UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

Administrative Proceedings Rulings
Release No. 6738 / March 3, 2020

Administrative Proceeding
File No. 3-17886

In the Matter of

**China Biopharma, Inc.**,
**China Linen Textile Industry, Ltd.**,
**China Water Group, Inc.**,
**Scout Exploration, Inc.**, and
**Teryl Resources Corp.**

**Order to Show Cause**

On August 6, 2019, the Division of Enforcement moved for default judgment against China Linen Textile Industry, Ltd., under article 15 of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *done* Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163. The administrative law judge assigned to this matter at that time deferred ruling on the motion. *China Biopharma, Inc.*, Admin. Proc. Rulings Release No. 6669, 2019 SEC LEXIS 2350 (ALJ Aug. 29, 2019). For the reasons set forth below, I find that the prerequisites for default judgment under article 15 have been met and accordingly order China Linen to show cause why it should not be found in default.

The Commission initiated this proceeding with an order instituting proceedings (OIP) on March 21, 2017. The proceeding has ended for all Respondents except China Linen. *China Biopharma, Inc.*, Initial Decision Release No. 1127, 2017 WL 1507534 (ALJ Apr. 27, 2017), *finality order*, Securities Exchange Act of 1934 Release No. 81127, 2017 WL 2963311 (July 11, 2017). Service of process on China Linen, however, has proved difficult.

China objects to service by mail under article 10(a) of the Hague Convention. For that reason, on March 30, 2017, the Commission's Office of International Affairs (OIA) sent the OIP and other materials to the Chinese Ministry of Justice, China's designated central authority, for service on China

Linen under article 5 of the Hague Convention. Mot. for Service by Publication (Feb. 28, 2019), Decl. of David S. Frye ¶ 4 & Exs. 4-5. The service package was delivered to the Ministry of Justice on April 6, 2017. Frye Decl. ¶ 5 & Ex. 6. Service has been pending for nearly three years. OIA has asked the Ministry of Justice about the status of service at least six times over that period, only once receiving a response, which indicated that service was "now pending in the court." Mot. for Default Judgment (Aug. 6, 2019), Decl. of Robert F. Schroeder ¶¶ 14-16, 18-20 & Exs. 7-9, 11-13. That was more than one year ago, and subsequent status requests have not resulted in a response.

Citing the length of time the Hague process has been pending, the Division moved for default under article 15 of the Hague Convention in August 2019. Mot. for Default Judgment at 9-10 (Aug. 6, 2019). Paragraph 2 of article 15 permits entry of a default where a document is transmitted by a Convention-prescribed method to a foreign-designated authority for service abroad and that authority fails to provide a "certificate of any kind" within six months of transmission despite "every reasonable effort" to obtain the certificate.

In this order, I determine that: (1) article 15 can be applied in a Commission proceeding, consistent with the Commission's Rules of Practice; (2) the requirements of article 15 have been satisfied; and (3) constitutional due process with respect to notice has been satisfied.

*Application of article 15 in Commission proceedings*

Paragraph 2 of article 15 provides that signatory countries are "free to declare" that the judge may find a party in default under certain conditions. The United States has adopted that provision. Declaration No. 3 of the United States (Aug. 24, 1967), https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=428&disp=resdn; *see CGI Techs. & Sols. Inc. v. Acacio*, No. 17-cv-1943, 2019 WL 978097, at *3 (C.D. Cal. Jan. 4, 2019). But to my knowledge, it has never been applied in a Commission proceeding, and research has disclosed only one federal administrative proceeding in which it has been applied. *See C.T.S. Tech. Co.*, 31 FCC Rcd. 6126, ¶ 4 (2016) (entering default judgment after more than one year passed since notice was transmitted to foreign authority for Hague service and four separate, unsuccessful attempts were made to obtain a certificate of service or to expedite the return of a certificate from the foreign authority).

In 2016, the Commission amended the provision of Rule 141 of its Rules of Practice governing service on a person in a foreign country. Amendments to the Commission's Rules of Practice, 81 Fed. Reg. 50,212, 50,218-19 (July 29, 2016). As amended, the rule specifically characterizes service "authorized by the Hague Convention" as "internationally agreed means of service . . .

reasonably calculated to give notice." 17 C.F.R. § 201.141(a)(2)(iv)(B). Nowhere in the Rules of Practice or in the adopting release are specific articles of the Hague Convention discussed. That is, article 15 is not mentioned on its own as an alternative method of service in Rule 141 or as a basis for a default under Rule 155.

However, the provisions of the Hague Convention are the supreme law of the land and self-executing; they have the same force as any federal statute. *See Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988); *Brown-Thomas v. Hynie*, 367 F. Supp. 3d 452, 463 (D.S.C. 2019). The United States' adoption of article 15 does not limit or condition it in any way, and no statute limits its applicability in this context. Thus, I find no basis to conclude that article 15 cannot be applied in a Commission proceeding. *Cf. Ackermann v. Levine*, 788 F.2d 830, 840 (2d Cir. 1986) ("[T]he Convention 'supplements'—and is manifestly *not* limited by—Rule 4 [of the Federal Rules of Civil Procedure].").

*The requirements of article 15*

Article 15 of the Hague Convention contains three requirements before a party may be held in default:

> a) the document was transmitted by one of the methods provided for in this Convention,
>
> b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,
>
> c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

As the Division transmitted the service documents as required nearly three years ago, the only open question is whether the Division has made "every reasonable effort" to obtain a certificate from the Ministry of Justice. Courts have applied differing standards for what constitutes every reasonable effort. *Compare Univ. Trading & Inv. Co. v. Kiritchenko*, No. 99-cv-3073, 2007 WL 660083, at *4 (N.D. Cal. Feb. 28, 2007) (single telephone call insufficient), *and Brown v. Allen*, No. 8:09-cv-1504, 2010 WL 11507324, at *2 (M.D. Fla. Aug. 17, 2010) (two letters insufficient), *with Celgene Corp. v. Gupta*, No. 2:17-cv-5308, 2018 WL 4027032, at *4 (D.N.J. Aug. 23, 2018) (two letters sufficient), *and China Int'l Marine Containers (Grp.) Ltd. v. Jiangxi Oxygen Plant Co.*,

No. 4:15-cv-1887, 2017 WL 6403886, at *2 (S.D. Tex. Feb. 15, 2017) (two inquiries sufficient); *see also Thomas v. Biocine Sclavo, S.P.A.*, No. 94-cv-1568, 1998 WL 51861, at *1-2 (N.D.N.Y. Feb. 4, 1998) (sufficient that plaintiff "had followed the proper procedures and waited a sufficient length of time").

But research has disclosed no case finding six inquiries to the relevant foreign authority made over more than two years to be insufficient.[1] The Division received a response from the Ministry of Justice on September 11, 2018, indicating that service was "now pending in the court." Mot. for Default Judgment, Ex. 7. The Division continued its inquiries, but to no avail. Given the number of inquiries made to the Ministry of Justice, the length of time service has been pending, and the Division's consultation with OIA and the State Department, I find that it has made every reasonable effort to obtain a certificate.

*The requirements of due process*

Compliance with the Hague Convention does not automatically satisfy constitutional due process with respect to notice. *See Burda Media, Inc. v. Viertel*, 417 F.3d 292, 303 (2d Cir. 2005) ("[I]n addition to the Hague Convention, service of process must also satisfy constitutional due process."). Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Schlunk*, 486 U.S. at 705 (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)). "The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane*, 339 U.S. at 315. But due process does not require actual notice in every circumstance. *Jones v. Flowers*, 547 U.S. 220, 226 (2006).

In this case, attempting service through the Ministry of Justice as required under the Hague Convention was reasonably calculated to apprise China Linen of this proceeding. And, given China's objection to service by mail and other difficulties associated with serving Chinese companies,[2] this may be

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[1] One court found a "handful of e-mails" inquiring on the status of Hague service not to constitute "every reasonable effort," but the court noted that the plaintiff had not attempted to serve the defendant "in any other manner" either. *Lexington-Fayette Urban Cty. Gov't v. Icarom, PLC*, No. 09-cv-20, 2010 WL 11646913, at *2 (E.D. Ky. June 30, 2010).

[2] China also objects to article 8 of the Hague Convention, which permits service abroad through diplomatic or consular agents. Hague Convention art. 8; Table Reflecting Applicability of Articles 8(2), 10(a)(b) and (c), 15(2) and

the only available method of attempting service that complies with Chinese law.[3] China Linen knew that serving process on it would be difficult. It warned potential investors in its most recent annual report that "you may experience difficulties in effecting service of legal process . . . in China based on United States or other foreign laws against us" and similarly that "it may not be possible to effect service of process within the United States or elsewhere outside China upon some of our directors and senior executive officers, including with respect to matters arising under U.S. federal securities laws or applicable state securities laws." China Linen Textile Industry, Ltd., Annual Report for Fiscal Year Ended Dec. 31, 2011 (Form 20-F) at 19 (filed Feb. 21, 2012). By locating itself in China and incorporating in the Cayman Islands (and subsequently failing to maintain its status on the companies registry of Cayman Islands), China Linen limited the options for service on it to those under the Hague Convention. Under these circumstances, attempting service through the Hague Convention process is the method one desirous of informing China Linen would adopt.

A handful of courts have suggested that an inquiry into the steps taken by the foreign central authority is necessary to determine whether an article 15 default complies with due process. *See Celgene Corp.*, 2018 WL 4027032, at *5 ("It would therefore be inappropriate to conclude, without further fact finding, that the Central Authority of India's service efforts, whatever they may have been, satisfied due process requirements."); *Grupo Famsa, S.A. de C.V. v. Eighth Jud. Dist. Ct.*, 371 P.3d 1048, 1051 (Nev. 2016) (finding that an evidentiary hearing on the central authority's service efforts was appropriate

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16(3) of the Hague Service Convention at 3 (Feb. 2019), https://assets.hcch.net/docs/6365f76b-22b3-4bac-82ea-395bf75b2254.pdf.

[3] The Division attempted or considered many other methods of service. It has: inquired, through OIA, about the status of service at least six times with the Chinese Ministry of Justice; consulted with OIA and the U.S. Department of State about alternative service; communicated by email with former counsel for China Linen; researched China Linen's registration status in the Cayman Islands and the status of its registered agent there; proposed publishing a notice in the *International New York Times* or local Chinese newspapers; emailed the OIP and translation to officers and directors of China Linen, including Gao Ren, Helen Yang, and Stephen Monticelli; contacted United States Customs and Border Protection about setting up a "border watch" for Gao Ren; contacted an investigative firm based in China; inquired of a United States-based process server whether it could serve process in China; and mailed a copy of the Division's motion for default via United States Postal Service to Gao Ren at a different company with which he is believed to be associated.

to determine whether service complied with due process); *cf. Diz v. Hellmann Int'l Forwarders, Inc.*, 611 So. 2d 18, *20 (Fla. Dist. Ct. App. 1992) (holding that article 15 "cannot be employed" consistent with due process, "to default a defendant who is *known* not to have been served" (emphasis added)). But, as article 15 requires that no certificate of any kind be returned from the central authority, this sort of inquiry is likely impossible in most situations. *Accord Mullane*, 339 U.S. at 313-14 ("A construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified."). That is the case here, where the Division has not received a certificate and its inquiries with the Chinese Ministry of Justice have been met with silence or a perfunctory response. In any event, service efforts by the Chinese authorities are not dispositive to determining whether the method of service is reasonably calculated to provide notice. *See Dusenbery v. United States*, 534 U.S. 161, 171 (2002) (noting the difficulties associated with having the validity of service "turn on disputed testimony" about actual service).

At this point, it is unclear what further actions the Division could take. Other than registering its securities here, China Linen has very little connection to the United States. In this proceeding, service through the Ministry of Justice appears to be the only possible means of service in China. Due process does not require "heroic efforts." *Id.* at 170. And when there are "no reasonable additional steps [that] could have [been] taken," a party attempting service need not do more. *Jones*, 547 U.S. at 234. For these reasons, default under article 15 of the Hague Convention does not violate the Due Process Clause in this case.

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Under article 15, judgment could now be entered against China Linen. But the Commission considers it to be good practice to order a respondent to show cause before it is found in default. *David Mura*, Exchange Act Release No. 72080, 2014 WL 1744129, at *3 & n.12 (May 2, 2014). Accordingly, I ORDER China Linen Textile Industry, Ltd., to SHOW CAUSE by March 18, 2020, why the registration of its securities should not be revoked by default due to its failure to file an answer or otherwise defend this proceeding. I also direct the Division to cause a copy of this order to be emailed to Gao Ren, Helen Yang, and the Chinese Ministry of Justice.

Jason S. Patil
Administrative Law Judge