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The Status of Service by Mail in the Eleventh Circuit

By Aaron S. Weiss – September 15, 2011

The United States is a signatory to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. 361, T.I.A.S. No. 6638 (1969) (Hague Service Convention), a multilateral treaty designed to simplify the methods for serving process abroad to ensure that defendants sued in foreign jurisdictions receive actual and timely notice of suit as well as to facilitate proof of service abroad.

Under the Hague Service Convention, the primary method of service is through the central authority established by each member state. However, service through the central authority is often costly and time-consuming. What's more, the central authority for service is not necessarily mandatory under the Hague Service Convention.

As an alternative to service through the central authority, service of process may be effectuated by mail under article 10(a) of the Hague Service Convention, provided that the state of destination does not object. Article 10 provides in relevant part as follows:

> Provided the State of destination does not object, the present Convention shall not interfere with—
>
> (a) the freedom to send judicial documents, by postal channels, directly to persons abroad,
>
> (b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,
>
> (c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

The current list of countries where this service method can be used (assuming the U.S. court agrees) includes Albania, Australia, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, China (including Hong Kong and Macau), Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Latvia, Luxembourg, Malta, Mexico, Monaco, Morocco, the Netherlands, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, Sri Lanka, Sweden, the United Kingdom, Antigua and Barbuda, Bahamas, Barbados, Belize, Botswana, Malawi, Pakistan, Saint Vincent and the Grenadines, San Marino, and Seychelles. Read the full text of the Hague Service Convention, along with information about the identities of the member states and the status of each member's position with respect to service by mail under article 10(a).

Of course, nothing is ever that simple. There is a dispute in the U.S. federal courts as to whether service of process (i.e., summons and complaint and other "jurisdictional" papers, as opposed to motions) may be effectuated under article 10(a). This question hinges on whether the word "send" in article 10(a) means the same thing as the word "service" in paragraphs (b) and (c) of article 10 of the Hague Service Convention.

Five of the federal circuit courts of appeal have addressed the issue. The Second and Ninth Circuits both held that article 10(a) permits service of process via postal channels; the Eighth and Fifth Circuits held otherwise.

In the first federal appellate decision to consider the issue, *Akermann v. Levine*, 788 F.2d 830, 839–40 (2d Cir. 1986), the Second Circuit concluded that the word "send" was intended to mean "service." In a more detailed opinion many years later, the Ninth Circuit agreed, in *Brockmeyer v. May*, 383 F.2d 798 (9th Cir. 2004). In *Brockmeyer*, the court considered the purpose of the convention and concluded that the word "send" in article 10(a) includes service of process. *Id.* at 802. The court relied on commentaries on the history of the negotiations leading to the Hague Service Convention as well as a letter written by the State Department disagreeing with contrary authority. The Seventh Circuit also addressed the issue in passing in *Research Systems Corp. v. IPSOS Publicite*, 276 F.3d 914, 926 (7th Cir. 2002), where it noted that service "by simple certified mail . . . [is]a method permitted by Article 10(a) of the Hague Convention, so long as the foreign country does not object."

If the *Ackermann*, *Brockmeyer*, and *Research Systems Corp.* decisions were the only cases on point, the issue would be far less complicated. However, in *Bankston v. Toyota Motor Corp.*, 889 F.2d 172 (8th Cir. 1989), the Eighth Circuit compared the use of the word "send" in article 10(a) to the use of the words "serve" or "service" throughout the rest of the convention and concluded that the difference was intentional. *Id.* at 174.

The *Bankston* decision drew an immediate rebuke from the U.S. Department of State. On March 14, 1990, Alan J. Kreczko, the then incumbent legal advisor to the Department of State, wrote a letter to the National Center for State Courts, criticizing the Eighth Circuit's decision in *Bankston*. A copy of the Kreczko letter [PDF] can be obtained through a Freedom of Information Act (FOIA) request to the U.S. Department of State.

Kreczko asserted Department of State's position that the *Bankston* decision was incorrect and concluded that permitting service by mail would spare plaintiffs in the United States time and expense. Furthermore, the Kreczko letter notes that a Japanese delegate at a meeting of new Hague Convention members expressed Japan's position on article 10(a), which was that service by mail did not violate Japan's judicial sovereignty. Kreczko, on behalf of the Department of State, asked the National Center for State Courts to distribute his letter to the state courts.

The Kreczko letter is particularly significant because of the long-standing proposition that the opinions of the State Department should be given special weight in construing treaties. *See, e.g.*,

Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184–85 (1982); *Bush v. United States* (*The Yulu*), 71 F.2d 635, 636 (5th Cir. 1934); *see also* 1 Restatement (Third) of the Foreign Relations Law of the United States § 112 cmt. c, at 59 (1987).

So what does this mean for practicing lawyers in the courts of the Eleventh Circuit? While the Eleventh Circuit has not interpreted article 10(a), the Alabama Supreme Court and several federal district courts within the circuit have addressed this issue.

Florida Cases

Service by Mail under 10(a) Permitted

The earliest reported case in Florida finding that service can be made by mail under article 10(a) of the Hague Service Convention was decided in 1996. Specifically, in *Lestrade v. United States*, 945 F. Supp. 2d 1557 (S.D. Fla. 1996), Judge William M. Hoeveler of the Southern District of Florida found that the Hague Service Convention permits service of process via postal channels. *Id.* at 1559. The court was persuaded by *Ackerman v. Levine*, 788 F.2d 830 (2nd Cir. 1986). Fourteen years later, in *TracFone Wireless, Inc. v. Bequator Corp., Ltd.*, 717 F. Supp. 2d 1307 (S.D. Fla. 2010), Judge Hoeveler once again found that article 10(a) of the Hague Service Convention permits service of process by mail and supported his finding by citing several district court opinions within the Eleventh Circuit. *See id.* at 1309. Judge Hoeveler also cited several other federal circuit and district court opinions.

In the Southern District of Florida, in *TracFone Wireless, Inc. v. Sunstrike International Ltd.*, No. 10-24386-CIV, 2011 WL 1319022 (S.D. Fla. 2011), Judge Jose E. Martinez found that article 10(a) of the Hague Service Convention permits service of process via postal channels. *Id.* at *1. In support of his conclusion, Judge Martinez cited several Southern District of Florida opinions that had reached a similar conclusion.

Two cases from the Middle District of Florida also support the proposition that service by mail is allowed under article 10(a) of the Hague Service Convention. First, in *Conax Florida Corp. v. Astrium Ltd.*, 499 F. Supp. 2d 1287 (M.D. Fla. 2007), Judge Thomas G. Wilson found that service of process via postal channels is permitted under article 10(a) of the Hague Service Convention. *See id.* at 1293. In reaching his conclusion, Judge Wilson relied on *Brockmeyer v. May*, 383 F.3d 798 (9th Cir. 2004). Also, the court found that service of process by mail is consistent with the purpose of the Hague Service Convention, which is to facilitate international service of judicial documents. Lastly, Judge Wilson noted that his interpretation of article 10(a) is shared by several other member countries of the Hague Service Convention. Likewise, in *Julien v. Williams*, No. 10-CV-2358T-TBM, 2010 WL 5174535 (M.D. Fla. 2010), Judge Susan C. Bucklew found that service of process via postal channels is permitted under article 10(a) of the Hague Service Convention. *Id.* at *2 (M.D. Fla. 2010). Judge Bucklew was persuaded by *Brockmeyer v. May*, 383 F.3d 798 (9th Cir. 2004).

The Florida state courts have not directly addressed service by mail under article 10(a) in any reported appellate decisions. One decision—*Chabert v. Bacquie*, 694 So. 2d 805, 812 (Fla. 4th

Dist. Ct. App. 1997)—mentions article 10(a) in passing but only in support of its finding that article 15 of the Hague Service Convention, which relates to service of judgments, does not apply. However, one trial court judge in Florida state court entered a highly detailed order [PDF] allowing service by mail under 10(a) in *Safra National Bank of New York v. Crystal Springs Partners, Ltd.*, Case No. 11-09045 CA 30 (Fla. Cir. Ct. (Miami-Dade Cnty.) May 13, 2010).

Service by Mail under 10(a) Not Permitted

The very first reported decision from any Florida court on 10(a) service by mail came from the Northern District of Florida in *McClenon v. Nissan Motor Corp. in U.S.A.*, 726 F. Supp. 822 (N.D. Fla. 1989), where Judge Clyde R. Vinson found that service of process via postal channels is impermissible under article 10(a) of the Hague Service Convention. Specifically, Judge Vinson stated that "it strains plausibility that the Conventions' drafters would use the word 'send' in Article 10(a) to mean service of process, when they so carefully used the word 'service' in Articles 10(b) and (c)." *Id.* at 826. Judge Vinson's opinion in *McClenon* remains the only Northern District of Florida case on 10(a) service by mail.

The next year in *Wasden v. Yamaha Motor Co., Ltd.*, 131 F.R.D. 206 (M.D. Fla. 1990), Judge Elizabeth A. Kovachevich found that service of process via postal channels is not permitted under article 10(a) of the Hague Service Convention. *Wasden*, 131 F.R.D. at 209. Judge Kovachevich solely relied on the Eighth Circuit's opinion in *Bankston* and did not consider the Second Circuit's contrary view in *Akermann* or the State Department's objection to *Bankston*.

Two years later, the Southern District of Florida joined in completing the trifecta of the Florida federal districts finding that service by mail was not permitted under 10(a). In *ARCO Electronics Control, Ltd. v. Core International*, 794 F. Supp. 1144 (S.D. Fla. 1992), Judge Norman C. Roettger Jr. found that service of process via postal channels is impermissible under article 10(a) of the Hague Service Convention because of the difference between the language used in article 10(a) and the language used in the rest of the Convention. *Id.* at 1147. Persuaded by Judge Kovachevich's decision in *Wasden v. Yamaha Motor Co., Ltd.*, 131 F.R.D. 206 (M.D. Fla. 1990), Judge Roettger expressed his belief that treaty conventions act intentionally. He further concluded that the drafters of the Hague Service Convention intentionally used the word "send" rather than the word "serve" when drafting article 10(a).

Until 2010, the only Florida decision finding service by mail was not permitted under 10(a) came in 2002. In *In re Greater Ministries International, Inc.*, 282 B.R. 496 (Bankr. M.D. Fla. 2002), Bankruptcy Judge Thomas E. Baynes found that service of process by use of postal channels is not permitted under article 10(a) of the Hague Service Convention. *See id.* at 502–3. Judge Baynes concluded that the drafters could have simply used the word "service" if they intended to provide for an additional method of service under article 10(a).

After being an issue that came up in a reported Florida federal opinion about once every three years between 1989 and 2010, service by mail under 10(a) become a frequent topic in 2010, as there were four separate reported decisions on the issue in that year. In addition to the *TracFone*

and *Julien* decisions discussed earlier, which found that service by mail was permitted under 10(a), two different Florida federal judges found that service by mail was not permitted under 10(a).

First, in *In re Mak Petroleum*, 424 B.R. 912 (Bankr. M.D. Fla. 2010), Bankruptcy Judge Paul M. Glenn found that article 10(a) of the Hague Service Convention should not be read to permit service of process by mail. *See id.* at 918. Judge Glenn noted that article 10(a) refers to "sending" documents by mail while article 10(b) and 10(c) refer to "effecting service" through judicial officers.Recognizing that the word "service" has a well-established technical meaning, the judge found that article 10(a) should not be read to include the word "serve." Rather, article 10(a) should be read only to enable parties to send documents such as motions and discovery responses. *Id.* at 918–19.

Next, in *Intelsat Corp. v. Multivision TV, LLC*, 736 F. Supp. 2d 1334 (S.D. Fla. 2010), Judge Cecilia M. Altonaga found that service of process via postal channels is not permitted under article 10(a) of the Hague Service Convention. *See id.* at 1343. In reaching her conclusion, Judge Altonaga noted that the majority of district courts in Florida tend to follow the line of cases rejecting service by postal channels under article 10(a). Judge Altonaga also emphasized the difference between the language used in 10(a) and the language used throughout the convention. While the rest of the convention uses the word "service," 10(a) uses the word "send." *Id.* at 1342. Reasoning that this difference in language was intentional, Judge Altonaga stated, "Where a legislative body uses language in one place but not in another, it is generally presumed that the body acts intentionally." *Id.* at 1342–43.

Georgia Cases

Unlike the federal courts in Florida, the Georgia federal courts have been consistent in construing article 10(a) and have all found that service by mail was permitted under 10(a). First, in *Curcuruto v. Cheshire*, 864 F. Supp. 1410 (S.D. Ga. 1994), Judge Anthony A. Alaimo found that article 10(a) of the Hague Service Convention contemplates service of process via postal channels. *See id.* at 1412–13. In reaching his conclusion, the judge found that such an interpretation provides adequate notice to those served and respects the protocol of the receiving countries. *Id.* at 1412.

Next, in *Patty v. Toyota Motor Corp.*, 777 F. Supp. 956 (N.D. Ga. 1991), Judge Harold L. Murphy found that article 10(a) of the Hague Service Convention contemplates service of process via postal channels. *Id.* at 959. Judge Murphy found that such an interpretation followed from the language of the convention. The judge also found that such an interpretation serves the purposes of the convention and the Federal Rules of Civil Procedure by providing adequate notice of the complaint and its grounds to those who are served.

The most recent Georgia case on 10(a) came in 2000, in *Schiffer v. Mazda Motor Corp.*, 192 F.R.D. 335 (N.D. Ga. 2000), where Judge Thomas W. Thrash found that service of process by mail is permitted under article 10(a) of the Hague Service Convention. *Id.* at 338. Judge Thrash

took a broader view, determining that the purpose of the convention is to create a means to serve documents and finding support for his conclusion in the preamble of the convention. Judge Thrash also noted that all of the articles in the convention involved service of process but not one involved later aspects of a case. Notably—and properly under *Sumitomo Shoji America, Inc.*, 457 U.S. 176—Judge Thrash considered the State Department's position, as set forth in the Kreczko letter. *See Schiffer*, 192 F.R.D.at 339.

Alabama Cases

Like the federal courts in Georgia, the Alabama courts have found that service by mail was permitted under 10(a)—though it has been more than 20 years since a court in Alabama has examined the issue. In *Coblentz GMC/Freightliner, Inc. v. General Motors Corp.*, 724 F. Supp. 1364 (M.D. Ala. 1989), Judge Myron H. Thompson found that service of process by mail was permissible under article 10(a) of the Hague Service Convention. *See id.* at 1373. In support of his finding, the court noted that Sweden had not objected to article 10(a) of the convention. *Id.* at 1372.

Justice Hugh Maddox of the Supreme Court of Alabama indirectly acknowledged that service of process via postal channels is acceptable under the Hague Service Convention. *See Parsons v. Bank Leumi Le-Israel, B.M.*, 565 So. 2d 20, 25 (1990). Justice Maddox was faced with the question of whether a foreign bank was required to serve an Alabama citizen with a translation of the summons and complaint. Justice Maddox held that no translation was required because service of process was effectuated via postal channels. He noted that "the procedures used for obtaining service of process complied with the Hague Convention."

Conclusion

The courts within the Eleventh Circuit have not reached the same conclusions regarding the scope of article 10(a). Until the Eleventh Circuit weighs in on the issue, lawyers in the circuit should carefully review the existing case law on the topic from lower federal courts and from state courts before they attempt to serve a party by mail under article 10(a) of the Hague Service Convention. This method should be a safe bet in Alabama, as it enjoys support from the Alabama Supreme Court and an Alabama federal court. Likewise, in Georgia, there is no contrary authority. Florida is another case altogether. It is possible, though, to ask the court in advance for an order permitting service by mail under article 10(a)—and this would likely be wise in Florida, where such a request would avoid wasting time with a challenge to service after the fact.

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Aaron S. Weiss is with Carlton Fields, in Miami, Florida.