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# You've Got Mail: Supreme Court Holds Foreign Defendants May Be Served via Certified Mail Under Hague Convention

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The decision saves U.S. plaintiffs time and expense in initiating a case and also removes a basis for foreign defendants to contest judgments against them.

Starting a lawsuit against defendants outside the United States just got cheaper and easier. On May 22, the U.S. Supreme Court settled a dispute as to whether the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention) authorizes service of process by certified mail. In holding that mail service is authorized, the Court removed a judicially created barrier to efficient service in international litigation and brought the United States' interpretation of the Hague Service Convention into agreement with the practices of many other developed nations. *Water Splash, Inc. v. Menon*, No. 16–254, slip op. at 12 (U.S. May 22, 2017).

**Article 10 of the Hague Service Convention**

Prior to *Water Splash*, multiple circuit courts distinguished between initial service of process and service of all post-complaint documents under the Hague Service Convention, concluding that only the latter was authorized by certified mail. *See Nuovo Pignone v. Storman Asia M/V*, 310 F.3d 374 (5th Cir. 2002); *Bankston v. Toyota Motor Corp.*, 889 F.2d 172 (8th Cir. 1989). The relevant section of the convention, Article 10, states:

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 through the judicial officers, officials or other competent persons of the State of destination.

Convention of the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1965 (Hague Service Convention), 20 U.S.T. 361, T.I.A.S. No. 6638 (emphasis added).

The circuit courts that concluded initial service of process could not be effected by mail, focused on the fact that Article 10(a) — which addresses the use of postal channels — uses only the word "send," while Articles 10(b) and 10(c) explicitly use the term "service of process." In those courts' view, this distinction demonstrated that the Article 10(a) was not meant to apply to service of process. The practical effect of this distinction was to limit plaintiffs in these jurisdictions to service through time-consuming formal Hague Service Convention processes.

**The *Water Splash* Decision**

In *Water Splash,* the Supreme Court rejected this narrow construction of Article 10, and instead looked to the structure of the Hague Service Convention as a whole. In an opinion authored by Justice Alito, the Court relied on the language of the Convention's preamble, which states that its purpose is to facilitate and encourage the efficient "service" of judicial documents, and Article 1, which states it "shall apply in all cases . . . where there is occasion to transmit a judicial or extrajudicial document *for service abroad*." *Water Splash, Inc.* No. 16–254, slip op. at 4 (emphasis added).

With respect to Article 10, the Court reasoned that the word "send" is a broad term and could encompass service of a complaint, even if Article 10(a) itself does not use the word "service." *Id.* at 6-7. Further, Articles 10(a), 10(b) and 10(c) all use the term "judicial documents" such that there is no reason to believe that Article 10(a) applies only to a subset of those documents (*i.e.*, post-complaint documents). *Id.* at 6. Moreover, in an effective turnaround of the Fifth and Eighth Circuit's reasoning, Justice Alito stated that, if the writers of the Convention intended Article 10(a) to be limited to documents served after the complaint, they could have included that limiting language. *Id.* at 6.

Additionally, the Court looked to how both the U.S. executive branch and the rest of the world have interpreted the provision. *See id.* at 8. Soon after the Eighth Circuit's decision in *Bankston*, the Department of State issued a letter outright disagreeing with the holding and arguing that Article 10(a) allowed for service of complaints through the mail. Today, even, the Department of State website "takes the same position." *Id.* at 10. The Court also gave "considerable weight" to the interpretation of the Hague Service Convention afforded by other parties to the Convention, citing courts in Canada, the United Kingdom and Italy that have held that Article 10(a) "encompasses service by mail." *Id.* at 10-11.

**The Effect of the *Water Splash* Decision**

*Water Splash* removes one barrier to the efficient service of complaints on foreign adversaries. However, other barriers remain. As the Court concluded, service by mail is authorized only so long as (1) "the receiving state[] has not objected to service by mail; and (2) service by mail is authorized under otherwise-applicable law." *Id.* at 12. Of these barriers, the first is the most significant. Parties to the Hague Service Convention may opt out of Article 10(a) altogether, and some countries — such as Germany, India and China — have done so.

As a result, service of process by mail in these countries is not an option. At the same time, there are many signatories that have not opted out of Article 10, including Canada, France and the United Kingdom. There, *Water Splash* has removed any barrier to effective service of a complaint by certified mail when applicable state or federal law authorizes such service on defendants outside the jurisdiction. This will save U.S. plaintiffs time and expense in initiating a case and also remove a basis for foreign defendants to contest judgments against them.

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