ALERT MEMORANDUM

U.S. Supreme Court: Hague Service Convention Permits Service of Process by Mail

May 23, 2017

On May 22, 2017, the U.S. Supreme Court unanimously held[1] in *Water Splash, Inc. v. Menon* that the Hague Service Convention[2] permits service of process by mail, so long as (1) the receiving state has not objected to service by mail; and (2) service by mail is authorized independently of the Hague Service Convention under the law of the local jurisdiction in which the lawsuit is pending. This decision resolves a long-standing uncertainty on the issue of whether the language used in the relevant part of the treaty – "the freedom to send judicial documents, by postal channels, directly to persons abroad" – covers sending documents in order to serve process, despite the lack of an explicit reference to the word "service." By answering this question in the affirmative, the Supreme Court's ruling in *Water Splash* will make it easier for litigants bringing claims against foreign defendants in U.S. courts to effectuate service in countries that have not filed an objection to service by mail under the Hague Service Convention.

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[1] Justice Gorsuch took no part in the consideration or decision of this case.
[2] Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965 ("Hague Service Convention"), 20 U.S.T. 361, T.I.A.S. No. 6638.

Background to *Water Splash, Inc. v. Menon*

Water Splash, Inc. brought a lawsuit in Texas state court against its former employee, Tara Menon, for various common law business torts. Pursuant to a court order, Water Splash served Menon, a resident of Quebec, Canada, by mail, among other means, purportedly under the authority of Article 10(a) of the Hague Service Convention, which states as follows: "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 . . . ." (emphasis added).

Menon failed to timely respond to the complaint and the trial court subsequently entered a default judgment for Water Splash. Shortly thereafter, Menon filed a motion for a new trial, arguing that service by mail is impermissible under the Hague Service Convention. The trial court denied Menon's motion.

On appeal, the intermediate state appellate court, in a 2-1 opinion, vacated the default judgment, adopting the minority view that the Hague Service Convention does not permit service of process by mail.[3] The majority applied canons of statutory interpretation to conclude that, because the term "send" is used exclusively in Article 10(a) and the term "service" is used elsewhere throughout the Hague Service Convention, the drafters did not intend to give "send" the same meaning as "service."[4] The majority also noted that the purpose of the Hague Service Convention is to ensure that defendants receive notice with sufficient time to defend allegations, and that it is unlikely the drafters set up procedures for service through a central authority (Articles 2-7) and diplomatic channels (Articles 8-9) "while simultaneously permitting the uncertainties of service by mail."[5]

The Texas Supreme Court declined to hear a discretionary appeal. The Supreme Court granted certiorari to resolve a long-standing split among federal and state appellate courts concerning whether the Hague Service Convention permits service of process by mail.

The Supreme Court's Decision

The Supreme Court vacated the judgment of the Texas Court of Appeals, and remanded the case for further proceedings.

Writing for the Court, Justice Alito first analyzed the text of Article 10(a), observing that the word "send" in Article 10(a) is "a broad term, and there is no apparent reason why it would exclude the transmission of documents for a particular purpose (namely, service)."[6] The Court further reasoned that, even if the use of the word "send" instead of "serve" in Article 10(a) indicated that those words have different meanings, it "would not imply that Article 10(a) must *exclude* service."[7] In addition, the Court relied on the French text of Article 10(a), which is considered equally as authentic as the English text, and its use of the word "adresser," which is widely interpreted as encompassing service.[8]

Moreover, the Court reasoned, the structure of the Hague Service Convention supports the textual reading that Article 10(a) encompasses service by mail. The Court relied on prior precedent, as well as the preamble and Article 1's definition of the scope of the convention, to support the Court's

[3] *Water Splash, Inc. v. Menon*, 472 S.W.3d 28 (Tex. App. 2015).
[4] *See id.* at 32-33.
[5] *Id.* at 33 (internal quotations omitted).
[6] *Water Splash, Inc. v. Menon*, No. 16-254, slip op. at 4 (May 22, 2017).
[7] *Id.* at 7.
[8] *Id.* at 7-8.

holding that, because the purpose of the convention is "limited to service of documents," it would be "quite strange" if Article 10(a) alone "concerned something other than service of documents."[9] The Court also noted that such a reading would render Article 10(a) superfluous.[10]

Finally, the Court stated that, even if Article 10(a) was ambiguous, the drafting history, the view of the Executive Branch and the views of other parties to the treaty all supported the conclusion that Article 10(a) permits service by mail, as follows. *First*, the drafting history, including statements by a member of the U.S. delegation involved in drafting the convention as well as a Rapporteur's report, confirms that service by mail is permitted under Article 10(a).[11] *Second*, the Executive Branch – from the Johnson administration to the most-current version of the U.S. State Department's website – has consistently maintained the position that Article 10(a) permits service by mail.[12] *Third*, other signatories' courts have adopted the view that Article 10(a) permits service by mail, and other signatories have also implicitly adopted that position by objecting to service by mail under Article 10(a).[13]

Conclusion

The Court's opinion in *Water Splash* makes clear that, while holding that the Hague Service Convention "permits" service by mail, it does *not* hold that the convention "affirmatively *authorizes* service by mail."[14] Because Article 10(a) provides that, absent objection by the receiving state, the convention does not "interfere with . . . the freedom" to serve documents by mail, service by mail is *only* appropriate *if* (1) the receiving state has not objected to service by mail, and (2) service by mail is authorized independently of the Hague Service Convention under the law of the local jurisdiction in which the lawsuit is pending. Thus, the Supreme Court remanded the case to the Texas Court of Appeals because "it had no occasion to consider whether Texas law authorizes the methods of service used by Water Splash," assuming that this issue was properly preserved.[15]

In light of the Court's holding in *Water Splash*, practitioners wishing to take advantage of service by mail under Article 10(a) of the Hague Service Convention should consult the Convention's website[16] to determine whether the defendant's country of residence has objected to service of process by mail, as well as the local law governing service of process in the jurisdiction in which the suit is pending.

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[9] *Id.* at 5.
[10] *Id.*
[11] *See id.* at 8-9.
[12] *See id.* at 9-10.
[13] *See id.* at 10-11.
[14] *See id.* at 12.
[15] *See id.*
[16] https://www.hcch.net/en/instruments/conventions/status-table/?cid=17.