No. 93436-3

SUPREME COURT OF THE STATE OF WASHINGTON

No. 73068-1-1

COURT OF APPEALS, DIVISION 1
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.

ANSWER TO PETITION FOR REVIEW

Steven W. Block, WSBA No. 24299
FOSTER PEPPER PLLC
1111 Third Avenue
Suite 3000
Seattle, Washington 98101-3292
Telephone: (206) 447-4400
Facsimile: (206) 447-9700
Email: steve.block@foster.com
Attorneys for Respondent Delex Inc.

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I. INTRODUCTION

This matter addresses an extremely narrow issue, one Washington apparently has never before encountered, and one only a handful of other courts – mostly federal – have addressed nationwide. The instances in which Washington plaintiffs might have occasion to sue defendants in Russia[1] are extremely small. There is no split within our appellate divisions or other ambiguity in the law. Rather, as presented in the Court of Appeals' well-written opinion, the arguments addressed in the petition for review of Petitioner Sukhoi Civil Aircraft Company ("SCAC") all fail under well-established Washington law, as well as under analyses applied by the only federal and foreign state courts to consider the issue.

Most arguments SCAC petitions this Court to review were not presented to the trial court; to the Court of Appeals' commissioner; or in two briefs to the Court of Appeals' panel. Only after the Court of Appeals issued its Ruling, and SCAC replaced its counsel, did SCAC raise these issues in a motion for reconsideration. As Respondent Delex, Inc. ("Delex") argued in response to that motion, and the Court of Appeals apparently agreed, SCAC's belated arguments are not of the variety an appellant may raise at any time, and were waived and/or fail substantively.

[1] The record does not suggest there are other countries which refuse to enforce their Hague Convention obligations.

II. IDENTITY OF ANSWERING PARTY AND CITATION TO COURT OF APPEALS DECISION

Delex answers the petition for review filed by SCAC seeking review of the Court of Appeals' April 18, 2016 Ruling which affirmed the trial court (attached as Appendix A to the petition for review).

III. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

1) Are arguments pertaining to personal jurisdiction which a defendant failed to raise in briefing to the courts below waived, such that they may not first be raised in a motion for reconsideration?

2) Must a plaintiff comply with service procedures outlined in the Hague Treaty on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the "Hague Convention") in a country which has definitively proclaimed it will not process applications for service under the Hague Convention?

3) Do the Civil Rules impose on plaintiffs a requirement that they receive a state court's pre-service authority to serve defendants in Russia by means outside the Hague Convention?

4) Does Washington's Long-Arm statute require plaintiffs serving defendants in Russia to file an affidavit demonstrating that service in Washington is impossible? If so, did Delex fulfill that requirement to the extent required by law?

IV. RESTATEMENT OF THE CASE

1. Operative Facts

In or about 2007, SCAC asked Delex to find office and warehouse storage space for SCAC in the Seattle area. Delex agreed to do so. SCAC represented to Delex it would pay all rent payments and other costs associated with a lease for the space it required.

AMB Institutional Alliance Fund II, LP ("AMB") had available for lease warehouse storage space that would fit SCAC's needs. In December 2007, Delex offered to arrange a lease of this space for SCAC. Delex and SCAC agreed that Delex would be the named tenant on the lease, as AMB would not contract with a foreign company. On March 21, 2008, Delex provided SCAC an offer for the lease of AMB's space. On March 26, 2008, Igor Andreev, SCAC's vice-president in charge of procurement, accepted the offer by affixing onto it SCAC's stamp "Accepted," with his dated signature (the "Contract"). Relying on SCAC's representations and the Contract, Delex entered into a three-year lease with AMB on April 3, 2008 (the "Lease").

In accordance with the Contract, from May 1, 2008 to December 2008, Delex invoiced SCAC for sums due under the Lease. SCAC made no payments to Delex. Delex had made six months of payments to AMB, and surrendered the premises to AMB in or about February of 2009. On

or about April 30, 2009, AMB sued Delex claiming damages of $485,000, including unpaid rent, interest, and attorneys' fees. Delex settled AMB's lawsuit pursuant to a settlement agreement executed in July 2010.

2. Service of Process on SCAC and Entry of Default Judgment

In April 2012, Delex personally served on SCAC, through its "Head of Foreign Activity Legal Support Department," at its Moscow, Russia address, a summons and complaint. There is no dispute SCAC had actual knowledge of the action per service proper under Russian law. Delex filed with the trial court an Affidavit of Service. SCAC failed to appear in the action.

In support of its motion for entry of a default judgment (before judgment was entered), Delex filed the Declaration of Oleg Ardashev (the "Ardashev Declaration") certifying that Delex entered into the subject lease transaction on SCAC's behalf because SCAC is a "foreign company with little or no connection to the area"; and that "SCAC, a foreign entity, is not an individual on active military duty." Attached to the Ardashev Declaration are copies of Ardashev's letter to SCAC demonstrating SCAC is located in "Moscow, Russia," and a receipt for service of process; and a certification that "Delex was forced to effect [service of process] in Russia

at high cost due to SCAC's refusal to accept service outside official protocols."

On August 12, 2012, the trial court entered a default judgment in Delex's favor against SCAC in the amount of $327,378.49.

V. ARGUMENT

SCAC's Petition for review should be denied because the issues are governed by unambiguous law; are extremely narrow; and are not likely to arise again with any conceivable frequency.

Only one of SCAC's arguments, i.e., its contention the trial court should have required Delex to endure a concededly futile process by which Russia would fail, during a six-month period, to effect service of process under the Hague Convention, was raised in SCAC's original two briefs to the Court of Appeals. Thus, the Court of Appeals' denial of SCAC's motion for reconsideration clearly was proper.

1. SCAC Fails to Present Issues that Merit Review by this Court

RAP 13.4(b), entitled **Considerations Governing Acceptance of Review**, provides that: A petition for review will be accepted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

SCAC's petition satisfies none of these. It does not propose bases 1 or 2. As this matter's issues are exceedingly unlikely to recur with any frequency, they cannot be said to involve an issue of substantial public interest per basis 4.

Nor does SCAC present a significant question of law under the state or federal constitution per basis 3.[2] While SCAC raises the color of a constitutional law issue based on this case's personal jurisdiction aspects, such issues are not significant for purposes of Supreme Court review because they (1) are governed by and subject to an international treaty that has been well interpreted by federal courts better suited to the issue than are state courts; and (2) again, because the issue is unlikely to recur with any frequency.

2. SCAC Failed to Timely Raise, and Therefore Waived, the Arguments it Raised in Its Motion for Reconsideration

SCAC argues that this Court should review the Court of Appeals' refusal to modify its Ruling based on SCAC's motion for reconsideration,

[2] To the extent SCAC does present a question of law under the state or federal constitution, it is waived. See discussion below.

which for the first time urged that (1) Delex was required to obtain trial court authority before serving SCAC outside the Hague Convention's terms; and (2) Delex failed to comply with aspects of Washington's Long-Arm Statute,[3] including service by mail[4] and the filing of a prejudgment affidavit certifying that service in Washington is impossible. Notably, SCAC raised these new arguments to the Court of Appeals only after replacing its original counsel.

While there are instances in which an appellant may raise new arguments after an appellate ruling, none apply here. Again, SCAC's motion for reconsideration presented entirely new arguments not addressed in trial court proceedings; to the Court of Appeals' Commissioner; or to the Court of Appeals' panel in either of its briefs.

A. RAP 12.4 does Not Allow New Arguments in Motions for Reconsideration

Generally, appellate courts "will not consider issues and arguments raised for the first time in a motion for reconsideration."[5] RAP 12.4, governing motions for reconsideration, provides that "[t]he motion should state with particularity the points of law or fact which the moving party

[3] RCW 4.28.185 (2).
[4] It is conceded that Delex served SCAC personally, in addition to mail.
[5] *State v. Davis*, 61 Wn. App. 800, 812 P.2d 510 (1991), *reconsideration granted, opinion withdrawn* (Sept. 5, 1991), *superseded* (Sept. 16, 1991), citing *Housing Auth. v. Northeast Lake Wash. Sewer & Water Dist.*, 56 Wn.App. 589, 595 n. 5, 784 P.2d 1284, *review denied*, 115 Wn.2d 1004, 795 P.2d 1156 (1990).

contends the court has overlooked or misapprehended, together with a brief argument on the points raised." This presupposes the Court of Appeals was presented with such points of law or fact in the original briefing. It was not.

RAP 12.4 is not designed for disappointed appellants to obtain additional time to submit new arguments. As the First Circuit Court of Appeals has held addressing the analogous federal appellate provision, "F.R.A.P. 40 was not promulgated as a crutch for dilatory counsel, [citation omitted], nor, in the absence of a demonstrable mistake, to permit reargument of the same matters."[6] The Ninth Circuit has ruled as follows:

> It is obvious from the statements in the affidavit that appellant plans, under the guise of a petition for rehearing, to study and reargue his case anew. Such is not the proper function of a petition for a rehearing, and an attempt to do as suggested is an abuse of the privilege of making such a petition.
>
> ... A properly drawn petition for rehearing serves a very limited purpose ...: "For the sole purpose of directing the attention of the court to some controlling matter of law or fact which a party claims was overlooked in deciding a case ..."[7]

SCAC waived its new arguments by failing to submit them in its opening appellate brief (or even its reply brief). "A party waives a claim of error by offering no argument on the claimed error in its opening

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[6] *United States v. Doe*, 455 F.2d 753, 762 (1st Cir.), *vacated and remanded sub nom. Gravel v. United States*, 408 U.S. 606, 92 S. Ct. 2614, 33 L. Ed. 2d 583 (1972).
[7] *Anderson v. Knox*, 300 F.2d 296, 297 (9th Cir. 1962). *See also Meyer v. U.S. Bank Nat. Ass'n*, No. 14-00297RSM, 2015 WL 3609238, at 1 (W.D. Wash. June 9, 2015).

brief."[8] Indeed, SCAC could not have raised its new arguments anywhere in its appellate briefing, as they were not made to the trial court.[9]

B. RAP 2.5(a)(1) Applies Only to Challenges to Subject Matter Jurisdiction, and Not to Personal Jurisdiction

SCAC believes its new arguments fall within an exception RAP 2.5(a)(1) provides for jurisdictional issues not raised below.[10] The jurisdictional exception is designed for challenges only to subject matter jurisdiction. At issue here is personal jurisdiction based on adequacy of service of process. Subject matter jurisdiction is conceded. Courts have applied RAP 2.5(a)(1) to subject matter jurisdiction based on its non-waivability, but never to personal jurisdiction. The Rule clearly is not designed for personal jurisdiction challenges, which may be waived.

As this Court has ruled citing RAP 2.5(a)(1), "[w]hile litigants ... may waive their right to assert a lack of *personal* jurisdiction, litigants may not waive *subject matter* jurisdiction [emphasis in original, citations omitted]. Any party to an appeal, including one who was properly served, may raise the issue of lack of subject matter jurisdiction at any time."[11] If

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[8] *Bordak Bros., Inc. v. Pac. Coast Stucco, LLC*, 190 Wn. App. 1025 (2015). *See also Jensen v. Jensen*, 190 Wn. App. 1011 (2015), citing *Brown v. Vail*, 169 Wn.2d 318, 336 n. 11, 237 P.3d 263 (2010) ("A party that offers no argument in its opening brief on a claimed assignment of error waives the assignment.").

[9] RAP 2.5.

[10] Petition for Review at 5, fn. 2.

[11] *Skagit Surveyors & Engineers, LLC v. Friends of Skagit Cty.*, 135 Wn. 2d 542, 556, 958 P.2d 962 (1998), citing RAP 2.5(a)(1); *Deaconess Hosp.*, 66 Wn.2d at 410, 403 P.2d

parties may waive challenges to personal jurisdiction, it follows that they may also waive arguments pertaining to personal jurisdiction.

C. SCAC Waived Any Constitutional Challenges to Personal Jurisdiction Notwithstanding RAP 2.5(a)(3)

SCAC argues that "[j]urisdiction and manifest errors affecting a constitutional right can be raised at any time,"[12] and on that basis believes it may first raise personal jurisdiction issues in a RAP 2.5(a)(3)motion for reconsideration. This argument also is groundless. RAP 2.5(a)(3) does not empower SCAC to make new arguments under the guise of constitutional issues without qualification. In Washington:

> Although a party may raise on appeal for the first time a "manifest error affecting a constitutional right" under RAP 2.5(a)(3), this does not mean that any constitutional error not argued below will be reviewed by this court.
>
> ***
>
> ... RAP 2.5(a)(3) in no way affects the discretion of this court to refuse review of issues not raised below. The rule merely enunciates our long-standing practice of addressing error where justice clearly demands we do so. This discretion will generally be exercised in favor of review when there exists "manifest error affecting a constitutional right." ... RAP 2.5(a)(3) may not be invoked merely because defendant can identify a constitutional issue not litigated below. [citation omitted]. ***Thus, "absent obvious and manifest injustice, we will not review assignments of error based upon the giving or refusal of instructions to***

54; *Skagit Motel v. Department of Labor & Indus.*, 107 Wn.2d 856, 858–59, 734 P.2d 478 (1987); and *In re Saltis*, 94 Wn.2d 889, 893, 621 P.2d 716 (1980).

[12] Petition for Review at 5, fn. 2.

> ***which no timely exceptions were taken."*** ... [emphasis added].[13]

While a matter may be raised at any time if it is a manifest error affecting a constitutional right, to be considered "manifest," the facts necessary to review the claim on appeal must be in the record and the defendant must show "actual prejudice."[14] Nothing in the record suggests Delex's service of process created any "obvious and manifest injustice," as SCAC concedes it received Delex's summons and complaint, and had actual notice of the lawsuit. There was no prejudice or injustice of any kind.

New constitutional arguments may not be raised even in an appellate reply brief. This Court has ruled that a prosecutor's contention a civil rule was "unconstitutional" which "arose only in appellant's reply brief" had been waived.[15] Moreover, "[i]t is improper to raise issues, even of constitutional magnitude, for the first time by reply brief ..."[16]; and an appeals court will "not consider arguments raised for the first time in a reply brief" addressing a "challenge to pretrial constitutional violations."[17] If constitutional arguments may not first be raised in a reply brief, they certainly may not first be raised in a motion for reconsideration.

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[13] *State v. Stubsjoen*, 48 Wn. App. 139, 148-49, 738 P.2d 306 (1987), citing *Smith v. Shannon*, 100 Wn.2d 26, 666 P.2d 351 (1983); *State v. Valladares*, 31 Wn.App. 63, 639. P.2d 813 (1982); and *State v. Louie*, 68 Wn.2d 304, 312, 413 P.2d 7 (1966).
[14] *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995).
[15] *State v. Alton*, 89 Wn. 2d 737, 739, 575 P.2d 234 (1978).
[16] *State v. Manthie*, 39 Wn. App. 815, 826, 696 P.2d 33 (1985).
[17] *State v. Wilson*, 162 Wn. App. 409, 417, 253 P.3d 1143 (2011).

3. Washington's Long-Arm Statute does Not Render Delex's Service of Process Unenforceable

SCAC challenges Delex's service of process based on provisions of Washington's Long-Arm Statute, claiming service was defective because Delex purportedly failed to file an affidavit confirming that service on SCAC could not be accomplished by ordinary means.[18]

Delex did indeed file adequate and timely affidavits demonstrating ordinary service means was impossible. Again, the Affidavit of Service and Ardashev Declaration certify that Delex's summons and complaint were personally served on SCAC at a Moscow, Russia address; that SCAC is a "foreign company with little or no connection to the area"; that "SCAC, a foreign entity, is not an individual on active military duty": that "Delex was forced to effect [service of process] in Russia at high cost due to SCAC's refusal to accept service outside official protocols." These statements satisfy RCW 4.28.185(4).

The Court of Appeals based its Ruling largely on a U.S. State Department circular stating that Russia will not honor the Hague Convention, and that parties should seek to have process served in Russian through alternative means.[19] The parties do not dispute that the State

[18] SCAC's Motion for Reconsideration at 4-5.
[19] Court of Appeals' Ruling at ¶11.

Department issued the circular, nor do they dispute its substantive accuracy. In Washington:

> "Judicial notice may be taken ***at any stage of the proceeding***." [emphasis added, citation omitted]. Generally, judicially noticed facts are "not subject to reasonable dispute" in the sense that they are "generally known" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." [citation omitted]. Judicial notice may be taken of those "facts capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy and verifiable certainty" [citation omitted]. ***Judicial notice may be taken whether or not requested by the parties***. [emphasis added, citation omitted].[20]

The U.S. State Department's website-issued circular is a "source whose accuracy cannot reasonably be questioned." It consists of "facts capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy and verifiable certainty." Thus, courts may take judicial notice of it now even though not so requested by a party at the time of service of process.

Delex's affidavits, especially when read in conjunction with the State Department's circular, adequately satisfy the RCW 4.28.185(4) requirement that "... an affidavit is made and filed to the effect that service cannot be made within the state." Importantly, "[s]ubstantial,

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[20] *Fusato v. Washington Interscholastic Activities Ass'n*, 93 Wn. App. 762, 772, 970 P.2d 774 (1999) citing ER 201 and *CLEAN v. State*, 130 Wn.2d 782, 809, 928 P.2d 1054 (1996) and *State ex rel. Humiston v. Meyers*, 61 Wn.2d 772, 779, 380 P.2d 735 (1963).

rather than strict, compliance with RCW 4.28.185(4) is permitted ... [meaning] that, viewing all affidavits filed ***prior to judgment***, the logical conclusion must be that service could not be had within the state [emphasis added]."[21]

The Ardashev Declaration must be considered, as it was filed prior to the entry of judgment:

> The statute (RCW 4.28.185(4)) does not provide that the affidavit must be filed [b]efore the summons and complaint are served, but simply that the service will be valid only when such an affidavit is filed. Consequently, the service became valid when the affidavit was filed. Furthermore, we have the rule in this state that substantial and not strict compliance is sufficient where a proper affidavit is filed, although late, where it appears that no injury was done the defendant as a result of the late filing.[22]

In keeping with the concept that the statute requires only substantial compliance, courts construe the totality of facts and circumstances to determine whether a plaintiff has adequately certified that service could not be effected within the state. This Court has:

> ... held that "substantial and not strict compliance is sufficient where a proper affidavit is filed, although late, where it appears that no injury was done the defendant as a result of the late filing." No injury is claimed here nor is there a showing the long-arm statute was being used to burden or harass defendant.

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[21] *Ralph's Concrete Pumping, Inc. v. Concord Concrete Pumps, Inc.*, 154 Wn. App. 581, 590-91, 225 P.3d 1035 (2010).
[22] *Hatch v. Princess Louise Corp.*, 13 Wn. App. 378, 379-80, 534 P.2d 1036 (1975), citing *Whitney v. Knowlton*, 33 Wash. 319, 74 P. 469.

> The logical conclusion from the language in the affidavits is that there were no authorized personnel in Washington for plaintiff to serve. The affidavits are thus, in the language of the statute, "to the effect that service cannot be made within the state." As they were filed before judgment, the affidavits were timely. ... There has been substantial compliance with RCW 4.28.185(4).[23]

If Delex has demonstrated through pre-judgment affidavits that (1) SCAC has "little or no connection to the area," i.e., it has no legal presence or representatives in Washington; (2) that it "was forced to effect [service of process] in Russia at high cost due to SCAC's refusal to accept service outside official protocols"; and (3) SCAC indisputably is in Russia where the U.S. State Department has confirmed Hague Convention service is impossible, then Delex has substantially complied with RCW 4.28.185(4) prior to judgment. As was the case in *Barr*, the "logical conclusion" is that service on SCAC could not be effected in Washington.

4. Delex has Demonstrated Service Outside the State was "Currently Impossible," but Doing So is Not Necessary under State Service Rules

SCAC argues without support that a plaintiff's onus is to demonstrate not just that service of process within the state by ordinary means is impossible, but that it is "*currently* impossible."[24] Thus, SCAC

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[23] *Barr v. Interbay Citizens Bank of Tampa, Fla.*, 96 Wn.2d 692, 696, 649 P.2d 827 (1982) citing *Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp.*, 66 Wn.2d 469, 472, 403 P.2d 351 (1965); *Whitney v. Knowlton*, 33 Wash. 319, 74 P. 469 (1903); *Schel v. Tri-State Irrigation*, 22 Wn.App. 788, 591 P.2d 1222 (1979).

[24] Petition for Review at 9.

asserts that personal service on a foreign corporation must be approved in advance by the trial court as required by the Federal Rules of Civil Procedure.[25]

SCAC bases this argument on its assertion that "this Court has repeatedly adopted federal jurisprudence, particularly where it addresses an issue of federal supremacy."[26] Preliminarily, SCAC's statement is inaccurate as regards interpretation and application of procedural rules. This Court has ruled that "... we follow the federal analysis only if we find its reasoning persuasive," and that "[a]ny party asking us to adopt the federal interpretation of a rule bears the burden of overcoming our reluctance to reform rules practice through judicial interpretation rather than rule making."[27]

The Court of Appeals properly rejected this argument by ruling that "[t]he requirement of prior approval in those cases comes from the Federal Rules of Civil Procedure, which do not apply here."[28] The Court of Appeals cited the 2014 federal court precedent *Microsoft Corp. v. Does 1-18* for the notion that "... federal courts have not required prior approval of alternative service methods when the federal rules did not require it,"

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[25] *Id.* at 11.
[26] *Id.*
[27] *Washburn v. City of Fed. Way*, 178 Wn. 2d 732, 750, 310 P.3d 1275 (2013).
[28] Court of Appeals' Ruling at ¶27.

and that "[t]here was no reason for Delex to seek prior approval under the Washington court rules."[29]

Moreover, service of process under the federal system differs materially from that under the state court system. Under the federal system, a district court itself must issue a summons.[30] Parties through their attorneys are not empowered to do so. FRCP 4(f)(3), providing that service may be implemented "by other means not prohibited by international agreement, as the court orders," is designed to allow federal courts necessary breadth to implement service. "[T]he drafters of the federal rules promulgated a nonexhaustive list of alternative means by which service can be authorized pursuant to Rule 4(f)(3). The rule is expressly designed to provide courts with broad flexibility in tailoring other methods of service to meet the needs of particularly difficult cases."[31] Nothing suggests that federal procedural rule is designed to ensure service of process is "currently impossible," as SCAC suggests. It is designed to give federal district courts latitude in issuing summonses.

In Washington, attorneys themselves issue summons, essentially as the court's agents, as prescribed by CR 4. CR 4(i) provides attorneys specific guidance as to how service may be effected in a foreign country,

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[29] *Id.* at ¶ 28, citing *Microsoft Corp. v. Does 1-18*, No. 1:13CV139 LMB/TCB, 2014 WL 1338677, at 2 (E.D. Va. Apr. 2, 2014).
[30] FRCP 4(b).
[31] *In re Int'l Telemedia Associates, Inc.*, 245 B.R. 713, 720 (Bankr. N.D. Ga. 2000).

one such way being "(A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction..." If the drafters had contemplated requiring issuing attorneys to first obtain court permission, they could and would have so provided in CR(4)(i). CR(4)(i) provides that "[t]he 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," again without any requirement of prior court approval as to what constitutes compliance with applicable treaties. The Court of Appeals properly concluded that Delex complied with the applicable treaty to the extent reasonable and necessary, in accordance with all known precedents, and actual notice is uncontested.

Again, SCAC's arguments here have been waived. The Court should not create a new rule of civil procedure to be retroactively applied that the Civil Rules' drafters could and would have included had they so intended. In any event, Delex's affidavits adequately and timely demonstrated to the trial court that service could not be effected on SCAC by ordinary means, especially given the U.S. State Department circular, of which courts may take judicial notice at any time (including the fact that it remains in effect today).

5. Delex Need Not have Undertaken a Concededly Futile Service Process under the Hague Convention

SCAC urges that the trial and appeals courts, before entering a default, should have required Delex to endure a futile, six-month process under the Hague Convention's Article XV whereby Russia would have refused to effect service. Specifically, SCAC argues that:

> 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. ... 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.[32]

In conjunction with its conclusions regarding service procedure under the federal rules, the Court of Appeals correctly rejected SCAC's contention, accepting summarizing Delex's arguments as follows:

> 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.[33]

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[32] Petition for review at 10.

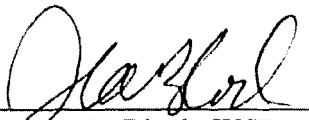
[33] Court of Appeals' Ruling at ¶24.

VI. CONCLUSION

The rarely-encountered issue of how state-court plaintiffs must serve defendants in Russia in light of that country's refusal to honor its Hague Convention obligations does not warrant this Court's limited resources. There is no implicated issue of substantial public interest; there is no conflict or ambiguity in the law; courts best suited to address it have ruled consistently; there is no manifest injustice that justice begs to correct; and the Court of Appeals has issued a published opinion thoroughly analyzing and providing guidance on the issues. While personal jurisdiction generally implicates constitutional issues, SCAC's arguments are aimed at compliance with rules of civil procedure and treaty obligations. That a constitutional issue is arguably implicated does not render the issue a "significant question of law under the Constitution of the State of Washington or of the United States." In any event, SCAC failed to raise these arguments timely, and they are waived.

The Civil Rules clearly do not require a plaintiff to obtain prior authorization of service on foreign defendants, and the Federal Rules of Civil Procedure are inapplicable. Delex adequately apprised the courts below of the current impossibility of service of process on SCAC within the state by ordinary means, and Delex has fully complied with CR 4(i). Accordingly, SCAC's petition for review should be denied.

RESPECTFULLY SUBMITTED this 26th day of August, 2016.



Steven W. Block, WSBA No. 24299
FOSTER PEPPER PLLC
1111 Third Avenue
Suite 3000
Seattle, Washington 98101-3292
Telephone: (206) 447-4400
Facsimile: (206) 447-9700
Email: steve.block@foster.com
Attorneys for Respondent Delex Inc.

CERTIFICATE OF SERVICE

I hereby certify that I am a legal assistant at Foster Pepper PLLC and that on August 26, 2016, I filed this pleading with the Supreme Court and have served this as follows:

Catherine W. Smith
Ian C. Cairns
Smith Goodfriend, P.S.
1619 8th Avenue North
Seattle, WA 98109
Telephone: (206) 624-0974
E-mail: cate@washingtonappeals.com
E-mail: ian@washingtonappeals.com

Michael P. Socarras
Attorney at Law
8200 Greensboro Drive, Suite 1500
McLean, VA 22102
Telephone: (703) 639-9022
E-mail: msocarras@sands-llp.com

Email and First Class Mail

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Seattle, Washington, on August 26, 2016.

Terri Quale

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From: Terri Quale [mailto:terri.quale@foster.com]
Sent: Friday, August 26, 2016 11:04 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Steven W. Block <steve.block@foster.com>
Subject: Delex Inc., Respondent/Sukhoi Civil Aircraft Company, Petitioner - No. 93436-3 - Answer to Petition for Review

In the case of Delex Inc., Respondent v. Sukhoi Civil Aircraft Company, Petitioner, Supreme Court Cause No. 93436-3, here is Respondent Delex Inc.'s Answer to Petition for Review. This is being filed by counsel for Respondent Delex Inc., Steven W. Block, 206-447-7273, WSBA No. 24299, of Foster Pepper PLLC, 1111 Third Ave., Suite 3000, Seattle, WA 98101.

Terri Quale
LEGAL SECRETARY
Assistant to Chuck Nomellini, Steve Block and Marco Magnano
FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3000
Seattle, WA 98101
terri.quale@foster.com
Tel: 206-447-5146
Fax: 206-447-9700
foster.com