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The U.S. Supreme Court Loosens Restrictions on International Service in Civil Disputes Rules

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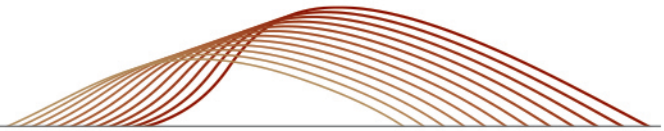
In *Water Splash, Inc. v. Menon*, a unanimous Supreme Court resolved a long-standing circuit split by holding that the Hague Service Convention (the "Convention")[1] does not exclude direct mail as a valid method of service of process. The Court reasoned that the text and structure of the Convention permit service by mail provided the receiving state does not object and service by mail is authorized under other applicable laws. In reaching its decision, the Court employed traditional tools of treaty interpretation, including consideration of the Convention's drafting history and the federal Executive's and other signatories' interpretation of the treaty. Given the importance of effecting service of process internationally, foreign companies and those which may attempt to serve process on defendants residing internationally should take note of this decision.

Courts lack the power to assert personal jurisdiction over a defendant unless the procedural requirement of effective service of process is satisfied.[2] Generally, without service of process, or the formal delivery of documents legally sufficient to charge the defendant with notice of a pending action, a court's judgment is null and void.[3]

The Supreme Court granted certiorari in *Water Splash* to resolve a circuit split between the U.S. Courts of Appeals for the Fifth and Eighth Circuits on one hand, and the Second and Ninth Circuits on the other.[4] The Convention, to streamline the process of serving documents abroad, specifies certain approved methods of service and preempts inconsistent methods of service wherever it applies. Article 10(a) of the Convention states that provided the receiving state does not object it does not interfere with the signatories' "freedom to send judicial documents, by postal channels, directly to persons abroad." Unlike Article 10(a), Articles 10(b) and (c) explicitly refer to additional acceptable methods of "service." While Article 10(a) does not expressly refer to "service," the Supreme Court found that the phrase "to send judicial documents" encompassed sending documents for the purposes of service.

Background

Water Splash, Inc. ("Water Splash") sued its former employee, Tara Menon ("Menon"), in a Texas state court. Because Menon resided in Canada, Water Splash (as required by the Texas civil procedure rules) sought and obtained the court's permission to effect service on Menon by mail.[5] After Menon declined to answer or appear, the court issued a default judgment in favor of Water Splash. On appeal, Menon argued that she had not been properly served, because service by mail did not comply with the Convention's requirements. The Texas Court of Appeals agreed with Menon's



interpretation, holding that the Convention prohibited service by mail. Because the question also divided federal appeals courts, the Supreme Court granted certiorari.

The Supreme Court's Interpretation of Article 10(a) of the Hague Service Convention

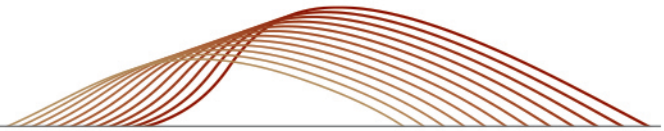
The Supreme Court approached the issue by deploying the traditional methods of treaty interpretation. The Court first observed that the text and structure of the Convention strongly supported the interpretation that the Convention permitted service by mail. Menon's primary contention to the contrary was that because Article 10(a) did not include the word "service" or any of its variants, the phrase "to send judicial documents" must mean something other than the "service of judicial documents," which is included in Articles 10(b) and (c) of the Convention.

The Court, however, noted that the scope and structure of the Convention was limited to the service of judicial documents. Article 1 of the Convention states that the Convention "shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." In *Volkswagenwerk Aktiengesellschaft v. Schlunk*, the Court interpreted Article 1 as making clear that the Convention only applied "when there is both transmission of a document from the requesting state to the receiving state, and service upon the person for whom it is intended."[6] Disinclined to interpret the Convention in a manner that would render any of its provisions superfluous, the Court determined that Article 10(a) must pertain to service.

The Supreme Court next addressed Menon's argument that no superfluity resulted because Article 10(a) does not pertain to the service of process and pertains only to the service of post-answer judicial documents. The Court found this interpretation implausible. The Court noted that other sections of the Convention refer to particular documents, like a writ of summons, whereas Article 10(a) refers broadly to "judicial documents." Thus, the Court concluded that had the framers of the Convention intended Article 10(a) to be applied narrowly, they would have included language limiting Article 10(a) to a particular subset of judicial documents. Menon's argument, by contrast, assumed the phrase "judicial documents" refer only to a particular subset of judicial documents—a position the Court found unconvincing.

After concluding that the structure of the Convention strongly suggested that Article 10(a) refers to the service of process, the Court turned to Menon's argument that, unlike other provisions of the Convention, Article 10(a) does not include the word "service." The Court concluded that Menon's textual argument "fail[ed] on its own terms."[7] Even after assuming the word "send" means something other than "serve," the Court reasoned that this does not mean that Article 10(a) must exclude service. The word "send" could be plausibly interpreted as including "service," which comports with the text, structure, and purpose of the Convention. The Court also found that this interpretation was supported by the French version of the Convention, which is "equally authentic to the English version."[8] The French counterpart to the word 'send' has consistently been interpreted as meaning service or notice. At best, the Court found Menon's argument merely supports the contention that there is some ambiguity with regards to Article 10(a).

To resolve this ambiguity, the Court turned to three traditional extra-textual sources: the treaty's drafting history, the views of the federal Executive, and the views of other signatories to help interpret the treaty.[9] The Court held that all three sources supported the understanding that Article 10(a) pertained to service of process. Contemporaneous observations by members of the U.S. delegation involved in the Convention's drafting indicated that Article 10(a) permitted direct service by mail



unless the receiving state objects to such service. The Executive Branch had a long-standing practice of treating the Convention as permitting service by mail, expressly objecting to contrary construction of the Convention by federal courts of appeals. Finally, the Court noted that many foreign courts have held that the Convention allowed service by mail and several of the Convention's signatories have acknowledged that Article 10 encompasses service by mail.

The Supreme Court then remanded the case so that the Texas Court of Appeals could consider whether the Texas law authorizes service by mail used by Water Splash—a question the lower court did not reach since it concluded that the Convention prohibited such service outright.

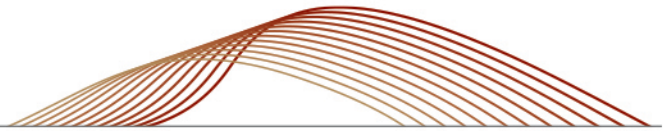
Practical Implications

The Supreme Court in *Water Splash* resolved the question that has long divided federal courts, and held that the Hague Service Convention permitted service by mail. In reaching this decision, the Court employed the traditional tools of treaty interpretation established by its precedents. These interpretative methods are similar—although not identical—to the interpretive rules prescribed by the Vienna Convention on the Law of Treaties,[10] which is used by many other countries when construing international treaties. Companies involved in litigating issues of treaty interpretation before the U.S. courts should be mindful of that difference, even though the sources considered under both the Supreme Court's precedent and the Vienna Convention—the treaty's text and structure, the drafting history, and the construction of the treaty by its signatories in the court of subsequent implementation—are largely similar.

In addition to examining the text and the structure of the Convention, the Supreme Court paid particular attention—as it had in prior treaty interpretation cases—to the contemporaneous drafting history (as demonstrated by various statements of the members of the U.S. delegation that negotiated the Convention), the constituent position of the federal Executive, and the practical construction of the treaty adopted by other countries signatories. This willingness to consider these extra-textual sources in the context of treaty interpretation stands in contrast to the skepticism expressed by many members of the Supreme Court about looking to similar extra-textual sources (such as legislative history) when construing a statute. That is because the Supreme Court generally views a treaty as a contract, although between different countries, and approaches the interpretive task accordingly.[11] Litigants facing issues of treaty interpretation in U.S. courts should be aware of this difference, and examine these extra-textual sources accordingly.

Importantly, the Supreme Court noted that, although the Convention permits service by mail, that service is subject to two requirements: First, the receiving state must not object to service by mail and, second, service by mail must be authorized under otherwise-applicable laws. Thus, the Convention simply does not *prohibit* service by mail, but does not answer the question of whether a company seeking to effect service internationally may rely on that method. Because proper service of process is required for a court's personal jurisdiction over a defendant, companies seeking to serve defendants residing internationally should therefore make sure to employ these additional steps:

- Consult local rules and the rules of the receiving state to determine the appropriate method of service, including whether these rules authorize service by mail and whether a court's permission to effect service via that method is required;



- If local rules require it, obtain permission from the local court before serving a defendant through international mail; and
- Determine whether service by mail is allowed by the receiving state, including whether the receiving state imposes any conditions on such service.

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[1] The Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.IA.S. No. 6638.

[2] *Mann v. Castiel*, 681 F.3d 368, 372 (D.C. Cir. 2012).

[3] *Vazquez-Robles v. CommoLoCo, Inc.*, 757 F.3d 1, 2 (1st Cir. 2014) ("Absent waiver or consent, a judgment that is rendered without lawful service of process is null and void.").

[4] 581 U.S. ----, 2017 WL 2216933 (U.S. May 22, 2017); *compare, e.g.*, *Bankston v. Toyota Motor Corp.*, 889 F.2d 172, 173-74 (8th Cir. 1989) (holding that the Hague Convention prohibits service by mail), *and Nuovo Pignone, SpA v. Storman Asia M/V*, 310 F.3d 374, 385 (5th Cir. 2002) (same), *with, e.g.*, *Brockmeyer v. May*, 383 F.3d 798, 802 (9th Cir. 2004) (holding that the Hague Convention permits service by mail), *and Ackermann v. Levine*, 788 F.2d 830, 838-40 (2d Cir. 1986) (same).

[5] *Menon v. Water Splash, Inc.*, 472 S.W.3d 28, 30 (Tex. App. 2015), *review denied* (May 27, 2016), *cert. granted*, 137 S. Ct. 547, 196 L. Ed. 2d 442 (2016), *and vacated and remanded*, No. 16-254, 2017 WL 2216933 (U.S. May 22, 2017).

[6] 486 U.S. 694, 701 (1988).

[7] *Water Splash*, 2017 WL 2216933, at *6.

[8] *Id.* (citing *Schlunk*, 486 U.S. at 699).

[9] *Id.*; *see Schlunk*, 486 U.S. at 700.

[10] May 23, 1969, 1155 U.N.T.S. 331. The rules on treaty interpretation are contained in Articles 31-33. The United States signed the Vienna Convention, but has not ratified it. Nevertheless, the federal Executive considers the Vienna Convention to represent customary international law of treaty interpretation.

[11] *BG Group, PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1208 (2014).