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A Primer for Service of Process Upon Foreign Entities Under FRCP 4

The world is not as large as it once was. Long gone are the days when the once great divide of our globe's oceans required businesses to transact only with local, or even just domestic, entities.

Today's global economy offers many advantages, but it also creates unanticipated legal problems when the international business deal fails and litigation in the United States is necessary.

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One of the first problems encountered by an attorney starting a litigation against a foreign business is how to serve process upon that business so that the jurisdiction requirements of a U.S. court's and, maybe more importantly, that the requirements of the foreign court for enforcement of the U.S. court's judgment in the foreign nation may be satisfied.

The starting point for addressing this issue in the federal courts is Rule 4 of Federal Rules of Civil Procedure, which provides that "unless federal law provides otherwise, an individual ... may be served at a place not within any judicial district of the United States" by one of three ways: (i) internationally agreed means; (ii) a method reasonably calculated to give notice; and (iii) other means not prohibited by international agreement, as the court orders.[1] This article offers a primer on effectuating service using the more common first two methods of service.[2]

Service By Any Internationally Agreed Means – The Hague Service Convention

The phrase "service by internationally agreed means" in Rule 4 immediately evokes consideration of the nebulous "Hague Convention." But, what is the "Hague Convention," and is it applicable to your foreign defendant and, if so, how does it work?

In 1893, several countries participated in what is now called the Hague Conference on Private International Law with the goal of unifying international civil law.[3] Since then, the Hague Conference has generated 39 different multilateral treaties, which are called "Hague Conventions," addressing a wide variety of civil litigation topics, including the International Administration of the Estates of Deceased Persons, the Recognition of Divorces and Legal Separations, and matters concerning the Taking of Evidence Abroad in Civil or Commercial Matters.

The most recognized convention for service of process abroad, the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents, is specifically mentioned in Rule 4.[4] Not every country is a signatory to the Service Convention, though. At last count, just 68 of the world's 196 countries recognize service of process under the Service Convention, including the United States, China and the Russian Federation.[5]

The Service Convention applies only to civil and commercial matters, and is the exclusive means for service of process in the signatory state. [6] It offers one main channel of service of process and several alternative channels, with the goal of creating a simpler and timely manner to ensure that defendants sued in foreign jurisdictions receive actual and timely notice of suit.

Under the main channel, the authority or judicial officer competent under the law of the requesting state – in the U.S., for example, an attorney – transmits a translated copy of the document to be served to a central authority in the foreign state, along with model forms provided by the Conference, including a request for service, a certificate that service has been effectuated, and summary of the document to be served.[7] The central authority of the receiving state then effectuates service of process by: (i) informal delivery of the documents to the defendant who voluntarily consents; (ii) any method authorized by the receiving state; or (iii) a particular manner requested by the applicant, unless that method is incompatible with the laws of the receiving state.[8] Not every signatory country has the same requirements, though. Some countries, such as Israel, require the foreign process to be executed by a judge or court clerk.

The alternative channels include service directly through the receiving state's diplomatic authorities. There is no hierarchy among the various channels for effectuating service under the Service Convention, however, the Service Convention allows states to object to the use of some or all of the alternative channels.[9] For example, Germany objects to service of process by mail, while Japan prohibits service of process by its judicial officers and officials.[10]

The Service Convention offers an expedited and cost efficient means to effectuate service process in signatory countries with little or no involvement by the courts or diplomatic channels. However, one must review the Service Convention carefully to ensure compliance with the specific country's permitted methods of service.

Service By A Method Reasonably Calculated To Give Notice – Letters Rogatory

Rule 4 recognizes that not every coun-

try participates in the Service Convention and, so, it offers three alternative methods of effectuating service of process.[11] The most common of those alternatives is service through the use of letters rogatory.

Simply stated, a letter rogatory, or letter of request, is a "document issued by one court to a foreign court[.]"[12] "In its broader sense in international practice, the term letters rogatory denotes a formal request from a court in which an action is pending, to a foreign court to perform some judicial act."[13]

While letters rogatory may be "utilized to serve process on an individual or corporation within the foreign jurisdiction[,]" parties may also use letters rogatory to take evidence from a specific person within the foreign jurisdiction.[14]

In either case, the process for obtaining the letter rogatory from the court is the same. The applicant for the letter rogatory submits a motion to the district court explaining the reason for the letter rogatory and attaching the draft letter rogatory and copies of the documents to be served that are translated into the applicable foreign language.[15] Once the letter rogatory is signed by the court, it is filed with the appropriate legal authority in the foreign jurisdiction for that authority to direct service of process.

As an alternative to the courts, one could obtain a letter rogatory through the Department of State; however, that can take considerably longer to process.[16]

Just as with the Hague Service Convention, international treatises and laws attempt to expedite the letter rogatory process and offer some assurance that a request will be timely effectuated. For example, the United States and certain Central and South American countries are signatories to the Inter-American Convention on Letters Rogatory and Additional Protocol, or IACAP.[17]

In civil and commercial matters, IACAP, provides a uniform application and form letter rogatory recognized by the signatory countries, as well as a centralized authority to process the requests for assistance.[18] Similarly, under the Canada Evidence Act, the Canadian courts permit a court outside of Canada to serve letters rogatory upon a Canadian court.[19]

Why Not Hire a Process Server in the Foreign Country

Although a request for assistance from one court to another is "usually granted, by reason of the comity existing between nations in ordinary peaceful times,"[20] there is no guaranty that a foreign court will grant the request. Moreover, even with a treaty, it may take an extraordinary amount of time to effectuate service of process.

Why not then hire a process server to personally serve the summons and complaint in the foreign jurisdiction and, ostensibly, obtain the U.S. court's jurisdiction over that entity? Indeed, Rule 4 specifically permits service of process abroad by "delivering a copy of the summons and of the complaint to the individual personally."[21]

First, personal service of process that way may violate that country's notion of sovereign immunity and its specific laws.[22] Consequently, Rule 4(f) only allows this method of service so long as it is not "prohibited by the foreign country's law."

Second, even if personal service is not prohibited by the foreign country's law, such service may render a resulting judgment worthless because it will not be recognized in the foreign jurisdiction.[23] Stated differently, using an authorized method of international service (*i.e.*, under the Service Convention or using letters rogatory) helps ensure that the ultimate judgment obtained in the United States will be recognized and enforceable abroad.

Conclusion

Service of process abroad involves the interplay between not just the various U.S. rules and statutes governing service, but also the laws of the foreign country, and the applicable treaties and conventions to which that country and the United States are signatories. A practitioner's failure to heed these rules, treaties and conventions may leave his or her client with a hollow, pyrrhic victory – a judgment that is not enforceable against the defendant's property in its home country.

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1. *See* FRCP 4(f). Under FRCP 4(h)(2), the means of personal service upon a foreign business entity are the same as those for service upon a foreign individual. For issues relating to service of process upon a foreign state, or an agency or instrumentality of a foreign state, see 28 USC §§ 1602 through 1607.
2. A treaty or letters rogatory are not essential to making effective service upon defendants outside the U.S., as the court is authorized to direct service in their absence. *See, e.g.*, *OS Recovery, Inc. v. One Groupe Int'l, Inc.*, 2005 WL 1744986 (SDNY July 26, 2005) (direct service by mail on party in Australia found effective, where Australia had not ratified the Hague Convention and Australian law did not prohibit service by mail).
3. *See* The Hague Conference on Private International Law, located at www.hcch.net (last visited on April 1, 2014).
4. *See* FRCP 4(f)(1). *See also* Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents ("Hague Service Convention").
5. *See* The Hague Conference on Private International Law, Status Table, located at www.hcch.net.
6. Article *See* Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents, Article I (stating it "shall apply in all cases"). *See also Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 698 (1988) (finding the Hague Service Convention preempts inconsistent methods of service offered by individual states).
7. *See* The Hague Conference on Private International Law, *supra* n.5. *See also* Form USM-94.
8. *See id.*, Articles 2 through 7.
9. *See id.*, Articles 8 through 10.
10. *See* Hague Conference: Germany – Central Authority & Practical Information; Hague Conference: Japan – Central Authority & Practical Information. *See also Hein v. Cuprum, S.A.*, 136 F. Supp. 2d 63, 70 (N.D.N.Y. 2001) (finding that service of process by first-class mail is ineffective).
11. *See* FRCP 4(f)(2)(A)-(C).
12. Black's Law Dictionary, p. 916-17 (7th ed. 1999). *See also* 28 USC § 1781(b) (authorizing the District Courts to issue and receive letters rogatory).
13. 22 CFR § 92.54.
14. *Lantheus Medical Imaging v. Zurich American Ins.*, 841 F. Supp. 2d 769, 776 (SDNY 2012) (citations omitted).
15. 28 USC § 1781. *See also*, Forms-Order to Take Evidence Abroad (www.nysd.uscourts.gov/forms.php).
16. *See* Preparations of Letters Rogatory, U.S. Dept. of State (located at www.travel.state.gov) (explaining that the diplomatic process could take a year or longer to complete).
17. The text, and list of signatories to, the IACAP can be found at: http://www.court.ca.gov/partner/documents/ea_ InterAmerican.pdf. Unlike the Hague Service Convention, IACAP requires the signature of both the clerk of the court and the Central Authority on its forms.
18. *See* Form USM-272 and 272A.
19. Canada Evidence Act, RSC 1985m c. C-5, § 46.
20. Lantheus Medical Imaging, 841 F. Supp. 2d at 777-78.
21. FRCP 4(f)(2)(c)(i). *See also* OS Recovery, Inc., supra n.2.
22. *See, e.g.*, *NML Capital v. Republic of Argentina*, 03-Civ.-8845, 2013 U.S. Dist. LEXIS 17572 (SDNY Feb. 8, 2013).
23. *See, e.g.*, *Dorchester Fin. Sec., Inc. v. Banco BRJ, S.A.*, 11-Civ.-1529, 2012 U.S. Dist. LEXIS 8987 (SDNY Jan. 24, 2012) (noting that, [u]pon attempting to enforce the judgment in Brazil, where [the defendant] is located, [plaintiff] learned that it would be unable to do so because a default judgment from a United States court is not enforceable against a Brazilian defendant unless process was served in that action by letters rogatory").