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Beware of International Service of Process

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If an attorney representing an American litigant seeking to institute an action against a foreign defendant is not very cautious in the method of service used to serve the foreign defendant, the result could be vacation and dismissal years after judgment.

In a recent New Jersey district court decision the minefield of service of process on a foreign defendant was visited. The risks associated with questionable service unfolded quite drastically: The plaintiff's complaint was dismissed.

In *Shenouda v. Mehanna and Said*, 203 F.R.D. 166 (D.N.J. 2001), U.S. District Court Judge Nicholas Politan vacated a 5-year-old default judgment and dismissed the plaintiff's complaint because the plaintiff failed to properly serve the defendant in accordance with the Hague Convention.

With today's globalization, businesses from all over the world are conducting commerce in the United States and vice versa. Naturally, disputes are bound to occur between Americans and those foreign entities or individuals.

Proper service of process on a foreign defendant is absolutely necessary for purposes of litigating the matter in a U.S. court and also is required for the enforceability of a default judgment in the future.

Hague

The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents, the largest multilateral treaty governing service of process abroad, came into force for the United States on Feb. 10, 1969. See the Hague Convention home page located at www.hcch.net/e/index.html. The United States and 54 other countries are signatories to this convention.

The underlying intent behind the Hague Convention was to simplify and expedite the service of process abroad, ensure that defendants sued in foreign jurisdictions received actual and timely notice of suit and facilitate proof of service. Because there is less likelihood that a defendant will actually receive notice when the summons and complaint are served abroad, the Hague Conven-

tion mandates that a central authority of the state addressed arrange for service and complete a certificate of service in the form of the model annexed to the convention.

In light of the many safeguards built into the convention's mechanism of service, service of process consistent with the convention would rarely be set aside. As such, it is not only strongly advisable to comply with the strictures of the convention when it applies, it is mandatory. Non-compliance could result in dismissal of plaintiff's case.

As a treaty, the Hague Convention is the supreme law of the land. Where a foreign defendant resides in a signatory country, the Hague Convention pre-empts any New Jersey method of service. As such, this article will only address the Federal Rules of Civil Procedure and will not discuss service of process pursuant to the New Jersey Court Rules.

Federal Rules

Rule 4(f) of the Federal Rules of Procedure provides, in part:

f) Service Upon Individuals in a Foreign Country. Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in a place not within any judicial district of the United States: (1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or

(2) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice.

Where the United States and the foreign country are signatories to an international agreement, Rule 4(f) mandates that service on an individual in a foreign country must be effectuated pursuant to the international agreement.

Interestingly, the U.S. Supreme Court has noted that it is advisable to serve process on a foreign national pursuant to the convention even in matters where the convention does not apply. See *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988) ("The Convention provides simple and certain means by which to serve process on a foreign national. . . . parties that comply with the Convention ultimately may find it easier to enforce their judgments abroad. For these reasons, we anticipate that parties may resort to the Convention voluntarily, even in cases that fall outside the scope of its mandatory application.")

Articles 2 through 6 of the convention establish a mechanism in which each signatory country designates a central authority to receive and arrange for service (of judicial documents from abroad) on individuals within its territories. Compliance with the convention is almost iron-clad proof of service. The United State has designated the Department of State as its central authority for purpose of the Hague Convention.

Article 3 of the convention directs the authorized person under the law of the state in which the documents originate to forward to the central authority of the state addressed a request conforming to the model annexed to the present convention.

Article 5 of the convention provides that:

The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either (a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or (b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.

Subject to subparagraph (b), the document may "be served by delivery to an addressee who accepts it voluntarily."

In certain instances, the central authority may require that the document be translated into, or written in, "the official language or one of the official languages of the State addressed."

Article 8 permits signatories to serve foreign defendants through its own diplomatic or consular agents. Article 9 permits signatories to use these agents to forward judicial documents to designated authorities in the receiving nation to undertake service of process on foreign defendants within its territory. Article 10 permits signatories to send judicial documents by postal channels or through judicial officers directly to foreign defendants in the receiving nation.

Article 11 permits signatories to agree to channels of transmission other than those provided for in the convention such as bilateral agreements. Article 19 further permits service of judicial documents on a foreign defendant within the receiving nation by any method of transmission that is permitted under the receiving nation's internal laws. Articles 24 and 25 support any supplementary agreements between signatories to the convention.

It is important to note that pursuant to Article 21, signatory countries may oppose the use of methods of transmission pursuant to Article 8 and 10. In fact, many signatory countries do not permit service of process directly via postal channels in the receiving nation as provided for in Articles 8 and 10. Attorneys should research whether the receiving signatory country opted out of any articles in the convention.

Dismissed

In *Shenouda*, the plaintiff Ishak Shenouda filed a complaint against defendants Hani Ahmed Mehanna and Samira Abdel Razik Said. (Mehanna did not join in defendant Said's motion to vacate and dismiss plaintiff's complaint.)

The plaintiff was a music concert promoter in the United States at that time. Defendant Hani Mehanna was the leader of his own musical group, and Samira Said was lead singer for the group. (Said was and continues to be a popular Arab singer.)

The complaint alleged that the defendants breached a contract entered into between them and the plaintiff, which engaged the defendants to perform a U.S. concert tour.

The plaintiff, through its local Egyptian counsel, attempted to serve the defendants with the summons and complaint. Plaintiff's local counsel forwarded the translated New Jersey district court summons and complaint to a small claims court process server to effectuate service on defendants.

The small claims court process server allegedly attempted personal service on defendant Said at her residence, but her residence was closed. After one attempt to personally serve the defendant, the process server allegedly mailed it by certified mail. The defendant maintained that she was never served with the summons and complaint and only became aware of the New Jersey action once the plaintiff instituted enforcement proceedings in Egypt.

The plaintiff conceded that the defendants were not served pursuant to the Hague Convention. Instead, the plaintiff argued that alternative methods of service consistent with Egyptian law sufficed to effect service on the defendants. Neither defendant filed an answer nor entered an appearance in the case. As such, default was entered against them. Subsequently, the court entered a final default judgment in favor of the plaintiff and against both defendants for the sum of $578,600 on Sept. 18, 1996.

When the plaintiff attempted to execute on the judgment by filing an enforcement action in Egypt, defendant Said filed a motion to vacate the default judgment and dismiss the complaint based on Rule 60(b)(4) and 12(b) of the Federal Rules of Civil Procedure.

After concluding that there is no time limitation to filing a motion to vacate a default judgment based on lack of jurisdiction because "a void judgment is no judgment at all," the court found that the Hague Convention applied and proceeded to analyze the plaintiff's method of service to determine whether it complied with the strictures of the Hague Convention.

The court began its discussion of the matter by reiterating well-established due process jurisprudence: Service of process is intended to provide defendants with notice and afford them an opportunity to defend themselves. Noting that the Supreme Court has held that compliance with the convention is mandatory when serving a foreign defendant in a signatory country, the court stressed:

Accordingly, where a destination country (such as Egypt) is a signatory to the Convention, the Convention's procedures are the exclusive means by which service of process may be effected in that country. Failure to comply with the Convention voids the attempted service.

Although the Hague Convention offers signatories a variety of additional methods of service as an alternate to the central authority, the court meticulously discussed each alternate method concluding that Egypt either had objected to the alternate method or the method simply did not apply. Egypt objected to Articles 8 and 10 of the convention, which permit direct service via postal channels.

In vacating the default judgment as void for lack of personal jurisdiction and dismissing the plaintiff's complaint for improper service, the court prefaced its conclusion with the warning given by the U.S. Supreme Court in *Volkswagenwerk*:

Those who eschew [the Convention's] procedures risk discovering that the forum's internal law required transmittal of documents for service abroad, and that the Convention therefore provided the exclusive means of valid service.

Absent Hague

Counsel can circumvent the applicability of the convention by serving the defendant in the United States through a subsidiary or parent agent. If a defendant is in a country that is not a signatory to the convention, counsel should inquire further to determine if a bilateral treaty controls the method of service.

If there is no bilateral treaty governing service, counsel must resort to the Federal Rules of Civil Procedure and the New Jersey Court Rules for direction. Also, it may be necessary to inquire about what constitutes proper service in the foreign country to ensure that a future enforcement action in the foreign country would not be dismissed for improper service.

To serve a foreign defendant in accordance with the Hague Convention, counsel should prepare and complete the request form reprinted at the end of the convention, which would include a summary of the information provided in the summons and complaint. This form can also be obtained from any U.S. Marshal's office by requesting a copy of form USM-94.

After completing Form USM-94, the summons and complaint should be forwarded to the central authority of the receiving country. The central authority would then undertake responsibility to ensure that all the necessary documents were completed and it would arrange to serve the defendant in its jurisdiction.

Once the central authority effectuates service, it will return to the plaintiff an affidavit of service in the form required under the convention. Following these simple steps will ensure compliance with Article 5 of the convention. Affidavit of service is iron-clad proof of service.

Finally, service of process on a defendant in a foreign country should not be taken lightly. Counsel should not take any risks. Questionable service on a defendant in a foreign country can eventually result, even five years after entry of a default judgment, in a dismissal.

The author, a sole practitioner in Clifton, represented the defendant in the case mentioned herein.