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Serving Process by Mail on Defendants Pursuant to Hague Service Convention

BY MARTIN E. RITHOLTZ, DANIEL S. GOLDSTEIN AND JOSHUA LEVIN-EPSTEIN


Martin E. Ritholtz


Daniel S. Goldstein


Joshua Levin-Epstein

In a rapidly changing and interconnected world, legal problems without passports proliferate and increasingly challenge New York attorneys, who find themselves embroiled in cases requiring the resolution of conflicts that extend beyond borders. Having to serve process of a New York lawsuit on defendants located outside of the country, for example, can be fraught with difficulties. This article provides guidance on serving process of a New York lawsuit through postal channels in accordance with Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (the Convention), Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638.

Ret. Hon. MARTIN E RITHOLTZ *is special counsel to Shiboleth LLP.* DANIEL S. GOLDSTEIN *and* JOSHUA LEVIN-EPSTEIN *are commercial litigation attorneys at the firm.*

The United States and many other leading international economies are signatories to the Convention, a multinational treaty "intended to provide a simpler way to serve process abroad, to assure that defendants sued in foreign jurisdictions would receive actual and timely notice of suit, and to facilitate proof of service abroad." *New York State Thruway Auth. v. Fenech*, 94 A.D.3d 17 (3d Dep't 2012). Where service of process is made in a foreign country that is a signatory of the Convention, compliance with the procedures of the Convention is mandatory. *Morgenthau v. Avion Res. Ltd.*, 11 N.Y.3d 383, 390 (2008).

The treaty requires each signatory state to establish a Central Authority that receives international service requests and thereafter serves documents by a method prescribed by the internal law of the receiving state. The use of the Central Authority, however, is not the only method of service under the Convention. *Sbarro v. Tukdan Holdings*, 32 Misc. 3d 217, 218 (Sup. Ct. Suffolk County 2011). For example, Article 8 permits service through diplomatic and consular agents. Likewise, pursuant to Article 10 of the Convention:

> Provided the State of destination does not object, the present Convention shall not interfere with—

a) the freedom to send judicial documents, by postal channels, directly to persons abroad,
b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,
c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination

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For years, American courts were divided over whether the phrase "the freedom to *send* judicial documents" in Article 10(a) includes within its meaning the freedom to effect service of judicial documents, as specified by Articles (b) and (c). *Brockmeyer v. May*, 383 F.3d 798 (9th Cir. 2004). This division led to conflicting case law in which the permissibility of international service of process by mail has varied by court, by state, and by appellate department within the state.

Until June 2016, this split existed within the New York Appellate Division. The First Department (and Third Department until 2012) interpreted the word "send" in Article 10(a) to authorize something other than effecting service, such as the transmittal of notices and legal documents, but not the service of process that initiates a lawsuit and secures jurisdiction over an adversary party. *New York State Thruway Auth. v. Fenech*, 94 A.D.3d 17, 19 (3d Dep't 2012). In contrast, the Second, Third and Fourth Departments interpreted the word "send" in Article 10(a) as including service of process and permitting service of process by regular mail when the State of destination does not object. Id.; *Sbarro v. Tukdan Holdings*, 32 Misc. 3d 217, 219 (Sup. Ct. Suffolk County 2011).

Although New York's Court of Appeals never addressed the issue, in *Mutual Benefits Offshore v. Zeltser*, 140 A.D.3d 444 (1st Dep't 2016), the First Department joined the Second, Third and Fourth Departments to hold that service of process by mail is not prohibited under the Convention. *See Mutual Benefits Offshore. v. Zeltser*, 140 A.D.3d 444 (1st Dep't 2016) (noting the different interpretations of Article 10(a) that had been adopted by New York state's appellate departments and, for the first time, aligning the appellate departments).

While New York's appellate departments were in line as of June 2016, the disagreement as to the interpretation of Article 10(a) of the Convention remained in other states and in federal circuit courts as well. *New York State Thruway Auth. v. Fenech*, 94 A.D.3d 17, 19-20 (3d Dep't 2012)

SCOTUS Resolves Circuit Split

On May 22, 2017, the U.S. Supreme Court resolved the disagreement as to the interpretation of Article 10(a) of the Hague Service Convention.

In *Water Splash v. Menon*, 137 S.Ct. 1504 (2017), plaintiff-petitioner

Water Splash, a Texas corporation, sued defendant-respondent Menon, a former employee residing in Canada, in state court in Texas. Water Splash commenced the action by serving Menon with process via postal channels. After obtaining a default judgment against Menon, Menon appealed, arguing that service of process by mail does not comport with the requirements of the Hague Service Convention. The Supreme Court acknowledged the broader conflict among courts as to whether the Convention permits service through postal channels, and granted certiorari.

After analyzing the treaty's drafting history, taking account of foreign courts' interpretation of the treaty, and applying "traditional tools of treaty interpretation," the Supreme Court held that Article 10(a) of the Convention indeed encompasses service of process by mail. *Water Splash* thus resolves the longstanding disagreement in the lower U.S. courts and clears the way for international service of process by mail under the Convention.

Additional Conditions for Serving Process Through Postal Channels

To be clear, the court's holding in *Water Splash* does not mean that the Convention "authorizes" service by mail in all cases. "Article 10(a) simply provides that, as long as the receiving state does not object, the Convention does not 'interfere with … the freedom' to serve documents through postal channels. In other words … 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 v. Menon*, 137 S.Ct. 1504, 1513 (2017).

Thus, to determine whether service of process by mail is authorized on a case by case basis, it is first necessary to confirm that the receiving state has not objected to Article 10(a). The objections and declarations of the Convention's participating countries are available using the Convention's website. Objectors to Article 10(a) include China (*Sulzer Mixpac AG v. Medenstar Indus. Co.*, 312 F.R.D. 329 (S.D.N.Y. 2015)), Germany (*PATS Aircraft v. Vedder Munich GmbH*, 197 F. Supp. 3d 663 (D. Del. 2016)), Switzerland (*In re Bernard L. Madoff Inv. Sec.*, 418 B.R. 75 (Bankr. S.D.N.Y. 2009)) and Mexico (*Forth v. Carnival*, 12-cv-23770, 2013 WL 1840373 (S.D. Fla. May 1, 2013)), among others, meaning that service by mail in those countries is not authorized by *Water Splash*. Comparably, the State of Israel asserted objections to Articles 10(b) and (c) and specifically declared thereunder that it will "effect the service of judicial documents *only through the Directorate of Courts*." Yet, because Israel has not objected to Article 10(a), the *Water Splash* decision would now appear to open defendants located in Israel to service of process in U.S. courts by mail.

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In addition to being authorized by the receiving State, service by mail must also be authorized "under otherwise-applicable law," meaning by the jurisdiction hearing the suit. If the case is commenced in federal court, this means service of process by mail must comport with the Federal Rules of Civil Procedure or other controlling statute on the service of process in that case. *Brockmeyer v. May*, 383 F.3d 798, 804 (9th Cir. 2004). In New York, service of process by mail, with certain exceptions, is not generally authorized by the CPLR (for example, it could be directed by an order of the Court under Article 3). Thus, absent a court order under Article 3 of the CPLR, service of process in New York in most cases will need to comport with New York Business Corporation Law §307, New York Vehicle and Traffic Law §253, or other authorizing New York statutes.