

Supreme Court of California (ROCKEFELLER TECHNOLOGY INVESTMENTS (ASIA) v. CHANGZHOU SINOTYPE TECHNOLOGY CO., LTD). A European reading of the ruling

A bit more than a month ago, the Supreme Court of California rendered its decision on a case concerning the (non-)application of the 1965 Hague Service Convention. The case has been thoroughly reported and commented before and after the ruling of the Supreme Court. I will refrain from giving the full picture of the facts; I will focus on the central question of the dispute.

THE FACTS

The parties are U.S. and Chinese business entities. They entered into a contract wherein they agreed to submit to the jurisdiction of California courts and to resolve disputes between them through California arbitration. They also agreed to provide notice and “service of process” to each other through Federal Express or similar courier. The exact wording of the clause in the MOU reads as follows:

“6. The Parties shall provide notice in the English language to each other at the addresses set forth in the Agreement via Federal Express or similar courier, with copies via facsimile or email, and shall be deemed received 3 business days after deposit with the courier.

“7. The Parties hereby submit to the jurisdiction of the Federal and State Courts in California and consent to service of process in accord with the notice provisions above”.

ARBITRATION PROCEEDINGS

An agreement between the companies was eventually not reached, which was reason for Rockefeller to initiate arbitration proceedings. All materials were sent

both by email and Federal Express to the Chinese's company address listed in the MOU. The latter did not appear. The arbitrator awarded Rockefeller the amount of nearly 415 million \$. The decision was sent to Sinotype by e-mail and Federal Express.

COURT PROCEEDINGS

In accordance with the Civil Procedure Code of the State of California [§ 1285. *Any party to an arbitration in which an award has been made may petition the court to confirm, correct or vacate the award...*], Rockefeller petitioned the award to be confirmed. The same 'service' method was used by the petitioner, i.e. e-mail and Federal Express. Again, Sinotype did not take part in the proceedings.

At a later stage, Sinotype became active, and filed a motion to set aside the default judgment for insufficiency of service of process. In particular, it asserted that it did not receive actual notice of any proceedings until March 2015 and argued that Rockefeller's failure to comply with the Hague Service Convention rendered the judgment confirming the arbitration award void. The motion was denied by the Los Angeles County Superior Court; the Court of Appeal reversed; finally, the Supreme Court reversed the appellate decision.

THE RULINGS

The first instance court confirmed that the Service Convention was in principle applicable, however, the agreement between the parties to accept service by mail was valid and superseded the Convention. The Court of Appeal reversed the judgment, stating exactly the opposite, namely that the Service Convention supersedes private agreements. In light of China's opposition to service by mail, the agreed method of communication was considered inadequate for the purposes of the Convention. The Supreme Court held yet again the opposite, because the parties' agreement constituted a waiver of formal service of process under California law in favor of an alternative form of notification; hence, the Convention does not apply.

COMMENT

I place myself next to the commentators of the case: It is true that the Service Convention does not apply in the course of *arbitration proceedings*. There is convincing case law to support this view from different jurisdictions in different

continents (example [here](#)). However, in the case at hand, the issue at stake was the use of a method not permitted by the Convention in *court proceedings*. It was lawfully agreed to send all documents by e-mail or FedEx during arbitration. Nowadays, this has become standard procedure in international commercial arbitration. However, a multilateral convention may not succumb to the will of the parties. If a contracting state refuses to accept postal service within the realm of litigation, the parties have no powers to decide otherwise. The best option would be, as already suggested, to oblige a party to appoint a service agent. This enables service within the jurisdiction, as already decided by the U.S. Supreme Court in the *Volkswagen Aktiengesellschaft v. Schlunk* case. In a similar fashion, the CJEU consolidated the same position in the *Corporis Sp. z o.o. v Gefion Insurance A/S* case, following its ruling in the case *Spedition Welter GmbH v Avanssur SA*.

Finally, returning to the EU, postal service would not require any agreement between the parties; Article 14 of the Service Regulation stipulates service by mail as an equivalent means of service between Member States. In addition, service by e-mail is scheduled to be embedded into the forthcoming Recast of the Regulation under certain requirements which are not yet solidified.