

A Brief Guide to the Service of Documents Abroad

By Amy Sara Cores, Esq.

How do you serve a complaint for divorce on the defendant who lives in Canada? The first step is to consult the Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters [hereinafter, 'Convention']. The Convention applies only to contracting Statesⁱ and provides for specific channels of transmission to be used when transmitting judicial or extrajudicial documents from one State Party to another State party. It is consistent with the New Jersey Rule 4:4-4(b)(1)(B), which provides for service on a party outside the territorial jurisdiction of the U.S. may be made in accordance with any governing international treaty or convention.

There are currently 60 member states to the Convention.ⁱⁱ The U.S. ratified the treaty in 1965, however, the treaty was not in force until November 10, 1969. The Convention is an open treaty and therefore new member states may accede. It is essential to check the Hague Conference website regularly to determine if a particular State is a party to the treaty.

The Convention provides for "channels of transmission" of documents between State parties. There are main, alternate, and derogatory channels of transmission. The main channel of transmission is the Central Authority. Each member State must create a body through which requests are received and transmitted. This body is referred to as the Central Authority. Article 2 of the Convention provides that the member States shall determine the form of the organization of the Central Authority. For example, in Germany each Länder has its own

Central Authority, while Canada has a federal Central Authority and one for each Province and Territory.ⁱⁱⁱ

Pursuant to the Service Convention the United States has set up a Central Authority for assistance with matters pending in Federal Court.^{iv} For actions pending in state courts actions, state law designates the person authorized to effect service. However, the same forms are used to request service.

Form USM-94 "Request for Service Abroad of Judicial and Extrajudicial Documents," must be completed. The form includes a "Summary of Document to be Served." The completed request form and documents to be served, as well as translations thereof into the native language in the receiving country, if not English, should be mailed directly to the foreign Central Authority, as provided by Article 3 of the Hague Convention. Article 2 of the Convention provides that the authority or judicial officer competent under the law of the requesting State must forward the request for service to the requested State Central Authority. Our courts have held that a private attorney is authorized to serve a judicial document in the United States and therefore the private attorney also has the authority to send a request for service directly to a foreign Central Authority.^v

Form USM-94 requires you to designate the method of service to be used by the foreign Central Authority. Formal and informal methods of delivery, as well as personal service, may be designated. The Central Authority of the receiving country will complete the certificate contained with the form and return the certificate to the requesting party once service has been completed. The State Department estimates that it can take two months to accomplish service under these methods.

However, Article 10 of the Convention does provide for methods of service by private parties directly between countries, but again you must check the receiving countries ratification of the Convention, as they may have objected to this form of service. Article 10 permits service of judicial process a) by "postal channels directly to persons abroad", b) by judicial officers, officials or other competent persons in the state of destination at the request of the same in the state of origin, or c) by judicial officers, officials or other competent persons in the state of destination at the request of an interested person in the state of origin. Article 8 permits the service of judicial process through the diplomatic or consular agents of the country of origin, but this too is subject to the consent of the State of destination. For example, to properly serve or receive process in Germany, the legal documents must be translated into German (even if both parties are American and the Court is the United States). Also, the documents must be forwarded using Form USM-94.

Process Forwarding International (PFI) has been the acting official U.S. Central Authority, since 2003. Last year, the contract was renewed for an additional 5 years. PFI administers all formal service of process consistent with the Convention, the Inter-American Convention on Letters Rogatory, and Letters Rogatory from non-Convention countries.

If the requested State is not a party to the Convention then there are several alternatives for serving documents. First and foremost, consult the Rules of Court. It is suggested that service on a litigant in a non-party State, should comply with the Federal or New Jersey Rules of Court (as applicable), the Convention, and the local rules for service in the requested State. This requires a bit of research to ascertain the most

appropriate method to select for service. Start with PFI, since they have worldwide service, even if the country is not a State party to the Convention.

Clearly personal service is the best form of service. However, it is not always possible. If a defendant cannot be located or if personal service is not possible, then alternative service tools must be implemented. Rule 4:4-4(3) provides that if service cannot be made consistent with any of the modes provided for in Rule 4:4, then any defendant may be served as provided by court order. Therefore, one must first determine the method that will be used to serve a defendant and then seek an order of the court providing that such service will be deemed good service. For example, if a defendant's current address is unknown, but the plaintiff knows that the last known address of the defendant is in the Philippines^{vi} then service by publication may be necessary.

Rule 4:4-5(c) provides for service by publication once in a newspaper published or of general circulation in the county in which the venue is laid. "[S]ervice by publication is the mode of service least calculated and least likely to result in notice to a party and rarely, in fact, does."^{vii} Therefore, if the plaintiff is aware that the defendant most recently resided in Jakarta, publication of the Summons and Complaint in the *Asbury Park Press*, is not likely to result in actual notice. Therefore, the court order permitting alternate service should provide for both strict compliance with Rule 4:4-5(c) and publication of the notice in a newspaper of general circulation in the city or State in which the defendant most recently resided.

It is suggested that the order of the court provide for multiple methods of service, when a defendant cannot be located

or when service in a non-Convention State is necessary. For example, mailing the Summons and Complaint to the last known address via regular and registered mail, as well as publication in the county in which the action is venued and the State in which the defendant resides, should both be provided for in the order. Likewise, the documents should be translated into the language of the State in which the defendant is located and served concomitantly with the Summons and Complaint in English. Also remember that all future notices and pleadings will have to be served on the defendant in the same manner. Therefore, it is necessary to provide for this in the order.

The courts of New Jersey have suggested that service or at least notice via email is preferable to an alternative method of service.^{viii} It is unclear whether service via email would suffice under the Convention. However, the goal of the Convention, as well as the scheme set forth in the Rules of Court, is to place a defendant on notice and to permit the plaintiff to obtain a judgment that is not subject to a challenge based on lack of notice. It is suggested that when dealing with a defendant located abroad that the strict adherence to the Convention and our local rules is essential to promote this goal and protect your client.

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ⁱ "State" herein is used in the international context to refer to a nation-state or county.

ⁱⁱ http://www.hcch.net/index_en.php?act=conventions.status&cid=17

ⁱⁱⁱ Hague Conference, Practical Handbook on the Operation of the Hague Service Convention (Wilson & Lafluer: Montreal, 2006).

^{iv} Office of International Judicial Assistance, Civil Division, Department of Justice, Todd Building, Room 8102, 550 11th Street N.W., Washington D.C. 20530, (2020) 307-0983. See also http://travel.state.gov/judicial_assistance.html

^v Holloway v. Arkansas, 435 U.S. 475 (1978); FRC International, Inc. v. Taifun Fuerlöschgerätebau und Vertriebs GmbH, 2002 WL 31086104 (N.D. Ohio 2002); Marschhauser v. The Travellers Indemnity Company, 145 F.R.D. 605 (S.D. Fla. 1992).

^{vi} The Philippines is not a party to the Convention.

^{vii} Camden County Bd. of Soc. Serv. 's v. Yocavitch, 251 N.J. Super. 24, 29 (Ch. Div. 1991).

^{viii} Modan v. Modan, 327 N.J. Super. 44 (2000).