CITATION: Khan Resources Inc. v. Atomredmetzoloto JSC, 2012 ONSC 1522
COURT FILE NO.: CV-10-409104
DATE: 20120309

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
KHAN RESOURCES INC., KHAN RESOURCES LLC, CAUC HOLDING COMPANY LIMITED, CENTRAL ASIAN URANIUM COMPANY LLC, KHAN RESOURCES B.V. and KHAN RESOURCES BERMUDA LTD.	*James Doris and Derek Ricci*, for the Applicants (Respondents in Appeal)
Applicants/Respondents in Appeal	*Robert Frank and Ryan Hauk*, for the Respondents (Appellants in Appeal)
– and –	
ATOMREDMETZOLOTO JSC and JSC PRIARGUNSKY INDUSTRIAL MINING AND CHEMICAL UNION	
Respondents/Appellants in Appeal	**HEARD:** January 24, 2012

B. P. O'MARRA J.

REASONS FOR DECISION

OVERVIEW

[1] This appeal involves the novel issue of determining whether an Ontario court can substitute, dispense with, or validate service of a party residing in a foreign state that refuses to facilitate service according to the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* ["Service Convention"]. More specifically, it requires this court to determine the relationship between Rules 17.05(3), 16.04, and 16.08 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 ["Rules"].

[2] Rule 17.05(3) governs the process of serving an originating process on a party who resides in a state that is signatory to the Service Convention. Rule 17.05(3) states that an originating process to be served in a contracting state must be done through the central authority of that state or in a manner permitted by Article 10 of the convention. Significantly, Article 13 of the Service Convention allows a state receiving a service request to refuse to facilitate such service if it deems that it would infringe its sovereignty or security.

[3] Rule 16.04 permits a court to make an order for substituted service where it appears that it is impractical for any reason to effect prompt service of an originating process or any other document required to be served personally or by an alternative to personal service under the Rules. Rule 16.04 also permits a court to dispense with service where necessary in the interest of justice.

[4] Rule 16.08 gives courts the discretion to validate service that is not authorized in the Rules. A court can exercise this discretion if it is satisfied that the document served has come to the notice of the person to be served, or that the document was served in such a manner that it would have come to the notice of the person to be served, except for the person's own attempts to evade service.

[5] What happens when a contracting state exercises its discretion under Article 13 of the Service Convention and refuses to facilitate service? Can an Ontario court substitute, dispense with, or validate service under Rules 16.04 or 16.08? Put another way, do the Ontario rules of service apply when service abroad is required pursuant to Rule 17.05(3)? This is the issue raised by this appeal.

FACTS

[6] The respondents in this appeal are companies incorporated pursuant to the laws of the British Virgin Islands, Mongolia, and Ontario.

[7] The appellants are Russian commercial enterprises. Atomredmetzoloto JSC ("AMRZ") is a subsidiary of the Russian State Atomic Energy Corporation, a Russian state-owned corporation. JSC Priargunsky Industrial Mining and Chemical Union is a subsidiary of AMRZ.

[8] Several years ago, the respondents entered into a joint venture with AMRZ to develop a uranium mining property in Mongolia known as the Donrod Property.

[9] In August 2010, the respondents commenced an action in Ontario seeking damages from AMRZ in the amount of $300 million for breach of fiduciary duty, unlawful interference with the respondents' economic relations, breaches of good-faith duties, and damage to the plaintiffs' rights, business reputation and property in Mongolia. The commencement of this action was published in a press release by the respondents, and the allegations were contained in Khan Resources' public disclosure. The appellants retained counsel for the purposes of defending the action in or before December 2010.

[10] The respondents retained the law firm of Baker & McKenzie in Moscow to assist in the service of the statement of claim on the defendants in Russia. The respondents were informed that service of the statement of claim must comply with the Service Convention, since both Canada and Russia are signatories. Article 2 of the Service Convention requires that a Request for Service be filed with the central authority, which is the Ministry of Justice of the Russian Federation ("the Ministry"). Khan filed this Request for Service with the Ministry in the form required by the Service Convention.

[11] In a letter dated December 9, 2010, the Ministry informed Khan that it declined to serve the statement of claim on the respondents on the basis of paragraph 1 of Article 13 of the Service Convention. No further explanation was provided by the Ministry.

[12] Article 13 states the following:

> 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.

[13] Article 10 of the Service Convention provides for methods of service other than through the central authority. This is recognized by Rule 17.05(3)(b). These methods, however, are only available if the contracting state in question has not objected to the application of Article 10. Russia is an objecting state. As such, the only method of service available to the plaintiffs was through Russia's central authority.

[14] The respondents considered their options after the Ministry declined to serve the defendants. There were at least two options for them to consider. First, they could have filed an application with the Arbitrazh court of Moscow appealing the Ministry's decision. However, they were informed by counsel in Russia that such an application was likely to be unsuccessful, due in part to counsel's opinion that there was a risk of political interference. Counsel also advised that the application would be costly.

[15] Second, the respondents could have made a complaint to a "superior authority" in Russia about the actions of the state authorities. Again, counsel advised that success was unlikely.

[16] The respondents ultimately decided not to pursue either of these options. Instead, they chose to bring a motion in Ontario to substitute or dispense with service pursuant to Rule 16.04 or to validate service pursuant to Rule 16.08.

HISTORY OF PROCEEDINGS

[17] On October 28, 2011, Master Graham allowed the respondents' motion to validate service pursuant to Rule 16.08 (*Khan Resources v. ARMZ*, 2011 ONSC 5465). In reaching this conclusion, Master Graham made two conclusions.

[18] First, Master Graham concluded that the Service Convention does not oust the jurisdiction of the Ontario courts to substitute, dispense with, or validate service under Rules 16.04 and 16.08 (paras. 43-44). In doing so, he followed the decision of Master Glustein in *Zhang v. Jiang* (2006) 82 O.R. (3d) 306. Master Graham also noted that, if the Service Convention ousted Ontario's jurisdiction, then contracting states would essentially be able to immunize state-owned corporations from litigation initiated by foreign companies by refusing to facilitate service. This conflicts with the Service Convention's stated purposes:

> 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

[19] Second, having concluded that he had jurisdiction to substitute, dispense with, or validate service, Master Graham found that the document came to the notice of the defendants either through the press release, the plaintiffs' public disclosure, or the attempt to serve the statement of claim through the Ministry (para. 49). Although these methods of service are not authorized by the *Rules of Civil Procedure*, Master Graham exercised his discretion pursuant to Rule 16.08 to validate service.

POSITION OF THE PARTIES

[20] The appellants submit that Master Graham did not have jurisdiction to substitute, dispense with, or validate service of the statement of claim. They claim that service must be done in accordance with the Service Convention, and Rules 16.04 and 16.08 cannot be used to circumvent the convention.

[21] The appellants make four arguments in support of this submission:

[22] Rule 17.05(3) must be given an interpretation that is consistent with Canada's existing international obligations. Allowing Rules 16.04 and 16.08 to apply when a contracting state has refused to facilitate service under Article 13 of the Service Convention would be inconsistent with Canada's obligations under the Service Convention.

[23] Rule 17.05(3) states that "an originating process … in a contracting state *shall* be served through the central authority in the contracting state". The language is mandatory.

[24] Rule 17.05(2) allows service in states that *are not* party to the Service Convention to be "in the manner provided by these rules for service in Ontario". This statement is not present in Rule 17.05(3), which applies to service in states that *are* party to the Service Convention. This absence suggests that service in a contracting state cannot be substituted, dispensed with, or validated according to Rules 16.04 and 16.08.

[25] Rule 16.04 applies only in respect of an originating process or any other document "required to be served personally or by an alternative to personal service under these rules". An originating process in a contracting state is not required to be served personally or by an alternative to personal service. It is only required to comply with the Service Convention. As such, Rule 16.04 does not apply to this case.

[26] In the alternative, if this court finds that Master Graham had jurisdiction to apply Rule 16.08, the appellants submit that it was unreasonable for Master Graham to validate service in this case. The respondents did not exhaust the other remedies available to them and sought an order under rule 16.08 solely for the purposes of expedience.

[27] The respondents submit that Master Graham did have jurisdiction to substitute, dispense with, or validate service pursuant to Rules 16.04 and 16.08. They make three arguments in support of this submission:

[28] Rule 16.01(1) governs service within Ontario. Like Rule 17.05(3), Rule 16.01(1) uses the mandatory language of "shall". Nevertheless, Rules 16.04 and 16.08 apply to service within Ontario. As such, the word "shall" in Rule 17.05(3) does not mean that Rules 16.04 and 16.08 have no application to service outside Ontario.

[29] Rules 16.08 and 16.04 do not state that they do not apply in circumstances where the Service Convention applies.

[30] Rule 16.08 states that it applies "where a document has been served in a manner other than one authorized by these rules or an order". The method of service that was validated by Master Graham was not authorized by the Rules. This does not mean that Rule 16.08 does not apply. It is precisely when service was not authorized by the Rules that Rule 16.08 applies.

ANALYSIS

[31] The parties are correct in focusing on the interpretation of Rule 17.05(3). The issue in this appeal is whether Rule 17.05(3) allows Rules 16.04 and 16.08 to apply when service abroad in a contracting state is required. Both parties analyze the words used or not used in the relevant sections. They also look to the context of Rule 17.05(3). The arguments of both parties are persuasive.

[32] However, the interpretation of the Rules in this case does not turn primarily on such arguments. Instead, the issue raises principles of statutory interpretation that are relevant when Canada's international obligations are at stake. This in turn raises three issues:

1 To what extent has the Service Convention been implemented into domestic law? It will be seen that all of the articles of the Service Convention that are relevant to this case have been implemented into domestic law.

2 Does the Service Convention apply to this case? I find that it does.

3 What obligations are imposed by the Service Convention, and how do these obligations impact the interpretation of Rule 17.05(3)? By considering the text of the Service Convention, I find that Rule 17.05(3) prescribes the only methods of service permitted when service is to be performed in a contracting state. It does not permit alternative methods of service countenanced by Rules 16.04 or 16.08.

[33] In light of these conclusions, I find that Master Graham erred in law by validating service pursuant to Rule 16.08. Accordingly, the appeal is allowed.

1. Implementation of the Service Convention into Domestic Law

The Service Convention in the Rules

[34] International treaties and conventions are not part of Canadian law unless they have been implemented by statute: *Capital Cities Communications Inc. v. Canadian Radio-Television* Commission, [1978] 2 S.C.R. 141, at pp. 172-173.

[35] Application of this principle is often straightforward. Legislation may explicitly state that an international convention is to be applied as law in Ontario. For example, the *Convention on the Civil Aspects of International Child Abduction* is declared to be in force in Ontario by s. 46(2) of the *Children's Law Reform Act*, R.S.O. 1990, ch. C.12. Other acts exist solely to implement the articles of an international convention. For example, the *International Sale of Goods Act*, R.S.O. 1990, ch. I.10 was enacted in order to implement the *United Nations Convention on Contracts for the International Sale of Goods* into domestic law.

[36] The Service Convention has not been implemented into domestic law under either of these two methods. Reference to the convention is wholly contained in Rule 17.05:

MANNER OF SERVICE OUTSIDE ONTARIO

Definitions

17.05 (1) In this rule,

"contracting state" means a contracting state under the Convention; ("État contractant")

> "Convention" means the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters signed at The Hague on November 15, 1965. ("Convention") R.R.O. 1990, Reg. 194, r. 17.05 (1).

General Manner of Service

> (2) An originating process or other document to be served outside Ontario in a jurisdiction that is not a contracting state may be served in the manner provided by these rules for service in Ontario, or in the manner provided by the law of the jurisdiction where service is made, if service made in that manner could reasonably be expected to come to the notice of the person to be served. R.R.O. 1990, Reg. 194, r. 17.05 (2).

Manner of Service in Convention States

> (3) An originating process or other document to be served outside Ontario in a contracting state shall be served,
>
> through the central authority in the contracting state; or
>
> in a manner that is permitted by Article 10 of the Convention and that would be permitted by these rules if the document were being served in Ontario. O. Reg. 535/92, s. 7.

Proof of Service

> (4) Service may be proved,
>
> (a) in the manner provided by these rules for proof of service in Ontario;
>
> (b) in the manner provided by the law of the jurisdiction where service is made; or
>
> (c) in accordance with the Convention, if service is made in a contracting state (Forms 17A to 17C). R.R.O. 1990, Reg. 194, r. 17.05 (4). [Emphasis added.]

[37] The Service Convention is expressly mentioned in 17.05(3)(b) and 17.05(4)(c). 17.05(3)(b) refers to Article 10, and 17.05(4)(c) requires reference to articles relevant to proof of service, e.g. Article 6. Neither of these articles are relevant to this case. Rule 17.05(3)(b) only allows service "in a manner that is permitted by Article 10 of the Convention". Article 10 states that the methods of service enumerated in that article apply "[p]rovided the State of destination does not object". The parties agree that Russia has objected to Article 10. As such, it has no application here. Rule 17.05(4)(c) is not relevant because proof of service is not at issue.

[38] It is important to note that the majority of the Service Convention's 31 articles are not expressly mentioned in the Rules. For example, Article 8 states that documents may be served

directly through diplomatic or consular agents. The Rules do not refer to this article. The fact that Rule 17.05(3) states that an originating process shall be served in one of the two methods prescribed indicates that Article 8 has not been implemented into domestic law. It follows that, though specific articles of the Service Convention have been implemented into domestic law, the Service Convention in its entirety has not.

(a) The Implementation of Article 13

[39] The question, then, is this: since Article 13 is not mentioned in the Rules, has it been implemented into domestic law? If it has not, then can this court simply ignore the Russian government's refusal to serve the respondents on the basis that it would infringe its sovereignty or security?

[40] I find that Article 13 has been implemented into domestic law through Rule 17.05(3)(a). The rule states that documents to be served in a contracting state shall be served "through the central authority in the contracting state". It does not define "central authority". It also does not specify how service is to be performed through the central authority. The legislature seems to be inviting the courts to look at the text of the Service Convention itself to answer these questions.

[41] To interpret a domestic law which implements an international obligation, resort can be made to the text of the international treaty that imposes that obligation. In *National Corn Growers Association v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, the majority stated the following at p. 1371:

> The first comment I wish to make is that I share the appellants' view that in circumstances where the domestic legislation is unclear it is reasonable to examine any underlying international agreement. In interpreting legislation which has been enacted with a view towards implementing international obligations, as is the case here, it is reasonable for a tribunal to examine the domestic law in the context of the relevant agreement to clarify any uncertainty. Indeed where the text of the domestic law lends itself to it, one should also strive to expound an interpretation which is consonant with the relevant international obligations. [Emphasis added.]

[42] Accordingly, though the majority of the Service Convention articles are not expressly referenced in Rule 17.05, those that are relevant to the issue of how service is to be performed through the central authority must be referenced in order to give substance to Rule 17.05(3)(a). This includes Articles 2, 3, 5, 6, which establish how a central authority is selected and how service is to be performed.

[43] Moreover, I find that this also includes Articles 4 and 13, which relate to the central authority's discretion to refuse to facilitate service. Article 4 permits a central authority to object to a request for service if it considers that the request does not comply with the provisions of the

Service Convention. Article 13, as stated already, permits a central authority to refuse to facilitate service if it would infringe its sovereignty or security.

[44] In interpreting Rule 17.05(3)(a), there is no reason to refer only to the articles that relate to the procedure of service through a central authority. The rule simply states that service shall be done "through the central authority in the contracting state". Reference to the Service Convention is necessary to determine both *how* service is to be done through the central authority, and *when* the central authority is required to facilitate service. Article 13 clearly relates to the latter.

[45] This conclusion is also supported by the passage from *National Corn Growers* cited above: "where the text of the domestic law lends itself to it, one should also strive to expound an interpretation which is consonant with the relevant international obligations." The obligations imposed by the Service Convention are best respected by including Article 13 with the other relevant articles in the interpretation of Rule 17.05(3)(a).

[46] Since I have concluded that Article 13 has been implemented into domestic law by Rule 17.05(3)(a), it is unnecessary to determine whether an Ontario court could ignore a foreign state's refusal to serve on the basis that it would infringe its sovereignty or security. If it were necessary, however, I would be inclined on the basis of the comity of nations to conclude that an Ontario court should not simply ignore such refusal: see e.g. *R. v. Hape*, 2007 SCC 26, paras. 47-48.

2. Applicability of the Service Convention

[47] Having determined that Article 13 of the Service Convention has been implemented into domestic law, the next question is whether the Service Convention applies in this case at all. The respondents submitted that the convention does not have any application to the present case. I disagree for the following reasons.

[48] According to Article 1, the Service Convention applies when two conditions are met: (1) the matter is a civil or commercial one; and (2) there is occasion to transmit a judicial or extrajudicial document for service abroad. If these two conditions are met, then the Service Convention shall apply.

[49] The respondents submitted that the second condition is not met here. There is no longer occasion to transmit a judicial or extrajudicial document for service abroad when a court orders that it is not necessary. In this case, Master Graham has validated service on the appellants, thus making it unnecessary to transmit any document for service abroad. The respondents cited the U.S. Supreme Court's decision in *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988) to support this proposition.

[50] This argument does not reflect a thorough reading of the *Schlunk* case. In that case, the plaintiff brought an action against Volkswagen of America (VWOA). Subsequently, the plaintiff amended his statement of claim to include VWOA's parent company in Germany as a party to

the action as well (VWAG). VWAG argued that it was not properly a party to the action because it had not been served according to the Service Convention. The plaintiff argued that VWOA was an agent of VWAG. As such, service on VWOA was also service on VWAG.

[51] The U.S. Supreme Court agreed with the plaintiff. It held that "[w]here service on a domestic agent is valid and complete under both state law and the Due Process Clause, our inquiry ends and the Convention has no further implications" (p. 707). Since VWOA was deemed under U.S. law to be an agent of VWAG, there was no need to transmit a document for service abroad, and the Service Convention did not apply.

[52] The issue raised in *Schlunk* is different from the one raised in this case. In *Schlunk*, the court had to determine whether it was necessary to serve VWAG in Germany. The court concluded that it was not, and thus the Service Convention had no application. In this case, there is no dispute that it is necessary to serve the defendants in Russia. Indeed, the respondents' attempt to do just that in accordance with the Service Convention shows that they recognize the application of the convention in these circumstances. In addition, the respondents' current attempt to validate service also involves serving the defendants in Russia. The respondents cannot escape the reality that they must transmit the statement of claim for service abroad. The defendants do not have an agent in Canada that would make it unnecessary for the plaintiffs to transmit documents to Russia. Moreover, Master Graham did not conclude that service abroad is no longer necessary. He merely concluded that the actions done by the plaintiffs to notify the defendants of the litigation constituted sufficient service under Rule 16.08.

[53] It is clear that the matter is a civil or commercial one, and that there is occasion to transmit a judicial or extrajudicial document for service abroad. As such, the Service Convention applies to this case.

3. Interpretation of Rule 17.05(3)

[54] The next issue lies at the heart of this appeal: according to Rule 17.05(3), does the Service Convention apply to the exclusion of domestic law, or does domestic law continue to apply as a supplement to the Service Convention? The appellants espouse the first position, and the respondents assert the second. If the appellants are correct, then Master Graham erred in law by applying Rule 16.08 to validate service.

(a) General Rule of Statutory Interpretation

[55] Resolution of this issue depends on principles of statutory interpretation. In *Hape*, *supra*, Lebel J. for the majority said the following about the role of Canada's international obligations in interpreting domestic laws at para. 53:

> It is a well-established principle of statutory interpretation that **legislation will be presumed to conform to international law.** The presumption of conformity is based on the rule of judicial policy that, as a matter of law, courts will strive to avoid constructions of domestic law

> pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result. R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 422, explains that the presumption has two aspects. First, the legislature is presumed to act in compliance with Canada's obligations as a signatory of international treaties and as a member of the international community. In deciding between possible interpretations, courts will avoid a construction that would place Canada in breach of those obligations. The second aspect is that the legislature is presumed to comply with the values and principles of customary and conventional international law. Those values and principles form part of the context in which statutes are enacted, and courts will therefore prefer a construction that reflects them. The presumption is rebuttable, however. Parliamentary sovereignty requires courts to give effect to a statute that demonstrates an unequivocal legislative intent to default on an international obligation. See also P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at pp. 367-68. [Italics in original; underlining added.]

[56] A proper interpretation of Rule 17.05(3) should result in a construction that upholds Canada's international obligations. There is no clear wording in the Rules that directs this court to interpret the provision otherwise. As such, it is necessary to determine what the Service Convention says about Canada's obligations.

(b) The Vienna Convention

[57] The interpretation of international treaties is guided by international rules of interpretation: see e.g. John H. Currie, *Public International Law* (Toronto: Irwin Law, 2001), at p. 20. These rules have been codified in the *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37 ("Vienna Convention"). In *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, Bastarache J. applied Articles 31 and 32 of the Vienna Convention to interpret the phrase "acts contrary to the purposes and principles of the United Nations" in the *Convention Relating to the Status of Refugees* and implemented into domestic law by the *Immigration Act*, R.S.C., 1985, c. I-2. The articles state as follows:

> *Article 31*
> *General rule of interpretation*
>
> > 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32
Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

> (b) leads to a result which is manifestly absurd or unreasonable. [Emphasis added.]

[58] Article 31 establishes that the interpretation of an international treaty must begin with the ordinary meaning of its terms in context, in light of the treaty's object and purpose. This also includes consideration of any subsequent practices in the application of the treaty or agreements between the parties regarding the interpretation of the treaty.

(c) Ordinary Meaning and Purpose of the Service Convention

[59] Article 1 of the Service Convention states that "[t]he 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." [Emphasis added.] The word "shall" suggests that, where the convention applies, contracting states must comply with its provisions. An ordinary reading of this article implies that contracting states are not free to apply their domestic laws at any time. Instead, the articles of the Service Convention have exclusive authority over the service of documents in contracting states.

[60] This interpretation must be considered in light of the convention's two-fold purpose:

> [T]o 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,
>
> [T]o improve the organisation of mutual judicial assistance for that purpose by simplifying and expediting the procedure

[61] It seems that the first purpose could be used to support the position that the convention could not have intended to oust the jurisdiction of domestic courts to apply their own laws relating to service. The first purpose of the convention is to "ensure that ... documents to be served abroad shall be brought to the notice of the addressee in sufficient time." The Service Convention was created to ensure that documents would be served. If Article 13 categorically prevents the appellants from serving the respondents, then this purpose is thwarted. It seems reasonable to conclude, therefore, that the convention intended domestic laws of service to have continued application when service under the Service Convention is not possible.

[62] The second purpose, however, supports the opposite conclusion. The Service Convention exists to "improve the organisation of mutual judicial assistance for that purpose by simplifying and expediting the procedure." The convention organizes, simplifies, and expedites the service procedure by creating an international standard for service abroad. States no longer have to determine for themselves whether the service regime of the serving state or of the receiving state applies to a particular dispute.

[63] Allowing courts to circumvent the methods of service prescribed by the Service Convention would compromise the organization, simplification, and expedition purposes of the

convention. The Service Convention would no longer be a comprehensive authority on service abroad. Parties to a dispute would have to become familiar with the domestic laws of service of any state in which a party performing or receiving service resides. Courts would have to determine whether the service regime of the receiving state or the serving state applies. These complications would undeniably delay the service process and prevent the party to be served from receiving timely notice.

[64] In sum, it is difficult to come to a definitive interpretation of Article 1 by considering the purposes of the Service Convention. I will move on to consider any subsequent agreements between the parties of the convention on its interpretation.

(d) Subsequent Agreements

[65] One of the leading cases on the application of the Service Convention is the U.S. Supreme Court's decision in *Schlunk*. On the word "shall", the court noted that "[t]his language is mandatory … [b]y virtue of the Supremacy Clause, U.S. Const., Art. VI, the Convention pre-empts inconsistent methods of service prescribed by state law in all cases to which it applies" (p. 699). While Canada does not have a Supremacy Clause like the U.S., it is noteworthy that the court interpreted the word "shall" as connoting mandatory language. Applied in the U.S. context, this means that the Service Convention has primacy over state law.

[66] As explained above, however, the court in *Schlunk* did not mean that the Service Convention always has primacy over state law. State law must be applied first to determine whether service abroad is necessary. If service abroad is necessary, then the application of the Service Convention is mandatory. In other words, the convention is mandatory when domestic law determines that it applies.

[67] To explain the result in *Schlunk*, two concepts have developed: the "mandatory" character of the convention, and the "exclusive" character of the convention. These concepts are defined in the *Practical Handbook on the Operation of the Hague Service Convention*, 3rd ed (Montreal: Wilson & Lafleur, 2006) ["Handbook"], published by the Permanent Bureau of the Hague Conference on Private International Law ["Permanent Bureau"]. The Handbook compiles and summarizes caselaw and special commission reports relating to the Service Convention.

[68] The Handbook defines the two concepts as follows at p. 14:

> [T]he question of *which law determines whether or not a document has to be transmitted abroad for service*, and, in particular, whether this issue is left to the Convention itself or the law of the forum, will be examined under the heading of ***whether or not*** the Convention is of ***mandatory*** character;
>
> [I]f, under the relevant law, a document has to be transmitted abroad for service, the question of *whether or not the channels of transmission provided for by the Convention are the only channels available* will be

> examined under the heading of ***whether or not*** the Convention is of ***exclusive*** character. [Emphasis in original.]

[69] The Handbook notes that the *Schlunk* case, along with another by the Supreme Court of the Netherlands, resolved the issue of whether the convention is mandatory – that is, whether the convention itself determines whether a document has to be transmitted abroad for service. These two cases held that the Service Convention is non-mandatory: the law of the forum, not the convention, determines whether or not a document is to be transmitted abroad for service.

[70] The Handbook goes on to determine whether the convention is exclusive in the sense that, where the convention applies, it "covers the field" by specifying the only service channels that are available. It concludes, at pp. 22-23, that the convention is of exclusive character:

> [A]part from one or two exceptions ... the Convention's exclusive character is now ***undisputed***. Thus, if under the law of the forum a judicial or extrajudicial document is to be *transmitted abroad* for service, the Convention applies and it provides the relevant catalogue of possible means of transmission for service abroad. In this sense, the Convention is "exclusive".
>
> The exclusive character of the Convention was never really disputed. It has been confirmed by ***case law*** and by ***legal scholars***, as well as by the ***2003 Special Commission***. [Emphasis in original.][i]

[71] The Handbook's conclusion on the exclusivity of the Service Convention is confirmed by reports published by the Permanent Bureau. In 2003, a Special Commission of the Permanent Bureau released its *Conclusions and Recommendations adopted by the Special Commission on the Practical Operation of the Hague Apostille, Evidence and Service Conventions*.[ii] The Special Commission was attended by delegates from 57 states that are members of the Hague Conference on Private International Law ("Hague Conference").[iii] All of the member states unanimously approved the conclusions and recommendations contained in the report.

[72] In that report, the Special Commission noted, at para. 37, that "there were still differing views among States party as to the obligatory and/or exclusive character of the Convention." The Special Commission then concluded the following at para. 73:

> Recalling the conclusions and recommendations of 1989, *the SC confirmed the prevailing view that the Convention was of a non-mandatory, but exclusive character* as described in more detail in the provisional version of the new edition of the Practical Handbook, without prejudice to international law on the interpretation of treaties. [Emphasis added.]

[73] The Handbook's conclusion on the exclusive character of the Service Convention constitutes a "subsequent agreement between the parties regarding the interpretation of the treaty

or the application of its provisions" pursuant to Article 31 of the Vienna Convention. As such, it is relevant to the interpretation of the word "shall" in the Service Convention.

[74] In 2009, another Special Commission of the Permanent Bureau published a similar report. This commission was attended by 203 experts from 64 states and organizations. Once again, they unanimously approved the contents of the report. The commission reaffirmed the exclusive character of the Service Convention at para. 12:

> The SC recalls Conclusion and Recommendation No 73 of the 2003 Special Commission and *confirms the view that the Service Convention is of a non-mandatory but exclusive character*, as explained in paragraphs 24 to 45 of the Practical Handbook. The SC further notes with great satisfaction that the non-mandatory but exclusive character of the Service Convention has not caused any difficulties in the past five years. [Emphasis added.]

[75] These reports, along with the Handbook, provide an unequivocal interpretation of Article 1 of the Service Convention: the word "shall" requires contracting states to confine their methods of service abroad to those contained in the Service Convention. Article 1 excludes domestic law from applying when the Service Convention applies.

(e) Application to Rule 17.05(3)

[76] The question that remains is the interpretation of Rule 17.05(3) in light of Canada's international obligations under the Service Convention. Both parties present plausible arguments on the interpretation of Rule 17.05(3). The correct interpretation, however, is determined by the principles summarized in *Hape*, *supra*:

> 1. Legislation is presumed to conform to international law
>
> 2. This presumption is rebuttable if the statute demonstrates an unequivocal legislative intent to default on an international obligation

[77] In light of these principles, I must presume that Rule 17.05(3) conforms to Canada's international obligations under the Service Convention. This means that Rule 17.05(3) prescribes the only methods of service available when service is to be performed in a contracting state. A party seeking to perform service cannot resort to Rules 16.04 or 16.08 to substitute, dispense with, or validate service. This conclusion is required by the exclusive character of the Service Convention.

[78] I also find that this presumption is not rebutted by "an unequivocal legislative intent to default" on this international obligation. The arguments made by the respondents do not rise to the threshold of "unequivocal legislative intent", particularly in light of the appellants' arguments to the contrary. As LeBel J. made clear in *Hape*, "In deciding between possible interpretations, a construction that would place Canada in breach of its international obligations

should be avoided." As such, I reject the respondents' interpretation and adopt the one advanced by the appellants.

[79] In summary, Rules 16.04 and 16.08 have no application when service must be performed abroad in a contracting state pursuant to Rule 17.05(3). Master Graham erred in law by validating service under Rule 16.08. Accordingly, the appeal is allowed.

4. Alternative Ground of Appeal

[80] The appellants also submitted that the Master should not have validated service, because the respondents had not yet exhausted all the remedies available to them. While this submission is unnecessary to allow the appeal, I would like to make the following observation.

[81] Much of the jurisprudence surrounding Rule 17.05(3) states that a party cannot circumvent the Service Convention by resorting to the Rules for the simple reason that compliance with the convention is costly or tedious. In *Dofasco Inc. v. Ucar Carbon Canada Inc.* (1998), 79 O.T.C. 377 (Ont. Ct. (Gen. Div.)), the plaintiffs brought a motion to substitute service of the defendants who resided in Japan. The plaintiffs argued that service under the convention had proved "unduly time consuming". Campbell J. dismissed this argument and required the plaintiffs to perform service according to the Service Convention.

[82] Similarly, in *Campeau v. Campeau*, [2004] O.T.C. 1047 (S.C.), the plaintiff brought a motion to validate service after repeatedly failing to serve the defendant in accordance with the Service Convention. Lalonde J. dismissed the motion, stating that "[i]t is not permissible to avoid the requirements, as set out in the Hague Convention, simply because these requirements may cause difficulty, inconvenience or expense for the serving party."

[83] *Campeau* and *Dofasco* involved plaintiffs who had not complied with the Service Convention's requirements for service. In this regard, the facts are different from the present case. The respondents had filed a request for service with the Russian Ministry in conformity to the Service Convention. However, the principle involved is essentially the same: the plaintiffs made motions to substitute or validate service under the Rules, because conformity to the Service Convention was too costly or tedious.

[84] This is the very reason why the respondents brought their motion before Master Graham to validate service. They alleged that appealing the Ministry's decision before a Russian court would be unduly costly and likely unsuccessful.[iv] They alleged the same with respect to making a complaint to a superior authority in Russia.

[85] Since I have concluded that the application of domestic rules of service constitutes non-compliance with the Service Convention, the respondents' motion to validate service should have been dismissed for the reasons stated in *Campeau* and *Dofasco*. The respondents cannot circumvent the Service Convention simply because compliance would be costly or tedious.

CONCLUSION

[86] For the reasons stated above, the appeal is allowed.

[87] If the parties cannot agree on costs, I will consider brief written submissions (no more than 4 pages) to be to judicial administration 10 days after release of the ruling.

[88] I am grateful to counsel for their assistance on this important issue.

B. P. O'Marra J.

Released: March 9, 2012

[i] The one exception noted by the Handbook is from a decision of the Quebec Court of Appeal: *Holding Tusculum B.V. c. S.A. Louis Dreyfus & Cie*, [1998] R.J. Q. 1722, leave to appeal to SCC refused, [1998] S.C.C.A. No. 429. In that case, LeBel J.A. (as he then was) began by finding that the Service Convention had not yet been implemented into Quebec law. As such, it had no application to the dispute. In *obiter*, LeBel J.A. held that a party bound by the Service Convention could effect service abroad using fax transmission, notwithstanding the absence of this method in the convention. He held that "[t]he use of such an instrument of communication, based on a liberal and evolutive construction of [the Convention], complies with [its] spirit and preserves [its] effectiveness" (translation by the Permanent Bureau). This means that courts must take technological developments into account in interpreting the Service Convention. This narrow exception to the exclusive character of the Service Convention is not relevant to this appeal.

[ii] All reports published by the Permanent Bureau relating to the Service Convention that are referenced here can be found at the Hague Conference on Private International Law, *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or*

Commercial Matters, online: The World Organisation for Cross-border Co-operation in Civil and Commercial Matters <http://www.hcch.net/index_en.php?act=conventions.text&cid=17>.

[iii] As of 2012, there are currently 72 members of the Hague Conference on Private International Law <http://www.hcch.net/index_en.php?act=states.listing>.

[iv] The appellants spent considerable effort to argue that this opinion should not be admitted as evidence. The respondents, however, did not insist in their appeal factum that the opinion was being submitted for the truth of its contents: "Khan relies on [the opinion] evidence concerning political interference and the chances of successfully appealing the Russian government's decision for the fact that the advice was given …. Whether or not [the] advice is correct as a matter of Russian law was not an issue before Master Graham and, in Khan's submission, is not relevant on this appeal." As such, it is unnecessary to determine the admissibility of the opinion as evidence.

CITATION: Khan Resources Inc. v. Atomredmetzoloto JSC, 2012 ONSC 1522
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DATE: 20120309

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

KHAN RESOURCES INC., KHAN RESOURCES LLC, CAUC HOLDING COMPANY LIMITED, CENTRAL ASIAN URANIUM COMPANY LLC, KHAN RESOURCES B.V. and KHAN RESOURCES BERMUDA LTD.

Applicants/Respondents in Appeal

– and –

ATOMREDMETZOLOTO JSC and JSC PRIARGUNSKY INDUSTRIAL MINING AND CHEMICAL UNION

Respondents/Appellants in Appeal

REASONS FOR DECISION

B. P. O'Marra

Released: March 9, 2012