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Service Abroad Under Fed. R. Civ. P. 4(f)(3)

By Aaron Weiss – December 22, 2011

Service of a U.S. complaint and summons on a defendant located outside the United States can sometimes be the most difficult aspect of pursuing a claim against an international adversary. Dozens of countries—including the United States—are parties to the Hague Convention of November 15, 1965, on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. In addition, several Latin American countries are parties to the Inter-American Convention on Letters Rogatory (the Inter-American Convention) and the Additional Protocol to the Inter-American Convention on Letters Rogatory. (The United States has a treaty relationship only with countries that are a party to both the Inter-American Convention and the Additional Protocol. There is authority suggesting that compliance with the Inter-American Convention may not be mandatory. *See Kreimerman v. Casa Veerkamp, S.A. de C.V.*, 22 F.3d 634 (5th Cir. 1994), *cert. denied*, 513 U.S. 1016 (1994); *Pizzabiocche v. Vinelli*, 772 F. Supp. 1245 (M.D. Fla. 1991).) Collectively, the Hague Service Convention and the Inter-American Convention provide an established set of rules for effectuated service in more than 75 countries. However, there are more than 100 countries that are not party to either of those treaties and are not party to a separate bilateral service treaty with the United States.

Luckily, plaintiffs in U.S. federal court proceedings need not throw up their hands in frustration, trying to serve process on a defendant in one of these more than 100 nonsignatory countries. Rule 4(f)(3) of the Federal Rules of Civil Procedure allows for service on individuals located outside of the United States to be accomplished by "other means not prohibited by international agreement as may be directed by the court." Fed. R. Civ. P. 4(h)(2) applies the broadly worded Rule 4(f)(3) for service on foreign business entities. Many U.S. federal courts have been quite accommodating in authorizing sometimes novel methods of service.

Service under Fed. R. Civ. P. 4(f)(3) May Be Used in the First Resort

As an initial matter, it is widely agreed that service under Rule 4(f)(3) is equally acceptable to service under Rule 4(f)'s other subsections. Further, Rule 4(f)(3) includes "no qualifiers or limitations which indicate its availability only after attempting service of process by other means." *Brookshire Bros., Ltd. v. Chiquita Brands Int'l, Inc.*, 2007 WL 1577771, at *2 (S.D. Fla. May 31, 2007) (citing *Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1015 (9th Cir. 2002); *see also Nuance Commc'ns, Inc. v. Abbyy Software House*, 626 F.3d 1222, 1239 (Fed. Cir. 2010) ("Rule 4(f)(3) is not subsumed within or in any way dominated by Rule 4(f)'s other subsections; it stands independently, on equal footing.") (quoting *Rio Props.*, 284 F.3d at 1015).

Moreover, there is no requirement for a party to attempt service of process by way of any of the other methods enumerated in Rule 4(f)(1) or Rule 4(f)(2) before asking the court for alternative relief under Rule 4(f)(3). *See Rio Props.*, 284 F.3d at 1014–15. In fact, "[c]ourt-directed service under Rule 4(f)(3) is as favored as service available under Rule 4(f)(1) or Rule 4(f)(2)." *Id.* at 1015; *see also*

Ryan v. Brunswick Corp., 2002 WL 1628933, at *2 (W.D.N.Y. May 31, 2002) ("subsection (f)(3) is an independent basis for service of process and is neither 'extraordinary relief' nor a 'last resort' to be used only when parties are unable to effectuate service under subsections (f)(1) or (f)(2)."); *Swarna v. Al-Awadi*, 2007 WL 2815605, at *1–2 (S.D.N.Y. Sept. 20, 2007) ("[T]here is nothing in the text of the rule which contains a hierarchy of service methods as between Rule 4(f)(2) and Rule 4(f)(3).").

Courts Have Approved Several Manners of Service

Under Rule 4(f)(3), "courts have authorized a wide variety of methods of service including publication, ordinary mail, mail to the defendant's last known address, delivery to the defendant's attorney, telex, and most recently, email." *Rio Props.*, 284 F.3d at 1016. Specifically, in *Rio Properties*, the Ninth Circuit held that the district court properly found that alternative service via international courier and via email was constitutionally acceptable. *Id.* at 1016–17. The Ninth Circuit confirmed that the "Constitution does not require any particular means of service of process, only that the method selected be reasonably calculated to provide notice and an opportunity to respond." *Id.* at 1017; *see also Chanel, Inc. v. Lin*, 2009 WL 1034627, at *2 (S.D. Fla. April 16, 2009) (noting that a method of service under Rule 4(f)(3) should be calculated "to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections").

Any Method of Service Not Prohibited by Destination Country Is OK

The Eleventh Circuit's decision in *Prewitt Enterprises, Inc. v. Organization of Petroleum Exporting Countries*, 353 F.3d 916, 921, 927 (11th Cir. 2003), also warrants special attention. As a note, other than the Ninth Circuit's decision in *Rio Properties*, the Eleventh Circuit's decision in *Prewitt* is the only federal appellate case that closely examines Rule 4(f)(3). In *Prewitt*, the Eleventh Circuit affirmed denial of service of process pursuant to Rule 4 on the Organization of Petroleum Exporting Countries (OPEC) at its headquarters in Vienna, Austria, where a specific Austrian law governed service on OPEC. At quick glance, *Prewitt* might entice a defendant contesting a Rule 4(f)(3) service order to make an argument that Rule 4(f)(3) requires strict adherence to the destination nation's methods of service. However, in the context of Rule 4(f) as a whole, Rule 4(f)(3) does not support this restrictive reading. Such a reading would necessarily render Rule 4(f)(3) superfluous and redundant of Rule 4(f)(2)(A), which permits service under the foreign country's service rules. A brief explanation of the facts before the court in *Prewitt* clarify the issues and explain why that case does notstand for the proposition that service pursuant to Rule 4(f)(3) can *only* be ordered under a method expressly permitted under rules for service in the foreign country where service is being made.

The plaintiff in *Prewitt* sued OPEC for violations of U.S. antitrust laws and attempted to serve process on OPEC at its headquarters in Austria. *Prewitt Enter., Inc. v. Org. of Petrol. Exp'g Countries*, 353 F.3d at 919–20. As the Eleventh Circuit recounted, the plaintiff first attempted to serve OPEC pursuant to Rule 4(f)(2)(c)(ii) by "requesting that the trial court send a copy of the complaint to OPEC by international registered mail, return receipt requested." *Id*. at 920. OPEC signed for the package, but decided that it "would not take any action with regard to the summons and complaint." *Id*. at 921.After default was entered, OPEC moved to set aside the default and to

dismiss the complaint for insufficient process pursuant to Fed. R. Civ. P. 12(b)(5). *Id.* at 920. OPEC argued that service was improper under Austrian law because the method of service—registered mail dispatched by the clerk of court—was specifically prohibited under Austrian law governing service on OPEC. *Id.* at 924–27. The plaintiff also argued that if service by registered mail pursuant to Rule 4(f)(2)(c)(ii) was found insufficient, it should be permitted to effect service on OPEC under Rule 4(f)(3), via "other means of giving actual notice, such as fax or email." *Id.* at 927.

The district court denied the plaintiff's request to uphold service via registered mail pursuant to Rule 4(f)(2)(c)(ii) or to permit service via fax or email pursuant to Rule 4(f)(3), and the Eleventh Circuit affirmed. *Id.* at 926–27. In affirming the district court's decision, the Eleventh Circuit explained that the plaintiff's proposed methods of service—under either subsection of Rule 4—were directly prohibited under Austrian law. Specifically, as the Eleventh Circuit noted, Article 5(2) of the Austrian/OPEC headquarters agreement states that "the service of legal process . . . shall not take place with the [OPEC] headquarters seat except with express consent of, and under conditions approved by, the Secretary General." *Id.* at 923 (ellipsis in original). The Eleventh Circuit further observed that article 5(2) was buttressed by article 9 of the headquarters agreement, which provides that "OPEC . . . shall enjoy *immunity from every form of legal process* except in so far as in any particular case OPEC shall have *expressly waived* its immunity . . . ." *Id.* at 926 n.18. (emphasis added to headquarters agreement in opinion).

After discussing the relevant Austrian statute—which was specifically and only applicable to service of process on OPEC—the Eleventh Circuit noted that paragraph (3) of the Advisory Committee Notes to Rule 4(f)(3) authorizes the court to approve other alternative methods of service, but when so doing, "*an earnest effort* should be made to devise a method of communication that is *consistent with due process* and *minimizes offense to foreign law.*" *Id.* at 927 (citing Advisory Committee Notes to Fed. R. Civ. P. 4(f)(3)). The Eleventh Circuit held that "[r]ather than minimizing offense to Austrian law, the failure to obtain OPEC's consent would constitute a substantial affront to Austrian law. We can find no support permitting such a consequence in the face of Austria's *direct prohibition of service on OPEC without its consent*." *Id.* at 927 (emphasis added).

The Eleventh's Circuit decision merely clarified that in complying with the Advisory Committee's admonition to "*minimize[] offense to foreign law*,"the federal courts should refrain from directing a method of service that is expressly prohibitedby the applicable law. The Eleventh Circuit did not hold that service under Rule 4(f)(3) must only be directed under the rules prescribed for service in the foreign country where service is to be made. In fact, the Eleventh Circuit noted that the facts in *Prewitt* were different from those before the Southern District of New York in *In re Ski Train Fire in Kaprun, Austria on Nov. 11, 2000*, 2003 WL 21659368 (S.D.N.Y. July 15, 2003), another 2003 case involving service of process in Austria pursuant to Rule 4(f)(3). The *In re Ski Train* court ordered alternative service of process pursuant to Rule 4(3) under a method that was not specifically permitted under Austrian law.

In *Prewitt*, the Eleventh Circuit distinguished the facts of these two cases and noted that *In re Ski Train Fire* was not applicable because "there was no Austrian law explicitly prohibiting service of

process on the defendant, an Austrian corporation, without its consent." *Prewitt Enter., Inc. v. Org. of Petrol. Exp'g Countries*, 353 F.3d at 928 n.20. The Eleventh Circuit's discussion of *In re Ski Train Fire* thus makes clear that the court was limiting its holding to cases where there was a foreign law specifically prohibitingservice in the manner a plaintiff proposes. The Eleventh Circuit did not disagree with the court's decision in *In re Ski Train*, but rather held that the case was inapplicable because the *In re Ski Train* plaintiff's proposed method of service was not expressly prohibited under the applicable foreign law. *Id.* at 927 n.20.

In *TracFone Wireless, Inc. v. Distelec Distribuciones Electronicas, S.A. de DV*, 268 F.R.D. 687, 690–91 (S.D. Fla. 2010), the court closely examined *Prewitt* where a plaintiff sought to serve a Honduras-based defendant by FedEx to Honduras and by hand-delivery to the defendant's United States-based attorney. The court found that such service was permissible under Rule 4(f)(3) because the proposed methods were not expressly prohibited by Honduran law. The court observed that the case was "very much different from . . . *Prewitt*,"noting that the proposed manner of service was "expressly prohibited by Australian law" and that, in contrast, the Honduras-based defendant before the court did "not put forth any evidence that Honduran law prohibits the method of service that Plaintiff proposes; Defendant simply argues that such service is not expressly authorized under Honduran law." The court thus concluded that *Prewitt* was factually inapposite and relied on *Rio Properties* to allow the proposed alternative 4(f)(3) service.

Service by FedEx

Federal courts have commonly authorized service of process via FedEx or another international courier pursuant Rule 4(f)(3) on defendants located outside the United States. *See Ehrenfeld v. Salim a Bin Mahfouz*, 2005 WL 696769, at *3 (S.D.N.Y. March 23, 2005) (approving service by certified mail or FedEx); *Mainstream Media, EC v. Riven*, 2009 WL 2157641, at *3 (N.D. Cal. July 17, 2009) (noting that, previously, the "court granted [the plaintiff's] motion for alternative service on [the defendant] pursuant to Federal Rule of Civil Procedure 4(f)(3), directing that the prior delivery of service documents by [the plaintiff] to [the defendant] via . . . FedEx was effective service of process."); *Marks v. Alfa Group*, 615 F. Supp. 2d 375, 380 (E.D. Pa. 2009) (authorizing service by FedEx under Fed. R. Civ. P. 4(f)(3)); *Securities and Exchange Commission v. Int'l Fiduciary Corp., S.A.*, 2007 WL 7212109, at *2 (E.D. Va. March 29, 2007) (finding that the plaintiff had complied with the direction of the court by mailing the summons and complaint via FedEx overnight delivery where the court had previously authorized such method of service pursuant to Fed. R. Civ. P. 4(f)(3)); *Bank of Credit and Commerce Int'l (Overseas) Ltd. v. Tamraz*, 2006 WL 1643202, at *6 (S.D.N.Y. June 13, 2006) (ordering that "[p]ursuant to Federal Rule of Civil Procedure 4(f)(3), plaintiff shall serve [the defendant] by Federal Express addressed to him at [his address in Paris, France] with plaintiff to furnish evidence regarding the signature of the person who accepted the package."); *TracFone v. Distelec*,268 F.R.D. at 690–91 (authorizing service on the defendant in Honduras pursuant to Fed. R. Civ. P. 4(f)(3) via FedEx).

Federal courts have also commonly granted leave to effectuate service pursuant to Rule 4(f)(3) via general "international courier" or other means of "express mail." *Alu, Inc. v. Kupo Co., Inc.*, 2007

WL 177836, at *4 (M.D. Fla. Jan. 17, 2007) (noting that the plaintiff's service on the defendant via international private courier was proper where the "Plaintiffs obtained leave of court from [the court] pursuant to Rule 4(f)(3) to serve [the defendant] by alternative means"); *Napp Techs., LLC v. Kiel Labs., Inc.*, 2008 WL 5233708, at *4 (D.N.J. Dec. 12, 2008) (noting that the court had previously entered an order "permit[ing] service on [the defendants] by express mail and e-mail" pursuant to Fed. R. Civ. P. 4(f)(3)); *Export-Import Bank of U.S. v. Asia Pulp & Paper Co., Ltd.*, 2005 WL 1123755, at *4–6 (S.D.N.Y. May 11, 2005) (declaring that service via DHL international courier pursuant to Fed. R. Civ. P. 4(f)(3) was valid); *Jenkins v. Pooke*, WL 412987, at *2–3 (N.D. Cal. Feb, 17, 2009) (directing service to be effectuated, *inter alia*, via international courier); *KPN B.V. v. Corcyra D.O.O.*, 2009 WL 690119, at *2 (S.D.N.Y. March 16, 2009) (ordering that service can be effectuated "by delivering process to . . . [the defendant's] last known address in Israel via international overnight courier."); *Swarna*, 2007 WL 2815605, at *2 (ordering that, pursuant to Fed. R. Civ. P. 4(f)(3), the plaintiff can effectuate "service of the summons and complaint by international courier to [the defendant's] residence in Paris, provided it is a courier service that maintains written or electronic records of delivery").

Service by Email or Fax

Email and fax are also manners of service that have frequently been approved to effectuate service pursuant to Rule 4(f)(3), particularly where the plaintiff can present evidence to the court that the email address or fax number is used by the defendant on whom service is sought. *See Liberty Media Holdings, LLC v. Vingay.com*, 2011 WL 810250 (D. Ariz. March 3, 2011) (approving email service); *Xcentric Ventures, LLC v. Karsen, Ltd.*, 2011 WL 3156966, at *2 (D. Ariz. July 26, 2011) (granting email service pursuant to Rule 4(f)(3)); *U.S. Commodity Futures Trading Com'n v. Aliaga*, 272 F.R.D. 617, 621 (S.D. Fla. 2011) (granting leave pursuant to Rule 4(f)(3) to serve the summons, complaint, and all subsequent pleadings and discovery on the defendant located in Honduras); *Philip Morris USA, Inc. v. Veles, Ltd*, 2007 WL 725412, at *2–3 (S.D.N.Y. Mar. 12, 2007) (authorizing service by email and facsimile pursuant to Rule 4(f)(3)).

Service on a Defendant's Attorney

Another common method of service pursuant to Rule 4(f)(3) is service on a defendant's United States-based attorney, when there is evidence of an attorney-client relationship. *See In re Potash Antitrust Litig.*, 667 F. Supp. 2d 907, 931 (N.D. Ill. 2009) (directing substituted service on U.S. attorneys retained by Russian defendants); *Brookshire Bros., Ltd. v. Chiquita Brands, Int'l*, 2007 WL 1577771, at *2 (S.D. Fla. May 31, 2007) (authorizing service on foreign defendants through local counsel); *U.S. Commodity Futures Trading Com'n v. Aliaga*, 272 F.R.D. at 621 (S.D. Fla. 2011) (authorizing service on an attorney in the United States); *RSM Prod. Corp. v. Fridman*, 2007 WL 2295907, at *6 (S.D.N.Y. Aug. 10, 2007) (authorizing service on the defendant's U.S. counsel); *LG Elecs, Inc. v. Asko Appliances, Inc.*, 2009 WL 1811098, at *4 (D. Del. June 23, 2009) (finding that, pursuant to Rule 4(f)(3), service on an attorney was permissible in light of the regularity of contact between the defendant and his attorney).

Prior Leave of Court May Be Required

It is important to consider whether court permission should be sought before trying to effectuate service abroad. Courts are divided as to whether service may be authorized retroactively under Rule 4(f)(3). Some cases have issued *nunc pro tunc* orders, retroactively approving service pursuant to Rule 4(f)(3). *See Export-Import Bank of U.S. v. Asia Pulp & Paper Co., Ltd*., 2005 WL 1123755, at *4–5 (S.D.N.Y. May 11, 2005) (allowing service under Rule 4(f)(3) *nunc pro tunc*); *Marks v. Alfa Group*, 615 F. Supp. 2d 375, 380 (E.D. Pa. 2009) (authorizing service *nunc pro tunc* by FedEx under Rule 4(f)(3) after the defendant returned a signed receipt acknowledging that it had received the summons); *Igloo Prods. Corp. v. Thai Welltex Int'l. Co., Ltd*., 379 F. Supp. 2d 18, 20 (D. Mass. 2005) (same).

However, the majority of courts that have reported decisions on the issue—including the only federal appellate court to address the issue—have declined to authorize *nunc pro tunc* service under Rule 4(f)(3). *See Brockmeyer v. May*, 383 F.3d 798, 805–06 (9th Cir. 2004) (refusing to allow service under Fed. R. Civ. P. 4(f)(3) on the grounds that the rule requires plaintiffs to obtain prior court approval for the alternative method of service); *see also MacLean-Fogg Co. v. Ningbo Fastlink Equip. Co., Ltd.*, 2008 WL 5100414, at *2 (N.D. Ill. Dec. 01, 2008) (holding that "an abundance of caution" was necessary in preserving the language of Fed. R. Civ. P. 4(f)(3), even if the means of service on Chinese defendants was effective); *U.S. v. Machat*, 2009 WL 3029303, at *4 (S.D.N.Y. Sept. 21, 2009) (declaring prior service effective *nunc pro tunc* was not appropriate because Rule 4(f)(3) requires the means of service to be ordered by the court); *Kaplan v. Hezbollah*, 715 F. Supp. 2d 165, 167 (D.D.C. 2010) (the plaintiffs would not be granted leave *nunc pro tunc* to achieve service on the party by serving the minister by international registered mail); *IntelliGender, LLC v. Soriano*, 2011 WL 903342, at *7 (E.D. Tex. March 15, 2011) (acknowledging contrary authority but declining to issue an order pursuant to Fed. R. Civ. P. 4(f)(3) *nunc pro tunc*).

Conclusion

Rule 4(f)(3) offers a method to save significant time and expense in serving defendants abroad. It is critical to carefully review the treaty relationships between the United States and the country where service is sought. Also, while it is not necessary to become comprehensively familiar with the laws of the destination country, it is important to at least confirm that the manner of service is not explicitly prohibited. Finally, it is advisable to seek leave from the U.S. court before effectuating such service.

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