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Court of Appeals
Division I
State of Washington

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.

REPLY BRIEF OF APPELLANT SUKHOI CIVIL AIRCRAFT COMPANY

Michael Socarras
SCHMITZ & SOCARRAS LLP
8200 Greensboro Drive, Suite 1500
McLean, Virginia 22102
(703) 639-9022

Pro Hac Vice for Specially Appearing Defendant-Appellant

John W. Phillips
PHILLIPS LAW GROUP, PLLC
315 Fifth Ave. South, Suite 1000
Seattle, Washington 98104
(206) 382-6163

Counsel for Specially Appearing Defendant-Appellant

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I. ARGUMENT

A. Article 15 of the Convention is Dispositive of the Claim of Error.

The Hague Service Convention[1] expressly allowed Washington Courts discretion to enter a default judgment if Russia refused to serve process, but only if Delex first complied with the six-month default procedure in Article 15 of the Convention by initiating a service of process request to the Russian central authority. Delex chose not to request service under the Convention. Knowing as much, Delex now leads with the argument, in Brief of Respondent at 6, that raising Article 15 is improper under RAP 2.5(a). Delex's attempt to convince the Court not to consider Article 15 of the Convention merely highlights that the default judgment, which should be liberally set aside as SCAC has shown, cannot survive a reading of the entire treaty.

First, the Court disposes of appeals on their merits save in compelling circumstances. RAP 1.2(a) provides that "[c]ases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands, subject to the restrictions in RAP 18.8(b)." Accordingly, where as here

[1] This Reply Brief uses the same short names and acronyms that are defined in the Brief of Appellant.

there is no compelling reason to disregard a specific provision of the Convention, the Court does not dispose of appeals under RAP 2.5(a).

Second, SCAC has fully complied with RAP 2.5(a). The claim of error appeals from the trial court's enforcement of a default judgment that SCAC showed below does not rest on valid service of process under the Convention. RAP 2.5(a) permits SCAC to raise authorities not argued in the trial court as long as they relate to the same general theory that was argued below. *See Bennett v. Hardy*, 113 Wn.2d 912, 917-18, 784 P.2d 258 (1990); *Walla Walla County Fire Protection District No. 5 v. Washington Auto Carriage, Inc.*, 50 Wn. App. 355, 357 n.1, 745 P.2d 1332 (1987). More than resting on the same general theory as SCAC's argument below, here Article 15 is an integral part of the Convention on which SCAC has based its position below and in this appeal. To disregard Article 15 as raised improperly on appeal would be like disregarding part of the seminal precedent on which an appeal hinges.

Third, in this appeal the Court does not merely review whether the trial court correctly decided the arguments before it. Rather, the Court conducts a *de novo* review of whether the judgment the trial court enforced rests on valid service of process. *See Scanlan v. Townsend*, 181 Wn.2d 838, 847, 336 P.3d 1155 (2014); *Goettemoeller v. Twist*, 161 Wn.App. 103, 107, 253 P.3d 405 (2011). As *Scanlan* and *Goettemoeller*

show, it is in the nature of *de novo* review that the Court conducts its own inquiry based on the entirety of the relevant law. In accord with the *de novo* cases, RAP 2.5(a)(1) provides a jurisdictional issues exception to the general rule of RAP 2.5(a). This jurisdictional exception applies to issues concerning whether otherwise applicable State law is preempted by Federal law. *See Fowlkes v. IBEW, Local No. 76*, 58 Wn.App. 759, 764, 795 P.2d 137, 808 P.2d 1166 (1990), *review denied*, 117 Wn.2d 1019 (1991), *cert. denied*, 502 U.S. 1099 (1992). Here, as in *Fowlkes*, SCAC raises jurisdictional issues related to preemption, in that any method of service other than that required by the Convention is constitutionally preempted, such that the primacy of the Constitution and Federal law require the assurance that the Court has considered all relevant provisions of the Convention. Thus, upholding Article 15 is not only proper but constitutionally mandated.

Fourth, while SCAC initiated the briefing as the Appellant, nonetheless it is Delex who must bear the "initial burden to prove a prima facie case of insufficient service," *Scanlan*, 181 Wn.2d at 847, and in this instance Delex has attempted to bear its burden by arguing that service under the Convention would have been futile, and that Article 15 of the Convention did not require transmittal of the service papers to the Russian

central authority. Brief for Respondent at 15-18. This Reply Brief properly responds to SCAC's effort to bear its burden under Article 15.

Because the Court reviews the validity of service *de novo*, and Delex attempts to bear its burden under Article 15 of the Convention, both the Brief of Appellant and this Reply Brief properly raise Article 15.

B. Article 15 of the Convention Specifies How Washington Courts May Enter Default Judgment Without Russia's Cooperation.

If Delex had attempted to serve process under the Convention—which it did not do—and if the Russian central authority had declined to cooperate, Delex's attempt to serve as that treaty requires would not have been futile because Article 15 of the Convention would have allowed it to move for default after waiting six months. Therefore Delex's entire problem consists of having ignored the Convention. It is a problem of Delex's own making for which Delex bears sole responsibility.

Delex's contention that Russia does not have an "active central authority[,]" Brief of Respondent at 15, is unsupported and misleading because Russia has designated a central authority, which is perfectly willing to serve so long as American requests for service comply with Russia's correct reading of the Convention. However, Russia's cooperation with service requests is ultimately not necessary provided that a plaintiff properly requests service under the Convention. Convention

signatories deposit notifications at the Hague Conference on International Law ("HCCH"), which advises that Russia has designated its Ministry of Justice as its central authority for purposes of service of process. *See* Hague Conference on Private International Law, *Declarations*, http://www.hcch.net/index_en.php?act=status.comment&csid=418&disp=resdn (last visited September 9, 2015). All up-to-date practical contact details at the Ministry of Justice, the relevant forms, the official Russian-language declarations on acceptable service within the terms of the Convention, and the English translation thereof are provided to the public by the HCCH repository for ease of use. *Id.*

Delex also argues in Brief of Respondent at 16 that it is impossible to transmit service papers under the six-month default judgment provision of Article 15 of the Convention because the Russian Ministry of Justice will not cooperate. Delex is mistaken, once again, because the transmittal to which the six-month provision of Article 15 refers is the transmittal of service papers to Russia. Delex does not quote the entirety of the relevant provision of Article 15 of the Convention, which states as follows:

> 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.

Art. 15 (Appendix A) (emphasis added).

Therefore the plain language of the six-month default provision in Article 15 provides for (i) the transmission of the service request to Russia's central authority, (ii) a lapse of at least six months "since the date of the transmission of the document," and (iii) the absence of a certificate of service received from the Russian central authority. If those three circumstances had been met, then the trial court in this case would have had discretion, expressly provided by the language of Article 15 of the Convention, to enter a judgment "even if no certificate of service or delivery has been received[.]" *Id.* Thus, a good-faith attempt by Delex to comply would have been fruitful, not futile.

That is how other courts have construed Article 15, holding that Article 15 is the Convention's "jurisdictional safety valve[,]" *In re South Africa Apartheid Lit.*, 643 F. Supp.2d 423, 438 (S.D. N.Y. 2009), *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), but Delex mistakenly argues that these cases did not involve the receiving country's specific refusal to comply with the Convention. Nothing in Article 15 suggests that it matters *why* Russia fails to return a certificate of service. Rather, the cases applying Article 15 show that what matters is that no certificate of service or delivery is received from the central authority after reasonable effort to obtain one for six months. The treaty does not require anyone to show whether the receiving state had good reasons or bad reasons for not returning a certificate of service, as any such requirement would invite courts in one country to sit in judgment of another country and would be unworkable.

Likewise it matters not, contrary to Delex's contentions in Brief of Respondent at 17, whether Germany returns certificates of service to American plaintiffs while Russia does not. The Convention does not depend on whether anyone may assign white hats or black hats to different nations. What matters is whether a plaintiff, after diligently initiating a service request to the central authority in the receiving country, receives or

does not receive a certificate of service from that central authority. Where no such certificate is received—precisely in cases against Russian defendants rather than in cases against German defendants—that default may be entered after six months.

Whether or not Delex's attempt to serve process on a corporation in Moscow by private messenger and in the English language complied with Russian domestic law on service of process is also irrelevant, *see* Brief of Respondent at 15-16, because Delex did not establish compliance with Russian law at the time it moved for default, and the Superior Court made no determination on Russian law then or later. Under Article 15 of the Convention, *where service is permitted by a method other than through the central authority*, "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[.]" Art. 15 (Appendix A) (emphasis added). Contrary to that provision of the Convention, here judgment was entered without the trial court first establishing that SCAC was served by a method allowed by Russian law.

Even if *arguendo* Article 15 of the Convention permitted entry of judgment without a prior determination of compliance with Russian service of process law, such a method of service is not available to Delex

under the Convention. Russia exercises its right under the Convention to object to all methods of service except through its central authority, leaving the six-month-default provision of Article 15 as Delex's readily available, exclusive, and lawful means of service of process in this action. Thus, there was no justification for Delex to eschew the "jurisdictional safety valve[,]" *see In re South Africa*, 643 F. Supp. 2d at 438, even if *arguendo* a Washington Court were free of the strictures of the Supremacy Clause and able to order alternative service.

The Washington Supreme Court has affirmed the correctness of SCAC's position by holding that, as the Convention preempts Washington law and deprives Washington Courts of control over service abroad, the act of transmittal of translated service documents to the foreign central authority equitably tolls a statute of limitations. *See Broad v. Mannesmann Anlagenbau, A.G.*, 141 Wn.2d 670, 674-75, 685-86, 10 P.3d 371 (2000). Delex's feeble attempt to distinguish *Broad* on the grounds that Germany generally returns service certificates and Russia does not is fruitless, as nothing in *Broad* suggests that Washington may refuse to follow a treaty by drawing distinctions among the signatories based on their degree of diplomatic cooperation under the Convention. On the contrary, *Broad* holds that Russia controls service of process, that Washington is bound to the Convention by the Supremacy Clause, and

that for this reason a statute of limitations should be equitably tolled.

There is no question that the Convention is in force between the United States and Russia, as shown in Brief of Appellant at 11. The United States includes the Convention in the Department of State's official compilation of treaties in force, which 1 U.S.C. § 112a(a) provides "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 . . . ." Russia's refusal or non-refusal to comply with the Convention does not negate the Convention's force of law in this country. *See Charlton v. Kelly*, 229 U.S. 447, 473 (1913). Thus it is not for Washington to decide whether the United States or the Russian Federation is correct in their diplomatic dispute, as the Convention preempts State law by virtue of being a treaty in force with Russia that applies to commercial disputes.

Delex chose to ignore the Convention because it knew that its claim would fail if taken to trial, resting as it does on a letter that is expressly conditioned on the signing of a separate warehouse lease contract, which did not occur. Whatever Delex's reasons for ignoring the Convention may have been, the trial court erred in ordering enforcement of the default judgment. Delex's compliance with the Convention was the constitutionally mandatory prerequisite to entry of judgment. Far from

being futile, transmittal of Russian language service documents to the Russian Ministry of Justice could have led to a valid default judgment, fully in accord with the Convention, regardless of Russia's response.

C. SCAC Was Entitled to Ignore Unlawful Service and to Move Later to Vacate a Default.

Delex wrongly argues, Brief of Respondent at 18-19, that actual receipt of the summons and complaint, actual notice of the suit, and inaction in light of a service attempt made its service attempt valid under CR 4(i)(1) or under equity considerations. To the contrary, SCAC had the right to ignore an invalid attempt to serve process in a State trial court by means other than through the Russian central authority, which as SCAC has shown is the sole means of service consistent with the Convention.

First, since the United States and Washington Supreme Courts have held that State laws providing for any means of service other than as required by the Convention, such as CR 4(i)(1) or equity principles, are preempted by virtue of the Supremacy Clause, *see Volkswagenwerk Aktiengesellscharft v. Schlunk*, 486 U.S. 694, 699, 108 S. Ct. 2104 (1988); *Broad*, 141 Wn.2d at 674-75, 685-86, Delex's argument is a brazen invitation to disregard the Constitution and laws of this country. The Court should decline the invitation and adhere to the rule of law, particularly where a Russian company is involved. If nothing else, this

case should show that the rule of law is the basis for all judicial decisions in the United States.

Second, even if it were possible *arguendo* to set aside the Supremacy Clause, then neither actual receipt or actual knowledge, nor inaction in response to an invalid service attempt, are grounds for personal jurisdiction, as "[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), and actual knowledge of the complaint "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); *see Saltes v. Este*, 133 Wn.2d 160, 161, 943 P.2d 275 (1997) (actual receipt of service is not sufficient for personal jurisdiction); *Gross v. Sunding*, 139 Wn. App. 54, 60, 161 P.3d 380 (2007) (same).

Third, as applied by the Washington Supreme Court to toll the limitations period upon transmittal of service documents to the Russian central authority, Washington equity takes as a given that the receiving state's central authority, not the trial court, controls service of process in this case. *See Broad*, 141 Wn.2d at 674-75, 685-86. For this additional reason both law and equity are beholden to the terms of the Convention.

Fourth, "[a] defendant is always free to ignore the judicial

proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds." *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706 (1982); *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931). As explained above, Delex's available course of action was to comply with the Convention, and to seek default if the Russian central authority did not certify that service of process had been performed on SCAC within six months of transmittal of the translated summons and complaint to the Russian central authority. By ignoring the Convention, Delex scoffed at the rule of law. SCAC, by taking no action and later entering a limited appearance to challenge the default judgment, adhered to the rule of law.

It was Delex's decision to ignore the Convention that creates what Delex now describes as an unfair situation for itself. There is no reason to release Delex from the consequences of its own decision to disregard the Convention and to make a motion for a default judgment that never mentioned the Convention.

D. There Is No Federal Precedent for States to Ignore the Convention.

Delex might have filed a diversity of citizenship suit in the United States District Court for the District of Washington, which may have entertained a motion for an order, unencumbered by preemption under the

Supremacy Clause, providing for alternate means of service. Delex could also have sued SCAC in Moscow. Delex preferred State court, but failed to heed the Convention's preemption of State law under the Supremacy Clause. Now Delex asks the Court to sanction a departure from the Convention and the Constitution by following select precedents in lower federal courts. Delex's insistence is misguided because federal courts do not simply ignore the Convention, as Delex did here. The federal authorities Delex cites considered the Convention and its current status between the United States and Russia, while here Delex did not bring the Convention to the trial court's attention, either to seek an order for alternative service, to move for default, or to move for execution, and the order granting default never mentions the existence of the Convention.

Moreover, no lower federal court has released a State court from the strictures of the Supremacy Clause of the Constitution, by virtue of which the Convention preempts any other method of service process under State law. *See Volkswagenwerk*, 486 U.S. at 699. As no federal case cited by Delex deals with the Supremacy Clause and service in a State Court, Delex's authorities are inapposite. Any federal court holding that had sided with Delex on the power of a State court not to follow the Convention would be void, because it would be in contradiction of binding federal precedent in *Volkswagenwerk*.

Further, even if a lower federal court had held that State courts may allow alternative service not permitted by the Convention despite the Supremacy Clause, the U.S. Supreme Court has specifically held, and made clear, that Washington Courts are not bound by lower federal court rulings. *See Washington v. Washington State Comm. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 684-85, 99 S. Ct. 3055 (1979), *modified sub nom. Washington v. U. S.*, 444 U.S. 816, 100 S. Ct. 34 (1979).

By choosing to sue SCAC in State court, Delex asked for a date with the Supremacy Clause of the Constitution. By choosing to pay no heed to the Constitution or the Convention, it did not go well, and no one but Delex is to blame.

E. SCAC, Not Delex, Has the Right to Legal Fees.

SCAC has followed the Constitution, Washington State law and international law, and has shown that SCAC is entitled to prevail in this appeal. SCAC has also shown that Delex disregarded the Convention, despite the availability in Article 15 of a mechanism to move for default six months after reasonable effort to comply with the Convention even if the Russian central authority did not return a certificate of service. Accordingly, SCAC has the right to, and hereby requests, its legal fees under RCW 4.28.185 and its costs.

Delex's disregard of the Convention, including its jurisdictional safety valve in Article 15, and of the applicability of the Supremacy Clause of the Constitution in a State proceeding, subjected SCAC to having to enter its special appearance in this jurisdiction to stop a sheriff's sale of aircraft technology worth millions of dollars. An award of legal fees and costs to SCAC for its entire special appearance, in the trial court and in this Court, is just and proper because SCAC is the prevailing party under RCW 4.28.185 and, separately, because SCAC's course of conduct has not been in accordance with a good-faith reading of constitutional law under the Supremacy Clause or of the Convention.

II. CONCLUSION

The Court should vacate the default judgment because it was obtained without lawful service and personal jurisdiction, order the return to SCAC of its cash security with interest as allowed by law, and award SCAC its attorneys' fees and costs incurred below and in this appeal.

DATED this 14th day of September, 2015.

Respectfully submitted,

SCHMITZ & SOCARRAS LLP

By: _____
Michael Socarras

Pro Hac Vice for Specially Appearing
Counsel for Defendant-Appellant

PHILLIPS LAW GROUP, PLLC

By: _____
John W. Phillips, WSBA #12185

Specially Appearing Counsel for Defendant-
Appellant

CERTIFICATE OF SERVICE

I hereby certify 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:

ATTORNEYS FOR PLAINTIFF:
Steve W. Block
Terrance J. Keenan
W. Adam Coady
1111 Third Avenue, Suite 3400
Seattle, Washington 98101-3299
Tel: (206) 447-4400
sblock@foster.com
keent@foster.com
coadw@foster.com

PRO HAC VICE FOR SPECIALLY APPEARING DEFENDANT-APPELLANT:
Michael Socarras
SCHMITZ & SOCARRAS LLP
8200 Greenboro Drive, Suite 1500
McLean, Virginia 22102
Tel: (703) 639-9022
msocarras@sands-llp.com

DATED at Seattle, Washington this 14th day of September, 2015 in Seattle, Washington.

Kimm Harrison, Legal Assistant