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## **The Never Waiver—Whether Parties Can Expressly Waive Service Requirements Under the Hague Convention**

Despite the language in the contract, you may still have to comply with the obligations of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, otherwise known as the Hague Service Convention, to serve the foreign defendant.

By **Kevin Paule** | January 11, 2022



**Kevin Paule of Hill Ward Henderson. Courtesy photo**

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Your client calls with a problem. They have a contract with another company, the contract has been breached, and they want to file a lawsuit. Being the diligent lawyer that you are, you review the contract. It states that all lawsuits must be brought in Florida, the parties waive arguments regarding personal jurisdiction, and service by mail is permissible. So far, so good.

But, the defendant is located in another country. After you draft the lawsuit and file it, is service as simple as mailing a copy of the summons and complaint to the defendant's overseas address? Not quite. Despite the language in the contract, you may still have to comply with the obligations of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, otherwise known as the Hague Service Convention, to serve the foreign defendant.

The Hague Service Convention is a multilateral treaty that streamlines the service of process abroad, and allows for defendants sued in foreign jurisdictions to receive actual and timely notice of lawsuits. The United States along with dozens of other countries are signatories. Each member country appoints its own central authority which receives documents (including process) and sets forth certain rules specific to each country,

including whether documents need to be translated. From a practical perspective, this can significantly increase the cost of litigation, in the event that a complaint needs to be translated to a different language, and can also increase the time for service. At the moment, some countries, such as China, have been taking over a year to respond to process service requests.

Article 1 of the Hague Service Convention applies “in all cases, in civil and commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.” If judicial documents are being transmitted abroad to a foreign defendant, then the Hague Service Convention likely applies.

But, what about service by mail? Article 10 states that “provided the state of destination does not object, the present convention shall not interfere with ... the freedom to send judicial documents, by postal channels, directly to persons abroad.” In other words, service by mail is allowed, so long as the destination country does not object. Several countries, including China, prohibit service by mail.

Assuming the defendant is from a country that objects to service by mail, the issue you face to avoid spending time, money, and energy with the rules under the Hague Service Convention is whether a country's objection prevents its citizens from waiving this requirement.

To date, Florida state and federal courts have not published an opinion on this precise issue. Florida Statute Section 48.194(1) provides that “service of process outside the United States *may* be required to conform to the provisions of the Hague Convention.” The general rule applied by Florida courts is that service of judicial documents abroad is authorized *so long as the destination country does not object*. Florida courts have also noted that the Hague Service Convention is “mandatory in all cases to which it applies” and that it “pre-empts inconsistent methods of service prescribed by state law.” This, along with U.S. Supreme Court precedent regarding the superiority of the Hague Convention, suggests that Florida courts would not allow for a foreign defendant to waive service requirements.

However, in weighing whether an alternative forum existed for purposes of forum non conveniens, the Middle District of Florida ruled that a Florida witness could waive the formalities of the Hague Convention. See *Image Linen Services v. Ecolab*, 2011 WL 862226, at \*4 (M.D. Fla. March 10, 2011). Additionally, several courts have held that service requirements under the Hague Service Convention can be waived. See, e.g., *Revman International v. SEL Manufacturing*, 2019 WL 10893956, at \*5 (D. S.C. March 26, 2019).

Recently, in a thorough opinion, the California Supreme Court ruled on this issue. In *Rockefeller Technology Investments (Asia) VII v. Changzhou Sinotype Technology*, 9 Cal. 5th 125 (2020), the parties executed a memorandum of understanding that provided, among other things, that the parties would consent to service of process via Federal Express. SinoType was based in China. Rockefeller initiated arbitration and transmitted the petition and summons to SinoType via Federal Express. SinoType did not appear or respond; Rockefeller obtained an arbitrator award of over \$400 million. SinoType then appeared and sought to quash the judgment for “insufficiency of service of process.” The motion to set aside the judgment was denied, but the California Court of Appeal reversed.

Relying on U.S. Supreme Court precedent, the *Rockefeller* court held that China's objection to foreign mail service would preclude service via Federal Express, regardless of the parties' contract or whether California law allowed for such service. However, the *Rockefeller* court reversed the appellate court on the grounds that in their agreement, the parties waived formal service of process and that, therefore, the Hague Service Convention was inapplicable. Had the parties' agreement been worded differently, it is possible that the *Rockefeller* court may have held differently. And, it's unclear whether other courts outside California will appreciate this distinction and rule similarly.

In order to avoid this headache, there are a few ways that parties contracting with foreign companies can structure agreements. First, and most easily (assuming the foreign company is agreeable), designate a registered agent in the United States. This likely eliminates the need to send or transmit anything overseas.

Second, similar to the parties' agreement that was the subject of *Rockefeller*, the parties should agree to *waive* formal service of process. A different court in a different jurisdiction may think differently than the California Supreme Court in *Rockefeller*, but it will allow a party to argue that if there's no formal service, there's nothing to serve, and therefore the Hague Service Convention is inapplicable.

Clients don't always anticipate that contracts will end up in litigation. But, by wisely crafting an agreement with a foreign defendant on the onset, a client can avoid wasting time and resources if litigation is needed.

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