No. 934363

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 73068-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DELEX INC.,
a New York corporation,

Respondent,

v.

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

Petitioner.

PETITION FOR REVIEW

SMITH GOODFRIEND, P.S.

By: Catherine W. Smith
WSBA No. 9542
Ian C. Cairns
WSBA No. 43210

1619 8th Avenue North
Seattle, WA 98109

cate@washingtonappeals.com
ian@washingtonappeals.com

SCHMITZ & SOCARRAS LLP

By: Michael Socarras
Pro Hac Vice

8200 Greensboro Drive
Suite 1500
McLean, VA 22102-3873

msocarras@sands-llp.com

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Constitutional Provisions

Treaties

Statutes

Rules and Regulations

Other Authorities

A. Identity of Petitioner and Court of Appeals Decision.

The Court of Appeals affirmed the trial court's refusal to vacate a default judgment entered against Sukhoi Civil Aircraft Company ("SCAC") based on service that violated the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. The Court of Appeals denied SCAC's timely motion for reconsideration of its April 18, 2016 published decision (Appendix A) on June 28, 2016 (Appendix B).

B. Issues Presented for Review.

1. Must a plaintiff seeking to serve a foreign defendant outside the mandatory channels of the Hague Convention obtain prior authorization from a court based on proof that compliance with the Hague Convention is currently impossible? (RAP 13.4(b)(3)-(4))

2. Does CR 4 allow service by mail on a foreign defendant despite the requirement of Washington's Long-Arm Statute, RCW 4.28.185(2), that service without the state can only be made "by personally serving the defendant"? (RAP 13.4(b)(2)-(4))

3. Must a court vacate a default judgment obtained without complying with RCW 4.28.185(4)'s requirement that plaintiff file an affidavit setting out why "service cannot be made within the state"? (RAP 13.4(b)(2), (4))

C. Statement of the Case.

1. Delex obtained a default judgment against SCAC premised on out-of-state service outside the Hague Convention.

In March 2012, Delex Inc. filed a complaint against SCAC, a Russian Federation company, alleging breach of a lease for warehouse space in Seattle. (App. A ¶ 3; CP 1-6)[1] Delex mailed English language copies of the summons and complaint to SCAC in Moscow, Russia, and delivered the same English language documents to an employee it alleged was the head of SCAC's Foreign Activity Legal Support Department. (App. A ¶ 3; CP 19-40) Delex's affidavit of service states it "served" SCAC in Russia, but contains no explanation why SCAC could not be served within Washington, *e.g.*, through a local agent or subsidiary. (CP 19-40)

SCAC did not respond to the lawsuit, and in August 2012, Delex moved for an order of default and default judgment. (App. A ¶ 4; CP 41-43) Delex supported its motion with the affidavit of its president, Oleg Ardashev, which alleged SCAC was "a foreign company with little or no connection to the area" and that "Delex was forced to effect [service] in Russia at high cost due to Sukhoi's refusal to accept service outside official protocols." (CP 47-50) A

[1] These facts are supported by citation to the Clerk's Papers and the Court of Appeals opinion.

default judgment of $327,378.49 was entered on August 3, 2012. (CP 57-59)

In January 2015, Delex executed on aerospace products SCAC was shipping through Washington. (CP 60-64) SCAC then made a special appearance for the limited purpose of challenging the validity of the default judgment. (CP 69-70) SCAC filed a motion asserting the default judgment was void because Delex did not comply with the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, which governs service on foreign parties in signatory countries. (CP 85-90, 196-202; Appendix C) Specifically, SCAC objected that Delex had served its complaint through means other than Russia's Central Authority, which is the required channel for service under the Hague Convention. (CP 87, 197-99; *see* § D.1) On February 24, 2015, King County Superior Court Judge Catherine Shafer denied SCAC's motion. (CP 220-22)

2. The Court of Appeals affirmed, holding service outside the Hague Convention does not require prior court approval and that service by mail on foreign defendants is acceptable.

On April 18, 2016, in a published decision, the Court of Appeals affirmed. *Delex Inc. v. Sukhoi Civil Aircraft Co.*, 193 Wn. App. 464, 372 P.3d 797 (2016) (App. A). The Court of Appeals

rejected SCAC's argument that consistent with federal precedent, Delex was required to seek prior court approval before effecting service outside the Hague Convention.

The Court of Appeals held that "[t]here was no reason for Delex to seek prior approval [of alternative service] under the Washington court rules." (App. A ¶ 29) The Court of Appeals also held that service by mail on foreign defendants was authorized under CR 4: "Delex served SCAC through the Russian Postal Service's registered mail and received confirmation of delivery from the Postal Service. This manner of service complies with CR 4(i)(1)(D)." (App. A ¶ 10) The Court of Appeals recognized plaintiff could not establish the propriety of personal service on the SCAC employee, stating doing so would require "*[a]ssuming* that this department head is an officer or a managing or general agent of SCAC." (App. A ¶ 10 (emphasis added))

Neither the parties nor the Court of Appeals addressed the jurisdictional implications of Washington's Long-Arm Statute, RCW 4.28.185, which forbids service by mail on foreign defendants (§ D.2) and requires a plaintiff to file an affidavit explaining why a defendant cannot be served within Washington (§ D.3). SCAC raised these issues with the Court through a timely motion for

reconsideration, which Division One denied on June 28, 2016 after calling for an answer from Delex.[2] (App. B)

D. Argument Why Review Should Be Granted.

1. The Court of Appeals decision conflicts with the Hague Convention and Supremacy Clause by allowing service on foreign defendants outside the Hague Convention without prior court approval. (RAP 13.4(b)(3)-(4))

This Court recently recognized "service under the Hague Convention" is an issue "of continuing and substantial public interest," and that the public deserves an "authoritative determination" of the treaty's application because otherwise "issues of international service of process are likely to recur." *Kim v. Lakeside Adult Family Home*, 185 Wn.2d 532, 554-55, ¶ 42, ___ P.3d ___ (2016). Here, the Court of Appeals approved Delex's

[2] SCAC properly raised these issues in its motion for reconsideration. Jurisdiction and manifest errors affecting a constitutional right can be raised at any time. RAP 2.5(a)(1), (3). RAP 2.5(a) applies to issues implicating both subject matter *and* personal jurisdiction, contrary to Delex's claim in the Court of Appeals. *See Pascua v. Heil*, 126 Wn. App. 520, 533, ¶ 21, 108 P.3d 1253 (2005) (addressing for first time on appeal propriety of service, citing RAP 2.5(a)). The RAPs sensibly provide appellate courts discretion to address law that has been overlooked in the parties' previous briefing, particularly when the oversight has resulted in a published decision on an issue of public importance. *State v. Blazina*, 182 Wn.2d 827, 834-35, ¶ 11, 344 P.3d 680 (2015) ("RAP 2.5(a) grants appellate courts discretion to accept review of claimed error not appealed as a matter of right"); *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 37, 42 P.3d 1265 (2002) (addressing issue raised for the first time in Supreme Court because it was an "issue of public importance and in the interest of judicial economy").

service outside the Hague Convention, without prior court authorization, accepting Delex's bare assertion that service through the Hague Convention was impossible – a position at odds with that taken by the federal courts. In doing so, the Court of Appeals allowed Delex to bypass the Hague Convention's default judgment provision, which would have allowed Washington to enter default if Russia refused to serve SCAC under the treaty. This Court should grant review and hold that the Supremacy Clause does not permit Washington courts to bypass the Hague Convention, that impossibility of service under the treaty does not excuse compliance, because the treaty allows default without service (under circumstances not established by Delex here), and that in all events a decision to circumvent the Hague Convention requires *proof* that service cannot be made through the treaty.

"The Hague Convention is a multilateral treaty 'intended to provide a simpler way to serve process abroad, to assure that defendants sued in foreign jurisdictions would receive actual and timely notice of suit, and to facilitate proof of service abroad.'" *Kim*, 185 Wn.2d at 555, ¶ 43 (quoting *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 698, 108 S.Ct. 2104, 100 L.Ed.2d 722 (1988)). "It applies in all civil cases where there is

occasion to transmit a judicial or extrajudicial document for service abroad" and "compliance with the Convention is mandatory in all cases to which it applies." *Kim*, 185 Wn.2d at 555, ¶ 43 (alterations and quotations omitted). Because the Hague Convention is a treaty ratified by the United States it preempts inconsistent state law under the Supremacy Clause, U.S. Const. art. VI. *Broad v. Mannesmann Anlagenbau, A.G.*, 141 Wn.2d 670, 674-75, 10 P.3d 371 (2000).

"The Hague Convention requires each state to designate a central authority, which receives requests for service, and either serves the documents itself or arranges service." *Kim*, 185 Wn.2d at 555, ¶ 44 (citing Hague Convention, Nov. 15, 1965, 20 U.S.T. 361, 362–63; *see* App. C art. 2, 5). If a country's central authority fails to serve a party, Article 15 of the Convention allows for entry of default judgment "if no certificate of service or delivery has been received . . . even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed," but only after six months have passed. (App. C art. 15)

This Court should grant review and hold that a plaintiff's allegation that service under the Hague Convention is impossible does not release Washington courts from the well-established

strictures of the Supremacy Clause and compliance with the treaty's provisions for entry of default judgment, and that the plaintiff must make a showing of impossibility of service under the Hague Convention prior to attempting service abroad, as the federal courts require. *See Nuance Communications, Inc. v. Abbyy Software House*, 626 F.3d 1222, 1238 (Fed. Cir. 2010) (plaintiff submitted declaration from Director of Operations of Crowe Foreign Services stating it could not serve defendant via Hague Convention) (cited at App. A ¶ 11), *cert. denied* 564 U.S. 1053 (2011); *In re Cyphermint, Inc.*, 445 B.R. 11, 15 (Bankr. D. Mass.), *aff'd*, 459 B.R. 488 (D. Mass. 2011) (prior attempt at service via Russia's Central Authority returned unexecuted) (cited at App. A ¶ 14).[3]

Requiring plaintiffs to make a showing that service under the Convention would have been impossible and to obtain prior

---

[3] *See also Arista Records LLC v. Media Services. LLC*, 69 Fed. R. Serv. 3d 1623, No. 06 CIV. 15319NRB, 2008 WL 563470, at *1 (S.D.N.Y. 2008) (plaintiff seeking to execute alternative service "must adequately support the request with *affirmative evidence* of the lack of judicial assistance by the host nation-conclusory assertions of the futility of Hague service are unavailing") (emphasis added) (citation omitted); *RSM Prod. Corp. v. Fridman*, No. 06 CIV. 11512(DLC), 2007 WL 2295907, at *2 (S.D.N.Y. Aug. 10, 2007) (holding alternative service was "warranted because plaintiffs had shown that they were unable to serve him in the Russian Federation pursuant to procedures set forth by the Hague Convention"); *West v. Rieth*, No. CV 15-2512, 2016 WL 195945, at *2 (E.D. La. Jan. 15, 2016) (refusing to approve alternative service because plaintiff had "not demonstrated that any comparable circumstances [*i.e.*, impossibility] exist in this case").

approval before attempting alternative service (let alone before obtaining a default judgment) ensures that plaintiffs do not execute service in violation of the Hague Convention, a treaty binding on Washington through the Federal Constitution's Supremacy Clause. RAP 13.4(b)(3). Lost in the Court of Appeal's decision is that *prior* cases – particularly prior trial court decisions – can only resolve the relevant question whether compliance with the Hague Convention is *currently* impossible for a particular case. Precedent, by definition, cannot establish that compliance with the Hague Convention will forever be impossible.[4] Requiring prior authorization also ensures that the alternative service comports with due process and the statutory requirements of Washington's

[4] In this case, for instance, the issue arose because of a dispute between the United States and Russia over the United States' decision in 2003 to outsource its obligations under the treaty to a private company and to allow that company to charge a fee for executing the United States' duties under the treaty. (*See* App. A ¶ 12; *see generally* Spencer Willig, Comment, *Out of Service: The Causes and Consequences of Russia's Suspension of Judicial Assistance to the United States Under the Hague Service Convention*, 31 U. Pa. J. Int'l L. 593 (2009)). As long as the United States allows its private contractor to charge a fee, Russia has stated its central authority will refuse to execute service requests from the United States. Willig, *supra*, 31 U. Pa. J. Int'l L. at 599-601; *see also* CP 129 (Russian Ministry of Justice statement that "the Russian Federation shall not apply the Convention in relation to [a] Contracting State" that collects "taxes or costs for the services rendered by the State addressed"). In setting out this history the Court of Appeals relied on a State Department circular last updated in 2013. (App. A ¶ 12, n. 4.)

Long-Arm Statute. (*See* §§ D.2-D.3; *Broad,* 141 Wn.2d at 678, n. 5 ("The treaty is not a long-arm device providing for independent authorization for service abroad. . . . Instead, it provides for methods of service when a state long-arm statute . . . authorizes service abroad.") (citation omitted))

In this case Delex could not show that it was without a remedy under the Convention. As SCAC argued below, Article 15 of the Hague Convention would have allowed the trial court to enter default if, after Delex requested Russia to serve SCAC under the Convention, Russia failed to return a certificate of service within six months. (*See* Brief of Appellant 17-23; Reply Brief 4-11) All that would have been required to enter default consistent with the Hague Convention, even assuming Russia would have refused the service request, was for Delex to wait six months after asking Russia to serve SCAC. This Court should hold that the Supremacy Clause does not allow Washington courts to bypass the Convention's six-month waiting period for default without a showing that irreparable prejudice or some other reason justifies faster relief. (App. C art. 15 ("the judge may order, *in case of urgency,* any provisional or protective measures.") (emphasis added))

Instead, the Court of Appeals erroneously concluded the trial court had the power to bypass the Convention without following the federal procedure for alternative service. The Court of Appeals refused to require prior authorization based on its mistaken belief that state, rather than federal law, should govern application of the Convention. (App. A ¶ 27: "The requirement of prior approval in those cases comes from the Federal Rules of Civil Procedure, which do not apply here."). But this Court has repeatedly adopted federal jurisprudence, particularly where it addresses an issue of federal supremacy. *See, e.g., W.G. Clark Const. Co. v. Pac. Nw. Reg'l Council of Carpenters*, 180 Wn.2d 54, 61-64, ¶¶ 13-17, 322 P.3d 1207 (2014) (adopting federal ERISA preemption analysis because "ERISA preemption is a matter of federal law"); *Freedom Found. v. Gregoire*, 178 Wn.2d 686, 700, ¶ 24, 310 P.3d 1252 (2013) (relying on analogous provisions of federal and state constitutions to adopt gubernatorial executive privilege); *Neighborhood Alliance of Spokane County v. City of Spokane*, 172 Wn.2d 702, 708, ¶ 1, 261 P.3d 119 (2011) ("adopt[ing] Freedom of Information Act (FOIA) standards of reasonableness regarding an adequate search").

This Court should grant review and hold that plaintiffs must obtain prior authorization from a court, based on proof that service

cannot be made through the treaty, before serving a foreign defendant outside the Hague Convention, an issue this Court has already held is "of continuing and substantial public interest." RAP 13.4(b)(4); *Kim,* 185 Wn.2d 532, 554-55, ¶ 42.

2. The Court of Appeals decision conflicts with Washington's Long-Arm Statute and its own precedent, both of which forbid service by mail on foreign defendants. (RAP 13.4(b)(2)-(4))

Even if the Supremacy Clause does not preempt state law on this issue, as the Court of Appeals concluded, its published decision holding that service by mail created personal jurisdiction over SCAC, a foreign defendant, conflicts with the plain language of Washington's Long-Arm Statute, RCW 4.28.185, as well as its own precedent. This Court should grant review and clarify that service by mail on foreign defendants is an unconstitutional expansion of our Long-Arm Statute. RAP 13.4(b)(2)-(4).

Washington's Long-Arm Statute "is coextensive with federal due process of law." *Pruczinski v. Ashby,* 185 Wn.2d 492, 500, ¶ 12, ___ P.3d ___ (2016). The procedural requirements of the Long-Arm Statute are designed "to ensure proper notice to nonresident defendants." *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wn.2d 107, 177, 744 P.2d 1032 (1987), *as amended* 109 Wn.2d 107, 750 P.2d 254 (1988). A judgment entered based on service

that violates the Long-Arm Statute is void because "[p]roper service of process is essential to invoke personal jurisdiction over a party." *Estate of Kordon*, 157 Wn.2d 206, 210, ¶ 8, 137 P.3d 16 (2006) (quotation omitted); *Haberman*, 109 Wn.2d at 177-78.

The Long-Arm Statute requires *personal service* on foreign defendants:

> Service of process upon any person who is subject to the jurisdiction of the courts of this state, as provided in this section, may be made by ***personally serving*** the defendant outside this state, as provided in RCW 4.28.180, with the same force and effect as though personally served within this state.

RCW 4.28.185(2) (emphasis added). In *Ralph's Concrete Pumping, Inc. v. Concord Concrete Pumps, Inc.*, 154 Wn. App. 581, 225 P.3d 1035, *rev. granted* 169 Wn.2d 1029 (2010), Division One held this language precludes service by mail on foreign defendants under CR 4. The *Ralph's Concrete Pumping* court observed that "the long-arm statute expressly provides for personal service of a summons on an out-of-state defendant" and that CR 4(i)'s provisions for alternative service in a foreign country are conditioned "on the absence of any 'provision prescribing the manner of service' in the relevant statute providing for out-of-state service." 154 Wn. App. at 587, ¶ 18 (quoting CR 4(e)(1)). Thus, the Court of Appeals concluded that because RCW 4.28.185 "mandates personal service

. . . CR 4(i) does not apply." *Ralph's Concrete Pumping*, 154 Wn. App. at 589, ¶ 24.

The Court of Appeals decision in this case directly conflicts with *Ralph's Concrete Pumping* by holding under CR 4(i) "[s]ervice on a party in a foreign country is sufficient if it is made . . . by any form of mail, requiring a signed receipt." (App. A ¶¶ 9-10) If this Court does not grant review, the law governing service on foreign defendants – a critical jurisdictional issue – will be in disarray, because Court of Appeals precedent now holds both that service by mail on foreign defendants is authorized and is barred by CR 4. This Court should grant review to clarify – consistent with the plain language of the Long-Arm Statute and CR 4 – that service by mail is

not an acceptable form of service on foreign defendants. RAP 13.4(b)(2).[5]

Both plaintiffs and defendants deserve clarity on what constitutes acceptable service under the Long-Arm Statute. RAP 13.4(b)(4). Defendants should know when they can safely ignore service, as is their right. *See Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706, 102 S. Ct. 2099, 2106, 72 L. Ed. 2d 492 (1982) ("A defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding"). Plaintiffs should know how to properly effectuate service so they do not waste (as Delex did here) time and resources executing improper service. Because neither Delex's service by mail nor

[5] The Court of Appeals correctly noted plaintiff could not establish the propriety of the other method of service, personal service on an employee of SCAC. (App. A ¶ 10: "*Assuming* that this department head is an officer or a managing or general agent of SCAC, this method of service satisfies CR 4(i)(1)(C).") (emphasis added) Delex submitted no facts establishing that employee's ability to accept service on SCAC's behalf, listing only her title without any explanation of her duties or responsibilities. *Myer v. Nitetrain Coach Co.*, 459 F. Supp. 2d 1074, 1077-78 (W.D. Wash. 2006) (holding service on foreign corporation was invalid because plaintiff made only a "conclusory and unilluminating" assertion of served employee's title and "submitted practically no facts from which this Court could make a determination regarding [her] status"). Personal service was invalid for the additional reason that the documents were not translated into Russian. (*See* CP 129: Russian Ministry of Justice: "documents to be served within the territory of the Russian Federation shall only be accepted if they have been written in, or translated into the Russian language.")

"personal" service was valid, the trial court never acquired jurisdiction over SCAC and its judgment is void. This Court should grant review and clarify the permissible and constitutional methods for serving foreign defendants. RAP 13.4(b)(2)-(4).

3. The Court of Appeals ignored the Long-Arm Statute's requirement that a plaintiff file an affidavit explaining why "service cannot be made within the state." (RAP 13.4(b)(2), (4))

The Court of Appeals ignored another critical aspect of the Long-Arm Statute – that an affidavit be filed before judgment explaining why the defendant cannot be served within Washington. Delex never filed such an affidavit. This Court should grant review and confirm that service on a foreign defendant is valid only when the affidavit required by the Long-Arm Statute is filed.

RCW 4.28.185(4) provides that "[p]ersonal service outside the state shall be valid only when an affidavit is made and filed to the effect that service cannot be made within the state." Though courts allow "substantial compliance" with this requirement, they do so only when "viewing all affidavits filed prior to judgment, the logical conclusion must be that service could not be had within the state." *Ralph's Concrete Pumping*, 154 Wn. App. at 590-91, ¶ 30. "If there is no compliance with the affidavit requirement of RCW 4.28.185(4), personal jurisdiction does not attach to the defendant

and the judgment is void." *Ralph's Concrete Pumping*, 154 Wn. App. at 591, ¶ 30.

The mere fact that service was accomplished outside of Washington does not mean service within Washington was impossible – the Long-Arm affidavit must explain *why* service could not be accomplished within the state. *See Sharebuilder Sec., Corp. v. Hoang*, 137 Wn. App. 330, 335, ¶ 9, 153 P.3d 222 (2007) ("The mere statement that Hoang was served at her California residence does not lead to the logical conclusion that she could not be served within the state. She might also have a residence in Washington or frequent Washington for business purposes."); *Morris v. Palouse River & Coulee City R.R.*, 149 Wn. App. 366, 372, ¶ 12, 203 P.3d 1069 ("Because the process server served Mr. Morris' summons and complaint on an individual at PCC's Idaho office without explanation why service could not be made in Washington . . . service was invalid."), *rev. denied* 166 Wn.2d 1033 (2009).

Again in conflict with its own precedent, the Court of Appeals approved Delex's service despite its failure to file the affidavit required by the Long-Arm Statute. Delex's affidavit of service does not explain why service of process could not be effectuated in Washington. (CP 19-40) It does not state that SCAC

conducts no business in Washington or that it has no agents in Washington. It plainly does not satisfy the Long-Arm Statute.

Nor did the affidavit of Delex's president meet the requirements of the Long-Arm Statute, as Delex argued to the Court of Appeals on reconsideration. That affidavit alleges SCAC had "[l]ittle or no connection to the area." (CP 48) But even a "little connection" is often enough to serve a defendant within the state, *e.g.*, through a local agent or subsidiary. *See, e.g., Volkswagenwerk Aktiengesellschaft v. Schlunk,* 486 U.S. 694, 707, 108 S.Ct. 2104, 100 L.Ed.2d 722 (1988) (approving service on foreign corporation by serving wholly owned domestic subsidiary); *Lozano v. Bosdet,* 693 F.3d 485, 488 (5th Cir. 2012) ("very often service abroad will prove unnecessary because the foreign defendant has a local presence or a local agent for service") (quotation and alteration omitted).[6] Nor does the bare statement Delex was "forced to effect [service] in Russia" satisfy the statute. (CP 50) That is the same conclusory statement the Court of Appeals rejected in *Sharebuilder* and *Morris,* because it does nothing more than state *where* the

[6] Indeed, Delex's own actions refute its contention that SCAC had no connection to Washington – Delex executed on SCAC property in Washington. (CP 63)

defendant was served without any explanation *why* the defendant could not be served within the state. RAP 13.4(b)(2).

SCAC's purported "[r]efusal to accept service outside official protocols" does not justify Delex's failure to comply with the Long-Arm Statute. (CP 50) A defendant has the right to insist on proper service even if it could receive actual notice through "unofficial" service. *Haberman*, 109 Wn.2d at 177 ("mere receipt of process and actual notice alone do not establish valid service of process"). Delex's position – accepted by the Court of Appeals – guts the Long-Arm Statute by allowing a plaintiff to avoid its requirements if the defendant refuses to accept service less than that required by law. The practical consequence is that plaintiffs will attempt substandard "service" on defendants knowing it is "win-win" proposition – either the defendant accepts service or the plaintiff can file suit without complying with the Long-Arm Statute. This Court should grant review and reject the Court of Appeals' distortion of the Long-Arm Statute that allows plaintiffs to commence litigation without filing the affidavit required by the statute. RAP 13.4(b)(4).

E. Conclusion.

This Court should grant review and vacate the judgment against SCAC.

Dated this 28th day of July, 2016.

SMITH GOODFRIEND, P.S.

By: _____
Catherine W. Smith
WSBA No. 9542
Ian C. Cairns
WSBA No. 43210

SCHMITZ & SOCARRAS LLP

By: _____
Michael Socarras
Pro Hac Vice

Attorneys for Petitioner

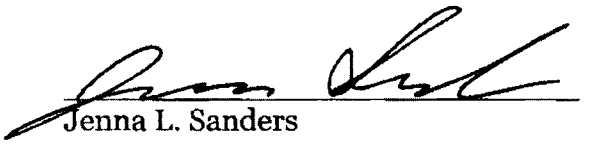
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on July 28, 2016, I arranged for service of the foregoing Petition for Review, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	___ Facsimile ___ Messenger ___ U.S. Mail ✓ E-File
Michael Socarras Schmitz & Socarras LLP 8200 Greensboro Drive, Suite 1500 McLean, Virginia 22102 msocarras@sands-llp.com	___ Facsimile ___ Messenger ___ U.S. Mail ✓ E-Mail
Steve W. Block Foster Pepper PLLC 1111 3rd Ave Ste 3000 Seattle WA 98101-3299 (206) 447-4400 sblock@foster.com terri.quale@foster.com	___ Facsimile ___ Messenger ✓ U.S. Mail ✓ E-Mail

DATED at Seattle, Washington this 28th day of July, 2016.



Jenna L. Sanders

193 Wash.App. 464
Court of Appeals of Washington,
Division 1.

DELEX INC., a New York corporation,
Respondent,
v.
SUKHOI CIVIL AIRCRAFT COMPANY, a Russian Federation Closed Joint Stock Company,
Appellant.

No. 73068–1–I.
|
April 18, 2016.

Synopsis
Background: Russian judgment debtor moved for relief from default judgment and stay of sheriff's sale on ground that creditor never followed Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. The Superior Court, King County, Catherine D. Shaffer, J., denied motion. Debtor appealed.

Holdings: The Court of Appeals, Trickey, A.C.J., held that:

[1] Russian Central Authority's refusal to serve Russian litigants on behalf of American litigants excused creditor from attempting service through Russia's Central Authority;

[2] creditor was not required to seek default judgment through article 15 of the Hague Convention;

[3] creditor did not need prior court authorization for service by registered mail and on head of debtor's foreign activity legal department; but

[4] creditor was not entitled to attorney fees.

Affirmed.

Attorneys and Law Firms

John Wentworth Phillips, Phillips Law Group PLLC, Seattle, WA, Michael P. Socarras, Sands LLP, Mclean, VA, for Appellant.

Terrance Joseph Keenan Jr., DSF Wealth Management, L.L.C., New Iberia, LA, Steven William Block, William Adam Coady, Foster Pepper PLLC, Seattle, WA, for Respondent.

Opinion

TRICKEY, A.C.J.

***1** ¶ 1 Sukhoi Civil Aircraft Company (SCAC), a Russian Federation company, appeals the trial court's denial of its motion to vacate a default judgment that Delex Inc., a New York corporation, obtained against it. SCAC claims that service of process was improper because Delex did not follow the Hague Convention's required procedures. Because the Russian Federation's refusal to serve Russians on behalf of American litigants relieves Delex Inc. of the responsibility of complying with the Hague Convention, we affirm.

FACTS

¶ 2 Delex alleges that it contracted with SCAC to lease office and warehouse storage space from a third party landlord in Seattle on SCAC's behalf. Delex entered into a three-year lease of the property but received no payment from SCAC at any time. Within the first year, Delex surrendered the premises to the landlord.

¶ 3 Delex filed a complaint against SCAC for breach of contract in King County Superior Court in March 2012. Delex served the summons and complaint on SCAC in Moscow, Russia, through registered mail and personally on the head of SCAC's Foreign Activity Legal Support Department in April 2012. SCAC never responded.

¶ 4 In August 2012, Delex moved for an order of default and default judgment. The court granted Delex's motion, a $327,378.49 judgment against SCAC. A representative of Delex e-mailed SCAC a copy of the default judgment later that month. Again, SCAC never responded or satisfied any of the judgment.

¶ 5 In January 2015, the court issued a writ of execution to the King County sheriff to seize SCAC's property, located in SeaTac and valued at approximately $420,000. According to SCAC, the property included "highly sensitive U.S. aircraft technology and components."[1]

SCAC appeared specially to move for relief from the default judgment and to stay the sheriff's sale. The trial court denied SCAC's motion. SCAC appeals.

ANALYSIS

¶ 6 SCAC argues that the trial court erred by refusing to vacate the default judgment entered against it. SCAC maintains that service was improper under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 (hereinafter Hague Convention). Delex responds that the United States Department of State (State Department) and several federal courts have excused American litigants from attempting service through Russia's "Central Authority" because the Central Authority no longer serves Russians on behalf of Americans. We agree with Delex.

[1] [2] ¶ 7 Under CR 60(b)(5), the court may relieve a party from a final judgment if that judgment is void. A default judgment against a party is void if the court did not have personal jurisdiction over that party. *Ahten v. Barnes*, 158 Wash.App. 343, 349, 242 P.3d 35 (2010). A court does not have personal jurisdiction over a party if service of the summons and complaint was improper. *Ahten*, 158 Wash.App. at 349, 242 P.3d 35.

*2 [3] [4] [5] ¶ 8 Under Washington law, the plaintiff has the initial burden to show that service was sufficient. *Scanlan v. Townsend*, 181 Wash.2d 838, 847, 336 P.3d 1155 (2014). The plaintiff can "establish service of process with an affidavit of service from a process server." *Scanlan*, 181 Wash.2d at 847, 336 P.3d 1155. Then it is the defendant's burden to show by clear and convincing evidence that service was improper. *Scanlan*, 181 Wash.2d at 847, 336 P.3d 1155. We review de novo "the trial court's denial of a motion to vacate a final order for lack of jurisdiction." *ShareBuilder Sec. Corp. v. Hoang*, 137 Wash.App. 330, 334, 153 P.3d 222 (2007).

¶ 9 Washington's CR 4(i)(1) offers parties several options for serving foreign litigants. Service on a party in a foreign country is sufficient if it is made

> (C) upon an individual, by delivery to the party personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or (D) by any form of mail, requiring a signed receipt, to be addressed and mailed to the party to be served; or (E) pursuant to the means and terms of any applicable treaty or convention ... The method for service of process in a foreign country must comply with applicable treaties, if any, and must be reasonably calculated, under all the circumstances, to give actual notice.

¶ 10 Delex served SCAC through the Russian Postal Service's registered mail and received confirmation of delivery from the Postal Service. This manner of service complies with CR 4(i)(1)(D). Delex also personally served the head of SCAC's Foreign Activity Legal Support Department. Assuming that this department head is an officer or a managing or general agent of SCAC, this method of service satisfies CR 4(i)(C). Delex filed an affidavit describing both service methods.

The Hague Convention

¶ 11 SCAC does not challenge the sufficiency of either method of service under Washington law. Instead, SCAC argues that service was improper because Delex did not comply with the Hague Convention. The Hague Convention is a "multi-national treaty that governs service of summons on persons in signatory foreign countries." *Nuance Commc'ns, Inc. v. Abbyy Software House*, 626 F.3d 1222, 1237 (Fed.Cir.2010). The Russian Federation and the United States of America are both signatories.[2] SCAC notes that since the United States is a party to the treaty, the supremacy clause, United States Constitution article VI, mandates compliance with its terms. *See Broad v. Mannesmann Anlagenbau, AG*, 141 Wash.2d 670, 674–77, 10 P.3d 371 (2000). The Hague Convention requires each member state to designate a Central Authority, which will serve litigants within its own country. Hague Convention art. 2. The Hague Convention provides other ways to serve litigants, including through postal channels and personal service, but it allows member states to object to those other methods. Hague Convention art. 10. Russia objected to those other methods.[3]

*3 ¶ 12 Ordinarily, the Hague Convention "applies 'where there is occasion to transmit a judicial or extrajudicial document for service abroad.' " *Broad*, 141 Wash.2d at 675, 10 P.3d 371 (quoting Hague Convention art. 1). However, a dispute arose in 2003 between Russia and the United States over fees charged by the United

States.[4] Russia declared in 2004 that it will "not apply the Convention" to states that charge for the services rendered by the state.[5] A State Department circular currently informs litigants that service through Russia's Central Authority is not available:

> In July 2003, Russia unilaterally suspended all judicial cooperation with the United States in civil or commercial matters.... [R]equests sent directly by litigants to the Russian Central Authority under the Hague Service Convention are returned unexecuted.
>
> Because of the Russian suspension of executing U.S. judicial assistance requests in civil and commercial matters, we advise litigants that they may wish to seek guidance from legal counsel in the Russian Federation regarding alternative methods of service. The United States has informed the Russian Federation on numerous occasions that in the absence of a direct channel for U.S. judicial assistance requests, U.S. courts and litigants will explore other methods to effect service of process.[6]

The State Department includes a disclaimer with its circular, noting that it is not taking a position on any pending litigation or expressing an opinion on the law.[7]

¶ 13 In *Nuance,* the Federal Circuit held that it was error for a district court to require a party, Nuance, to serve a Russian litigant, Abbyy Production, through the Hague Convention procedures. 626 F.3d at 1238. The court relied on the State Department's circular, other federal cases, and a declaration from an expert in international service of process to determine that Russia had categorically refused to serve litigants on behalf of Americans. *Nuance,* 626 F.3d at 1238. The court rejected the argument that Nuance had to attempt service through the Central Authority before seeking alternatives. *Nuance,* 626 F.3d at 1238. The court authorized Nuance to serve one of Abbyy Production's corporate affiliates within California. *Nuance,* 626 F.3d at 1240.

¶ 14 Several other federal courts have held that service on Russian parties by American litigants was proper even though it did not comport with the Hague Convention. *In re Cyphermint, Inc.,* 445 B.R. 11, 15–17 (Bankr.D.Mass.2011) (holding that alternative service was "sufficient and proper" because service under the Hague Convention had "been rendered impossible due to the unilateral action of the Russian Federation Central Authority"); *Microsoft Corp. v. John Does 1–18,* No. 1:13cv139, 2014 WL 1338677, at *3–4 (E.D.Va. Apr. 2, 2014) (court order) (allowing service on Russian litigant through international courier and registered mail). Recently, a federal magistrate judge in Nevada allowed a party to serve Russian litigants through e-mail and international express mail. *Smith v. Wolf Performance Ammunition,* No. 2:13–cv–02223–JCM–NJK, 2015 WL 315891, at *3 (D.Nev. Jan. 23, 2015) (court order) (authorizing service on Russian litigants through e-mail and international express mail). It does not appear that any court has required a party to serve Russian litigants through the Central Authority since the dispute between Russia and the United States began.

*4 [6] ¶ 15 We agree with the federal courts that the Russian Central Authority's refusal to serve Russian litigants on behalf of American litigants renders service under the Hague Convention impossible for a plaintiff like Delex. Therefore, Delex must be allowed to serve SCAC through alternative means.

[7] [8] ¶ 16 SCAC argues that these federal decisions are inapplicable because "no lower federal court has released a State court from the strictures of the Supremacy Clause of the Constitution."[8] Delex, on the other hand, claims that these lower court decisions are binding on this court. Neither is correct. While the supremacy clause requires this court to follow the United States Supreme Court's interpretations of federal law, it does not prevent us from interpreting federal law altogether. *See S.S. v. Alexander,* 143 Wash.App. 75, 92, 177 P.3d 724 (2008). Lower federal court decisions that interpret federal law are not binding on this court but are "entitled to great weight." *Home Ins. Co. of N.Y. v. N. Pac. Ry. Co.,* 18 Wash.2d 798, 808, 140 P.2d 507 (1943).

¶ 17 SCAC insists that we cannot allow Delex to serve Russian litigants outside the limited procedures of the Hague Convention because it would be altering the United States position on the treaty, which we lack the authority to do. We reject this argument. We are not abrogating the treaty.

¶ 18 By holding that Delex properly served SCAC, we, like several federal courts, are doing no more than what the United States has explicitly warned the Russian Federation that the United States courts would do. SCAC argues that, because of the supremacy clause, state courts do not have the same authority as federal courts have to make this decision. This argument confuses state law with state courts. In this decision, we, like federal courts, are interpreting a federal treaty, not resolving a conflict between state and federal law.

Charlton v. Kelly

¶ 19 SCAC, relying primarily on the century-old case *Charlton v. Kelly*, argues that United States citizens must comply with the Hague Convention despite Russia's refusal to do so. 229 U.S. 447, 473, 33 S.Ct. 945, 57 L.Ed. 1274 (1913). There, an American court had to decide whether to extradite an American citizen to Italy in light of Italy's refusal to extradite Italians to the United States. *Charlton*, 229 U.S. at 469–72, 33 S.Ct. 945. The Court reviewed correspondence between the State Department and the Italian charge d'affaires about the particular case. *Charlton*, 229 U.S. at 469–72, 33 S.Ct. 945. According to the United States, Italy's refusal violated its bilateral extradition treaty with the United States. *Charlton*, 229 U.S. at 472–73, 33 S.Ct. 945. The Court held that breach rendered the treaty "voidable, not void." *Charlton*, 229 U.S. at 473, 33 S.Ct. 945. The United States chose not to void the treaty but, instead, appeared to waive its objections to Italy's breach. *Charlton*, 229 U.S. at 473, 33 S.Ct. 945.

¶ 20 *Charlton* does not control, as seen in the many federal court decisions that have tackled this question without reference to *Charlton*. *See, e.g., Nuance*, 626 F.3d 1222; *Microsoft*, 2014 WL 1338677; *Smith*, 2015 WL 315891; *Cyphermint*, 445 B.R. 11. The Court recognized in *Charlton* that the United States had to consider how its response to Italy's interpretation of the treaty might impact the United States' treaties with other countries. 229 U.S. at 473, 33 S.Ct. 945. Similarly, withdrawing from the Hague Convention as a response by the United States to the Russian Central Authority's refusal to effect service on behalf of American litigants would have far-reaching consequences.

***5** ¶ 21 The Hague Convention is a multilateral treaty. There is no mechanism in the Hague Convention for the United States to abrogate the treaty with respect to Russia but leave it in force with the other signatories. The United States' decision to honor its bilateral treaty obligations in the face of a breach by the only other party is not comparable to the United States' decision not to withdraw from the Hague Convention, which governs its foreign service of process with more than 60 nations, based on the conduct of 1 nation.

¶ 22 Further, Delex's actions here are consistent with the State Department's circular. Refusing to extradite the American in *Charlton* would have gone against the State Department's clearly articulated position. 229 U.S. at 471–72, 33 S.Ct. 945. Here, the State Department's stance is different. The State Department lists the Russian Federation as a party to the Hague Convention in its "Multilateral Treaties in Force as of January 1, 2013."[9] But, when offering information about the Russian Federation specifically, the State Department warns that Russia's Central Authority will not serve Russians on behalf of American litigants.[10] It stated, "The United States has informed the Russian Federation on numerous occasions that in the absence of a direct channel for U.S. judicial assistance requests, U.S. courts and litigants will explore other methods to effect service of process."[11] That is exactly what Delex did.

Article 15—Default Judgment

[9] ¶ 23 SCAC also contends that, even if it is true that the Russian Central Authority does not process requests for American litigants, Delex could, and should, have attempted service through the Central Authority and then sought a default judgment through article 15 of the Hague Convention, which SCAC refers to as a "jurisdictional safety valve."[12] The Hague Convention allows for entry of default judgment under certain conditions:

> [T]he judge ... may give judgment even if no certificate of service or delivery has been received if all of 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.

Hague Convention art. 15.

¶ 24 We do not require Delex to pursue a default judgment through this procedure for three reasons. First, requiring Delex to send documents to Russia's Central Authority that the Russian Authority would not serve on SCAC would be a waste of Delex's resources. Second, it would cause unnecessary delay. Third, and most importantly, it would not be calculated to give SCAC actual notice of the pending suit.

***6** ¶ 25 In this case, SCAC does not dispute that it had actual notice of the suit based on Delex's other service. But, had Delex relied solely on the Central Authority to serve SCAC and then taken the default judgment after six

months as permitted under article 15, SCAC would never have received notice of the suit. Therefore, we reject SCAC's argument that Delex must have attempted to serve SCAC through the Central Authority even though it knew that the Central Authority would not have served SCAC.

Prior Court Authorization

[10] ¶ 26 SCAC contends next that, even if service outside the Hague Convention procedures may sometimes be proper, Delex would have had to receive prior approval from the trial court before attempting it. SCAC supports this argument with citations to federal cases where a party sought approval from the court under Federal Rule of Civil Procedure (FRCP) 4(f)(3). *See, e.g., Smith,* 2015 WL 315891, at *3 (court authorized plaintiff to serve defendants under FRCP 4(f)(3)).

¶ 27 The requirement of prior approval in those cases comes from the Federal Rules of Civil Procedure, which do not apply here. FRCP 4(f)(2)(C)(i) allows personal service on a foreign individual. However, FRCP 4(h)(2), which governs foreign service on foreign corporations, specifically prohibits litigants from effecting personal service on a foreign corporation under FRCP 4(f)(2)(C)(i). So, in order to serve Russian litigants, some of the plaintiffs resorted to FRCP 4(f)(3), which allows for service "by other means not prohibited by international agreement, as the court orders." *See, e.g., Smith,* 2015 WL 315891, at *2.

¶ 28 By contrast, federal courts have not required prior approval of alternative service methods from plaintiffs when the federal rules did not require it. *See, e.g., Microsoft,* 2014 WL 1338677, at *3–4 (holding that service on a Russian *individual* was proper under FRCP 4(f)(2)(A) and (C)(i) without requiring prior authorization from the court).

¶ 29 There was no reason for Delex to seek prior approval under the Washington court rules. Although CR 4(i)(1)(G) authorizes service "as directed by order of the court," there is no indication that Delex is relying, or needs to rely, on that manner of service. Delex's service was proper under CR 4(i)(1)(C) and (D), which do not require prior court approval.

¶ 30 In short, we hold that Delex properly served SCAC.

Attorney Fees

[11] ¶ 31 Delex seeks attorney fees pursuant to RAP 18.1(a). We decline its request.

[12] ¶ 32 Attorney fees are not available absent "a contract, statute, or recognized ground of equity." *Ino Ino, Inc. v. City of Bellevue,* 132 Wash.2d 103, 142–43, 937 P.2d 154, 943 P.2d 1358 (1997). To "deter plaintiffs from seeking relief prior to a trial on the merits," an award of attorney fees is often available on equitable grounds after a court has dissolved "a wrongfully issued injunction or restraining order." *Ino Ino, Inc.,* 132 Wash.2d at 143, 937 P.2d 154, 943 P.2d 1358.

*7 ¶ 33 Delex argues that SCAC "obtained a temporary injunction of a scheduled [s]heriff's sale based on improper legal arguments."[13] It is mistaken. The only stay SCAC received was a temporary stay from this court pending the outcome of its emergency motion for a stay during the appeal.[14] That stay lasted three days.[15] After a commissioner of this court denied SCAC's emergency motion, SCAC deposited a $475,000 supersedeas bond. The parties then agreed to quash the writ of execution, which was the basis for the sheriff's sale.

¶ 34 Delex claims that this temporary stay of the sheriff's sale was tantamount to a temporary restraining order but cites no authority for this position. Although SCAC does not prevail on its legal arguments, Delex has not explained how the legal arguments were improper. Delex is not entitled to attorney fees. Additionally, SCAC sought relief from the sheriff's sale in order to have a trial on the merits. Here, attorney fees would not serve the same equitable purpose as they do when awarded against plaintiffs who seek relief before trial but do not prevail on the merits.

¶ 35 We affirm the trial court's denial of SCAC's motion to vacate the default judgment.

WE CONCUR: LAU and BECKER, JJ.

All Citations

--- P.3d ----, 193 Wash.App. 464, 2016 WL 1562324

Footnotes

1 Clerk's Papers at 89.

2 Hague Convention, 658 U.N.T.S. at 182; Accession of Russian Federation to Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 2165 U.N.T.S. 200, 204, https://treaties.un.org/doc/Publication/UNTS/Volume2165/v2165.pdf; *see also Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters: Members of the Organisation*, HAGUE CONF. PRIV. INT'L L., https://www.hcch.net/en/instruments/conventions/status-table/?cid=17.

3 Declarations of Russian Federation to Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 2293 U.N.T.S. 114, 115, *https://treaties.un.org/doc/Publication/UNTS/Volume2293/v2293.pdf* (hereinafter Russian Federation Declaration); *see also Declarations Reservations*, HAGUE CONF. PRIV. INT'L L., https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=418 & disp=resdn.

4 *Legal Considerations: International Judicial Assistance: Russia*, U.S. DEP'T OF STATE, http://travel.state.gov/content/travel/en/legal-considerations/judicial/country/russia-federation.html (last updated Nov. 15, 2013) (follow "Service of Process" hyperlink).

5 Russian Federation Declaration, 2293 U.N.T.S. at 115 (declaration VIII). Russia specifically excludes from this declaration foreign states whose costs are proper under the Hague Convention, article 12(2)(a) and (b). The United States argues that its fees are proper under those paragraphs. *See Legal Considerations, supra* (follow "Service of Process" hyperlink). This is the basis of the dispute.

6 *Legal Considerations, supra* (follow "Service of Process" hyperlink).

7 *Legal Considerations, supra.*

8 Appellant's Reply Br. at 14.

9 U.S. DEP'T OF STATE, TREATIES IN FORCE 410, http://www.state.gov/documents/organization/218912.pdf.

10 *Legal Considerations, supra* (follow "Service of Process" hyperlink).

11 *Legal Considerations, supra* (follow "Service of Process" hyperlink).

12 Br. of Appellant at 22.

13 Br. of Resp't at 20.

14 Comm'r's Ruling Denying Emergency Mot. for Stay & Lifting Temporary Stay, at 3 (Wash. Ct. App. Feb. 27, 2015).

15 Comm'r's Ruling at 8.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

DELEX INC., a New York corporation, Respondent, v. SUKHOI CIVIL AIRCRAFT COMPANY, a Russian Federation Closed Joint Stock Company, Appellant.	)	No. 73068-1-I ORDER DENYING MOTION TO STRIKE AND MOTION FOR RECONSIDERATION

The appellant, Sukhoi Civil Aircraft Company, has filed a motion for reconsideration of the court's opinion filed April 18, 2016. The respondent, Delex, Inc., has filed a motion to strike the appellant's motion for reconsideration and a response to the motion for reconsideration. The appellant has filed a response to the motion to strike and the respondent has filed a reply. The court has taken the matters under consideration and has determined that the respondent's motion to strike and the appellant's motion for reconsideration should both be denied.

Now, therefore, it is hereby

ORDERED that the respondent's motion to strike the appellant's motion for reconsideration is denied; and, it is further

ORDERED that the appellant's motion for reconsideration is denied.

Done this 28th day of June, 2016.

FOR THE COURT:

Trickey, ACJ

HCCH
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.

[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.).

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.

SMITH GOODFRIEND

July 28, 2016 - 3:40 PM

Transmittal Letter

Document Uploaded: 730681-Petition for Review.pdf

Case Name: Delex, Inc., v. Sukhoi Civil Aircraft Company
Court of Appeals Case Number: 73068-1

Party Respresented:
Is this a Personal Restraint Petition? ○ Yes ◉ No
Trial Court County: ____ - Superior Court # ____

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ○ Brief: ____
- ○ Statement of Additional Authorities
- ○ Affidavit of Attorney Fees
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ◉ Petition for Review (PRV)
- ○ Other: _____

Comments:

No Comments were entered.

Sender Name: Jenna Sanders - Email: jenna@washingtonappeals.com

A copy of this document has been emailed to the following addresses:

msocarras@sands-llp.com
sblock@foster.com
terri.quale@foster.com
ian@washingtonappeals.com
cate@washingtonappeals.com