New York Law Journal

A NEW YORK LAW JOURNAL SPECIAL SECTION

ALM

LITIGATION

Web address: http://www.nylj.com

MONDAY, AUGUST 20, 2007

Overseas Defendants In Non-Hague Territory

Serving process in the 130 countries outside the convention.

BY TIMOTHY G. NELSON AND JULIE BÉDARD

IF YOU WANT TO SUE foreign defendants, you first need to serve them. We usually expect this issue to be governed by the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Convention).[1] But there are 130 countries that are not party to the Hague Convention, including many large trading partners of the United States. This article seeks to clarify the rules for service in these countries.

The Inter-American Convention

The Inter-American Convention on Letters Rogatory (Inter-American Convention), signed in 1974 and enhanced in 1979, is a product of the Organization of American States and provides a framework for service between the United States and Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, Spain, Uruguay and Venezuela.[2]

It requires contracting parties to honor letters rogatory[3] transmitted to them, provided all requisite formalities are met,[4] i.e., an authenticated copy of the pleadings, the name of the requesting court, and a statement of the relevant time limits and sanctions for non-compliance.[5]

Unlike the Hague Convention, which applies pre-emptively to all situations involving service of process on a defendant resident in a Convention state,[6] the Inter-American Convention does not exhaustively regulate service in the defendant's home state. It only addresses letters rogatory, and "*does not preempt every other conceivable method of serving process on defendants residing in other signatory states.*" *Kreimerman v. Casa Veerkamp, S.A. de C.V.*, 22 F.3d 634, 647 (5th Cir. 1994) (emphasis added); accord *Laino v. Cuprum S.A. de C.V.*, 235 A.D.2d 25, 29, 663 N.Y.S.2d 275, 277 (2d Dep't 1997).

Thus, a resident of an Inter-American Convention state may be served by other means of service that are:

(1) otherwise valid and lawful; and

(2) comport with the constitutional requirement of due process such that "the method of service [was] reasonably calculated, as a matter of fair play, to give actual notice to a prospective party abroad."[7]

Because a party who relies on letters rogatory is essentially at the mercy of a foreign bureaucracy (as well as its own courts' prior approval),[8] alternative means of service (e.g., service by mail or personal service, see infra)[9] are often more attractive than using the Inter-American Convention.

If, as occurred in one case involving the Inter-American Convention, a U.S. court can be persuaded that service through direct means would be unlawful in the defendant's state of residence,[10] service via letters rogatory may be the only practical means of effecting service. In other situations, however, the Inter-American Convention has a limited utility.

Bilateral Service Treaties

The United States is party to a smorgasbord of bilateral agreements relating to litigation rights, e.g., consular conventions,[11] mutual legal assistance treaties,[12] diplomatic "Notes Verbale," and old-style "Amity Treaties" on friendship, commerce and navigation.[13]

Every bilateral treaty presents its own challenges. For instance, in *Hypo Bank Claims Group, Inc. v. American Stock Transfer & Trust Co.*, No. 604562/2004, 2004 WL 1977612 (Sup. Ct. N.Y. County June 28, 2004) (decision referenced in tables at 4 Misc. 3d 1020, 791 N.Y.S. 2d 870), the court held that a "Note Verbale" between Austrian and U.S. diplomats governing service of process was an exhaustive, pre-emptive treaty on service, just like the Hague Convention. Id. at *3, *6-7. Thus, plaintiffs' attempts to serve an Austrian bank in a manner inconsistent with the Note Verbale were invalid. Id. at *7.

But in another dispute, the U.S. District Court for the Southern District of New York took the opposite approach, upholding service in a manner authorized by the court, even though it contravened the Note Verbale and Austrian law. See *In re Ski Train Fire at Kaprun, Austria, on Nov. 11, 2000*, No. MDL 1428 SAS, 2003 WL 21659368, at *3-4 (S.D.N.Y. July 15, 2003).

Where Rules of Court Govern

Absent a service treaty, ordinary rules of court will govern. Federal Rule of Civil Procedure 4(f)(2) permits "service" to be made on foreign individuals

> ...provided that service is reasonably calculated to give notice:
>
> (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or
>
> (B) as directed by the foreign authority in response to a letter rogatory or letter of request; or
>
> (C) unless prohibited by the law of the foreign country, by
>
> (i) delivery to the individual personally of a copy of the summons and the complaint; or
>
> (ii) any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served....

Id.; see also Fed. R. Civ. P. 4(h)-(z) (applying each of these methods to corporations except for service via Rule 4(f)(2)(C)(i)).

Because letters rogatory are prone to delay (see supra), the most attractive of these various options are: (1) personal service by direct delivery of the relevant court papers;[14] or (2) service via return-receipt mail. In many countries, these modes of service are expressly permitted. The circular "Service of Legal Documents Abroad," prepared by the U.S. Department of State, lists countries where service by mail should not be used;[15] they include Australia, Croatia, New Zealand, the Philippines, Singapore and Thailand.

For countries that do not expressly authorize such service, there is a case split concerning

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the meaning of the phrase "prohibited by the law of the foreign country" in Rule 4(f)(2)(C). Some courts have held that service by personal delivery or by return-receipt mail is proper in every country, except where such service is affirmatively banned.[16] Others courts have held that such service is only proper if it is affirmatively permitted, i.e., sanctioned by the forum state's rules.[17]

On either view, however, a positive finding of illegality will invalidate service. See, e.g., *Headstrong Corp. v. Jha*, Civil Action No. 3:05CV813-HEH, 2007 WL 1238621, at *2 (E.D. Va. April 27 2007) (service via mail prohibited in India); see also *Hollow v. Hollow*, 747 N.Y.S.2d 704, 705 (N.Y. Sup. Ct. 2002) (discussing evidence that service by mail is prohibited in Saudi Arabia).[18]

In the last resort, a litigant can obtain a court order authorizing service pursuant to Rule 4(f)(3), "by other means not prohibited by international agreement as may be directed by the court." This Rule "add[s] flexibility by permitting the court by order to tailor the manner of service to fit the necessities of a particular case."[19]

Courts have authorized service by publication,[20] ordinary mail,[21] e-mail,[22] facsimile,[23] delivery to defendant's last-known address[24] and telex or cable.[25] Such methods must, however, comport with due process.[26]

Serving States and Organizations

Service on foreign states is exclusively governed by the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §1608, mandating service through official channels (e.g., the U.S. State Department).[27]

For international organizations in which the United States participates, the International Organizations Immunities Act, 22 U.S.C. §288-288l, confers immunity from "judicial process," unless waived, and so a litigant must examine the activities and status of each such organization to ascertain whether it is amenable to suit (and, a fortiori, service of process) in a particular case.[28]

Even where the Act does not apply, complications may still arise. In *Prewitt Enterprises, Inc. v. Organization of Petroleum Exporting Countries*, 353 F.3d 916 (11th Cir. 2003), service on OPEC's Vienna headquarters was defective because it contravened an Austrian law prohibiting service of legal process "'within the [OPEC] headquarters except with the express consent of…the Secretary General.'" Id. at 923 (citation omitted).

Conclusion

Service is always simpler in countries that have liberal service rules permitting personal service or service by mail. Service becomes harder where a litigant needs to resort to official channels and/or seek letters rogatory, and is hardest when the foreign defendant lives in a country such as Saudi Arabia, which imposes harsh restrictions on personal service, or Taiwan, which is hampered (due to its diplomatic status) from entering international treaties.

When negotiating a contract with someone resident in one of these countries, it is therefore worthwhile getting the individual to nominate a local (U.S. or Western) agent for service of legal process. Although a "service agent" clause will not necessarily eliminate any future disputes about service of process, some protection is better than none.

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1. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638 (Hague Convention).

2. Inter-American Convention on Letters Rogatory, Jan. 30, 1975, O.A.S.T.S. No. 43, Additional Protocol to the Inter-American Convention on Letters Rogatory and Annex, May 8, 1979, O.A.S.T.S. No. 56. Nicaragua has signed the Inter-American Convention, but apparently has not ratified it. The United States undertakes to be bound only by parties that are subject to the Additional Protocol. Bolivia deposited its instrument of ratification on Sept. 26, 2006, with the secretariat of the OAS.

3. Letters rogatory are "formal request[s]" from a U.S. court "to the appropriate judicial authorities in another country that can effectuate service of process." *Magness v. Russian Fed'n*, 247 F.3d 609, 614 n.10 (5th Cir. 2001).

4. See Inter-American Convention arts. 5-8. Under the Inter-American Convention, a letter rogatory may be transmitted through judicial channels, diplomatic or consular agents, and/or other designated authorities. Id. art. 4. The officially designated "central authority" for the United States is the Office of International Judicial Assistance, Civil Division, Department of Justice, in Washington, D.C.

5. Id. art. 8. Depending on the country and the entity, other "formalities" may include the legalization of documents or their translation into the country's official language. See id. art. 5.

6. See *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988).

7. *Vazquez v. Sund Emba AB*, 152 A.D.2d 389, 398, 548 N.Y.S.2d 728, 733 (2d Dept. 1989); accord *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950).

8. In one instance, service in Peru through letters rogatory issued took six months. See *Northrop Grumman Overseas Serv. Corp. v. Banco Wiese Sudameris*, No. 03 Civ. 1681 (LAP), 2004 U.S. Dist. LEXIS 19614, at *58 (S.D.N.Y. Sept. 29, 2004). Moreover, unlike the Hague Convention, which, in practice, permits a U.S. plaintiff to send papers to the foreign "Central Authority" with a minimum of interference by U.S. authorities, see Hague Convention arts 3, 5, the Inter-American Convention requires a plaintiff to go to a U.S. court to get a letter rogatory even before process is served. See Inter-American Convention, arts. 2, 8.

9. See, e.g., *Kreimerman*, 22 F.3d at 647 (remanding for consideration of whether service by mail under Texas long-arm statute comported with Fed. R. Civ. P. 4(f)); *Pizzabiocche v. Vinelli*, 772 F. Supp. 1245, 1249 (M.D. Fla. 1991) (upholding personal service on Argentinian and Uruguayan defendants; holding Inter-American Convention non-mandatory). Note, however, that since 2000, Mexico and Argentina have acceded to the Hague Convention, meaning that service in those countries must now be done pursuant to that convention. Venezuela is also a Hague Convention state.

10. See *Lake Charles Cane Lacassine Mill, LLC v. Smar Int'l Corp.*, Docket No. 07-CV-667, 2007 U.S. Dist. LEXIS 41941, at *6-7 (W.D. La. June 8, 2007) (setting aside direct service where it was proved that "Brazilian law mandates that foreign legal pleadings be served upon corporate citizens of Brazil by means of letters rogatory issued to the Ministry of Foreign Relations"). Even if letters rogatory are necessary, however, the Inter-American convention might not be the only means of issuing them. See *Chemical Waste Mgmt. Inc. v. Ruiz Hernandez*, 95 No. Civ. 9650 (HB), 1997 U.S. Dist. LEXIS 1033, at *4-6 (S.D.N.Y. Feb. 5, 1997) (applying Fed. R. Civ. P. 4(f)(2)(B); upholding service that was effected by a direct letter rogatory issued from the Southern District to a local Mexican court).

11. Numerous countries in Africa, Asia and the Caribbean (former British colonies) have continued a 1951 U.S.–U.K. consular convention under which "[a] consular officer may within his district…serve judicial documents…in a manner permitted under special arrangements on this subject between the High Contracting Parties or otherwise not inconsistent with the laws of the territory." Convention on Consular Officers, U.S.–U.K., art. 17(1), June 6, 1951, 3 U.S.T. 3426, T.I.A.S. No. 2494. N.b. U.S. consular officials are constrained from certain activities. See 22 C.F.R. §§92.85 (2007) (banning consular officials from serving process abroad "except when directed by the Department of State"); but see, 28 U.S.C. 22 C.F.R. §§92.86 to 92.88 (2007) (authorizing U.S. consular officers to serve subpoenas on U.S. citizens and permanent resident aliens abroad).

12. See, e.g., Agreement on Procedures for Mutual Legal Assistance, U.S.–Philippines, art. 8, June 11, 1986, T.I.A.S. No. 11366 ("The parties shall use their best efforts to assist in the expeditious execution of letters rogatory issued by the judicial authorities in connection with any legal proceedings which take place in their respective states."); Agreement on Judicial Procedure, U.S.–Sierra Leone, March 31, 1966, 17 U.S.T. 944, T.IA.S. No. 6056.

13. See, e.g., Treaty of Amity and Economic Relations, U.S.–Thailand, May 29, 1966, 19 U.S.T. 5843, T.IA.S. No. 6540. N.b. Each Amity treaty needs to be considered on its own terms. Most only provide for the right of reciprocal access to courts in both countries, which does not necessarily relate to service of process.

14. Although Fed. R. Civ. P. 4(f)(2)(C)(i), permitting service by personal "delivery," only applies to individuals, service on a foreign corporation may be made by personally delivering the court papers to a corporate representative—provided such service is "prescribed by the [domestic service of process] law of the foreign country" for purposes of Rule 4(f)(2)(A). See, e.g., *Cosmetech Int'l, LLC v. Der Kwei Enter. & Co.*, 943 F. Supp. 311, 316 (1996) (applying Rule 4(f)(2)(A); upholding service on Taiwanese company because "Taiwan [civil procedure] law expressly permits service upon a corporation by delivery to 'the manager concerned'").

15. See U.S. Dep't of State, Service of Legal Documents Abroad, http://travel.state.gov/law/info/judicial/judicial_680.html.

16. See, e.g., *Power Integrations, Inc. v. Sys. Gen. Corp.*, No. C-04-02581 JSW, 2004 WL 2806168, at *1-3 (N.D. Cal. Dec.7, 2004) (allowing service by mail in Taiwan; finding it was not explicitly proscribed by law there); *Dee-k Enters. Inc. v. Heveafil Sdn. Bhd.*, 174 F.R.D. 376, 381-82 (E.D. Va. 1997) (service by courier in Malaysia and Indonesia permitted because it was not explicitly proscribed by law there); see also *Fujitsu v. Nanya Tech. Corp.*, C 06-6613 CW, 2007 U.S. Dist. LEXIS 13132, at *14-15 (N.D. Cal. Feb. 9, 2007) (noting that service by mail might be sufficient in Taiwan, but further holding that the failure to obtain proof of receipt mean that valid service was not proved).

17. See, e.g., *Export-Import Bank v. Asia Pulp & Paper Co.*, 03 Civ. 8554 (LTS)(JCF), 2005 WL 1123755, at *2-4 (S.D.N.Y. May 11, 2005) (disallowing service via mail in Indonesia where the relevant rules state that service "must" be delivered by a bailiff).

18. The interpretation of particular countries' rules on service is occasionally inconsistent. Compare *Resource Ventures, Inv. v. Resource Mgmt. Int'l, Inc.*, 42 F. Supp. 2d 423, 430 (D. Del. 1999) (finding that Indonesia banned service by mail) with *Dee-k Enters. Inc.*, 174 F.R.D. at 381-82 (opposite finding).

19. *In re Int'l Telemedia Assocs., Inc.*, 245 B.R. 713, 719 (Bankr. N.D. Ga. 2000) (quoting Fed. R. Civ. P. 4 advisory committee's note (1963 Amendment)); see also *Williams v. Advertising Sex LLC*, 231 F.R.D. 483, 486-88 (N.D.W. Va. 2005) (Rule 4(f)(3) particularly appropriate where attempts at traditional service have failed).

20. See *Mwani v. Bin Laden*, 417 F.3d 1, 9 (D.C. Cir. 2005) (allowing service by publication in East African, Arabic and international press); *Smith v. Islamic Emirate of Afghanistan*, No. 01 CIV 10132(HB), 2001 WL 1658211, at *3 (S.D.N.Y. Dec. 26, 2001) (allowing service by publication in Afghanistan).

21. See *Int'l Controls Corp v. Vesco*, 593 F.2d 166, 174 (2d Cir. 1979) (authorizing service by mail to Bahamas, coupled with leaving pleadings in a place where defendant would find them); *Ryan v. Brunswick Corp.*, No. 02-CV-0133E(F), 2002 WL 1628933, at *2 (W.D.N.Y. May 31, 2002) (allowing service by ordinary mail, coupled with other service methods, on Taiwanese defendant).

22. See, e.g., *Williams*, 231 F.R.D. at 487-88 (allowing service by e-mail); *Int'l Telemedia*, 245 B.R. at 720 (same); *Hollow v. Hollow*, 193 Misc. 2d 691, 692, 695-96, 747, N.Y.S. 2d 705, 708 (Sup. Ct. Oswego County 2002) (service via e-mail permitted on American defendant resident in Saudi Arabia who had blocked off all other communications).

23. See *Int'l Telemedia*, 245 B.R. at 720 (allowing service by facsimile).

24. See id. (allowing service by mail to defendant's last known address).

25. See *New England Merchs. Nat'l Bank v. Iran Power Generation & Transmission. Co.*, 508 F. Supp. 49, 52 (S.D.N.Y. 1980) (allowing service via telex, cable delivery).

26. See *Ryan*, 2002 WL 1628933, at *2 ("Any alternative methods [of service] approved by this Court must comport with due process requirements.").

27. See 4B Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure §1111, at 123 (3d ed. 2007) ("Section 1608 of the Foreign Sovereign Immunities Act provides the exclusive procedure for service of process on a foreign state or its political subdivisions, agencies, or instrumentalities….") (citing legislative history).

28. See, e.g., *Osseiran v. Int'l Finance Corp.*, No. 06-336, 2007 U.S. Dist. LEXIS 54229, at *11-12 (D.D.C. July 27, 2007) (holding that the International Finance Corporation's involvement in a "commercial transaction" operated to waive immunity from suit).