IN THE SUPREME COURT OF GUAM

EDWARD KIM,
Plaintiff-Appellee,

v.

MIN SUN CHA,
Defendant-Appellant.

Supreme Court Case No.: CVA18-020
Superior Court Case No.: DM0376-16

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted on March 12, 2019
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Hagåtña, Guam

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BEFORE: KATHERINE A. MARAMAN, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; ROBERT J. TORRES, Associate Justice.[1]

MARAMAN, C.J.:

[1] The Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Service Convention") is an international treaty governing the service of judicial documents in certain foreign countries. In this divorce and custody action, Defendant-Appellant Min Sun Cha ("Cha") appeals the denial of her motion to set aside a default judgment. The Superior Court entered default judgment after failed attempts at official service on Cha through the Republic of Korea's ("South Korea") Central Authority. In moving to set aside the judgment, Cha alleges she was never properly served with the action as provided in the Hague Service Convention. The Superior Court refused to set aside the judgment because Cha received actual notice of the action when the complaint was mailed to her in South Korea. Because South Korea has specifically objected to service by mail, we conclude that Plaintiff-Appellee Edward Kim failed to establish that proper service was made on Cha. He also fails to meet any applicable exception to service under the Hague Service Convention. For the following reasons, we reverse the Superior Court's order denying relief under Guam Rule of Civil Procedure 60(b)(4) and remand with directions to vacate the default judgment and litigate the case on the merits.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] In 2012, Cha, a South Korean citizen, married Kim, a former South Korean citizen and citizen of the United States. *See* Record on Appeal ("RA"), tab 50 at 1 (Dec. & Order, June 28, 2018); DM0376-16 (Req. for Registration Pursuant to 7 GCA § 39305, Mar. 6, 2018) (containing

[1] The signatures in this opinion reflect the titles of the justices when this matter was argued and submitted.

Seoul Family Court Ruling, Jan. 23, 2017).[2] In 2014, the couple had a child. In April 2016, Cha left Guam for South Korea with the couple's child. In July 2016, Kim filed for divorce in Guam. In September 2016, allegedly unaware of the divorce petition pending in Guam, Cha filed for divorce in South Korea. While the divorce actions were pending, Kim filed a request for the return of the child in the Seoul Family Court in South Korea. Both Kim and Cha participated in these proceedings, where the Seoul Family Court determined that the child should remain in South Korea under the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Abduction Convention"). On January 20, 2017, the Seoul Family Court determined (1) that the child's habitual residence could be established in both Guam and South Korea and (2) that Cha did not illegally abduct or detain the child under the Hague Abduction Convention because, in part, Kim consented to the child's prior and current stays in South Korea. Kim's appeals of this decision were denied.

[3] Kim made several attempts to serve the Guam divorce action upon Cha. In July 2016, upon Kim's motion, the Superior Court ordered that service be made by publication and by mail to Cha's last known address in South Korea. The envelope mailed to Cha did not include a name for the addressee and was discovered by Cha only because the guard at her apartment building told her about an envelope from Guam in the return-to-sender box. Cha consulted a South Korean attorney and an attorney formerly licensed in Guam and was advised by both attorneys that she was not properly served and did not need to respond to the suit.

[2] Cha filed a Request for Registration of the Seoul Family Court judgments. For some reason not apparent from the record, this document was marked only as "received" and not "filed." The Superior Court, however, should have considered this request, but did not, either in denying the motion to set aside the default judgment or during the limited remand. As the documents are in the record and no party challenges them, we may consider them and need not address issues on judicial notice. Nonetheless, while we refer to the documents, nothing in this opinion should be read to suggest we find them conclusive and binding. While the Seoul Family Court judgments may be binding on these parties, that issue is not presently before us. We leave the issues of authenticity, registration, and legal effect to be addressed by the Superior Court on remand. These are merits issues, and this appeal involves only the entry of a default judgment.

[4] On September 14, 2016, Kim filed a Request to Enter Default and Entry of Default. In November 2016, Kim made his first request for service through the South Korean Central Authority.[3] He received a certificate of non-service dated December 21, 2016. After the Seoul Family Court entered its judgment, Kim attempted a second request for service of the Guam divorce action through the South Korean Central Authority in March 2017. He received a certificate of non-service dated May 2, 2017. Also in March 2017, Kim, through his attorney, mailed documents related to an order to show cause for custody *pendente lite* to Cha in South Korea. The Superior Court re-issued the order to show cause for custody *pendente lite* on May 2, 2017, which Kim again tried to serve by mail.

[5] After Cha failed to appear for the hearing on the order to show cause, the Superior Court entered an Order After Hearing, an Interlocutory Default Judgment of Divorce, and the Final Decree of Divorce, all filed on July 25, 2017. In addition to declaring the parties divorced and dividing the marital property, the Superior Court awarded the parties joint legal custody of the child, while awarding Kim primary physical custody with reasonable visitation to Cha. The Superior Court ordered the immediate return of the child to Guam.

[6] Kim's final appeal of the Seoul Family Court's decision was denied on September 12, 2017. On March 6, 2018, Cha, through counsel, submitted a request for registration of the Seoul Family Court judgments. Counsel's letter was received by the Superior Court but never entered on the docket. On March 28, 2018, Cha moved to set aside or vacate the default judgment under Guam Rules of Civil Procedure ("GRCP") 60(b)(1), 60(b)(4), and 55(c).

[3] Kim filed his correspondence with South Korea's Central Authority by order of this court. *See* Order (Mar. 15, 2019). Cha filed a memorandum in opposition to this court taking judicial notice. Opp'n Taking Jud. Notice (Apr. 3, 2019). Judicial notice is now moot because we issued a limited remand, *see* Limited Remand Order (Apr. 6, 2019), where the documents and issues were considered by the Superior Court. Therefore, the correspondence is now a part of the record.

[7] On June 28, 2018, the Superior Court denied Cha's motion to vacate the default judgment. The court determined that Cha's failure to respond to the lawsuit after acquiring actual notice of the summons and complaint mailed to South Korea constituted culpable conduct warranting denial of her motion to vacate. The Superior Court also found that Cha's reliance on advice from attorneys not licensed in Guam was not done in good faith because "she was, or should have been, aware that she was receiving advice about Guam law from lawyers who were not licensed to practice American law." RA, tab 50 at 6 (Dec. & Order, June 28, 2018). Cha timely appealed.

[8] While the appeal was pending, this court issued a limited remand of the case to the Superior Court to determine whether the divorce action was properly served and a default judgment entered consistent with the Hague Service Convention. The Superior Court found that a certificate of non-service from the Central Authority is not a "certificate of any kind" under the Hague Service Convention.

II. JURISDICTION

[9] This court has jurisdiction over an appeal from an order made after a final judgment. 7 GCA § 25102(b) (2005); 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 116-214 (2020)); 7 GCA §§ 3107(b), 3108(a) (2005).

III. STANDARD OF REVIEW

[10] Treaty interpretation is a question of law, which we review *de novo*. *See, e.g.*, *Swarna v. Al-Awadi*, 622 F.3d 123, 132 (2d Cir. 2010) ("We review *de novo* a district court's interpretation of a treaty . . . ."); *United States v. Alvarez-Machain*, 504 U.S. 655, 663-68 (1992) (applying *de novo* review to treaty interpretation); *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1408 (9th Cir. 1995).

[11] This case also involves a motion to set aside a judgment. The standard of review of a denial of a motion to set aside a default judgment under GRCP 60(b) is determined by the specific subdivision asserted. We review *de novo* a denial of a motion to set aside a default judgment brought under GRCP 60(b)(4). *Mariano v. Surla*, 2010 Guam 2 ¶ 8. But when lack of service of process is at issue, we review the Superior Court's determinations of the facts for clear error. *Id.* For motions brought under other subsections of GRCP 60(b), we review the Superior Court's decision for abuse of discretion. *Id.* ¶ 7.

IV. ANALYSIS

[12] Kim and Cha disagree over the validity of the default judgment entered against Cha in this divorce and custody action. We therefore begin by reciting the general principle that a default judgment is "a drastic measure, only appropriate in extreme circumstances because, whenever possible, cases should be decided on their merits." *Midsea Indus., Inc. v. HK Eng'g, Ltd.*, 1998 Guam 14 ¶ 6. However, the default judgment does not merely require us to weigh questions of fairness and substantial justice. When the default judgment was entered against Cha—a South Korean citizen—she was in South Korea and never received formal legal process. Questions of international service of process and how a civil action is started against a foreign defendant compose the primary dispute here. Questions of due process and international comity are also central to our discussion.

[13] In discussing this case, we will explain why Cha's motion to set aside the default judgment was timely. Second, we will discuss how Kim failed to comply with the Hague Service Convention. Part and parcel to this discussion, we will also analyze the reasons proffered by Kim which, in his view, either satisfy his service obligations or excuse compliance with the Hague Service Convention. We will address Kim's arguments on why the default judgment should not

be set aside. Ultimately, however, the law compels us to reverse the Superior Court's order denying the motion to set aside the default judgment for improper service of process. In this opinion, we will explain why the default judgment is void, and we will remand the action to the Superior Court with directions to vacate the default judgment and address the merits of the dispute.

A. Cha Timely Filed the Motion to Set Aside the Default Judgment

[14] Under GRCP 60(b), a party may seek relief from a judgment or order, including seeking to set aside a default judgment, for six reasons.[4] *See* Guam R. Civ. P. 60(b); *see also* Guam R. Civ. P. 55(c) ("For good cause shown, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)."). In each case, the moving party must seek relief from the judgment within a "reasonable time." Guam R. Civ. P. 60(b). Under the first three subsections of GRCP 60(b), the "reasonable time" cannot exceed "one year after the judgment, order, or proceeding was entered or taken." *Id.* There is no specific time limit for seeking relief under the last three subsections of GRCP 60(b). *See id.*

[15] About eight months after entry of the final judgment, Cha moved to set aside the entry of default under GRCP 55(c) and the default judgment under GRCP 60(b)(1) and (4). The motion was filed within the one-year outer limit for motions under GRCP 60(b)(1). Kim argues, however,

[4] Rule 60(b) lists the following reasons a party may be relieved of a final judgment, order, or proceeding:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
>
> (6) any other reason justifying relief from the operation of the judgment.

Guam R. Civ. P. 60(b).

without supplying any reasoning or citing any case law, that the eight-month delay was still not reasonable and justifies denying consideration of the motion. As Cha filed her motion within the one-year deadline and as Kim fails to support his assertion that eight months is not a "reasonable time," we conclude Cha's motion was timely under GRCP 60(b). *See Lamb v. Hoffman*, 2008 Guam 2 ¶ 35 ("It is not sufficient for a party 'simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims . . . and then search for authority either to sustain or reject his position.'" (quoting *Wilson v. Taylor*, 577 N.W.2d 100, 105 (Mich. 1998))).

[16] Cha's challenge to the judgment as void under GRCP 60(b)(4) is not subject to any time limit. And a judgment entered without proper service of process is generally void. *See infra* Part IV(C)(3). As we ultimately conclude below that the judgment is void, Cha's challenge would not be subject to a specific limitation. We have also independently reviewed the record and cannot conclude that Cha acted unreasonably in moving to set aside the judgment. Kim participated in custody proceedings in South Korea where the child was ordered to remain in South Korea. Simultaneously, Kim failed to properly serve Cha with the Guam action, in which the court reached a conflicting result, through default, by ordering the couple's child returned to Guam. *See infra* Part IV(C). Kim continued to appeal and challenge the South Korea judgment even after the default judgment was entered in Guam. Cha was reasonable in relying on the joint participation of both parties in South Korea to not pursue legal remedies in Guam. Further, there is no evidence in the record to suggest that Cha received actual notice of the Guam judgment. On these facts, we find that the eight-month period between entry of the Guam judgment and seeking to set it aside is reasonable.[5]

[5] Cha's "delay" in seeking relief would be further reduced if we were to begin counting from the conclusion of the South Korea action.

[17] Finally, if the challenge to the judgment is under GRCP 60(b)(4), some courts have held that a default judgment that is void can be challenged at any time. *See Turner v. Turner*, 473 S.W.3d 257, 277-79 (Tenn. 2015); *Stidham v. Whelchel*, 698 N.E.2d 1152, 1156 (Ind. 1998) ("[A] judgment that is void for lack of personal jurisdiction may be collaterally attacked at any time and . . . the 'reasonable time' limitation under [Indiana Trial Procedure] Rule 60(B)(6) means no time limit."). As we ultimately find the judgment void, Cha may not even be subject to the "reasonable time" limitation.

B. The Hague Service Convention Governs Service in this Case

[18] Article VI, Clause 2 of the United States Constitution reads:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. Both the United States and South Korea have ratified the Hague Service Convention. *See* Hague Service Convention, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163, 182 (United States); Accession (with Declarations) to Hague Service Convention, Aug. 1, 2000, 2121 U.N.T.S. 294, 296-97 (Republic of Korea). At the time of ratification, the United States declared that the Hague Service Convention applies in Guam. Hague Service Convention, Designations and Declarations Made on the Part of the United States in Connection with the Deposit of the United States Ratification [hereinafter U.S. Designations and Declarations], decl. 5, 20 U.S.T. 361.

[19] The Hague Service Convention applies and compliance with its terms is mandatory if judicial documents must be transmitted abroad to effect service. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988). When the Hague Service Convention

applies, it preempts all inconsistent methods of service prescribed by state law. *Id.* Here, Kim—a Guam resident—initiated a divorce and custody suit against Cha, who was in South Korea when the suit was started. As Kim was trying to serve Guam legal documents in a foreign country, the Hague Service Convention applies.

[20] Cha did not originally raise the Hague Service Convention by name when moving to set aside her judgment. However, Cha did raise GRCP 4, which embraces the principles of the Hague Service Convention. *See infra* Part IV(C)(1). During the proceedings on limited remand, Kim advanced the argument that the Hague Service Convention does not apply because Article 1 of the Convention states, "This Convention shall not apply where the address of the person to be served with the document is not known." Hague Service Convention art. 1, 20 U.S.T. 361; RA, tab 82 at 5 (Pl.'s Br. Re: Hague Service, May 20, 2019). The record reflects that Kim knew Cha's address and sent mail directly to her there. RA, tab 38 (Decl. Def. Supp. Mot. Set Aside Entry Default J., Mar. 28, 2018), Ex. 2 (Envelope postmarked Aug. 8, 2016); *Id.*, Ex. 3 (Envelope postmarked Mar. 10, 2017); *Id.*, Ex. 4 (Envelope postmarked May 4, 2017). And Kim has abandoned this argument on appeal. Appellee's Suppl. Br. at 4 (Aug. 1, 2019) ("There is no question as to the place of service being the [Defendant's] proper address . . . ."). We have held in prior cases that a party may abandon an argument on appeal by explicitly conceding an issue, *see, e.g.*, *Sinlao v. Sinlao*, 2005 Guam 24 ¶ 21, or by failing to include any argument or discussion in his or her brief, *see Guam Greyhound, Inc. v. Brizill*, 2008 Guam 13 ¶ 3 n.2. Because Kim fails to raise the argument on appeal and explicitly concedes that he knew Cha's address, there is no alternative basis to find that the Hague Service Convention does not apply. We find that the Hague Service Convention issue was raised below, even though not artfully, and Kim fails to credibly challenge its applicability on appeal.

[21] Finally, even if Kim were correct in asserting that Cha failed to raise the Hague Service Convention issue below, we may review it for the first time on appeal when necessary to address significant questions of general importance or pure questions of law. *See Tanaguchi-Ruth + Assocs. v. MDI Guam Corp.*, 2005 Guam 7 ¶ 82. Here, the international treaty obligations of the United States under both the Hague Service Convention and the Hague Abduction Convention are legal questions of significant importance and great public concern warranting our review, *see, e.g.*, *Abalos v. Cyfred Ltd.*, 2006 Guam 7 ¶ 18 ("Even assuming the argument was raised for the first time on appeal, we still have the discretion to address the issue if it is purely one of law."); *Wright v. Hanna Steel Corp.*, 270 F.3d 1336, 1342-43 (11th Cir. 2001) (outlining five circumstances for addressing issues for first time on appeal including when "issue presents significant questions of general impact or of great public concern" (quoting *Narey v. Dean*, 32 F.3d 1521, 1526-27 (11th Cir. 1994))).

C. The Default Judgment Against Cha Was Not Permitted Under the Hague Service Convention

[22] Having established that the Hague Service Convention governs this case, we must turn to whether the default judgment was properly entered under the Convention. Kim argues that we should affirm the Superior Court's denial of the motion to set aside the default judgment for three reasons. First, he argues that Cha was served with the action when she received a copy via mail while in South Korea. Next, he argues that his attempts at service through South Korea's Central Authority, while unsuccessful, would permit a default judgment under the exception to service in Article 15 of the Hague Service Convention. In Kim's view, the certificate of non-service he received from the Central Authority does not constitute a "certificate of any kind" under Article 15. Finally, Kim appeals to equity and argues that, even if service was insufficient, because Cha

received actual notice, she exhibited culpable conduct in refusing to enter the action or not seeking to set aside the default judgment earlier. We ultimately find Kim's arguments unpersuasive.

1. Guam legal documents cannot be served by mail in South Korea

[23] The U.S. Supreme Court has noted that, if documents must be transmitted abroad to effect service, using procedures outlined in the Convention is mandatory. *Volkswagenwerk*, 486 U.S. at 699. Guam has integrated the principles of the Hague Service Convention into GRCP 4(f), which provides for service of process on an individual in a foreign country. Under GRCP 4(f), service may be effected "by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague [Service] Convention" or by "means not prohibited by international agreement as may be directed by the court." Guam R. Civ. P. 4(f)(1), (3). "[I]n cases governed by the Hague Service Convention, service by mail is permissible if two conditions are met: first, the receiving state has not objected to service by mail; and second, service by mail is authorized under otherwise-applicable law." *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 1513 (2017). Article 10(a) of the Hague Service Convention permits people to "send judicial documents, by postal channels, directly to persons abroad." Hague Service Convention art. 10(a), 20 U.S.T. 361. However, under Article 21 of the Convention, a contracting State may inform the Ministry of Foreign Affairs of the Netherlands of its "opposition to the use of methods of transmission pursuant to articles 8 and 10." Hague Service Convention art. 21, 20 U.S.T. 361. In a declaration and reservation to the Convention, South Korea has objected to service by mail. Accession (with Declarations) to Hague Service Convention, 2121 U.N.T.S. 294, 296 (Republic of Korea).

[24] Other courts have noted that because South Korea has objected to service by mail, such attempts at service are insufficient. Legal documents must be served in some other manner. Citing

U.S. Supreme Court precedent, one federal district court considering a similar factual posture recently stated: "South Korea's express opposition to Article 10(a) makes the Plaintiff's attempt to serve Defendant Kim by mail insufficient." *Boone-Coleman v. SCA, Inc.*, Civ. Act. No.: 3:18-cv-776-ECM, 2019 WL 5295567, at *3 (M.D. Ala. Oct. 18, 2019) (citing *Water Splash*, 137 S. Ct. at 1513). Another federal district court observed that "to properly serve an individual in South Korea per the Hague Convention, a plaintiff must serve a translated version of the Complaint through South Korea's designated Central Authority, as required by the Hague Convention." *Baek v. Radish Media, Inc.*, CV 18-7475-RSWL-RAO, 2018 WL 6025843, at *2 (C.D. Cal. Nov. 16, 2018). In both *Baek* and *Boone-Coleman*, the courts found insufficient service of process. *Baek*, 2018 WL 6025843, at *3; *Boone-Coleman*, 2019 WL 5295567, at *3.

[25] The same conclusion has been reached when discussing other nations that have objected to service by mail under Article 10. In a case finding that the Hague Service Convention applied, the Supreme Court of Iowa remanded an action to determine whether "service was properly commenced through the [German] Central Authority" because the only evidence in the record showed that service was attempted directly on a respondent in Germany through mail and personal service. *In re Estate of Graf Droste Zu Vischering*, 782 N.W.2d 141, 147 (Iowa 2010).[6] Because Germany objected to service by mail, service needed to occur through the Central Authority. *See id.* In *Graf Droste Zu Vischering*, the Iowa court remanded the case to determine whether the attempt at personal service was initiated through the Central Authority. *Id.*

[6] In Germany, service by mail may be authorized by the Central Authority. But when it is authorized, "the competent Central Authority will hand over the document to the postal authorities for service." *See* Hague Service Convention art. 5 n.10 ¶ 4 (Germany's declaration to Article 5). A foreign plaintiff cannot serve by mail directly in Germany but must proceed through the Central Authority and the terms of the Hague Service Convention. *See, e.g.*, *PATS Aircraft, LLC v. Vedder Munich GmbH*, 197 F. Supp. 3d 663, 673 (D. Del. 2016).

[26] In a child custody case, the Court of Appeals of Texas reached a similar conclusion regarding documents sent to a father living in Mexico, which has also objected to service of legal documents by postal channels. *In re T.M.E.*, 565 S.W.3d 383, 392 (Tex. App. 2018). In *T.M.E.*, the court found that "under the Hague Service Convention, a Mexican national . . . can be served in Mexico with a foreign proceeding only through the Central Authority of Mexico." *Id.* The Supreme Court of Arizona has also held, in relation to service of U.S. legal documents in Mexico, that "service through Mexico's central authority, its Ministry of Foreign Affairs, is the exclusive means by which service may be accomplished in Mexico." *Cardona v. Kreamer*, 235 P.3d 1026, 1029 (Ariz. 2010) (en banc). In a divorce action, the Court of Appeals of Utah has also observed that the only defined way to serve foreign legal papers in Mexico is through Mexico's Central Authority. *Saysavanh v. Saysavanh*, 2006 UT App 385, ¶¶ 18-19, 145 P.3d 1166. Similarly, in a divorce action involving a Greek national living in Greece, which has also objected to service by mail under Article 10, the Delaware Supreme Court found that a wife's attempt to serve her husband by mail and publication in Greece was invalid. *See Daskin v. Knowles*, 193 A.3d 717, 724-25 (Del. 2018).

[27] Based on the text of the Hague Service Convention, South Korea's declaration, and prior precedent, we conclude that service by mail is unavailable when attempting to effect service of Guam legal documents upon individuals in South Korea. Service must be accomplished through the Central Authority. Thus, Kim's mailing of judicial documents to Cha in South Korea could not effect service of process. We recognize that Kim acknowledges some defects related to service by mail, but he nonetheless urges us not to set aside the default judgment on reasons related to his attempts to serve Cha by mail and his unsuccessful attempts at service through South Korea's

Central Authority. Therefore, unless Kim can show service through South Korea's Central Authority or an applicable exception, the default judgment against Cha cannot stand.

2. Kim has not completed service through South Korea's Central Authority, and the Article 15 exception to service does not apply when a party receives a certificate of non-service from a Central Authority

[28] We turn our attention first to Kim's attempt at service under the Hague Service Convention. On this point, Kim makes two related arguments. First, he asserts that his delivery of the documents to South Korea's Central Authority and its six attempts at service leave "no question that the documents were transmitted by one of the methods provided for in the convention." Appellee's Suppl. Br. at 5. Second, he asserts that the "certificate of non-service" he received from South Korea's Central Authority is not a "certificate of any kind," and a default judgment may be entered consistent with Article 15 of the Hague Service Convention.

[29] To Kim's first argument, delivery of documents to a country's Central Authority is not the equivalent of service of those documents. The Eighth Circuit has stated: "The Central Authority is the designated authority through which documents may be served in countries belonging to the Hague Convention. It is not, however, a designated agent for service of process." *Paracelsus Healthcare Corp. v. Philips Med. Sys., Nederland, B.V.*, 384 F.3d 492, 494 n.2 (8th Cir. 2004). Further, Article 2 of the Hague Service Convention states: "Each Contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other Contracting States . . . ." Hague Service Convention art. 2, 20 U.S.T. 361. Based on these authorities, delivery of documents to a Central Authority acts as only a "request for service." It is not actual service because the Central Authority is not an agent for each of a country's residents. Kim's first argument fails because proof that a request was made to a Central Authority is not a substitute for proof of service upon the actual party to a proceeding.

[30] Having disposed of the first part of Kim's argument, we now address Kim's argument that a certificate of non-service does not constitute a "certificate of any kind," therefore permitting a default judgment under Article 15. Based on the treaty and prior cases, the conditions of Article 15 were not met. Article 15 of the Hague Service Convention states:

> Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that –
>
> a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or
>
> b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention,
>
> and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.
>
> Each Contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this Article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled –
>
> 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.
>
> Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.

Hague Service Convention art. 15, 20 U.S.T. 361. The United States has declared that a "judge may, notwithstanding the provisions of the first paragraph of Article 15, give judgment even if no certificate of service or delivery has been received, if all the conditions specified in subdivisions

(a), (b) and (c) of the second paragraph of Article 15 are fulfilled." Hague Service Convention, U.S. Designations and Declarations, decl. 3, 20 U.S.T. 361.

[31] Our analysis above of service by mail is important because it shows that the default judgment was not entered under the first paragraph of Article 15. Kim has not shown that the divorce and custody petition and summons were served on Cha either (1) by a method prescribed by the internal law of South Korea or (2) by actual delivery to Cha or to her residence through another method provided for by the Convention. Kim does not make a showing under the first provision. And, as we have held that service by mail of foreign legal papers cannot be made in South Korea, *see supra* Part IV(C)(1), service cannot be said to have been made "by another method provided for by this Convention," Hague Service Convention art. 15, 20 U.S.T. 361.

[32] Therefore, the default judgment can stand only if the second paragraph of Article 15 has been satisfied. There is no genuine dispute between the parties that Kim's transmission of documents to South Korea's Central Authority satisfies the condition in subsection (a) of Article 15, paragraph 2. Further, no party is challenging the adequacy of the period under subsection (b) of paragraph 2, and the record amply supports that at least six months passed. The dispute between Kim and Cha revolves around subsection (c) of paragraph 2 and the legal impact of the two "certificates of non-service" Kim received from South Korea's Central Authority. Kim argues, and the Superior Court agreed, that the certificate of non-service from the South Korea Central Authority does not constitute a "certificate of any kind" under subsection (c) of paragraph 2.

[33] On limited remand, the Superior Court stated in its Decision and Order regarding the legal effect of the certificates of non-service:

> [T]he Court finds that the two certificates of non-service provided by the Seoul Family Court suffice to meet the condition that "no certificate of any kind has been received." Neither Article 15 nor Article 16 explicitly provide[s] for default judgment in the case where a Central Authority returns a certificate of non-service,

> but the Court finds that it would be unreasonable to find that the Convention allows for default judgment in instances where a Central Authority ignores a request, but not in instances where a Central Authority is unable to effectuate service.

RA, tab 83 (Dec. & Order, June 14, 2019). While we are sympathetic to its desire to bring some finality to this case, the Superior Court's reasoning is erroneous both on the legal effect of the certificate of non-service and the rationale behind the second paragraph of Article 15. First, Article 6 of the Convention discusses the required contents of a "certificate." The certificate can either (1) "state that the document has been served and shall include the method, the place and the date of service and the person to whom the document was delivered," or (2) "[i]f the document has not been served, the certificate shall set out the reasons which have prevented service." Hague Service Convention art. 6, 20 U.S.T. 361. The Hague Service Convention appears to contemplate that a "certificate" can be a certificate of service or a certificate of non-service.

[34] Further, the Superior Court's approach conflicts with or narrows what other courts have considered a "certificate of any kind." In *Burda Media, Inc. v. Viertel*, 417 F.3d 292, 302 (2d Cir. 2005), the Second Circuit concluded that a police report completed by French authorities stating that service was completed was a "certificate of any kind." In *Burda Media*, the police report ultimately demonstrated that service was made on the defendant in France, meaning that the default judgment would not be set aside. *Id.* Because a certificate was received, the default-judgment provisions of Article 15—which apply absent service—were not applicable when service was accomplished. *Id.* According to the Second Circuit, the police report instead of a "formal Certificate," while "not a model" of best practices, "certainly meets this broader standard of 'any kind' of Certificate." *Id.* at 296, 302. Further, in *Diz v. Hellman Int'l Forwarders, Inc.*, 611 So. 2d 18, 19-20 (Fla. Dist. Ct. App. 1992), a Florida appellate court vacated a default judgment, relying on an affidavit of a process server regarding longer wait times for service in Spain and on

a certificate of non-service later procured by the defendant. The *Diz* court suggested that the defendant's certificate of non-service attached to his failed motion to vacate the default constituted a "certificate of any kind." *See id.* at 20. Finally, in *Jian Zhang v. Baidu.com Inc.*, 932 F. Supp. 2d 561, 564, 567 (S.D.N.Y. 2013), a federal district court found that a certificate from the Chinese Ministry objecting to service for "sovereignty or security" reasons under Article 13 of the Hague Service Convention was a "certificate of any kind" under Article 15. Based on the language of Article 6, we find the application in *Burda Media*, *Diz*, and *Jian Zhang* to be persuasive. A "certificate of any kind" is a broad standard that includes more than just certificates of service. Documents evidencing service, attempts at service, or valid objections to service meet the standard. Here, the certificates of non-service, whether issued directly from South Korea's Central Authority or instead from the Seoul Family Court (as the Superior Court found), constitute "certificates of any kind" under Article 15. As the second paragraph of Article 15 requires that "no certificate of any kind" to have been received before proceeding to entry of a default judgment, the Article 15 conditions for a default judgment were not met here.

[35] The Superior Court also addressed policy concerns regarding the certificates of non-service. In its view, it is not reasonable to treat situations in which the Central Authority could not serve a defendant differently than situations where the Central Authority refused to serve a defendant. We disagree with this proposition and find the language from *Diz* persuasive. Speaking to the purpose of the second paragraph of Article 15, the *Diz* court stated:

> The obvious purpose of the second paragraph is to permit the local court to proceed against a foreigner upon whom service has or may be presumed to have been accomplished, even though the domiciliary country has, by recalcitrance or neglect, failed to provide the documentation otherwise required by the first paragraph of the Article.

611 So. 2d at 20. In the Florida court's view, "Article 15 simply cannot be employed, as it was below, to default a defendant who is known not to have been served." *Id.* We see it similarly. The second paragraph of Article 15 appears to be a pseudo-enforcement mechanism that encourages a country to meet its minimum obligations under the Hague Service Convention—that is, to serve or attempt to serve its residents. We read the second paragraph as applying only if a Contracting State has failed to meet its minimum obligations to attempt service and to communicate that attempt to the person seeking to serve documents. The Superior Court's policy concerns supply no reason to deviate from the plain definition of "certificate of any kind."

3. Kim's equitable arguments neither support violating the United States' treaty obligations nor provide a basis for entering a default judgment against Cha

[36] Kim also raises equitable arguments under GRCP 60, which he contends would provide a basis for not vacating the default judgment. He essentially argues that because Cha acted in bad faith, it justified the Superior Court's denial of her motion to set aside the default judgment. Kim argues that because Cha received actual notice, any technical defect in service was cured. On this point, he argues that when Cha consulted the South Korean attorney and the former Guam attorney, who advised her she was not properly served, she acted unreasonably because this was a matter of Guam law on which they were not qualified to opine. Kim's equitable appeals are unavailing. While actual notice can sometimes cure technical defects in service, the defect here was not technical. The defect would require us to ignore the United States' treaty obligations. Cha's consultation with a South Korean attorney is reasonable given that treaties are matters of international law.

[37] While this court has not addressed the question, *see Pineda v. Pineda*, 2005 Guam 10 ¶ 18 n.7, we recognize that actual knowledge of a lawsuit has been held sometimes to cure technical defects in service, *see Ruffin v. Lion Corp.*, 940 N.E.2d 909, 912 (N.Y. 2010); *Phillips v. Johnson*,

2003 ME 127, ¶ 24, 834 A.2d 938, 945. This court has adopted the doctrine of "substantial compliance" related to certain defects in service of claims against the government. *See Kittel v. Guam Mem'l Hosp. Auth.*, 2020 Guam 3 ¶ 15; *Quan Xing He v. Gov't of Guam*, 2009 Guam 20 ¶¶ 33-36. However, we view Kim's defect to be fundamental, not technical. Fundamental defects in service include failing to name the correct party, *see, e.g., Johnson v. Cintas Corp. No. 2*, 2012 WI 31, ¶ 50, 339 Wis. 2d 493, 811 N.W.2d 756, or making no attempt at proper service even where there is actual notice, *C.H.A. Venture v. G.C. Wallace Consulting Eng'rs, Inc.*, 794 P.2d 707, 709 (Nev. 1990) (per curiam). When a party does not receive legal process, actual notice is not a cure. *See Lifestar Response of Md., Inc. v. Vegosen*, 594 S.E.2d 589, 591 (Va. 2004); *see also Estate of Skepple v. Bank of Nova Scotia*, 69 V.I. 700, 715 n.5 (2018) ("[A]ctual notice is not a substitute for legal notice, but legal notice may be valid, though potentially not providing actual notice."). Here, Kim argues that because Cha received actual notice of suit based on the documents sent in the mail, his improper service should be excused. This argument is not credible as it asks us to ignore that Cha's actual notice was accomplished through service by mail, when South Korea has objected to service by mail. Kim's defect is fundamental because he has provided no process to Cha through lawful means. Cha's actual notice, here, cannot be a substitute for legal notice.

[38] This does not end the inquiry, however, because this case arises on a motion to set aside a default judgment, not merely a motion to dismiss for insufficient service of process. The Superior Court found that Cha's actual notice constituted culpable conduct under *Midsea Industrial, Inc. v. HK Engineering, Ltd.*, 1998 Guam 14. In the Superior Court's decision and Kim's additional argument, Cha's actual notice—while maybe not sufficient legal process—does not justify setting aside the default judgment because Cha should have acted sooner. This point fails because *Midsea*

does not apply here, and the record suggests that both parties potentially engaged in procedural gamesmanship.

[39] In *Midsea*, we analyzed several factors in determining whether to deny a motion to set aside a default judgment, including culpable conduct. However, motions under GRCP 60(b)(4), unlike other subsections, are not subject to a discretionary weighing of factors. Culpability is not a relevant inquiry to whether a judgment is void, and the *Midsea* factors do not apply to a motion under GRCP 60(b)(4). *See SEC v. Internet Sols. for Bus. Inc.*, 509 F.3d 1161, 1165 (9th Cir. 2007); *see also Mariano*, 2010 Guam 2 ¶ 13. The only relevant inquiry is into the validity of the judgment itself.

[40] But even if culpability were relevant, it does not appear that Kim comes with clean hands either. When Kim sought the default judgment against Cha, he omitted presenting the South Korean judgments which ordered the couple's child to remain in South Korea. The documents suggest Kim appeared and participated in the South Korean proceedings. While we do not reach the question of the authenticity and legal effect of the South Korean judgments, Kim's apparent omission led to the Superior Court's conflicting order requiring the child to be returned to Guam. At a minimum, these questions demand further inquiry on the merits. Adopting Kim's position under the Hague Service Convention and overlooking his probable omission would require us to ignore a judgment from a South Korean court and our obligations under both the Hague Service Convention and the Hague Abduction Convention. This court will not recognize—let alone sanction by default—such interjurisdictional mischief, especially when doing so would strain our treaty obligations and potentially undermine the comity we seek for our judgments when presented in foreign courts.

[41] Unlike the Superior Court, we find it of no significance that Cha received some of her legal advice regarding service from a South Korean attorney. Since Kim was trying to serve documents in South Korea and the Hague Service Convention applies, the issue is not purely one of Guam law. Before a judgment, the Hague Service Convention requires service "by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory." Hague Service Convention art. 15, 20 U.S.T. 361. This means that service is also a matter of South Korea's internal law and a matter of international law. Cha was reasonable in consulting a South Korean attorney on matters of South Korean law.

[42] Kim was not left without other potential options. Under GRCP 4(f)(3), Kim could have appealed to the court to discern whether there were other means of service "not prohibited by international agreement." Guam R. Civ. P. 4(f)(3). Several courts have required or ordered various forms of other service against defendants in foreign countries where attempts at service through the Central Authority failed. *See Dreyer v. Exel Indus., Inc.*, No. 05-10285-BC, 2007 WL 1584205, at *3 (E.D. Mich. May 31, 2007) ("Plaintiff has not demonstrated that he has made 'every reasonable effort' to obtain service through means also legally available in France."); *In re South African Apartheid Litig.*, 643 F. Supp. 2d 423, 437-38 (S.D.N.Y. 2009) (ordering service on defendant's counsel after other attempts at service failed); *see also Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1016-17 (9th Cir. 2002) (finding no abuse of discretion in district court's ordering service by email). *But see Luxottica Grp. S.p.A. v. P'ships & Unincorporated Ass'ns Identified on Schedule "A"*, 391 F. Supp. 3d 816, 824 (N.D. Ill. 2019) ("Plaintiffs Have Not Shown That Service By Email In China Is Consistent With The Hague Service Convention."), *recons. denied in part*, No. 18 CV 2188, 2019 WL 2357011 (N.D. Ill. June 4, 2019); *Habas Sinai Ve Tibbi Gazlar Istihsal A.S. v. Int'l Tech. & Knowledge Co.*, Civil Action No. 19-608, 2019 WL 7049504,

at *3 (W.D. Pa. Dec. 23, 2019) (finding that Turkey's objection to service by mail would also prohibit service by email). While courts do not agree on this issue, Kim did not even apply to the Superior Court to try an alternative option before seeking a default judgment. However, we need not reach the question of what other forms of service may be permissible on individuals in South Korea, because here no other form of service was attempted.

[43] This analysis has been necessary to show that Kim's equitable arguments provide no support for upholding the default judgment. Having found that the entry of default judgment contradicted Article 15 and there is no other reason to affirm the order refusing to set it aside, we must now consider the remedy and what happens on remand.

D. The Default Judgment Against Cha is Void, and the Case Must be Remanded for the Superior Court to Consider the Merits of the Dispute

[44] "A default judgment entered without proper service is void since the trial court lacks personal jurisdiction if service is defective." *Mariano*, 2010 Guam 2 ¶ 13; *see also Internet Sols.*, 509 F.3d at 1165. As we observed above, a party may attack a void judgment at any time. *See supra* Part IV(A). "A void judgment is one that, from its inception, is a complete nullity and without legal effect . . . ." *Stidham*, 698 N.E.2d at 1154 (quoting 46 Am. Jur. 2d *Judgments* § 31 (1994)). As we have determined that Cha never received proper service, the default judgment entered against her is void. On remand, the Superior Court must set it aside.

[45] After the default judgment is set aside, the Superior Court must address several questions before it can enter a final judgment on the merits. First, the court must consider personal jurisdiction going forward. In the continuing absence of personal jurisdiction, service of process consistent with the Hague Service Convention will be required. That said, personal jurisdiction may also be established through other means, such as a valid waiver of service or Cha's general appearance. Once personal jurisdiction is established through any valid means, the Superior Court

may then also consider other outstanding issues related to the United States' treaty obligations, the registration of the foreign judgments, and other challenges to the court's authority such as subject-matter jurisdiction or comity arguments. However, because these issues are not presently before us, we will not address them for the first time on appeal and leave them to the Superior Court to consider. *See Villagomez-Palisson v. Superior Court (Laguana)*, 2004 Guam 13 ¶ 32.

V. CONCLUSION

[46] We **REVERSE** the Superior Court's order denying Cha's motion to set aside the default judgment under GRCP 60(b)(4). We **REMAND** with directions to **VACATE** the Superior Court's default judgment and for further proceedings not inconsistent with this opinion.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
ROBERT J. TORRES
Associate Justice

/s/
KATHERINE A. MARAMAN
Chief Justice