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Knock, Knock, Knocking on Menon's Door

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In a decision sure to have wide-ranging implications for cross-border discovery and governing privacy regimes, the Supreme Court recently held in *Water Splash, Inc. v. Menon*, that the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (the "Hague Service Convention" or the "Convention") does not prohibit service by mail. While the Court stated explicitly that its holding does not affirmatively authorize service by mail, the Court concluded that the Convention does not prevent service by mail if: (1) the receiving country has not objected to service by mail; and (2) service by mail is authorized under otherwise-applicable law.

For any corporate entity with global operations or employees and consumers abroad, take a close look at the terms of the Convention, the applicable service laws of the countries in which you maintain operations, and, as always, be mindful of where you might need to look for documents or other things that might be implicated in relation to a complaint served or received aboard. At the very least, pop Bob Dylan into Pandora and enjoy this warm summer day.

A full summary of the opinion can be found below.

Factual Background

Petitioner Water Splash sued its former employee, Menon, in state court in Texas. Because Menon resided in Canada, Water Splash sought and obtained permission to effect service by mail. Menon declined to answer or enter an appearance and the trial court issued a default judgment in favor of Water Splash. Menon moved to set aside the judgment on the grounds that she had not been properly served because service by mail was "prohibited" under the Convention.

Discussion

At issue was Article 10 of the Convention, which reads in pertinent part: "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; or (c) the freedom of any person interested in judicial proceedings to effect service of judicial documents directly through the judicial officers […]." The Court noted that Article 10(a) does not expressly refer to "service" so the question in the case was whether, despite this textual

difference, the Article 10(a) phrase “send judicial documents” encompasses sending documents for the purpose of service.

In finding that “send” did include sending of documents for the purpose of service, the Court relied on the following conclusions:

1. The scope of the Convention is limited to the service of documents so it would be “quite strange if Article 10(a) – apparently alone among the Convention’s provisions – concerned something other than service of documents.”
2. The counterpart to “send” in the “equally authentic” French-language version of the Convention has consistently been interpreted to mean service or notice.

The Court then concluded that, even if Article 10(a)’s meaning is ambiguous, three extratextual sources make it clear that the Convention does not prevent service by mail:

1. The drafting history of the Convention indicates it did not intend to prevent service by mail. A member of the United States’ delegation who was involved in drafting the Convention published at article, just prior to ratification, stating that “Article 10 permits direct service by mail…unless [the receiving] state objects to such service.” Additionally, the Rapporteur’s report on a similar draft version of Article 10 made it clear that service by postal channels was permissible.
2. The Court gives “great weight” to the Executive Branch’s interpretations of a treaty and “the Executive has consistently maintained that the Convention allows service by mail.”
3. The Court gives “considerable weight” to the views of other parties to a treaty and multiple foreign courts, signatories and Special Commissions have held that the Convention does not prohibit service by mail. By contrast, Menon could point to no foreign authority for the proposition that the Convention did prohibit service by mail.

The Court rejected Menon’s argument that even if Article 10(a) does apply to service of documents, it applies only to service of “post-answer judicial documents” and not service of process. The Court found that this argument “lacks any plausible textual footing in Article 10.” If the drafters wished to limit Article 10(a) to a subset of documents, the Court reasoned, they would have said so – as they did in other parts of the Convention. The Court held that “the traditional tools of treaty interpretation unmistakably demonstrate that Article 10(a) encompasses service by mail.” As such, “in cases governed by the 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.”

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