U.S. Supreme Court to Decide Whether the Hague Service Convention Authorizes Service By Mail on Foreign Defendants

OVERVIEW

In 1965, the member states of the Hague Conference on Private International Law, including the United States, adopted a treaty known as the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Service Convention"). The Hague Service Convention enables service of process from one member state to another member state without the use of consular or diplomatic channels. In *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988), the U.S. Supreme Court held that where a defendant resides in a state that adopted the Hague Convention its procedures are mandatory.[1]

The U.S. Supreme Court has decided to review the case of *Menon v. Water Splash, Inc.*, 472 S.W.3d 28, 33-34 (Tx. Ct. App. 2015), which presents an issue that has been in dispute for some time—whether the Hague Service Convention authorizes service of process by mail on foreign defendants.

BACKGROUND

Article 10 of the Hague Service Convention states, in relevant part:

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

Art. 10 (a)(emphasis added).

In 2013, Water Splash, Inc. ("Water Splash") sued its former employee, Tara Menon ("Menon"), in Texas District Court. Menon was a Canadian citizen residing in Québec, Canada. The trial court authorized alternative service on Menon by "first class mail, certified mail, and Federal Express to Menon's address" and "by email to each of Menon's known email addresses."

A default judgment was entered by the trial court after Menon was served by the alternative service. Menon then filed a motion for new trial wherein she argued that service by mail, Federal Express, or email does not comply with article 10(a) of the Hague Service Convention, and therefore, the

[1]This results because the Hague Service Convention "pre-empts inconsistent methods of service prescribed by state law in all cases to which it applies." Id.

default judgment should be set aside. The trial court denied the motion and Menon appealed to the Fourteenth Court of Appeals in Houston, Texas.

In the Court of Appeals, Menon argued that the trial court's default judgment should be set aside because: (1) article 10(a) of the Hague Service Convention does not allow for service of process by mail; and (2) the law of Québec, without implementing legislation, does not permit service of process by mail without going through Canadian and Quebecer government channels.

Menon argued that the word "send" employed in the Hague Service Convention does not mean "service of process," and that the Hague Service Convention, although adopted by Canada, has not been fully implemented by the province of Québec so as to effectuate service by mail on Menon without going through a Quebec judge or "l'huisser," and therefore, the service on Menon by mail was not effective.

In a majority opinion, the Texas Court of Appeals held that "send" does not include "service of process" and reversed the default judgment.[2] *Menon v. Water Splash, Inc.*, 472 S.W.3d 28, 32 (Tex. App. – Houston [14th Dist.] 2013, pet. denied). The majority's reasoning is based on what it considered to be the unambiguous text of the Hague Service Convention.

After a motion for *en banc* reconsideration was denied without opinion, Water Splash filed a petition for review in the Texas Supreme Court, which denied the petition for review without opinion.

Water Splash filed a petition for writ of certiorari with the U.S. Supreme Court to resolve the split of authority regarding whether the Hague Service Convention authorizes service of process by mail.

CURRENT SPLIT OF AUTHORITY

There is currently a split of authority among courts in the United States regarding whether article 10(a) of the Hague Service Convention authorizes service of process by mail. One group of cases holds that article 10(a) does not permit service by mail, but merely provides for the mailing of non-service-related judicial documents. *See, e.g., Nuovo Pignone v. Storman Asia M/V*, 310 F.3d 374, 384 (5th Cir. 2002); *Bankston v. Toyota Motor Corp.*, 889 F.2d 172, 173-74 (8th Cir. 1989); *Riendeau v. St. Lawrence & Atlantic R. Co.*, 167 F.R.D. 26, 29 (D. Vt. 1996) (service in Québec); *Postal v. Princess Cruises, Inc.*, 163 F.R.D. 497, 499 (N.D. Tex. 1995); *Raffa v. Nissan Motor Co. Ltd.*, 141 F.R.D. 45, 46 (E.D. Pa. 1991); *Pochop v. Toyota Motor Company*, 111 F.R.D. 464, 466 (S.D. Miss. 1986); *Mommsen v. Toro Co.*, 108 F.R.D. 444, 446 (S.D. Iowa 1985); *Golub v. Isuzu Motors*, 924 F. Supp. 324, 327 (D. Mass 1996); *Kim v*

[2]The two-judge majority adopted the Fifth Circuit's precedent that, under the principles of "statutory construction," because Article 10's fails to specify "service" of process but instead speaks of "sending" documents, a conscious choice was made to prohibit service by mail.

Frank Mohn A/S, 909 F. Supp. 474, 479, and n. 4 (S.D. Tex. 1995); *Mateo v. M/S KISO*, 805 F. Supp. 792, 796- 97 (N.D. Cal. 1992); *Arco Elec. Control Ltd. v. Core Intern.*, 794 F. Supp. 1144, 1147 (S.D. Fla. 1992); *Honda Motor Co. v. Superior Court*, 12 Cal. Rptr. 2d 861, 861- 84, 10 Cal. App. 4th 1043 (Cal.App.6th Dist.); *Reynolds v. Koh*, 490 N.Y.S.2d 295, 297 (1985); *Ordnandy v. Lynn*, 122 Misc. 2d 954, 472 N.Y.S.2d 274, 274-75 (1984).

Another group of cases hold that service under article 10(a) may be made by mail. *See*, *e.g.*, *Brockmeyer v. May*, 383 F.3d 798, 808-09 (9th Cir. 2004); *Research Sys. Corp. v. IPSO Publicite*, 272 F.3d 914, 916 (7th Cir. 2002); *Koehler v. Dodwell*, 152 F.3d 304, 307-08 (4th Cir. 1998); *Ackerman v. Levine*, 788 F.2d 830, 839 (2d Cir. 1986).

CONCLUSION

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, that ruling may force plaintiffs either to use Central Authorities or find alternative means of service. However until 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.

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