

1980

A Practical Guide to Service of United States Process Abroad

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Recommended Citation

Gary N. Horlick, *A Practical Guide to Service of United States Process Abroad*, 14 INT'L L. 637 (1980)
<https://scholar.smu.edu/til/vol14/iss4/4>

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A Practical Guide to Service of United States Process Abroad

Introduction

Lawyers in the United States accustomed to the relative ease of service of process in federal court litigation frequently are surprised to find that compliance with the technical requirements of service outside the United States can involve costs, delays and technical pitfalls grossly disproportionate to the basic function of service of process, that of notifying the defendant of the pending action. Fortunately, two developments in the 1960s and 1970s—the 1965 Hague Convention on Service Abroad of Judicial and Extrajudicial Documents¹ and Rule 4(i) of the Federal Rules of Civil Procedure²—have somewhat eased the task of the United States lawyer³ in completing this prerequisite to litigation. This article will review the elements involved in serving

¹Convention on Service Abroad of Judicial and Extrajudicial Documents, done November 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163. [hereinafter cited as *the Hague Convention*.] See Amram, *Report on the Tenth Session of the Hague Conference on Private International Law*, 59 AM. J. INT'L L. 87, 90-91 (1965); Note, *The Effect of the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 2 CORNELL INT'L L.J. 125 (1969).

The 1965 Convention is a revision of an earlier document, the Hague Civil Procedure Convention of 1954. There is also a 1975 Inter-American Convention on Letters Rogatory, 14 INT'L LEGAL MATS. 339 (1975), with a 1979 Additional Protocol, 18 INT'L LEGAL MATS. 1238 (1979). The United States is not a party to those Conventions.

²FED. R. CIV. P. 4(i) (adopted in 1963) [hereinafter cited as Rule 4(i)].

³It should be noted that U.S. State Department personnel are prohibited from making service abroad in ordinary civil litigation. 22 C.F.R. § 92.85 (1979). Foreign service officers abroad can furnish information concerning local procedures and lists of local attorneys. 22 C.F.R. § 92.94 (1979). It would be a valuable service if the State Department were to compile from each United States embassy a detailed explanation of local procedures for service of process.

outside⁴ of the United States prospective parties in federal civil⁵ litigation within this country,⁶ and will concentrate on the essentials of service under the Hague Convention and under Rule 4(i).

Conceptually, there is not a great deal of difference between service of U.S. process under the Convention and service of U.S. process in countries that are not a party to the Convention. In both cases, the validity of service for purposes of enforcement in the United States will be judged by Rule 4, or its state law equivalent, and in both cases validity for purposes of enforcement in the foreign country will be judged on the basis of that country's law, without any concern as to whether or not service was made through the Convention. The *advantage* of service under the Convention is that the process is a fairly simple, rapid and not terribly expensive one, in which the foreign country has agreed to undertake most of the chores involved in actually serving the documents. By contrast, service in a country which is not a party to the Convention is the responsibility of the party seeking service, who must worry about every step of a frequently lengthy, expensive and twisting process bordered on all sides with fatal pitfalls.⁷

The first question to ask when confronted with a potential defendant upon whom service cannot be made within the United States is the classic one that precedes much civil litigation: "Where are the assets?" If assets against which enforcement can be made are located within the jurisdiction of a U.S. court, one will want to ensure that the service will be valid by the standards that are applied by that court.⁸ If, however, enforcement of the U.S. judg-

⁴It should be borne in mind that a number of cases have held that service of process *within* the United States on a domestic subsidiary of an alien corporation constitutes service on the foreign parent for purposes of seeking a judgment in the United States. Such decisions have rested upon findings that the alien corporation was doing business in the United States by reason of its control over the activities of the subsidiary. *Sunrise Toyota, Ltd. v. Toyota Motor Co.*, [1972] Trade Cas. (CCH) ¶ 74,092 (S.D.N.Y. 1972); *In re Siemens & Halske A.G.*, Berlin, Germany, 155 F. Supp. 897 (S.D.N.Y. 1957), *petition for mandamus denied sub nom.* Elec. & Musical Indus., Ltd. v. Walsh, 249 F.2d 308 (2d Cir. 1957) (*subpoena duces tecum*); *United States v. Watchmakers of Switzerland Information Center*, 133 F. Supp. 40 (S.D.N.Y. 1955), *reargument denied*, 134 F. Supp. 710 (1955); *United States v. Imperial Chem. Indus., Ltd.*, 100 F. Supp. 504, 511 (S.D.N.Y. 1951); *United States v. United States Alkali Export Ass'n*, [1946-47] TRADE REG. REP. (CCH) ¶ 57,481 (S.D.N.Y. 1946).

⁵With respect to criminal proceedings, see Gallagher, *Subpoena Service on Citizens Residing Abroad: A Proposal for the Adoption of an International Approach in Criminal Proceedings*, 12 INT'L LAW. 563 (1978).

⁶In general, the United States, like most common law countries, makes service of process within the United States in aid of foreign litigation here quite easy. See 28 U.S.C. § 1696 (1976); J. McCLEAN & K. PATCHETT, *THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS AND ORDERS AND THE SERVICE OF PROCESS WITHIN THE COMMONWEALTH: A FURTHER REPORT* 187 (1977).

⁷An exploration of some of those pitfalls, when contrasted with the relative ease of the Convention, demonstrates the desirability of having as many countries as possible ratify the Convention.

⁸It should be noted that United States courts have consistently held that the enforceability of the judgment in the foreign country is irrelevant for purposes of sufficiency of service under the laws of the United States. *Bersch v. Drexel Firestone, Inc.*, 389 F. Supp. 446 (S.D.N.Y. 1974),

ment will be sought in a foreign country, that country's standards for service of process should be followed to the extent possible, perhaps after consultation with a lawyer of that country.

I. Service under Federal Rule 4(i)

After analyzing the facts of the case and the probable place where enforcement of a judgment will be sought, the U.S. lawyer should ascertain if the relevant foreign country is a party to the Hague Convention. If service is sought on a person located within a country not a party to the Convention, the American attorney may proceed without having to check any treaties, as treaty relationships are not required by U.S. courts.⁹ Instead, the attorney must consult the appropriate federal or state rules on service of process abroad. For federal litigation,¹⁰ service of process in countries that are not parties to the Convention is eased by the liberal provisions of Rule 4(i), which provides for various alternate methods of service in foreign countries where the statute which provides the basis for extraterritorial jurisdiction does not specify the manner of service.¹¹ Rule 4(i) supplements, rather than replaces, other provisions for service under Rule 4, so service can also be made in any way acceptable under Rule 4 (including use of state law rules under Rule 4(e)).

modified, 519 F.2d 974 (2d Cir. 1975), *cert. denied*, 423 U.S. 1018 (1975); *Alco Standard Corp. v. Benalal*, 345 F. Supp. 14, 26 (E.D. Pa. 1972).

⁹*Blackmer v. United States*, 284 U.S. 421 (1932); *SEC v. Briggs*, 234 F. Supp. 618, 620-21 (N.D. Ohio 1964).

¹⁰Admiralty matters are not covered by the Federal Rules of Civil Procedures, FED. R. CIV. P. 81(a)(1), and special provisions for service are found in the admiralty rules.

The provisions for service in the UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT, § 2.01 [hereinafter cited as U.L.A.], patterned on Rule 4(i), have been adopted by Arkansas, the District of Columbia, Massachusetts, Michigan, Oklahoma, Pennsylvania and the Virgin Islands. See WRIGHT & MILLER, FED. PRAC. & PROC., *Civil* § 1133, at 558 n.23 (1969). [hereinafter cited as WRIGHT & MILLER] *But see* N.Y. CIV. PRAC. LAW 2d §§ 308 *et seq.* (McKinney 1972).

¹¹See FED. R. CIV. P. 4(e). Rule 4 does *not* provide an independent basis for extraterritorial jurisdiction, which must be found in the relevant federal or state statute. Section 12 of the Clayton Act, 15 U.S.C. § 12 *et seq.* (1976), for example, permits service of process on corporations in judicial districts where the corporation is an "inhabitant," or "wherever it may be found"—thereby establishing personal jurisdiction over the corporation in the forum district. *Eastman Kodak Co. v. S. Photo Materials Co.*, 273 U.S. 359 (1927). It is possible that foreign corporations who have transacted substantial business in the district might be served at offices overseas (service "wherever . . . found"). *Intermountain Ford Tractor Sales Co. v. Massey-Ferguson Ltd.*, 210 F. Supp. 930, 939 (D. Utah 1962) (dictum), *aff'd*, 325 F.2d 713 (10th Cir. 1963), *cert. denied*, 377 U.S. 931 (1964). Service on a United States subsidiary in the forum may confer jurisdiction over the foreign parent, if the subsidiary is a mere instrument for carrying out the parent's business. *United States v. United States Alkali Export Ass'n*, [1946-47] TRADE REG. REP. ¶ 57,481 (S.D.N.Y. 1946) (N.Y. subsidiary directed and operated by employees of the U.K. parent); *Sunrise Toyota, Ltd. v. Toyota Motor Co.*, [1972] Trade Cas. (CCH) ¶ 74,092 (S.D.N.Y. 1972); *Accord*, *United States v. Watchmakers of Switzerland Information Center*, 133 F. Supp. 40 (S.D.N.Y. 1955). *Cf.* *O.S.C. Corp. v. Toshiba America, Inc.*, 491 F.2d 1064 (9th Cir. 1974) (no vicarious presence of the foreign parent through the U.S. subsidiary, if the two companies are operated separately). In addition, state long-arm statutes of the forum are appli-

Rule 4(i) provides five alternate means of service. Subsection (A) of Rule 4(i) permits service to be made in the manner prescribed by the law of the country where service is to be made for service in an action in that country in any of its courts of general jurisdiction. This would include methods of service not available in the United States, such as substituted service in Italy by delivery to the concierge of the building where the person to be served lives,¹² as long as the method of service is likely to give the actual notice required by United States due process concepts.

This method of service has the advantage of being likely to aid enforcement of a United States judgment in the country where service is made. In addition, such service can sometimes be made by contacting a local attorney, without the need for time-consuming actions by the local authorities. The difficulties of this method depend, of course, upon the method of service used in the given foreign country. One would want to investigate how service is made there and weigh the time and cost constraints against the desirability of enforcement of any judgment in that country.¹³

The second method, set out in subsection (B), is for service as directed by the foreign country pursuant to a letter rogatory. The transmittal of letters rogatory is governed by 28 U.S.C. § 1781 (1976), as well as by the State Department Regulations, 22 C.F.R. § 92.54 (1979). Section 1781 authorizes the State Department to receive, forward, and return after execution, letters rogatory requesting service of process abroad. Section 1781 does not preclude transmittal of letters rogatory directly from the issuing court to the addressee court, nor their return in similar fashion, *i.e.*, without intervention by the government involved, if the foreign country so permits. Such direct transmission from one court to another is permitted by certain bilateral treaties (*e.g.*, France-Belgium), and by certain Latin American countries (*e.g.*, Colombia).

A letter rogatory must be requested from the court in which the action is pending. A suggested form for that application can be found attached to Memorandum No. 386, available in U.S. marshals' offices. Once the applica-

cable in antitrust cases. *See generally* United States v. Scophony Corp. of America, 333 U.S. 795 (1948); Japan Gas Lighter Ass'n v. Ronson Corp., 257 F. Supp. 219 (D.N.J. 1966). Express statutory provisions for service abroad pursuant to court order can be found scattered throughout the U.S. Code. *See, e.g.*, 35 U.S.C. §§ 146, 293 (1952) (patents); 38 U.S.C. § 784(a) (1958) (veterans' insurance); 46 U.S.C. § 1292 (*as amended* 1965) (marine war risk insurance). In addition, U.S. courts prior to enactment of Rule 4(i) have found valid extraterritorial service by mail pursuant to statutes which do not specify the manner of service. *See* Zurini v. United States, 189 F.2d 722 (8th Cir. 1951) (8 U.S.C. § 1451 (1976), immigration law); SEC v. Briggs, 234 F. Supp. 618 (N.D. Ohio 1964) (1933 and 1934 Securities Acts, current version at 15 U.S.C. § 77 *et seq.* (1976 & Supp. II 1978)).

¹²United States v. Danenza, 528 F.2d 390 (2d Cir. 1975).

¹³For examples of how neighboring countries can have very different methods for serving process, *see Service of Process in Austria, England, Italy and West Germany*, 9 INT'L. LAW 689 (1975).

tion for the issuance of a letter rogatory has been granted, the judge must sign it, after which the clerk of the court should affix the seal of the court. An original, and one copy of the letter, together with two copies of the documents to be served and a certified translation of each, plus a certified check for \$60 payable to the U.S. Embassy in the country in which service is to be made, should be sent either directly to that Embassy or to the Office of Special Consular Services of the Department of State in Washington, D.C. The Embassy will transmit the request to the foreign country's Ministry of Foreign Affairs, which will transmit the documents to the appropriate officials for service, after which return of service will be made to the requesting American court via the same channels. No other papers should be attached, as they could cause confusion or delay. Some countries (such as Mexico) will require an authentication of the seal of the court.

The principal advantage of using letters rogatory is that some countries—notably Switzerland—permit no other form of service. The Swiss position is based on an extreme view of the nature of sovereignty, whereby any act touching Switzerland, including mailing of service *into* Switzerland from the United States, is viewed by Switzerland as a judicial act by the United States *within* Switzerland, thereby invading Swiss sovereignty.¹⁴ United States courts, however, have no such qualms and will recognize service made in Switzerland by means of which the Swiss disapprove. Indeed, the Swiss have conceded that, notwithstanding the objection of the Swiss authorities to service of process in Switzerland by mail, nothing prevents U.S. courts from considering such process to be valid.¹⁵

The disadvantages of service through letters rogatory stem from the frequently cumbersome procedures involved. A letter rogatory to Switzerland,

¹⁴The Swiss sent a stiff diplomatic note to the U.S. in 1961 complaining of service by means other than letters rogatory. In an aide-memoire to the Embassy of Switzerland, dated November 28, 1961, the Department of State replied:

The Department of State has informed the competent United States authorities of the Swiss law referred to in the aide-memoire. The Department believes that this action will avoid any future transmittals of such documents in a manner inconsistent with Swiss law. The inadvertent violation of applicable Swiss law by United States authorities is regretted.

56 AM. J. INT'L L. 794 (1962). The Swiss serve process in the United States without the use of letters rogatory. See *Julen v. Larson*, 25 Cal. App. 3d 325, 101 Cal. Rptr. 796 (1972). The Government of France has recently protested service by mail of a Federal Trade Commission subpoena, claiming that such service violates international law. *Federal Trade Commission v. Compagnie de Saint-Gobain-Pont-a-Mousson*, Misc. No. 78-0194 slip op. at 11 (D.D.C. February 14, 1980). The underlying basis of the French protest appears to be the attempt to obtain sensitive evidence in France, more than the use of postal service.

¹⁵*Atlantic Steamers Supply Co. v. International Maritime Supplies Co.*, 268 F. Supp. 1009 (S.D.N.Y. 1967). In that case, the Swiss Federal Department of Justice and Police had written a letter stating that foreign legal process could only be served in Switzerland through the diplomatic branches of the government, but conceding that

... despite the opposition of the Swiss authorities to the serving of notice by post, nothing prevents the American courts, if their law finds a postal notification sufficient, from considering the writ in question as having been duly served on its addressee.

268 F. Supp. at 1015.

for example, must proceed through the diplomatic channels of both nations, identify the documents to be served, contain a copy of the documents translated into the official language of the court that will make the service, set forth the substance of the proceeding and contain a general promise of reciprocal treatment should the Swiss court ever be in need of aid.¹⁶

While in most cases a request for service in Mexico may be made directly to the Mexican court, thus avoiding the time-consuming diplomatic channels, the letter itself must undergo a series of procedural steps, including verification of its legality by the Mexican consul responsible for the issuing court's jurisdiction, attachment of a certified and authenticated translation¹⁷ into Spanish, and compliance with such local procedural requirements as the spelling out of all numerals.¹⁸

In addition, letters rogatory may be subjected to special delays or noncompliance if relations between the U.S. and the country of which service is requested are chilly, or if the foreign authorities refuse to serve process for actions that could not be maintained in that country. As a result, letters rogatory should not be used unless there is no other method of service in that country and enforcement will be sought there, or if active assistance of a foreign court will be necessary (as, for example, to locate a defendant whose address is not known). If letters rogatory are used, local counsel can be very useful, both to ascertain formal requirements and to speed the progress of the letter through the local bureaucracy.¹⁹

Subsection (C) permits service on an individual in a foreign country to be made by personal delivery on the individual, or on an officer, manager or general agent of a corporation, partnership or association. Service may be made by any person who is not a party and is at least eighteen years of age, or who has been designated by the U.S. or the foreign court to serve process. While personal service may involve some foreign costs, it has the advantage of being relatively speedy and easy—the federal district court clerk upon request will transmit the summons to the plaintiff, who can arrange for rapid transmission to the person of his choice, including foreign counsel, who will actually make the service. Another advantage is that this method appears calculated to guarantee actual notice, as required by U.S. standards of due

¹⁶WRIGHT & MILLER § 1134. In West Germany—before it became a party to the Hague Convention—letters rogatory had to go through diplomatic channels, and service was made only on a defendant who voluntarily accepted the documents after having had the right to inspect them, with no substituted service. Stern, *International Judicial Assistance*, 14 PRACTICAL LAW. 17, 23 (December 1968).

¹⁷Some foreign courts will accept certification of translations by the embassy or consulates of that country in the U.S. Local counsel should be consulted for verification.

¹⁸Stern, *supra* note 16, at 22.

¹⁹Some countries will require local counsel to have a power of attorney executed in the form required by that country. This should be checked with local counsel when the first contact is made. The United States and several Latin American countries are parties to a Protocol on Uniformity of Powers of Attorney Which Are to Be Utilized Abroad, 56 Stat. 1376 (1942), T.S. 982.

process. A further advantage is that such a person, by not being an official of the United States government, may be less offensive to the foreign country in which process is made. Service by subsection (C) may well run afoul, however, of some foreign requirements that service be made by an officer of the foreign court, and thus, it could create problems in enforcing a U.S. judgment abroad.

Subsection (D) allows for service by any form of mail requiring a signed receipt. Actual mailing of the documents must be done by the clerk of the court.²⁰ Service by mail has the advantage of being both rapid and inexpensive, as well as requiring no activity by the foreign country's authorities (except for the mechanical operation of the postal service). It will not, however, permit enforcement of a U.S. judgment in those countries that require personal or substituted service pursuant to court order, and it is considered offensive by Switzerland and the Federal Republic of Germany. Courts have upheld service by mail on corporations at their principal place of business, as well as service on wholly owned subsidiaries and affiliated corporations which are co-defendants in the action.²¹ One court has implied that the address need only be a location where some of the defendant corporation's employees are located, although the same court refused to rule on whether service upon a woman not the wife of the individual defendant was sufficient.²²

The final method under Rule 4(i), subsection (E), provides that if none of the other four alternatives is likely to be satisfactory, service may be made as directed by the order of the U.S. court, which allows the court to tailor service to the needs of a particular situation. For example, in a 1965 case, after service by registered mail under subsection (D) and personal service under subsection (C) had both failed, the court authorized service by ordinary mail to the defendant at his Canadian residence, to his Canadian lawyers at their offices, and to a U.S. lawyer who had been retained by the defendant in connection with the subject matter underlying the action. The court held that service by mail under subsection (E) was not subject to the requirements of service by registered mail under subsection (D), because the court under subsection (E) could fashion whatever safeguards it found necessary.²³

In summary, Rule 4(i) permits rapid and inexpensive overseas service which is acceptable in United States courts; it also allows for more time-

²⁰Local practice, such as that in the Southern District of New York, frequently requires the attorney to provide the clerk with an envelope, postage, return-receipt card, and a copy of the summons and complaint to be served. *Hunt v. Mobil Oil Corp.*, 410 F. Supp. 4, 9 (S.D.N.Y. 1975) (no need for the clerk to use official stationery).

²¹*Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 402 F. Supp. 262, 330 (E.D. Pa. 1975).

²²*Bersch v. Drexel Firestone, Inc.*, 389 F. Supp. 446, 462-63 (S.D.N.Y. 1974).

²³*Levin v. Ruby Trading Corp.*, 248 F. Supp. 537 (S.D.N.Y. 1965). In a more sensational instance, the court order was modified by telephone to permit plaintiff's attorney to throw the papers on the grounds of defendant's residence and then flee pursuing bodyguards. *International Controls Corp. v. Vesco*, 593 F.2d. 166, 175-192 (2d Cir. 1979).

consuming methods, which will be necessary if enforcement is sought in certain countries. As a practical matter, if one will not seek enforcement overseas, one usually begins with service by registered mail under subsection (D). If service is not successful within three or four weeks, or if greater speed is needed, personal service under subsection (C) should be attempted. If that fails, there are two tracks which might be followed simultaneously: (1) contacting a lawyer in the foreign country to explore the possibility of service by the means normally used in that country; and (2) going to federal court to seek service by ordinary mail under subsection (E). Only as a last resort should service by letter rogatory under subsection (B) be attempted.

II. Proof of Service

Under Rule 4(i)(2), proof of service may be made either by the ordinary rules (as set forth in Rule 4(g)), which essentially require an affidavit, or in accordance with the law of the country where served. That second method was added because process servers in foreign countries have been unwilling or unable to provide any proof of service other than that which is customary in their own countries. In addition, proof of service may be made as directed by order of the U.S. court, which gives one considerable flexibility. Of particular importance is the provision in Rule 4(i)(2) that when service is made by mail pursuant to subsection (D), proof of service includes either a receipt signed by the addressee or some evidence of delivery to the addressee satisfactory to the U.S. court. United States courts have found postal markings which indicate that delivery has been made to be sufficient proof of service, without requiring proof of the addressee's acceptance of the document.²⁴ In any event, it would appear that proof of service under Rule 4(i) is governed by the provision in Rule 4(g) that failure to make proof of service does not affect the validity of the service.²⁵

III. Due Process Considerations

To be held valid, any method of service of process used for U.S. litigation must meet a minimal due process standard. That standard was set by *Milliken v. Meyer*, where the Supreme Court held that

[A]dequacy [of service] so far as due process is concerned is dependent on whether or not the form of . . . service provided for such cases and employed is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard. If it is, the traditional notions of fair play and substantial justice implicit in due process are satisfied. (Citations omitted.)²⁶

²⁴*Aero Associates, Inc. v. La Metropolitana*, 183 F. Supp. 357, 359 (S.D.N.Y. 1960) (interpreting a New York State statute similar to Rule 4(i)(D)); *Bersch v. Drexel Firestone*, *supra* note 22 at 462 (interpreting subsection (D)).

But service on the Maharishi Mahesh Yogi was held to have failed when a summons sent by registered mail to his Swiss headquarters was returned without having been picked up at the post office. *Malnak v. Yogi*, 440 F.Supp. 1284, 1325 n.28 (D.N.J. 1977).

²⁵WRIGHT & MILLER § 1136.

²⁶*Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

Federal courts have shown a repeated tendency to “bootstrap” themselves into a finding that defendant’s appearance in court, even when contesting the validity of service, means that due process standards of actual notice have been observed. This has been applied in cases where attempted service by registered mail under subsection (D) was returned without a signed receipt but with evidence of delivery,²⁷ in cases of service by ordinary mail under subsection (E),²⁸ and in cases of service under subsection (A), according to the local method of service.²⁹

It would appear under Rule 4 that, at the least, a summary of the contents of the documents in the language of the defendant is required for U.S. due process purposes, unless it is shown that the recipient is familiar with the English language. The summary should show the nature of the documents, time limits for entering an appearance or making a reply, and so forth. A translation also may well be necessary where enforcement of the judgment overseas will be sought overseas.³⁰ In cases where the defendant was a multinational corporation whose representatives had already shown an ability to deal in English,³¹ United States courts have not been impressed with the due process argument that the documents to be served should have been translated into the language of the country where served.

IV. Service on Foreign Governments

Service on foreign governments or foreign government agencies (including government-owned businesses) is governed exclusively by the Foreign Sovereign Immunities Act of 1976.³²

²⁷Bersch v. Drexel Firestone, Inc., *supra* note 22 at 463.

²⁸Levin v. Ruby Trading Corp., *supra* note 23 at 541.

²⁹United States v. Danenza, *supra* note 12 at 391.

³⁰See *Julen v. Larson*, 25 Cal. App. 3d 325, 101 Cal. Rptr. 796 (1972) (Swiss judgment unenforceable in California where German-language Swiss document served on defendant in the United States did not give him sufficient notice of pending Swiss action).

³¹*Hunt v. Mobil Oil Corp.*, 410 F. Supp. 4, 9 (S.D.N.Y. 1975); *Shoei Kako Co. v. Superior Court*, San Francisco, 33 Cal. App. 3d 808, 109 Cal. Rptr. 402 (1973) (service of English language documents on defendant Japanese company in Japan found proper evidence that defendant corresponded in English in its international trading activities).

³²Pub. Law No. 94-583, 90 Stat. 2894 (1976). See H.R. REP. NO. 1487, 94th Cong., 2d Sess. at 24-25 (1976); [1976] U.S. CODE CONG. & AD. NEWS 6604, 6623-24. Under that statute.

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision;

or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents;

or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

V. Service through the Hague Convention

The Convention, like Rule 4(i), in no way extends the extraterritorial reach of U.S. jurisdiction,³³ nor does it in any way ensure enforcement of U.S. judgments abroad. Further, the Convention is limited by its terms to “civil or commercial matters,” thus excluding tax, administrative and criminal mat-

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a “notice of suit” shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

28 U.S.C. § 1608. The Annex to 22 C.F.R. § 93.2 (1979) includes a form that can be used to give the “notice of suit” discussed in 28 U.S.C. § 1608(a) (3) (1976). The form is designed to give the foreign government a summary idea of the nature of the litigation. The Act applies only to a foreign government agency or instrumentality if a majority of it is owned by a foreign state. 28 U.S.C. 1603(b)(2) (1976). In addition, the “agency or instrumentality” must be a separate legal person, 28 U.S.C. § 1603(b)(1) (1976), so the rules for service on an unincorporated joint venture would depend on which joint-venturer is to be served.

³³See text at note 11 *supra*. If the country where service will be sought is a party to the Hague Convention, the U.S. lawyer will usually make service through the Convention’s mechanisms,

ters.³⁴ The distinction sought to be made—between “private” and “public” law—is one familiar to those versed in civil law systems, but the effect is that each party to the Convention decides the scope of the exclusion. Thus, for example, in France the Convention probably would not apply to government contracts or to tax matters; Japan has declared it inapplicable in administrative matters; and in Egypt it does not apply to matters of family law (which is the province of religious courts in that country).³⁵

VI. Central Authority

The core innovation of the Convention is the designation by each country of a Central Authority—typically the Ministry of Justice or the Supreme Court—which receives the requests for service, serves the documents, and certifies and returns the certificates of service,³⁶ all without the chain of legalizations which can otherwise delay the service of process abroad.³⁷

The Convention provides for service in three ways. Any of the three methods, to satisfy U.S. standards of due process, must be reasonably calculated to give actual notice to the prospective party.³⁸

because of their speed, economy and convenience. Nevertheless, U.S. adherence to the Convention in no way displaces the Federal Rules, and federal courts will recognize as valid service made in Convention countries through any means available under Rule 4. *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 431 F. Supp. 1226, 1228-29 (N.D. Ill. 1977), *cert. denied*, 435 U.S. 905 (1978), *quoting* with approval *Shoei Kako Co. v. Superior Court, San Francisco*, 33 Cal. App. 3d 808, 821, 109 Cal. Rptr. 402, 411 (1973).

³⁴Considerable controversy has arisen over the clarity of this distinction with respect to the Hague Convention on Taking Evidence Abroad, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, especially with respect to the nature of United States antitrust cases. *See Westinghouse Elec. Corp. Uranium Contract Litigation*, [1977] 1 All E.R. 434 (H.L.), *reprinted in* 17 INT'L LEGAL MATS. 38 (1978).

³⁵It should be noted that service under Rule 4(i) is not limited to civil matters (as is the Hague Convention), but rather applies to all matters that fall within the bailiwick of the Federal Rules of Civil Procedure, including civil contempt orders stemming out of criminal grand jury proceedings involving possible criminal charges. *United States v. Danenza*, note 12 *supra*. In addition, of course, numerous administrative matters require no formal service on foreign parties. Notice of a U.S. government antidumping investigation, for example, will simply arrive at the foreign exporter's office in the mail or by a U.S. Customs Service attaché, but a foreign manufacturer who wants to keep selling in the United States may not want to ignore the matter.

³⁶The Hague Convention, art. 11, permits direct contact between a process server in one country and a process server in the other, without intervention by the Central Authority. Apparently, this happens between process servers in Belgium and France, and, on a very informal basis, between process-serving officials along the U.S.-Canadian border.

³⁷The Hague Convention, arts. 1 & 2. There is a Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, *opened for* October 5, 1961, 527 U.N.T.S. 189, which in essence replaces chain legalizations with a one-time seal (*apostille*). *See Comment, The United States and the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents*, 11 HARV. INT'L L.J. 476 (1970). The Convention received the “advice and consent” of the Senate in 1979, and formal ratification by the United States is pending.

³⁸*See text at note 25 supra.*

1. *Article 5(a)*

Under Article 5(a), the Central Authority may serve the documents by the method used for service of documents in domestic actions. One advantage of using this method is that it would aid enforcement of the judgment in the foreign country. At the same time, it also meets the requirements for validity of service of Federal Rule 4(i)(A).

If the local method of service is used, a translation into the local language is likely to be required.³⁹ In any event, for purposes of due process in U.S. courts, a summary should be given in the local language, and, unless it can be shown that the defendant can read or does business in English, a full translation should be provided.

This use of the local method may also entail payment of the process server's costs, although service will be made before the request for payment is sent to the applicant for service. Until recently, the United States charged a standard service fee of fifteen dollars for making service under the Convention, which aroused considerable displeasure among the other parties to the Convention; the United Kingdom warned that it might impose a "reciprocity" fee of eight pounds for service of U.S. documents.

2. *Article 5(b)*

The Convention also provides for service by any method requested by the applicant, although this provision is little used. Where service is by a method requested by the applicant, it may be required that the complaint or summons be translated into the local language, as was the case with the first method. The Japanese declaration specifically declares that a translation will be required for service pursuant to Art. 5(b). In addition, the applicant must pay the cost of any process-server.⁴⁰

Article 5(b) provides that the foreign Central Authority shall use the applicant's chosen method "unless such a method is incompatible with the law of the State addressed." Not many methods of service to be carried out by a Central Authority could be *incompatible* with the law of that state (rather than merely inconvenient).⁴¹ For example, the Swiss and the West Germans find service by mail or by foreign officials to be an affront to their sovereignty. But under Art. 5(b), one would not be asking the Swiss or Ger-

³⁹The ratifications by Japan, Luxembourg, Sweden and the United Kingdom specifically declare that a translation will be required.

⁴⁰See Hague Convention, art. 12.

⁴¹A foreign country may refuse to comply with a request under the Convention only if such compliance would infringe its sovereignty or security (as would, for example, a summons to a local judge for matters within his scope of duties, or against a head of state). Article 13 prohibits a foreign country from refusing to comply with the Convention solely because it claims exclusive jurisdiction over the subject matter of the action, or because the type of action could not be brought within that country under that foreign country's own law. This would be an obstacle to ratification by many Latin American countries (e.g., Colombia).

man Central Authority to perform service by mail or by a foreign official, but rather to deliver it themselves (which is not incompatible with local law). Similarly, the British in divorce cases apparently require the person serving the process outside of Great Britain to certify that the person served actually resembles a photograph which is enclosed with the complaint or summons. While this may be inconvenient for a process-server in the United States, it is not *incompatible* with the law of the United States.

3. *Remise Simple*

Finally, the Convention in Article 5 provides for delivery to an addressee who accepts delivery voluntarily.⁴² This form of service, known as *remise simple*, is frequent in Western Europe. Typically, the Central Authority sends the document to the local police station, which asks the intended recipient to come in and pick it up. In the event of "voluntary service", no translation would be required, and usually, no costs must be paid. It appears that a majority of such recipients do in fact pick up the documents to be served, either out of greater respect for authority than is prevalent in the United States, or because they have assets at risk in the country from which the service is being made.⁴³

VII. Return of Service

Once service has been attempted by the Central Authority, it fills out a certificate of service stating that service has been made, or, if the document has not been served, the reasons which prevented service. The time period for service through the Convention appears to run from four to six weeks from the date of mailing of the request for service. Applicants requesting service are advised that if no certificate is returned within forty-five to sixty days they should pursue the matter by contacting the Central Authority that was asked to make the service.⁴⁴

VIII. Stale Service

Even if the date for the hearing (noted on the request for service) has passed, service will be made by most Central Authorities as a means of giving notice to the potential party of the pendency of the proceeding. This is more of a problem in civil law countries, where appearances are required within a very short time after the initiation of the litigation. In any event, provision

⁴²Article 10 of the Convention permits, in the absence of objection by the State of destination, service through postal channels, but objections have been registered by numerous countries.

Article 8 allows service within compulsion by consular officials on their own nationals. The Swiss, who are not yet party to the Convention, do not accept that principle.

⁴³Civil law systems often place more emphasis on attachment than on personal service as a form of notification.

⁴⁴Justice Department Memorandum No. 386 at 16.

has been made in the Convention for protection of defendants who do not in fact receive notice. Under Article 15, if the defendant does not appear, no judgment shall be entered:

- (a) until it is established that service was made according to the laws of the country in which the defendant was located; or
- (b) until confirmation of actual service by some other method provided for in the Convention has been made; or
- (c) until at least six months have passed since the request was sent to the foreign country and every reasonable effort has been made to get a certificate of service from the foreign country.

Under Article 16, however, a defendant may be allowed to appeal a final judgment already entered if:

- (a) he can show that he had no knowledge of the proceeding in time to defend against it;
- (b) he can make out a prima facie defense; and
- (c) the appeal is made within one year after the date of judgment.

Most countries have allotted a waiting period of one year for Article 16 purposes, but Norway has set a period of three years.⁴⁵

IX. Service on Foreign Governments

The Convention does not preclude service on foreign governments and their agencies so long as the litigation involves private law matters. (For United States litigation, the Foreign Sovereign Immunities Act must permit the service requested.) Thus, as long as both countries adopt a "restrictive" test for sovereign immunity, it seems likely that a request for service on a foreign government agency should result in service being made.

X. Practical Steps in Service of Process Abroad

As a practical matter, the first step for a lawyer seeking to serve process under the Convention is to review the text of the Convention, the list of countries that have ratified it and any reservations which those countries may have stated. All of that material is conveniently available in an appendix to Rule 4(i), as printed in 28 U.S.C.A. Having determined that the Convention is indeed in force between the United States and the country in which service is sought, one must next ascertain the exact address of the person upon whom service is to be made, as required by Article 1 of the Convention. In the case of a corporation, the exact corporate name is needed. In practice, it appears that the various parties to the Convention are fairly diligent in attempting to serve the documents even when provided with an incorrect address.⁴⁶

⁴⁵Declaration of Norway, August 2, 1969, ¶ 6. Some Commonwealth countries are reportedly unhappy with the assumption that service was valid based solely on the passage of time. COMMONWEALTH SECRETARIAT, RECOGNITION AND ENFORCEMENT OF JUDGMENTS AND ORDERS AND SERVICE OF PROCESS WITHIN THE COMMONWEALTH 7 (1979).

⁴⁶Where service is being attempted on military personnel whose addresses are secret, the for-

Under Article 3 of the Convention, a request for service under the Convention can only be made by someone authorized to serve process under the law of the State where the document originates. In the United States, usually the U.S. marshal or state process server will formally request service under the Convention, *not* the U.S. lawyer.⁴⁷ Therefore, in federal litigation the applicant's third step will be to contact the local U.S. marshal to obtain the three forms required by the Convention.⁴⁸ The forms must be filled out in duplicate. The marshal or other authorized official will then send by international air mail both copies of the forms to the appropriate foreign Central Authority which will serve the documents as requested and return a certificate of service to the marshal, who will notify the applicant. The applicant can then breathe a sigh of relief and start worrying about the many other problems of litigation with foreign elements, such as taking evidence abroad.

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eign country's Central Authority should give the documents to the military authorities or consul of the country of which the prospective defendant is a national.

⁴⁷Some states allow private attorneys to serve process. If such is the case, the private attorney may send the request for service to the foreign country. The attorney would be well advised to note on the request that he is "authorized under United States practice to request service under the Convention." By contrast, the English consider solicitors as empowered to send out requests under the Convention.

⁴⁸The marshal also will have a copy of the Justice Department's Memorandum No. 386, which sets out in some detail the steps to be followed in requesting service under the Convention.

The United States has expressed concern that the "Summary" of the litigation, required by the Convention, may give recipients insufficient information to enable them to protect their rights. Department of State, Observations and Comments of the United States of America on the Proposal of the Secretary General of the Council of Europe Concerning Information to Accompany Judicial and Extra-Judicial Documents to be Sent or Served Abroad in Civil or Commercial Matters, March 21, 1980.