, 141 Wn.2d at 683 ("The Hague Service Convention stands as a positive rule of law which could prevent timely commencement of suit.").

"Although the convention also provides for several alternative methods of service, it allows signatory countries to object to those methods." *Id.* at 674. The Convention allows every signatory to designate service through its central authority as its exclusive method of service. *See* Restatement (3d) of Foreign Relations Law of the United States § 471 cmt. e (1987) ("for states that have objected to all of the alternative methods, service through the Central Authority is in effect the exclusive means"). Objection to all alternative methods is not unusual; thus, for instance, Germany has objected to all methods of serving process in Germany for American civil cases other than through the designated central authority under the Convention. *See Broad*, 141 Wn.2d at 674.

In declarations deposited with the Netherlands as the official repository, the Russian Federation has designated the Russian Ministry of Justice as the central authority under Article 2 for purposes of service under Articles 3-6 of the Convention, and has exercised every signatory's right under the Convention to object to all other methods of service of process. *See* Declarations of the Russian Federation Relating to Articles 2, 3, 5, 6, 8, 9, 10, 12, and 15 of the Hague Service Convention, http://www.hcch.net/index_en.php?act=status.comment&csid=418&disp=resdn (last visited May 29, 2015). Accordingly, as a constitutional matter, no summons issued in a civil case in a Washington Superior Court, or complaint filed therein, may be served in Russia except through the Ministry of Justice of the Russian Federation in accordance with the provisions of the Convention.

Here, Delex made no attempt to serve process in Russia in accordance with the exclusive method of service permitted by the Convention. Delex did not transmit to the Russian Ministry of Justice the summons and complaint with translations to the language of Pushkin and Tolstoy as required by the Convention, nor did Delex move the lower court for any determination that doing so would be futile, even assuming *arguendo* that the trial court had authority to bypass the Convention. Delex also ignored the Convention after it filed with the Superior Court a purported proof of personal service, never mentioning the requirements of the Convention to the court below in its motion for entry of default. The record is devoid of any indication that Delex ever apprised the Superior Court of any issue relating to the Russian Federation's acceptance or non-acceptance of American requests for service of process generally, and thus the default judgment was entered on a record devoid of any evidence or finding of fact relating to alleged Russian non-compliance with the Convention.

Reviewing the Superior Court's order *de novo*, the Court should conclude that SCAC's motion to vacate the writ of execution should have been granted because the default judgment is void for failure to comply with the Convention, and order on the same grounds the release to SCAC of the cash security SCAC deposited to free the attached property and supersede the invalid judgment pending this appeal. *See Rodriguez*, 127 Wn. App. at 146 (failure of proper service constitutes lack of personal jurisdiction requiring vacation of judgment).

C. Transmittal of Service Documents to the Russian Central Authority Can Never Be Futile Because the Convention Expressly Reserves Washington's Right to Enter Default Six Months After Such Transmittal.

For the first time in this case, after SCAC entered a special appearance under reservation of rights to move to vacate the Default Judgment, Delex argued that any attempt by Delex to comply with the Convention would have been futile, citing a few federal cases that granted motions to allow alternative methods of service in Russia upon showings that Russia "no longer complies with formal requests for judicial assistance pursuant to the Hague Service Convention from the United States." CP 177-79 (quoting *Microsoft Corp. v. Does 1-18*, 2014 WL 1338677, *3 (E.D. Va. 2014)). Delex's reliance on such federal cases has no force here for several reasons.

First, unlike in the federal cases, here Delex never told the Superior Court that it had not complied with the Convention and did not move for an order permitting an alternative method of service. Second, unlike federal courts, here the Supremacy Clause deprives Washington of discretion to approve attempts to serve process by methods inconsistent with the Convention, *see Volkswagenwerk Aktiengesellscharft*, 486 U.S. at 699; and Washington Courts are bound by United States Supreme Court precedent and not by lower federal court rulings. *See Wash. v. Wash. State Comm. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 684-85, 99 S.

Ct. 3055 (1979), *modified sub nom. Wash. v. U.S.*, 444 U.S. 816, 100 S. Ct. 34 (1979).

Third, and most fundamentally, Delex's post-judgment argument that it would have been futile to comply with the Convention is simply wrong as a matter of law. The Convention itself would have provided Delex a remedy if Delex had attempted to comply with it. In its recurring disregard for the Convention, Delex ignores that the treaty itself expressly reserves the United States'—and therefore the State of Washington's—power to enter default judgments when the designated central authority does not return a certification of service ***within six months***, provided that the Superior Court makes certain findings set forth in the treaty itself. Here, Delex did not attempt to comply with the Convention, never mentioned the Convention, and the Superior Court had no opportunity to make the findings contemplated by the Convention in the event the designated central authority does not return a certification of service ***within six months***. *See* CP 41-43.

The entry of American default judgments involving service of process in Russia is specifically regulated by the Convention. Article 15 of the Convention provides two sets of procedures for entry of default judgments. The first procedure allows default when a defendant does not appear after being served by an approved alternative method under the

Convention. The second procedure allows defaults when the method of service is through the central authority and the latter does not certify within six months that it effectuated service. The following is the procedure for default where a signatory Country does not object to an alternative method of service:

> 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.

Convention, 20 U.S.T. 361, T.I.A.S. No. 6638 at Art. 15 (Appendix A).

This first alternative is not available here because, as shown above, the Russian Federation has objected to all methods of service except service through the central authority, and in all events the trial court made no findings under Russian law as required by this provision.

The second option available to Delex under Article 15 of the Convention was to obtain a default judgment six months after transmittal of service documents to the Russian central authority, if the latter had not returned a certificate of accomplished service during that time:

> Each Contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this Article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled –
>
> a) the document was transmitted by one of the methods provided for in this Convention,
>
> b) ***a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document***,
>
> c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.
>
> Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.

Id.

The foregoing procedure was available to Delex, because it is expressly applicable where service is to occur through a designated central authority rather than by an alternative method where, as here, the receiving state (the Russian Federation) objects to the other methods. The Superior Court, however, did not make the findings required in Article 15. And it was disabled from doing so, because Delex disregarded the Convention, the summons and complaint were not translated to Russian and were not transmitted to the Russian central authority as the Convention requires, Delex did not allow six months to pass thereafter, and it obtained default judgment using a method of service inconsistent with the Convention, and preempted by the Supremacy Clause of the Constitution, without even mentioning to the Superior Court the Convention or its non-compliance with it. CP 57.

Courts have explained that the Convention rewards good faith attempts to comply, consisting of due transmittal of service documents to the designated central authority, by reserving to each contracting state the power to enter a default judgment within six (6) months thereafter if the central authority does not return a certificate of service during that period. *See In re South Africa Apartheid Lit.*, 643 F. Supp.2d 423, 438 (S.D. N.Y. 2009) (Article 15 of the Convention contains a "jurisdictional safety valve"). Thus service may be proper under the Convention, despite a decision by the designated central authority not to serve or to certify service, if the plaintiff made a good faith attempt to comply with the Convention, unlike Delex. *See Scheck v. Republic of Argentina*, 2011 WL 2118795 (S.D. N.Y. 2011) (holding service was proper without certificate from central authority under the six-month provision of Article 15 of the Convention); *Thomas v. Sclavo*, 1998 WL 51861, *1 (N.D. N.Y. 1998) (affirming default judgment after transmittal to central authority and absence of certificate within six months thereafter).

The "jurisdictional safety valve" reinforces that the Convention continues to have the force of law between the United States and the Russian Federation. Delex thus had no fewer than three courses of action to serve SCAC and prosecute its case. First, Delex could have sued SCAC in the United States District Court for the Western District of Washington based on complete diversity of citizenship and an amount in controversy greater than $75,000 exclusive of interest and costs, *see* 28 U.S.C. § 1332(a)(2), subject to SCAC's jurisdictional, venue and other defenses. Second, Delex could have sued SCAC in the courts of the Russian Federation where SCAC is domiciled. And third, Delex could have sued SCAC in the Superior Court if it complied with the Convention by duly transmitting the prescribed service documents, with translations, to the Russian central authority, waited six months for a certificate of service from Russia, and then sought an order of default judgment from the Superior Court, with appropriate findings per Article 15 of the Convention before moving for default if none was received. Had Delex done the latter, it would also have tolled Washington's statute of limitations upon transmittal of service documents to the Russian central authority, with translations, in accordance with *Broad.* But Delex did none of these things, and failed to alert the Superior Court to the requirements of the

Convention or that it had failed to comply with it.

It is the United States, not the Russian Federation, whose procedures for the implementation of the Convention deviate from the treaty's provisions, as the United States requires payment of contractor fees to which Russia objects because the Convention does not provide for such fees. *See generally* Convention, 20 U.S.T. 361, T.I.A.S. No. 6638 [1969]. Irrespective of where blame should be cast with respect to that diplomatic dispute over implementation of the Convention, that debate did not prevent Delex from prosecuting its case against SCAC. It simply chose not to comply with the law and instead to obtain a default judgment by illegal means to avoid its burden on the merits. The Court should vacate the Default Judgment because the one course of action the law does not allow Delex to take is to disregard the Convention.

D. The Default Judgment Should Be Set Aside.

The Court should set aside the default judgment under CR 60(b)(11) for the reasons set forth in SCAC's motion below. CP 88-89. Setting aside the default judgment would be a proper exercise of discretion under "the policy of this court to set aside default judgments liberally[,]" *Morin v. Burris*, 160 Wn.2d 745, 754, 161 P.3d 956 (2007), but here it is legally mandated by the rule that "a judgment rendered in excess of the court's jurisdiction is void and a legal nullity." *Bell Helicopter Textron,* *Inc. v. Islamic Republic of Iran*, 734 F.3d 1175, 1181 (D.C. Cir. 2013) (citation omitted) (affirming vacatur of default judgment). It is well-established in Washington that "[p]roper service of the summons and complaint is a prerequisite to the court obtaining jurisdiction over a party[.]" *Woodruff v. Spence*, 76 Wn. App. 207, 209, 883 P.2d 936 (1994). Any actual knowledge of the complaint by SCAC "standing alone is insufficient to impart the statutory notice required to invoke the court's in personam jurisdiction." *Thayer v. Edmonds*, 8 Wn. App. 36, 40, 503 P.2d 1110 (1972), *rev. denied*, 82 Wn.2d 1001 (1973) (citation omitted).

SCAC's non-appearance has no effect on its right to vacate the default judgment, because of Delex's failure to comply with the Convention. The Supreme Court of the United States holds that SCAC had the right "to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds[.]" *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706, 102 S. Ct. 2099 (1982) (citation omitted).

The Superior Court's order on appeal, CP 223-24, denied SCAC's request for further briefing on the validity of the default judgment, thus leaving SCAC no remedy other than to appeal that order to this Court. Upon full briefing here and reviewing the validity of the default judgment *de novo*, the Court should set aside the default judgment for lack of personal jurisdiction in conformity with the supremacy of the Convention over Washington law by virtue of the Supremacy Clause. SCAC's *supersedeas* bond, consisting of cash security in the amount of $475,000 which the parties stipulated and the Superior Court ordered would supersede the judgment pending appeal, should be returned to SCAC with interest as permitted by law upon vacation of the default judgment.

IV. CONCLUSION

The Court should vacate the default judgment, because it was obtained by lawful service and without personal jurisdiction over SCAC, and order the return to SCAC of its cash security with interest as allowed by law.

DATED this 11th day of June, 2015.

Respectfully submitted,

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By: ______________________
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Specially Appearing Counsel for Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby declare that on this day I caused to be served by email, a true and correct copy of the foregoing with this Certificate of Service upon:

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DATED at Seattle, Washington this 11th day of June, 2015 in Seattle, Washington.

Kimm Harrison, Legal Assistant

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

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

(Concluded 15 November 1965)

The States signatory to the present Convention,

Desiring to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time,

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

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

Article 1

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

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

CHAPTER I – JUDICIAL DOCUMENTS

Article 2

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

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

Article 3

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

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

Article 4

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

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

APPENDIX A

Article 5

The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either –

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

b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.

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

If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed.

That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document.

Article 6

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

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

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

The certificate shall be forwarded directly to the applicant.

Article 7

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

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

Article 8

Each Contracting State shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents.

Any State may declare that it is opposed to such service within its territory, unless the document is to be served upon a national of the State in which the documents originate.

Article 9

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

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

Article 10

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

a) the freedom to send judicial documents, by postal channels, directly to persons abroad, *b)* the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,

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

Article 11

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

Article 12

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

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

b) the use of a particular method of service.

Article 13

Where a request for service complies with the terms of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security.
It may not refuse to comply solely on the ground that, under its internal law, it claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not permit the action upon which the application is based.
The Central Authority shall, in case of refusal, promptly inform the applicant and state the reasons for the refusal.

Article 14

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

Article 15

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

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

b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention,

and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

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

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

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

c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.

Article 16

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

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

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

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

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

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

CHAPTER II – EXTRAJUDICIAL DOCUMENTS

Article 17

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

CHAPTER III – GENERAL CLAUSES

Article 18

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

The applicant shall, however, in all cases, have the right to address a request directly to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

Article 19

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

Article 20

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

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

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

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

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

Article 21

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

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

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

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

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

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

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

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

Article 22

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

Article 23

The present Convention shall not affect the application of Article 23 of the Convention on civil procedure signed at The Hague on 17th July 1905, or of Article 24 of the Convention on civil procedure signed at The Hague on 1st March 1954.
These Articles shall, however, apply only if methods of communication, identical to those provided for in these Conventions, are used.

Article 24

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

Article 25

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

Article 26

The present Convention shall be open for signature by the States represented at the Tenth Session of the Hague Conference on Private International Law.
It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 27

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 26.
The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 28

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

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

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

Article 29

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

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

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

Article 30

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

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

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

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

Article 31

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

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

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

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

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

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

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

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

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