



International Litigation: Serving Process outside the US

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This Practice Note analyzes the key issues to consider when serving process on a defendant outside the US. In particular, this Note addresses service of process under the 1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Convention), Inter-American Convention on Letters Rogatory and its Additional Protocol (Inter-American Service Convention or IASC), Rule 4 of the Federal Rules of Civil Procedure (FRCP), US state law and the Foreign Sovereign Immunities Act (FSIA).

Generally, a plaintiff commences a lawsuit in the US by filing a complaint (or its equivalent) with the court and having the court clerk issue a summons commanding the defendant's appearance. The summons and complaint are commonly referred to as legal "process." After commencing the action, the plaintiff normally arranges for service of process on the defendant. Proper service

of process on the defendant is critical to establish jurisdiction over the defendant and to compel it to appear in (and be bound by) the proceedings.

Domestic service of process in US federal proceedings is typically governed by Rule 4 of the Federal Rules of Civil Procedure (FRCP), and to a certain extent, the law of the state where the action is pending or where service is made. In contrast, a wide range of laws and treaties potentially govern service of process when the defendant is outside the US. These include:

- The 1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Convention or Convention).
- The Inter-American Convention on Letters Rogatory and its Additional Protocol (Inter-American Service Convention or IASC).
- FRCP 4.
- US state law.
- The Foreign Sovereign Immunities Act (FSIA).

This Note analyzes the key issues to consider under each of these laws when serving process on a defendant outside the US.

THE HAGUE CONVENTION

The Hague Convention entered into force in the US on February 10, 1969 (*20 U.S.T. 361; T.I.A.S. No. 6638; 28 U.S.C.A. (App. following FRCP 4); 16 I.L.M. 1339 (1977)*). It provides the most commonly used method for serving parties in civil or commercial matters outside the US. Over 70 nations have ratified the Hague Convention, including most Western European countries, China and the Russian Federation. Most but not all EU member states are signatories. However, few Southern Hemisphere states have signed.

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The Hague Conference on Private International Law (Hague Conference) *Status Table of the Service Convention* contains a list of nations that have ratified the Hague Convention. The *full text* of the Convention may also be found on the Hague Conference's website.

The main issues for counsel to consider when attempting to serve process under the Hague Convention are:

- The types of lawsuits the Convention covers (see *Hague Convention Applies only to Civil or Commercial Matters* and *Hague Convention Applies only Where Defendant's Address is Known*).
- Whether the Hague Convention provides the exclusive means of service in contracting states (see *Preemptive Effect of the Hague Convention*).
- Whether contracting states can place limits on how process is served within their borders (see *Hague Convention Limitations*).
- The proper methods for serving process under the Hague Convention (see *Methods of Service under the Hague Convention*).

HAGUE CONVENTION APPLIES ONLY TO CIVIL OR COMMERCIAL MATTERS

Article 1 states that the Convention applies only to "civil or commercial matters." There has been very little discussion of what this phrase means given the mixture of common law and civil law jurisdictions bound by the Convention.

However, in at least one case, a German court held that the Convention did not apply to service of process in connection with a US False Claims Act lawsuit because, the German court reasoned, the case went beyond a "civil or commercial" claim to settle a private dispute. The German court concluded that, because the plaintiffs sought damages not only for themselves but also "on behalf of" the US government, there were claims that arose under "public law." Such "public law" claims were deemed to be beyond the scope of the "civil or commercial matters" to which the Convention applies. The US plaintiffs asked the US court (in which the claims were pending) to find the German court's conclusion to be in error. The US court declined and deferred to the German court based on the manner in which the Convention allocates such decisions, as well as based on fundamental principles of comity (see *United States ex rel. Bunk v. Birkart Globistics, GmbH & Co., Nos. 02-cv-1168, 07-cv-1198, 2010 WL 423247 (E.D. Va. Feb. 4, 2010)*).

HAGUE CONVENTION APPLIES ONLY WHERE DEFENDANT'S ADDRESS IS KNOWN

Article 1 states that the Convention shall not apply where the defendant's address is not known. In this situation, a US litigant seeking to serve process abroad must look to FRCP 4(f)(2) (or an equivalent state rule, if the case is pending in a US state court) and the local law of the destination state to determine the appropriate method of service.

PREEMPTIVE EFFECT OF THE HAGUE CONVENTION

The Hague Convention in most instances provides the exclusive means for service of US process in signatory states. Article 1 of the Convention states that it "shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." By virtue of the Supremacy Clause of the US Constitution (*U.S. Const., art. VI*) the Hague Convention preempts inconsistent methods of service prescribed by state law in all cases to which it applies (see *Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 699 (1988)*). However, US courts may look to the US forum state's law for guidance on service issues that are not addressed by the Convention (see *Ackermann v. Levine, 788 F.2d 830, 840 (2d Cir. 1986)*).

HAGUE CONVENTION LIMITATIONS

Although the Hague Convention is intended to provide uniformity of practice among most of its signatories, some countries have made specific reservations regarding particular methods of service. For example, Japan does not permit its judicial officers or officials to serve process under Article 10(b) and (c) of the Convention (see *Hague Conference: Japan - Central Authority & Practical Information*). Lawyers must be aware of these reservations and their impact on service in a nation that has ratified the Convention. The Hague Conference's *Status Table of the Service Convention* sets out the objections and reservations lodged by each of the Convention's contracting states. For additional country-specific information, see the US State Department's *Bureau of Consular Affairs (CA): Judicial Assistance - Country-Specific Information*.

METHODS OF SERVICE UNDER THE HAGUE CONVENTION

The Hague Convention codifies universally accepted procedures for service of process in civil or commercial matters among the signatories, and eliminates the need to serve process through consular or diplomatic channels. The Hague Convention provides three main alternate methods for service:

- Use of the state's designated Central Authority (see *Service through the State's Central Authority*).
- International postal channels (see *Service through Postal Channels*).
- Direct service through an agent in the destination state (see *Service through an Agent in the Destination State*).

The Convention also allows for:

- Service through diplomatic or consular channels (see *Service through Diplomatic or Consular Channels*).
- Service under the destination state's local rules (see *Additional Alternate Methods of Service*).

Rule 4 of the FRCP specifically incorporates the Hague Convention as a proper method of service on individuals and corporations in foreign countries (*FRCP 4(f)(1) and (h)(2)*).

SERVICE THROUGH THE STATE'S CENTRAL AUTHORITY

Article 2 of the Hague Convention requires each signatory to designate a Central Authority to act as the service agent for process served under the Convention. Although service through a Central Authority is not required in many countries, litigants commonly choose to effect service through this method. Moreover, some countries, such as Switzerland, require service within their boundaries to be made through the Central Authority (see *CA: Switzerland Judicial Assistance*). For a list of the Central Authorities designated by the various Hague Convention contracting states, see *Hague Conference: Authorities*. Additional country-specific information may be found on the US State Department's *CA: Judicial Assistance - Country-Specific Information* webpage.

Key issues for counsel to consider when effecting service of process through the destination state's Central Authority are:

- How to complete the request for service form (see *Request for Service Form*).
- How many copies of the required documents must be given to the Central Authority (see *Provide the Central Authority with Two Copies of the Initiating Papers*).
- Whether the summons, complaint and other case-initiating documents need to be translated into the destination state's official language (see *Provide the Central Authority with Translated Copies of the Initiating Papers*).
- How to transmit the case initiating documents to the destination state's Central Authority (see *Delivering the Initiating Papers to the Central Authority*).
- How the destination state's Central Authority will serve the documents (see *Service Methods used by the Central Authority*).
- How to obtain proof of service from the destination state's Central Authority for filing in the US action (see *Proof of Service Provided by the Central Authority*).
- When service must be effected (see *Time Frame for Service*).
- Whether the destination state's Central Authority will demand payment for service of process within its borders (see *Reimbursing the Central Authority's Service Costs*).

Request for Service Form

Article 3 of the Convention states that litigants wishing to serve process through a signatory's Central Authority must file a formal request form with the Central Authority. In the US, litigants file a *Form USM-94*, available from any office of the US Marshal's Service.

The lawyer representing the party seeking service must fully complete the Form USM-94. As an officer of the court, a US lawyer for a party seeking service is authorized to act as a requesting authority under the Convention.

However, a few Hague Convention signatories, such as Israel, require foreign process to be executed by a judge or court clerk (see *CA: Israel Judicial Assistance*). The US State Department

advises that applications for service in these countries should include the seal of the court, and signature and title of the clerk of court. If that is not possible, a cover letter from the judge or clerk to the Central Authority might enable a request executed by a private attorney to be served without going through diplomatic channels.

In addition, some Hague Convention signatories accept process issued by a lawyer only if the request form cites to a specific US law authorizing lawyers to serve process. When serving process in these countries, the Form USM-94 should prominently state that service is requested under FRCP 4(c)(2) (authorizing any person who is at least 18 years old and not a party to the case to serve the summons and complaint) and any relevant state law (see *U.S. Dep't of Justice Memo. No. 386 at 14*, reprinted in *16 I.L.M. 1331, 1335 (1977)*).

Provide the Central Authority with Two Copies of the Initiating Papers

Under Article 3 of the Convention, the party requesting service must provide the Central Authority with:

- Two copies of the completed Form USM-94.
- Two copies of the summons, complaint and any other papers required by the US court to be served on the defendant (initiating papers). The initiating papers must be attached to the Form USM-94.

The destination state, however, may dispense with the duplicate-copy requirement (*Hague Convention, art. 20(a)*).

Provide the Central Authority with Translated Copies of the Initiating Papers

Generally, initiating papers such as the summons and complaint must be translated into the official language of the foreign country (*Hague Convention, art. 5*). However, under Article 7:

- The standard terms contained in the Form USM-94 need only be written in English, although they may also be written in the official language of the destination state.
- The corresponding blanks in the Form USM-94 may be completed in either English or the language of the destination state.

Nevertheless, good practice suggests that the Form USM-94 should be translated into the official language of the destination state for ease of service by the nationals of the destination state.

Note that the destination state may dispense with the translation requirement (*Hague Convention, art. 20(b)*).

In addition to providing the Central Authority with translated versions of the initiating papers, the party seeking to effect service abroad should also provide the Central Authority with copies of the **actual** complaint, and any other initiating documents that were filed in the case, for service on the defendant.

Delivering the Initiating Papers to the Central Authority

Once completed, the party seeking service may simply mail the Form USM-94 and its attachments directly to the Central Authority for service. However, as a practical matter, a US lawyer may want to enlist the services of local counsel to deliver the documents to the Central Authority and to help move the documents through the legal system of the destination state. PLC's *Which Lawyer?* database contains a comprehensive listing of recognized lawyers world-wide.

For additional helpful information on retaining foreign local counsel, see the US State Department's *CA: Retaining a Foreign Attorney* and *Judicial Assistance - Foreign Attorneys* webpages.

Service Methods used by the Central Authority

Article 5 of the Convention sets out the methods by which the Central Authority may serve process in the destination state. The Form USM-94 must specify the method of service the party wishes the Central Authority to use. The Central Authority may serve process:

- By a method prescribed by its internal law for the service of documents in domestic actions on persons within its territory (*Hague Convention, art. 5(a)*).
- By a particular method requested by the applicant, unless that method is incompatible with the law of the destination state (*Hague Convention, art. 5(b)*).
- By delivery to an addressee who accepts it voluntarily, unless this service method is incompatible with the law of the destination state (*Hague Convention, art. 5(c)*). The US State Department reports that service by this method is the most common, and is usually made by a local police officer in the destination state.

Proof of Service Provided by the Central Authority

Article 6 of the Hague Convention requires the destination state's Central Authority to complete a certificate of service and forward it directly to the party that requested service. Under Article 6, the certificate must state that the documents have been served and identify the:

- Method of service.
- Place of service.
- Date of service.
- Person to whom the documents were delivered.

If the documents were not served, the certificate must set out the reasons why service was not made (*Hague Convention, art. 6*).

The reverse side of Form USM-94 contains a Certificate of Service form, which is to be completed by the foreign Central Authority (or the entity it designates to make service) and returned to the party requesting service. Under Article 6, the applicant may require that a certificate which is not completed by a Central Authority or judicial authority be countersigned by one of those authorities.

After receiving the executed certificate of service, the requesting party must file it with the US court in which the action is pending (*FRCP 4(l)(2)(A)*). Keep in mind that the procedure for filing the certificate of service may vary from court to court. For example, in the Southern District of New York, the party that commenced the action must:

- E-file the certificate of service through the Case Management/Electronic Case Filing (CM/ECF) system.
- Deliver the original certificate of service, with summons attached, to the clerk's office.
- Include a copy of the CM/ECF Notice of Electronic Filing with the original certificate of service.

(*S.D.N.Y. ECF Rules & Instructions, § 14.4 (Apr. 2011 ed.)*.)

For more on filing proof of service in a federal civil lawsuit, see *Practice Note, Commencing a Federal Lawsuit: Filing and Serving the Case Initiating Documents: Filing the Proof of Service* (<http://us.practicallaw.com/9-506-3484>).

Time Frame for Service

The Hague Convention does not specify a time frame for service. However, Article 15 of the Convention provides that alternative methods of service may be used if a Central Authority does not respond within six months of a request for service (see *In re South African Apartheid Litig.*, 643 F. Supp. 2d 423, 437-38 (S.D.N.Y. 2009); *In re Bulk [Extruded] Graphite Prods. Antitrust Litig.*, No. 02-cv-6030, 2006 WL 1084093, at *3 (D.N.J. Apr. 24, 2006)).

Because the Convention does not provide a time for making service under its procedures, FRCP 4(m) exempts service in a foreign country from the normal requirement that a summons and complaint be served within 120 days after commencing the action. Nevertheless, a court may dismiss a case for failure to serve a foreign defendant within a reasonable time (see *In re South African Apartheid Litig.*, 643 F. Supp. 2d at 437; *In re Bulk [Extruded] Graphite Prods. Antitrust Litig.*, No. 02-cv-6030, 2006 WL 1084093, at *3).

The Hague Conference advises that most Central Authorities can accomplish service within two months. However, as a practical matter, the process can take as many as six months to effect service and return proof of service to the requesting party.

Reimbursing the Central Authority's Service Costs

Under Article 12, the party seeking service through a Central Authority must pay or reimburse the costs incurred by the Central Authority in:

- Employing a judicial officer (or other competent person) to serve the documents.
- Using a particular method of service.

The destination state, however, may dispense with this requirement (*Hague Convention, art. 20(d)*).

SERVICE THROUGH POSTAL CHANNELS

Article 10(a) of the Hague Convention preserves the right of litigants to effect cross-border service of judicial documents between signatory states through postal channels, provided that the state of destination does not object. Key issues for counsel seeking to serve process in a Hague Convention country via mail are:

- Whether the term “judicial documents” includes legal process (see *May Process be Served by Mail?*).
- Whether the destination state has objected to service of process via mail within its borders (see *Hague Convention Signatories May Object to Service by Mail*).
- Whether service must be made by registered mail (see *Registered Mail versus Ordinary Mail*).
- Whether the serving party must include translated copies of the documents to be served by mail (see *Translation May (or May Not) be Necessary for Mail Service*).
- Whether delivery by private courier constitutes mail service under the Hague Convention (see *Service by Private Courier*).
- How to file proof of mail service in the US court where the lawsuit is pending (see *Proof of Service by Mail*).

May Process be Served by Mail?

US courts are split over whether Article 10(a) relates to service of process or only to judicial documents, such as motions, served after the suit has been instituted:

- Some courts hold that Article 10(a) permits service of process by mail (see *Ackermann*, 788 F.2d at 839; *Brockmeyer v. May*, 383 F.3d 798, 803 (9th Cir. 2004)).
- Other courts hold that Article 10(a) does not permit service of process by mail (see *Bankston v. Toyota Motor Co.*, 889 F.2d 172, 173-74 (8th Cir. 1989); *Nuovo Pignone v. Storman Asia MN*, 310 F.2d 374, 384 (5th Cir. 2002)).

The better-reasoned approach would appear to be that the Convention permits service of process by mail, as this is the position advanced by:

- The US representative to the Convention negotiations and nearly all other Convention signatories (see *Ackermann*, 788 F.2d at 839; *Brockmeyer*, 383 F.3d at 803).
- The US State Department (see *Letter from Alan J. Kreczko, U.S. Dep't of State Deputy Legal Advisor, to the Administrative Office of the U.S. Courts (March 14, 1991)*, quoted in *U.S. Department of State opinion regarding the Bankston Case*, 30 I.L.M. 260, 261 (1991)).
- The 2003 Special Commission of the Hague Convention (see *Conclusions and Recommendations Adopted by the Special Commission on the Practical Operation of the Hague Apostille, Evidence and Service Conventions*, at ¶ 55 (Oct. 28 – Nov. 4, 2003)).

Ultimately, however, lawyers must be aware of the position taken by the circuit in which their action is pending when deciding whether to attempt service by mail under the Convention.

Hague Convention Signatories May Object to Service by Mail

Consistent with Article 10(a), US courts have held that international mail service is improper where countries have entered appropriate reservations against this method of service (see *Knapp v. Yamaha Motor Corp.*, 60 F. Supp. 2d 566, 573 (S.D. W. Va. 1999)). Germany, for example, has objected to mail service under the Hague Convention (see *Hague Conference: Germany - Central Authority & Practical Information*). For more information on which Hague Convention signatories have objected to service by mail, see the Hague Conference's *Status Table of the Service Convention*. Additional helpful information may be found on the US State Department's *CA: Judicial Assistance and Country-Specific Information* webpages.

Registered Mail versus Ordinary Mail

When attempting service by mail, the better practice is to serve by registered mail. Some courts have approved of service by registered mail, while finding service of process by ordinary mail to be ineffective (see, for example, *Hein v. Cuprum, S.A.*, 136 F. Supp. 2d 63, 70 (N.D.N.Y. 2001)). To determine whether registered mail service exists in a specific foreign state, see the US Post Office's *International Mail Manual: Index of Countries and Localities*.

Potential Problems with Mail Service

Even where permitted, service by mail creates potential risks. If a defendant did not have actual knowledge of the process through no fault of her own (for example, where the mail was not delivered or was misdirected), she may be able to vacate a default judgment if she meets additional requirements under Article 16.

Translation May (or May Not) be Necessary for Mail Service

As noted above, a party intending to serve papers through a Central Authority under Article 5 normally must ensure that the initiating papers are translated into the official language of the destination state (see *Provide the Central Authority with Translated Copies of the Initiating Papers*). In contrast, US courts are divided over whether documents served by mail under Article 10(a) need to be translated (see *Lobo v. Celebrity Cruises, Inc.*, 667 F. Supp. 2d 1324, 1338-39 (S.D. Fla. 2009)). The safest course is to have the initiating papers translated into the official language of the destination state. Otherwise, the foreign defendant may be able to successfully argue that it did not receive fair notice of the lawsuit.

Service by Private Courier

Although service by private courier is not specifically addressed under Article 10 of the Hague Convention, a Special Commission of the Convention stated in 2003 that service through private courier is the equivalent of service through postal channels (see *Conclusions and Recommendations Adopted by the Special Commission on the Practical Operation of the Hague Apostille, Evidence and Service Conventions*, at ¶ 56 (Oct. 28 – Nov. 4, 2003)).

Proof of Service by Mail

A party serving process by mail under Article 10(a) must file proof of service with the US court in which the action is pending (*FRCP 4(l)(2) (A)*). In contrast to the situation where the destination state's Central Authority serves the initiating papers, a US litigant serving process by mail must draft its own proof of service. Proof of service usually takes the form of an affidavit or declaration which identifies the:

- Documents served.
- Person served.
- Method of service.
- Time, date and place of service.

To view a sample federal affidavit of service, see *Standard Document, Affidavit of Service (Fed. R. Civ. P. 4)* (<http://us.practicallaw.com/0-505-8401>). To view a sample declaration, see *Standard Document, Declaration: General (Federal)* (<http://us.practicallaw.com/5-507-4700>). For more on filing proof of service in a federal civil lawsuit, see *Practice Note, Commencing a Federal Lawsuit: Filing and Serving the Case Initiating Documents: Filing the Proof of Service* (<http://us.practicallaw.com/9-506-3484>).

SERVICE THROUGH AN AGENT IN THE DESTINATION STATE

Service through the designated Central Authority is the surest way to obtain jurisdiction over a litigant found outside the US. However, if time is of the essence, US lawyers may need to consider direct service on the defendant where it is permitted by the destination state. Article 10(b) and (c) of the Convention preserve the right of litigants to effect cross-border service between signatory states directly through the judicial officers, officials or other "competent persons" of the state of destination. The latter phrase is understood to mean anyone who would be competent to serve process within the destination state under that state's law (see, for example, *Koehler v. Dodwell*, 152 F.3d 304, 307 (4th Cir. 1998)).

When attempting to serve process abroad through a local agent in the destination state, counsel should:

- Determine what limits, if any, the destination state imposes on this service method (see *Contracting State May Object to Service through Local Agent*).
- Consider whether to have the local agent serve duplicate and translated copies of the documents (see *Translations and Duplicate Copies*).
- Obtain competent local counsel to help navigate the destination state's legal terrain (see *Obtaining Local Counsel*).
- Work with the local agent to prepare the proof of service which must be filed in the US action (see *Local Agent's Proof of Service*).

Contracting State May Object to Service through Local Agent

Article 10 permits direct service through a local agent only if the destination state does not object to this service method. A US plaintiff planning to effect service under Article 10(b) or (c) must determine whether the destination state has objected to

(or placed limits on) this service method before retaining a local agent to serve the initiating papers. Japan, for example, does not permit its judicial officers or officials to serve process under Article 10(b) and (c) (see *Hague Conference: Japan - Central Authority & Practical Information*). For information on which Hague Convention signatories have objected to direct service under Article 10(b) and (c), see the Hague Conference's *Status Table of the Service Convention*. Additional helpful information may be found on the US State Department's *CA: Judicial Assistance and Country-Specific Information* webpages.

Translations and Duplicate Copies

Article 10 (unlike Articles 3 and 5) does not expressly state whether a party effecting service through a local agent must provide the defendant with duplicate translated copies of the initiating papers. Nevertheless, good practice suggests that a US litigant should provide its local agent with duplicate copies of the initiating papers in English and the official language of the destination state for service on the defendant. Failure to follow these steps may give the defendant an opportunity to successfully challenge the validity of the service and adequacy of notice.

Obtaining Local Counsel

A party seeking to serve the initiating papers through an agent located in the destination state should retain local counsel to ensure compliance with the destination state's service requirements. Local counsel may also be able to arrange for an agent to serve the initiating papers. PLC's *Which Lawyer?* database contains a comprehensive listing of recognized lawyers world-wide. For additional helpful information on retaining foreign local counsel, see the US State Department's *CA: Retaining a Foreign Attorney and Judicial Assistance - Foreign Attorneys* webpages.

Local Agent's Proof of Service

A party arranging for service of process through a local agent must ensure that the local agent prepares a proof of service to be filed in the US court where the action is pending. In federal proceedings, it is usually preferable to have the local agent prepare an unsworn declaration of service (containing the required statutory language under 28 U.S.C. § 1746) rather than a sworn affidavit of service. This is because the procedure for preparing a foreign affidavit for use in a US proceeding is more complicated than the procedure for preparing a declaration. To view a sample declaration, see *Standard Document, Declaration: General (Federal)* (<http://us.practicallaw.com/5-507-4700>).

If the party effecting service chooses to file an affidavit of service, it must ensure that the affidavit is either:

- Notarized at a US consulate or embassy located in the destination state.
- Sworn before a foreign notary (or its equivalent) in accordance with the destination state's local law.

(See *CA: Notarial and Authentication Services of U.S. Consular Officers Abroad*.)



An affidavit sworn before a US consular official may normally be used in a US proceeding without having the official's signature authenticated by any other authority.

In contrast, an affidavit sworn before a foreign notary (or equivalent official) must include proof as to the authenticity of the notary's (or equivalent official's) signature. In countries that have acceded to the 1961 Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents (1961 Convention), this is accomplished by attaching an apostille to the affidavit. The authentication procedure in countries that have not signed the 1961 Convention is more complicated, often requiring a consular official to "legalize" the affidavit (see *CA: Service of Legal Documents Abroad: Personal Service by Agent*).

For more information on the 1961 Convention, including a list of signatories to that treaty, see the Hague Conference's *Apostille Section*. Additional helpful information may be found on the US State Department's *Apostille Requirements* webpage.

SERVICE THROUGH DIPLOMATIC OR CONSULAR CHANNELS

Article 8 of the Convention authorizes a contracting state to use its consular or diplomatic agents to serve judicial documents on persons located abroad. Article 9 of the Convention authorizes contracting states to use consular or diplomatic channels to forward documents to the authorities of another contracting state for service. As a practical matter, US litigants rarely serve process under Articles 8 and 9, because officers of the US Foreign Service are normally prohibited from serving process or legal papers or appointing other persons to do so (*22 C.F.R. § 92.85*). However, keep in mind that difficulties arising in connection with the transmission of judicial documents for service abroad must be settled through diplomatic channels (*Hague Convention, art. 14*).

ADDITIONAL ALTERNATE SERVICE METHODS

As explained below, US litigants may sometimes serve process on defendants located in Hague Convention contracting states by methods other than those set out by Articles 5 and 10.

Destination State May Provide for Alternate Service Methods

Article 11 provides that contracting states may allow judicial documents to be served by any means not specifically set out by the Convention. Similarly, Article 19 provides that the Convention does not affect a contracting state's internal laws permitting foreign documents to be served within that state by methods other than those set out in the Convention.

Domestic Service under FRCP 4 and Waiver of Formal Service

Sometimes, a US litigant may be able to serve the initiating papers on a foreign defendant without triggering the Hague Convention's procedures. For example:

- Service in the US on a foreign company's US subsidiary may sometimes constitute good service on the foreign parent corporation.
- Service in the US on an individual partner of a foreign partnership may sometimes constitute good service on the partnership.
- Service in the US on a foreign individual may sometimes constitute good service on the individual.
- A foreign defendant may agree to waive formal service of process under FRCP 4(d).

These (and other) service methods under FRCP 4 are analyzed in more detail in *International Service of Process under the FRCP*.

THE INTER-AMERICAN SERVICE CONVENTION

Most Central and South American nations have not ratified the Hague Convention. Mexico, Argentina and Venezuela are notable exceptions. However, many members of the Organization of American States have signed the Inter-American Service Convention (IASC). Its signatories include the US, Argentina, Brazil, Chile, Colombia, Ecuador, El Salvador, Guatemala, Mexico, Panama, Paraguay, Peru, Uruguay and Venezuela (see *1438 U.N.T.S. 287, 14 I.L.M. 339 (1975)*). The IASC therefore provides an important supplement to the Hague Convention when US litigation implicates parties located in Central and South America.

Links to the IASC and its Additional Protocol may be accessed through the US State Department's *CA: Judicial Assistance – Service of Process Abroad* webpage.

This section covers the key issues for counsel to consider when attempting to serve process under the IASC, including:

- Whether the IASC provides the exclusive methods for serving process within the boundaries of its contracting states (see *Non-exclusive Method of Service*).
- Whether process may be served under the Hague Convention, where the destination state is a signatory to both the IASC and the Hague Convention (see *Hague Convention as Alternative*).
- What kinds of cases are governed by the IASC (see *Scope of the IASC*).
- The procedure for serving process under the IASC (see *Procedure under the IASC*).
- The practical difficulties in serving process under the IASC (see *Practical Difficulties in Serving Process under the IASC*).

NON-EXCLUSIVE METHOD OF SERVICE

The IASC was intended to establish uniform procedures for service of process among its signatories. However, US courts have held that the IASC does not provide the exclusive method of effecting service between signatories (see *Kreimerman v. Casa Veerkamp, S.A.*, 22 F.3d 634, 644 (5th Cir. 1994)).

HAGUE CONVENTION AS ALTERNATIVE

Where the destination state has ratified both the Hague Convention and the IASC, attorneys are more likely to prefer to serve under the Hague Convention as it permits service of papers unendorsed by the court clerk and the US Central Authority, which the IASC requires. For more on this issue, see *Procedure under the IASC: Request for Service Form and Case Initiating Documents*.

SCOPE OF THE IASC

Article 2 provides that the scope of the IASC is limited to civil and commercial matters. However, Article 16 permits states to apply the IASC to criminal and administrative matters. So far, only Chile has declared that it will apply the Convention in criminal and administrative cases.

PROCEDURE UNDER THE IASC

This section outlines the basic procedure for serving process under the IASC, specifically:

- How to fill out the request for service form (see *Request for Service Form and Case Initiating Documents*).
- Whether the case initiating documents to be served must be translated into the official language of the destination state (see *Translations of Documents*).
- The proper method for serving documents under the IASC (see *Method of Service under the IASC*).

Request for Service Form and Case Initiating Documents

A party makes a request for service under the IASC by completing an official Form *USM-272* and *272A*, available at the office of any US Marshal. The request is comprised of an original and two copies of the forms, and three copies of the summons and complaint or other documents to be served.

Article 3 of the Additional Protocol specifies that “letters rogatory” must be prepared as part of the request. The US has taken the position that the Form *USM-272/272A* satisfies this requirement, and that a separate, formal letter rogatory is not required.

Unlike the Hague Convention, the IASC requires the request for service form (here, the Form *USM-272/272A*) to bear the seal and signature of the clerk of the court from which the process issues, as well as the signature and stamp of the Central Authority of the state in which the court sits.

Translations of Documents

All documents served with the Form *USM-272/272A* must be translated into the language of the destination state. Although the Form *USM-272/272A* is not itself required to be translated into the language of the destination state, good practice suggests that it be translated as well for ease of service by the nationals of the destination state.

Method of Service under the IASC

Requests for service under the IASC must be made through the Central Authorities for both the originating and destination states. As with the Hague Convention, each IASC signatory has established a Central Authority for receiving requests for service of process within its borders and for making service pursuant to those requests. The Central Authorities for several IASC contracting states are listed on the Organization of American States’ Department of International Law *website*.

The US State Department reports that requests not transmitted through Authority channels are often returned unserved. After receiving the required documents, the Central Authority in the destination state will make service by the method prescribed by local law.

The IASC makes no provision for service by mail. Whether service in a signatory state by mail would be accepted is a question to be determined by reference to the local laws of the destination state.

PRACTICAL DIFFICULTIES IN SERVING PROCESS UNDER THE IASC

The US State Department reports that there have been some practical problems with implementation of the IASC in certain states. It reports that some signatories have failed to designate Central Authorities for implementing the IASC’s procedures, while others claim not to receive requests transmitted by the US Central Authority. When the process works, it can take six months to one year for a request for service to be completed. The US State Department, however, advises that requests for service to Argentina and Peru typically receive more prompt treatment, generally completing service within three months.

INTERNATIONAL SERVICE OF PROCESS UNDER THE FRCP

Service of process may be effected on defendants outside the US in the absence of an international treaty (see *Blackmer v. United States*, 284 U.S. 421 (1931); *Brockmeyer v. May*, 383 F.3d 798 (9th Cir. 2004)). For example, in *OS Recovery, Inc. v. One Groupe Int’l, Inc.*, the US District Court for the Southern District of New York held that direct service by mail on a party in Australia was effective, even though Australia had not ratified the Hague Convention, because Australian law did not prohibit service by mail (Australia has since acceded to the Hague Convention) (*No. 02-cv-8993*, 2005 WL 1744986, at *1 (S.D.N.Y. July 26, 2005)).

As detailed below, Rule 4(f) of the FRCP provides a comprehensive framework for service of process on persons (and other entities) outside the US, independent of the provisions set out in the Service Conventions. When serving process on a foreign entity under Rule 4 of the FRCP, counsel should:

- Determine what service methods are available under Rule 4 (see *Extraterritorial Methods of Service under FRCP 4(f)*).
- Read Rule 4 in its entirety to ensure that service is properly made (see *Cross-reference to Other Sections of FRCP 4*).
- Check to make sure that the chosen service method is acceptable under the law of the destination state (see *Practical Considerations when Serving Process Abroad under FRCP 4*).
- Consider whether it is possible to serve process on the foreign entity inside the US (see *Serving Foreign Entities inside the US*).
- Check whether the foreign entity will agree to waive service of process altogether (see *Waiving Formal Service under FRCP 4(d)*).

EXTRATERRITORIAL METHODS OF SERVICE UNDER FRCP 4(F)

FRCP 4(f) incorporates the following methods of service on individuals in foreign countries:

- Any internationally agreed means of service reasonably calculated to give notice, such as those authorized by the Hague Convention (*FRCP 4(f)(1)*).
- Where there is no internationally agreed means of service, service may be effected as follows:
 - in a manner prescribed by the law of the destination state (*FRCP 4(f)(2)(A)*);
 - as directed by the destination state in response to a letter rogatory or letter of request (*FRCP 4(f)(2)(B)*); or
 - by personal delivery or by any form of mail addressed by the clerk of the court and requiring a signed receipt, unless prohibited by the foreign country's law (*FRCP 4(f)(2)(C)*).

In addition, a US court may order service by any other means that are not prohibited by international agreement (*FRCP 4(f)(3)*). US courts have read this provision flexibly, consistent with the constitutional requirements of due process. For example, in *Rio Properties, Inc. v. Rio Int'l Interlink*, the Ninth Circuit held that a district court did not abuse its discretion by authorizing a plaintiff to serve an Internet business outside the US by e-mail (*284 F.3d 1007, 1017-18 (9th Cir. 2002)*). Because the defendant did not list a physical address, but chose to operate by e-mail, the court found that notice by e-mail was reasonably calculated to give notice of the action and an opportunity to be heard.

CROSS-REFERENCE TO OTHER SECTIONS OF FRCP 4

Aspects of service not addressed in Rule 4(f) of the FRCP are resolved by reference to the other parts of Rule 4. For example, proof of service outside the US remains governed by Rule 4(l).

PRACTICAL CONSIDERATIONS WHEN SERVING PROCESS ABROAD UNDER FRCP 4

Many nations regard service of process as the official act of a foreign sovereign that should not occur within their borders in the absence of a treaty, especially where service is attempted by foreign nationals or officials. Personal service of US process outside the US is therefore less likely to meet with objections by the destination state if local agents are retained to make service on behalf of the US litigant.

In addition, where the destination state is not a party to an international service treaty, the party seeking to effect service must determine whether the destination state requires (or prohibits) certain service methods. For example, some countries may require service to be made pursuant to a letter rogatory (also called a letter of request). A letter rogatory is a formal request from a court in which an action is pending, to a foreign court to perform some judicial act, such as service of a summons and complaint. Normally, US litigants try to avoid serving process pursuant to a letter rogatory, as this is a time-consuming and potentially expensive method of service. However, a US litigant may have no other choice if this method of service is mandatory under the destination state's law. For more information on letters rogatory, see the US State Department's *CA: Preparation of Letters Rogatory* webpage.

SERVING FOREIGN ENTITIES INSIDE THE US

A US plaintiff does not necessarily need to resort to international service methods if the foreign defendant is present inside the US. Some common situations where a plaintiff may validly serve a foreign entity in the US are analyzed below.

Service on Foreign Individuals

Generally, a foreign individual may be personally served with process under FRCP 4 while she is physically present in the forum state (see *Kadic v. Karadzic*, *70 F.3d 232, 247 (2d Cir. 1995)*, citing *Burnham v. Superior Court of California*, *495 U.S. 604 (1990)*). This is commonly referred to as "tag" or "transient" jurisdiction. However, if the individual entered the forum state to testify in an unrelated action, she is normally immune from service for the duration of time she is present in the jurisdiction for purposes of the unrelated action (see *Estate of Ungar v. Palestinian Auth.*, *396 F. Supp. 2d 376, 379-382 (E.D.N.Y. 2005)*).

Service on Foreign Corporations

A foreign corporation may be served in a judicial district in the US under FRCP 4(h)(1) by:

- Delivering the initiating papers to an officer, managing agent or other agent authorized to receive service.
- Following the law of the state where either the district court is located or service is effected.

US states typically require all corporations doing business within their boundaries to designate an in-state agent to receive service

of process (see, for example, *N.Y. Bus. Corp. Law* §§ 304-306). A US plaintiff should therefore check the website for the forum state's Secretary of State (or similar authority) to determine whether the defendant has designated an in-state agent to accept service of process. A plaintiff may save a significant amount of time and money effecting service on a domestic agent rather than arranging for service of the summons and complaint on the defendant abroad.

Moreover, under the laws of some states, a litigant may serve a foreign company through its US subsidiary if the subsidiary has acted as the parent's agent, or because state law makes the US subsidiary an involuntary agent of the parent for service of process. To effect service in this way, the plaintiff must show an agency relationship between the two corporations that goes beyond the parent's mere ownership of the subsidiary (see *Darden v. DaimlerChrysler North America Holding Corp.*, 191 F. Supp. 2d 382, 387-88 (S.D.N.Y. 2002)). The Supreme Court has held that service on a domestic subsidiary does not implicate the Hague Convention's requirements because service is complete upon delivery to the US subsidiary, and therefore does not present an "occasion to transmit a judicial or extrajudicial document for service abroad" (*Volkswagenwerk Aktiengesellschaft*, 486 U.S. at 707-08; see also *Hague Convention*, art. 1).

Service on Foreign Partnerships and Unincorporated Associations

As with service on a corporation, a party may serve a non-US partnership or association under Rule 4(h) of the FRCP by delivering the initiating papers to an agent or other individual located in the forum state authorized by law to accept service of process. In New York, for example:

- Service on a partnership may be made by serving an individual partner within the state with the summons and complaint (*N.Y. C.P.L.R. 310(a)*).
- Service on an unincorporated association may be made by serving the association's president or treasurer (see *Gross v. Cross*, 211 N.Y.S.2d 279, 280 (Sup. Ct. N.Y. Co. 1961), citing *N.Y. Gen. Ass'n's Law* § 13).

Due Process Considerations

Generally, a natural person may be subject to tag jurisdiction in the forum state even if she does not have sufficient minimum contacts with the state to establish personal jurisdiction under the forum state's long-arm statute (see *Estate of Ungar*, 396 F. Supp. at 379). In contrast, courts have held that tag jurisdiction over foreign corporations, partnerships and associations is insufficient to confer personal jurisdiction unless these entities also have sufficient minimum contacts with the forum state (see *Golden Scorpio Corp. v. Steel Horse Saloon I*, No. 08-cv-1781, 2009 WL 976598, at *3 & n. 4 (D. Ariz. Apr. 9, 2009); *C.S.B. Commodities, Inc. v. Urban Trend (HK) Ltd.*, 626 F. Supp. 2d 837, 849-51 (N.D. Ill. 2009)).

WAIVING FORMAL SERVICE UNDER FRCP 4(D)

If a foreign defendant agrees to accept service voluntarily, the US plaintiff should consider proceeding under Rule 4(d) of the FRCP, which permits defendants to waive formal service of process.

The Hague Convention's requirements are not implicated when a defendant voluntarily agrees to waive formal service (see *1993 Advisory Committee Notes to FRCP 4(d)*; *Hoffman-La Roche, Inc. v. Invamed, Inc.*, 183 F.R.D. 157, 159 (D.N.J. 1998)).

Waiving formal service of process can benefit both the plaintiff and the defendant. For example:

- The plaintiff benefits by avoiding the costs associated in translating and serving documents under the Hague Convention or other applicable laws.
- The foreign defendant who agrees to waive formal service benefits by having 90 days to respond to the complaint, instead of the standard 21 days under Rule 12 of the FRCP (*FRCP 4(d)(3)*).

Importantly, a defendant does not waive any objection to personal jurisdiction or venue by waiving formal service (*FRCP 4(d)(5)*).

For more information on waiving formal service of process under Rule 4(d), see *Practice Note, Commencing a Civil Action in Federal Court: Filing and Serving the Case Initiating Documents: Plaintiff May Request that Defendant Waive Formal Service* (<http://us.practicallaw.com/9-506-3484>)).

SERVICE UNDER US STATE LAW

If the lawsuit is pending in a US **state** court, and no binding international treaty governs service of process, the plaintiff must look to the relevant state's service of process rules. Many states have specific rules governing extraterritorial service of process. For example, New York law allows process to be served outside of the state in the same manner as service is made within the state (*N.Y. C.P.L.R. 313*). In addition, New York law allows process to be served outside the state by either a New York resident who is authorized to serve process within New York or anyone authorized to serve process under the laws of the foreign country (*N.Y. C.P.L.R. 313*). Of course, US litigants should always check to see whether a particular state's service methods are prohibited under the law of the foreign state. If so, the foreign court may not recognize a US judgment entered in the action.

SERVICE PROVISIONS FOUND IN THE FOREIGN SOVEREIGN IMMUNITIES ACT

The treaties and rules discussed above all deal with service of process on private entities. As briefly explained below, a US plaintiff who wishes to sue a foreign state (or its agents or instrumentalities) must follow the service methods set out by the FSIA.



METHOD OF SERVICE ON FOREIGN STATES

The FSIA allows foreign state defendants to be served in any of the following ways:

- Pursuant to a special agreement between the plaintiff and the foreign state.
- As prescribed in an applicable international agreement (such as the Hague Convention).
- By mail from the court clerk to the head of the foreign state's Ministry of Foreign Affairs.
- Through diplomatic channels.

(28 U.S.C. § 1608(a).)

METHOD OF SERVICE ON FOREIGN STATE AGENCIES AND INSTRUMENTALITIES

The FSIA allows agencies and instrumentalities of foreign states to be served in any of the following ways:

- Pursuant to a special agreement between the plaintiff and the foreign agency or instrumentality.
- As prescribed in an applicable international agreement (such as the Hague Convention), or by delivery of the summons and complaint to an officer, managing or general agent, or any other agent authorized by appointment or by law to receive service of process in the US.
- Where service cannot be effected pursuant to the above methods, then as follows:
 - as directed by a foreign authority in response to a letter rogatory or letter of request;
 - unless prohibited by law, any form of mail requiring a signed receipt; or
 - by other means not prohibited by international agreement as may be directed by a US court.

(28 U.S.C. § 1608(b).)

FSIA PROVIDES EXCLUSIVE SERVICE METHODS

The FSIA provides the exclusive methods for effecting service of process on a foreign state, political subdivision, agency or instrumentality.

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