# US Supreme Court to Decide Whether Foreign Defendants May Be Served by Mail

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The U.S. Supreme Court has decided to review a key issue concerning service abroad of process on foreign defendants — namely, whether foreign defendants may be served by mail. The case, *Menon v. Water Splash, Inc.*,[1] marks the first time that the Supreme Court will rule on this particular aspect of the 1965 Hague Convention on the Service Abroad of Judicial Documents in Civil or Commercial Matters (Hague Service Convention).[2]

Service of process — *i.e.*, formally delivering to the defendant the papers initiating a lawsuit — is a prerequisite to starting a case under U.S. federal and state rules of civil procedure. Foreign individuals typically must be served where they reside; foreign corporations typically can be served at an official address or headquarters. Exceptions may apply for foreign defendants who have appointed a local agent for service or entered into some other agreement permitting service by other means.

The Hague Service Convention, which has been adopted by more than 70 countries including the United States, creates uniform rules for service on foreign defendants. In a 1988 decision, the U.S. Supreme Court held that, where a defendant resides in a Hague Convention state, its procedures are mandatory.[3]

The prototypical Hague Convention mode of service is service through a "Central Authority." Under this procedure (described in Articles 2-5), court papers are transmitted from the originating state to a government or judicial official designated by the state in which the defendant is located. The Central Authority then becomes responsible for serving process on the foreign defendant and, once this is done, will officially certify that service has been completed.[4]

Although Central Authority service has the benefit of certainty, it has some perceived drawbacks. Service often takes several months, possibly longer. Some countries require plaintiffs to furnish full translations of all documents to be served. For these and other reasons, plaintiffs often seek to bypass the Central Authorities in favor of other options.

In this regard, plaintiffs often attempt to utilize Article 10(a) of the Hague Service Convention, which states:

> Provided the State of designation does not object, the present Convention does not interfere with ... the freedom to send judicial documents, by postal channels, directly to persons abroad. ...

The Second, Fourth, Seventh and Ninth Circuits, and some state courts (including New York) have construed Article 10(a)'s reference to "send[ing] ... judicial documents" by mail as permitting service of process by mail.[5] The Fifth and Eighth Circuits have taken the opposite view, holding that the text of Article 10 does not actually refer to "service" of process, and thus does not contemplate postal service of papers that originate court proceedings.[6]

[1] *Menon v. Water Splash, Inc.*, 472 S.W.3d 28, 33-34 (Tx. Ct. App. 2015).

[2] With the exception of Mexico, Argentina and Venezuela, most Central and South American nations have not acceded to the Hague Convention. Many of these countries are parties to another convention, the Inter-American Service Convention.

[3] *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988).

[4] Another official means of service is through "diplomatic or consular agents" (*i.e.*, arranging for a consular official to find and serve persons located in the relevant country), but numerous countries have either banned or restricted this practice, or ruled that it can only be used against expatriates. For example, China has ruled that the U.S. consulate in Hong Kong only has power to serve U.S. process on American nationals.

[5] *See, e.g., Ackermann v. Levine,* 788 F.2d 830, 838-39 (2d Cir. 1986); *Research Sys. Corp. v. IPSOS Publicite*, 276 F.3d 914, 926 (7th Cir. 2002); *Brockmeyer v. May*, 383 F.3d 798, 802 (9th Cir. 2004); *New York State Thruway Auth. v. Fenech*, 94 A.D.3d 17, 22 (1st Dep't 2012).

[6] *See, e.g., Nuovo Pignone SpA v. STORMAN ASIA M/V*, 310 F.3d 374, 384 (5th Cir. 2002); *Bankston v. Toyota Motor Corp.*, 889 F.2d 172, 174 (8th Cir. 1989).

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The Supreme Court has granted certiorari in a case providing the opportunity to resolve the conflict among the various Circuits and state appellate courts. *In Water Splash, Inc. v. Menon*, filed in a state court in Galveston, Texas, a U.S. manufacturer of aquatic playgrounds sued a Canadian individual who, it claimed, had unfairly appropriated its designs and then pitched them to the city of Galveston as her own. The manufacturer, with the Texas court's permission, attempted to serve the individual by certified mail, addressed to her Canadian address. When the individual failed to appear, the district court entered a default judgment against her. At that point, she appeared before the Texas District Court and moved to set aside the default judgment on the grounds she had not been properly served. When her motion was denied, she successfully appealed to the 14th Court of Appeals of Texas.

Although the appellate court granted her appeal, it did so by split decision in which the three-member panel was divided on whether Article 10(a) authorized service:

- The two-judge majority adopted Fifth Circuit precedent that (i) applies principles of "statutory construction" to the text of the Hague Service Convention; and (ii) holds that, because Article 10 does not specify "service" of process but only speaks of "sending" documents, this must be interpreted as a conscious choice to prohibit service by mail.[7]
- The dissenting judge rejected a "statutory" reading of the Hague Service Convention, instead interpreting it as an agreement between nations, with weight given to its object and purpose, the interpretations given by its signatories, and the text and context of the provision in question.[8] The dissenter thus viewed Article 10(a) as permitting service on foreign defendants by mail in signatory states that, like Canada, have not objected to such service.[9]

After the Supreme Court of Texas declined to review the case, the defense sought, and was granted, review by the U.S. Supreme Court. If the Supreme Court upholds the Texas appellate court's decision and rules that service by mail is *not* authorized by the Hague Service Convention, the ruling may force plaintiffs either to use Central Authorities or find alternative means of service, *e.g.*, service through diplomatic or consular channel and service under the destination state's local rules.[10] Conversely, if the Texas decision is reversed, plaintiffs in some jurisdictions (*e.g.* the Fifth and Eighth Circuits, and the state courts that follow their approach) will have an additional option for service.

If the Supreme Court validates service by mail under Article 10(a), numerous countries (*e.g.*, Argentina, Germany, Japan, Poland and Switzerland) will be unaffected, as they have exempted themselves from this method by issuing declarations that ban service by mail. Furthermore, there may be situations where, even if the Hague Service Convention is satisfied, the particular state or federal service rules applicable to the case (and/or the constitutional requirements of due process) would require further procedures be followed to ensure the defendant has received fair notice of the lawsuit.[11]

Moreover, regardless of the interpretation that the Supreme Court places on the Hague Convention, it will still only represent the view of one party to that treaty (*i.e.*, the United States). Thus, in the event a U.S. final judgment, obtained after mail service, is taken for enforcement to a foreign defendant's home country, it remains possible that the courts of that country might construe Article 10 differently and deny enforcement of a US judgment based on failure to serve in compliance with its view of the Convention.

Finally, it is important to note that the mode of service in *Water Splash v. Menon* was certified mail, *i.e.*, physical mail effectuated by official postal channels. The case thus does not directly address the validity of service by other means, such as electronic service.

However the Supreme Court decides this case, it will affect the scope of available options for service of process on defendants abroad for proceedings in U.S. courts.

[7] *Menon v. Water Splash, Inc.*, 472 S.W.3d at 33-34.

[8] *Id.* at 36-39 (Christopher J., dissenting).

[9] *Id.* at 39-44.

[10] *See, e.g.,* Article 10(b) or (c), which preserve the "freedom" to utilize "judicial officers" or "other competent persons of the State of destination" to effect service in the defendant's home state, or Article 19 (providing that a plaintiff may utilize any "method of transmission ... of documents coming from abroad" "permit[ted]" under the "internal law" of a member state). The extent to which some of these provisions may be utilized is, like Article 10(a), potentially controversial.

[11] "Even [where] the Convention has been strictly followed," U.S. state and federal courts are obligated, under the Due Process clause of the U.S. Constitution, to check that "the method of service [was] reasonably calculated, as a matter of fair play, to give actual notice to a prospective party abroad." *Vazquez v. Sund Emba AB*, 152 A.D.2d 389, 398 (2d Dep't 1989). Thus, "[f]ailure to provide a translation may, in some instances, constitute a denial of due process," even if the Convention and host state rules did not strictly require one in the particular case circumstances. *Id.*