

AFFIRM; and Opinion Filed December 13, 2017.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-17-00258-CV

**VITRO PACKAGING DE MEXICO, S.A. DE C.V., Appellant
V.
JOHN KASIMIR DUBIEL JR., Appellee**

**On Appeal from the 191st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-13-04664-J**

MEMORANDUM OPINION

Before Justices Lang-Miers, Brown, and Boatright
Opinion by Justice Brown

In this interlocutory appeal, Mexican corporation Vitro Packaging de Mexico, S.A. de C.V. (Vitro Mexico), appeals the trial court's order denying its second special appearance. In two issues, Vitro Mexico contends the trial court did not have personal jurisdiction over it because the plaintiff did not serve it in accordance with The Hague Convention, a multinational treaty. For reasons that follow, we affirm the trial court's order.

In April 2013, John Kasimir Dubiel Jr. sued numerous defendants, alleging he was injured in a grocery store when soft drink bottles exploded and glass shards hit his eye. In August 2014, Dubiel amended his petition to add Vitro Mexico and Vitro Packaging, LLC as defendants. The amended petition alleged both Vitro Mexico and Vitro Packaging could be served through their registered agent in Plano, Texas, Kevin Jackson.

On October 6, 2014, Vitro Mexico filed a special appearance in which it asserted it was not subject to the trial court’s jurisdiction because Dubiel did not serve it according to the Hague Convention, which Vitro Mexico contends preempted Texas laws and rules and provided the exclusive means for service of process. Both the United States and Mexico are parties to the treaty, which applies “in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.” Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Convention), Nov. 15, 1965, 20 U.S.T. 361, art. 1; *In re J.P.L.*, 359 S.W.3d 695, 705 (Tex. App.—San Antonio 2011, pet. denied). The Hague Convention requires each country to establish a central authority to receive requests for service of documents from other countries. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 698 (1988); 20 U.S.T. 361, art. 2; *see Saavedra v. Schmidt*, 96 S.W.3d 533, 543 n.14 (Tex. App.—Austin 2002, no pet.) (Hague Convention uses term “Contracting State” to refer to countries). The central authority then serves the documents itself or arranges for service by an appropriate agency either by a method proscribed by its internal law or by a method requested by the applicant. *Volkswagenwerk*, 486 U.S. at 699; 20 U.S.T. 361, art. 5. When the forum state’s law does not define the applicable method of serving process as requiring the transmittal of documents abroad, however, the Hague Convention does not apply. *Volkswagenwerk*, 486 U.S. at 700, 706–07.

In its special appearance, Vitro Mexico alleged Dubiel was required to comply with the Hague Convention, but instead served the citation at Jackson’s Texas address. Vitro Mexico maintained Jackson was not its registered agent, and that it had no offices, employees, or registered agent in Texas and that its principal place of business was in Nuevo Laredo, Mexico. Vitro Mexico asked that Dubiel be ordered to serve it pursuant to the Hague Convention. Vitro Mexico supported its special appearance with Jackson’s affidavit. According to the affidavit, Jackson is a

vice president of and registered agent for Vitro Packaging, which distributes certain products manufactured by Vitro Mexico, but is not a registered agent for Vitro Mexico.

Dubiel responded that the Texas long-arm statute permitted him to serve Vitro Mexico by serving Vitro Packaging. He relied on section 17.043 of the civil practice and remedies code, which provides that in an action arising from a nonresident's business in Texas, process may be served on the person in charge of any business in which the nonresident in engaged in this state. TEX. CIV. PRAC. & REM. CODE ANN. § 17.043 (West 2015).

In January 2015, the trial court held a hearing on the special appearance. In response to Dubiel's argument about section 17.043, Vitro Mexico cited section 17.045, which provides that if the person in charge of a nonresident's business is served under section 17.043, a copy of the process and notice of service must be immediately mailed to the nonresident or its principal place of business. *See id.* § 17.045 (West 2015). Vitro Mexico argued that because section 17.045 required notice of service to be mailed to it in Mexico, the Hague Convention applied. Vitro Mexico also argued that Jackson was not the person in charge of its business in Texas. The trial judge indicated she thought that service was flawed because Dubiel did not prove Vitro Packaging was in charge of Vitro Mexico's business in Texas. Later that day, Dubiel amended his petition to allege that Vitro Mexico could be served through Vitro Packaging's registered agent because the action arose from Vitro Mexico's business in Texas and Vitro Packaging is the entity in charge of Vitro Mexico's business in this state. On February 12, 2015, the trial court signed an order quashing Dubiel's attempt to serve process on Vitro Mexico by serving Jackson.

In March 2015, Vitro Mexico filed a second special appearance. Vitro Mexico alleged that on February 5, 2015, Dubiel served his second amended petition at Jackson's Plano address. The citation was issued to Vitro Mexico through Vitro Packaging through its registered agent Jackson. Vitro Mexico again asserted it was not subject to the trial court's jurisdiction because the citation

and second amended petition were not served pursuant to the Hague Convention. At a hearing in February 2016, the trial court indicated it would grant Vitro Mexico's second special appearance but first wanted letter briefs from the parties. In February 2017, the trial court denied Vitro Mexico's second special appearance. Vitro Mexico appeals the order denying its second special appearance. *See id.* § 51.014(a)(7) (West Supp. 2017).

Vitro Mexico raises two related issues in this appeal. First, it contends the Hague Convention was the exclusive means of serving it with process. It next contends the trial court should have granted its second special appearance because Dubiel's service on Jackson violated the Hague Convention. We need not decide whether Dubiel was required to serve Vitro Mexico pursuant to the Hague Convention and thus do not reach Vitro Mexico's first issue. Vitro Mexico generally appeared when it filed a special appearance that raised a curable defect in service rather than a complaint about Vitro Mexico's amenability to service.

We review de novo a trial court's order denying a special appearance. *Foley v. Trinity Indus. Leasing Co.*, 314 S.W.3d 593, 600 (Tex. App.—Dallas 2010, no pet.). A special appearance may be made by any party for the purpose of objecting to the jurisdiction of the court over the person or property of the defendant on the ground that such party or property is “not amenable to process issued by the courts of this State.” TEX. R. CIV. P. 120a. The key word in rule 120a is “amenable.” *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 202 (Tex. 1985).

The words “not amenable to process issued by the courts of this state” can only be interpreted to mean that the special appearance is available solely to establish that the Texas court cannot, under the federal and state constitutions and the appropriate state statutes, validly obtain jurisdiction over the person or the property of the defendant with regard to the cause of action pled.

Id. (quoting E. Wayne Thode, *In Personam Jurisdiction: Article 2031(b), the Texas Longarm Statute; and the Appearance to Challenge Jurisdiction in Texas and Elsewhere*, 42 TEX. L. REV. 279, 312–13 (1964)). A curable defect in service of process does not affect a nonresident

defendant's amenability to service of process. *Id.* Defective service of process must be challenged by a motion to quash, not a special appearance. *Id.* at 203. A special appearance that merely challenges the method of service fails as a special appearance and constitutes a general appearance. *GFTA Trendanalysen B.G.A. Herrdum GMBH & Co., K.G. v. Varne*, 991 S.W.2d 785, 786 (Tex. 1999) (citing *Kawasaki*, 699 S.W.2d at 202). A complaint that a defendant was not served in accordance with the Hague Convention is a complaint regarding a curable defect in service of process. *Wright v. Sage Eng'g, Inc.*, 137 S.W.3d 238, 246 (Tex. App.—Houston [1st Dist.] 2004, pet. denied). Such a complaint does not defeat a nonresident's amenability to the court's process and thus should not be raised via a special appearance. *Id.*

Vitro Mexico does not argue that it lacked minimum contacts with Texas. It acknowledges *Kawasaki* holds that complaints regarding defects in service may not be raised in a special appearance. But because *Kawasaki* does not involve the Hague Convention, Vitro Mexico asserts an exception should be made for complaints regarding noncompliance with the Hague Convention. Vitro Mexico maintains that filing a special appearance was the only option it had to raise its Hague Convention argument. It points out that it could not have filed a motion to quash because that would have been a general appearance. *See* TEX. R. CIV. P. 122.

Although *Kawasaki* is not a Hague Convention case, we are bound by its holding that alleged defects in the method of service should not be raised via a special appearance. It is not our role as an intermediate court of appeals to create an exception to this rule. We note that Vitro Mexico had the option to take no action and force a default judgment. Articles 15 and 16 of the Hague Convention limit the circumstances in which a default judgment may be entered against a defendant who had to be served abroad and did not appear, and provide some means for relief from such a judgment. *Volkswagenwerk*, 486 U.S. at 699; *see* 20 U.S.T. 361, arts. 15, 16. Under the rule in *Kawasaki*, when Vitro Mexico filed its first special appearance to complain about the

method of service, rather than about its amenability to service, it generally appeared and waived any defects in service. *See Uche v. Igwe*, No. 05-11-00570-CV, 2012 WL 2785355, at *2 n.1 (Tex. App.—Dallas July 10, 2012, no pet.) (mem. op.); *Williams v. Nexlore Corp.*, No. 05-09-00621-CV, 2010 WL 4945364, at *3 (Tex. App.—Dallas Dec. 7, 2010, pet. denied) (mem. op.). Accordingly, the trial court did not err in denying Vitro Mexico’s second special appearance. We overrule Vitro Mexico’s second issue.

We affirm the trial court’s order.

/Ada Brown/
ADA BROWN
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

VITRO PACKAGING DE MEXICO, S.A.
DE C.V., Appellant

No. 05-17-00258-CV V.

JOHN KASIMIR DUBIEL JR., Appellee

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Opinion delivered by Justice Brown,
Justices Lang-Miers and Boatright
participating.

In accordance with this Court's opinion of this date, the trial court's order denying appellant's second special appearance is **AFFIRMED**.

It is **ORDERED** that appellee John Kasimir Dubiel Jr. recover his costs of this appeal from appellant Vitro Packaging de Mexico, S.A. de C.V.

Judgment entered this 13th day of December, 2017.