GIBSON DUNN

California Supreme Court Confirms That the Hague Service Convention Does Not Preempt Right of Parties to Contract for Their Preferred Method of Service

Client Alert | April 6, 2020

Related People

Julian W. Poon

Daniel M. Kolkey

Jennafer M. Tryck

On April 2, 2020, the California Supreme Court issued an important opinion regarding the right of parties to agree to waive the mandatory provisions for service of process abroad under the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (hereinafter the "Hague Service Convention").

Gibson Dunn drafted the leading amicus brief that set forth the legal argument that supported the right of private parties to agree to waive the provisions of the Hague Service Convention in the context of proceedings to enforce an award resulting from an international commercial arbitration.

I. The California Supreme Court's Decision

In *Rockefeller Technology Investments (Asia) VII v. Changzhou Sinotype Technology Co., Ltd.*, No. S249923, ___ Cal.5th ___, 2020 WL1608906 (Cal. Apr. 2, 2020), the California Supreme Court reversed a court of appeal decision that had ruled that the failure to comply with the Hague Service Convention rendered a judgment confirming an arbitration award void because the plaintiff's service of the petition to confirm the arbitration award did not conform with the requirements of the Hague Service Convention. Instead, the Court, in a unanimous opinion authored by Justice Corrigan, ruled that the parties could agree to provide for notice and service of process through other means, as permitted under California law, because the Hague Service Convention "applies only when the law of the forum state requires formal service of process to be sent abroad" and alternatively, "because the parties' agreement constituted waiver of formal service of process under California law in favor of an alternative form of notification." (*Id.* at *1.)

In *Rockefeller*, Rockefeller Technology and Changzhou SinoType had contracted to arbitrate their disputes in Los Angeles, to submit to the jurisdiction of the federal and state courts in California, and to consent to service of process by notice via Federal Express or similar courier, with copies via facsimile or email. (*Id.*) After a dispute arose and despite notice as provided in the contract, SinoType did not appear at the arbitration, and a default award for $414.6 million was issued against it. (*Id.* at *2.) Thereafter, Rockefeller petitioned to confirm the award and served the petition and summons pursuant to the notice provisions in the contract. (*Id.*) SinoType did not appear, and the award was confirmed. (*Id.*) Only when Rockefeller sought assignment of various royalty payments owed to SinoType did SinoType assert that Rockefeller's failure to comply with the Hague Service Convention rendered the judgment confirming the award void. (*Id.*)

The California Court of Appeal agreed and held that, notwithstanding the parties' agreement, service had to comply with the Hague Service Convention. (*Id.*)

© 2024 Gibson, Dunn & Crutcher LLP. All rights reserved. For contact and other information, please visit us at www.gibsondunn.com. | **www.gibsondunn.com**

In reversing the Court of Appeal, the California Supreme Court "conclude[d] that the parties' agreement constituted a waiver of formal service of process under California law" and thus the Hague Service Convention did not apply. (*Id.* at *5.) First, the high court observed that the Code of Civil Procedure provides that a petition to confirm, correct, or vacate an arbitral award provides that it shall be served "in the manner provided in the arbitration agreement for service of such petition and notice." (*Id.* at *7, quoting Code Civ. Proc., § 1290.4, subd. (a).) It then ruled that when the parties agree to waive formal service of process under California law in favor of informal notification, the case does not present the need to transmit a judicial document for formal service abroad under the Hague Service Convention. (*Id.*) And it concluded that "because the parties' agreement constituted a waiver of formal service of process under California law in favor of an alternative form of notification, the Convention does not apply." (*Id.* at *1.) It explained that "[r]equiring formal service abroad under California law where sophisticated business entities have agreed to arbitration and a specified method of notification and document delivery would undermine the benefits arbitration provides" and that uncertainty with respect to service "appears contrary to the Legislature's attempts to position California as a center for international commercial arbitration." (*Id.* at *10.)

II. Conclusions

Gibson Dunn has played a leading role in supporting the legal foundation for international commercial arbitration in California. Its partner, Daniel M. Kolkey, co-authored California's International Arbitration statute (Code Civ. Proc., § 1297.11 *et seq.*), chaired a working group formed by the California Supreme Court in 2017 that led to the enactment of legislation authorizing foreign and out-of-state attorneys to represent their clients in international commercial arbitrations in California, and was the author of the lead amicus brief in the *Rockefeller* case.

Gibson Dunn's amicus brief helped secure the stable future of those choosing California law for their contracts calling for arbitral resolution in their dealings abroad, ensuring California will remain a sought-after market for legal expertise in this increasingly important arena.

For more information, please feel free to contact the Gibson Dunn lawyer with whom you usually work or the leaders of Gibson Dunn's California Appellate Practice Group and its International Arbitration Practice Group set forth below.

California Appellate Practice Group:
Theodore J. Boutrous, Jr. – Los Angeles (+1 213-229-7000, tboutrous@gibsondunn.com)
Daniel M. Kolkey – San Francisco (+1 415-393-8420, dkolkey@gibsondunn.com)
Julian W. Poon – Los Angeles (+1 213-229-7758, jpoon@gibsondunn.com)
Theane Evangelis – Los Angeles (+1 213-229-7726, tevangelis@gibsondunn.com)

International Arbitration Practice Group:
Cyrus Benson – London (+44 (0) 20 7071 4239, cbenson@gibsondunn.com)
Penny Madden – London (+44 (0) 20 7071 4226, pmadden@gibsondunn.com)

© 2020 Gibson, Dunn & Crutcher LLP

Attorney Advertising: The enclosed materials have been prepared for general informational purposes only and are not intended as legal advice.

Related Capabilities

Appellate and Constitutional Law

International Arbitration

© 2024 Gibson, Dunn & Crutcher LLP. All rights reserved. For contact and other information, please visit us at www.gibsondunn.com. | **www.gibsondunn.com**