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# Supreme Court Makes a "Splash," Upholds Hague Service by Mail, and Leaves Us Lost in Translation

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A question that has divided state courts, federal district courts and the federal circuits regarding methods of service under the Hague Service Convention (Convention) was decided May 22, 2017, by the U.S. Supreme Court in ***Water Splash, Inc. v. Menon***, No. 16-254, 581 U.S. ___ (2017). The Supreme Court, in an 8-0 decision written by Justice Alito, without recently appointed Justice Gorsuch, held that "The Hague Service Convention does not prohibit service of process by mail." The case concerned a Texas corporation suing a former employee residing in Quebec, Canada.

This decision may be seen as a bit of a setback for counsel defending clients abroad, as the holding effectively rubber-stamps service of process on foreign nationals and foreign corporations via mail; however, such service is not without certain limitations. In particular, the Supreme Court failed to address the issue of whether the mailed judicial documents need to be translated into the intended recipient's national language. Article 5 of the Convention requires such translation if service is to be effectuated through a state's centralized authority. However, there is a split on the translation issue because Article 10 fails to contain a requirement for a translation, which a seeming majority of U.S. courts have held does permit service by mail without an appropriate translation.

**Background**

Water Splash, Inc., a Texas corporation, sued its former employee, Menon, for unfair competition, tortious interference with business relations and conversion, as it appeared that she had begun working for a competitor before leaving Water Splash. Menon was a resident of Quebec, Canada, and after attempts at service through other means were unsuccessful, Water Splash sought leave to serve Menon via mail. After mail service was completed, Menon defaulted in appearing and a default judgment was entered against her. Menon appealed, arguing that the Hague Convention does not "Comport with the requirements of the Hague Service Convention." The Texas Court of Appeals sided with Menon and the Supreme Court granted *certiorari*.

In articles 2-7, the Convention requires each state to establish a central authority to receive requests for service of documents from other countries. When the central authority receives a request it must either serve the documents or arrange for their service and provide a certificate of service. According

to the Supreme Court's holding, the Convention does not prohibit other means of service, as Article 11 allows two states to agree on other methods of service and Article 19 clarifies that the Convention does not preempt any internal laws of its signatories that permit other methods of service from abroad.

The Supreme Court interpreted the treaty by (1) viewing the text and its context and (2) looking to extra-textual sources such as the drafting history, views of the executive and views of other signatories. In particular, they found that the scope of the Convention is limited to service of documents and that the Convention was intended to ensure that judicial documents served abroad are brought to the notice of the addressee in sufficient time. *See* Hague Service Convention, Art. 1 (1965). Justice Alito's decision suggested that it would be "quite strange if Article 10(a) … concerned something other than service of documents."

The failed argument by Menon centers on the distinction between "send" and "serve" as used in Article 10. In particular, Menon attempted to distinguish that Article 10(a), which uses "send," refers to a different set of documents than 10(b) or 10(c), which each use "serve." Menon claimed that the distinction means that Article 10(a) applies to documents to be served following the filing of an answer. However, the Court quickly dismissed the argument, finding it "hard to fathom," that Article 10(a) applies to a different category of documents than 10(b) and 10(c), especially as the three sub-articles each refer to the same term "judicial documents." Besides finding this argument entirely "atextual" there was no other support for their claim. In particular, the French word in Article 10(a) is *adresser*, which was "consistently interpreted as meaning service or notice." The French version of the Convention is "equally authentic" to the English version; as a result, at best, the English version of the Convention creates an ambiguity, and therefore the Court may look beyond the written words.

The Supreme Court then looked to other sources that confirmed "Article 10 permits direct service by mail … unless the receiving state objects to such service." Notably, the Court found that the State Department in 1991 expressed its disagreement with the ruling of the Eighth Circuit in a letter addressed to the Administrative Office of the U.S. Courts and the National Center for State Courts regarding *Bankston v. Toyota Motor Corp.*, 889 F.2d 172 (8th Cir. 1989), which addressed this issue of service through mail under the Convention, where the Eighth Circuit found that the Convention did not allow for service via mail. The Supreme Court also found that multiple foreign courts have held that the Convention does allow for service by mail. Ultimately, the Court remanded the case to the Texas courts to determine whether Texas law authorizes service by mail and any other remaining issues.

**Analysis**

In 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." As a result, service on a foreign individual or corporation via mail is not sufficient in and of itself. The foreign state must not have objected to service by mail, the venue in which the suit was commenced must have laws authorizing such service, and such law must be fully complied with in effectuating service via mail in the foreign state.

By way of example, in New York, C.P.L.R. §312-a, *et seq.* allows for "Personal Service by Mail," whereby a party serves the summons and complaint together with two copies of a statement of service by mail, an "acknowledgement of receipt" form (proscribed by statute) and a postpaid return envelope. This method of service requires some cooperation on the part of the recipient, who must

affirm the acknowledgement and return one copy of the acknowledgement form in the postpaid envelope. C.P.L.R. §312-a(c). If none is returned, then the plaintiff will have to resort to other conventional forms of service and the penalty to the defendant is that the court may assess against the defendant the “reasonable expense” of the other form of service (the acknowledgement includes a statement to this effect). C.P.L.R. §312-a(f). If a New York plaintiff were to sue a Canadian resident, they could use this method of mail service, C.P.L.R. §312-a, as Canada does not object to the service of process by mail. For a full listing of the current (as of April 26, 2017) status of countries that have adopted various portions of the Hague Service Convention, see the current **Status Table**.

Again, none of what is described above discusses the need (or lack thereof) to translate the documents being served into the native language of the recipient, which is required by the Convention. That would fall into one of the “other remaining issues” on remand. Therefore, service without the appropriate translation via mail may still be a valid argument to be made against good service, even if the mail reached the appropriate individual, who understood English and then timely appeared in the action. *See* Hague Service Convention, Art. 5 (1965) (Article 5 requires translation before service by the central authority; however, it appears a majority of courts have ruled that the absence of such requirement for a translation in Art. 10 of the Convention negates the need for such translation to be provided when process is served via mail). *See Taft v. Moreau*, 177 F.R.D. 201, 204 (D. Vt. 1997) (*citing Lemme v. Wine of Japan Import, Inc.*, 631 F.Supp. 456,464 (E.D.N.Y. 1986)); *Williams v. LeBrun*, 2010 Conn. Super. LEXIS 1989 (Conn. Super. Ct. 2010); *Atl. Specialty Ins. Co. v. M2 Motor Yachts*, 2017 U.S. Dist. LEXIS 56846 (D.Fl. 2017); *Fraserside IP L.L.C. v. Youngtek Solutions Ltd.*, 796 F. Supp. 2d 946 (D. Iowa 2011).

A minority of jurisdictions have found the other way, requiring documents that were served via mail to be translated into the recipient’s national language. *See Froland v. Yamaha Motor Co., Ltd.*, 296 F. Supp. 2d 1004, 1008 (D. Minn. 2003) (quashing service via mail for failure to translate). *See also Borschow Hosp. & Medical Supplies, Inc. v. Burdick-Siemens Corp.*, 143 F.R.D. 472, 480 (D.P.R. 1992); *American River Transp. Co. v. M/V BOW LION*, 2004 WL 764181 (E.D. La. 2004).



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