US Federal Rules of Civil Procedure, the US Supreme Court and the Hague Service Convention: is reform necessary?

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The USA is a Contracting Party to the 1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (the "Hague Service Convention", which it ratified in 1967. The Hague Service Convention is a multilateral treaty whose purpose is to simplify, standardize, and generally expedite the process of serving documents abroad, thus it plays a central role in international litigation. The Hague Service Convention specifies several allowed methods of service to provide due notice of a proceeding in one Contracting State to a party in another.

The primary method (and main alternative to service through diplomatic channels) — laid out in Articles 2 to 7 of the Convention — is via a designated Central Authority in each Contracting State. When a Central Authority receives a request for service, it must serve the documents or arrange for their service. This method is usually faster than service through diplomatic and consular agents (which remain available under Article 8 of the Convention), along with the possibility that two or more Contracting States may agree to permit channels of transmission of judicial documents other than those provided for in the Convention.

Further, at Article 19 the Convention clarifies that it does not preempt any internal laws of its Contracting States that permit service from abroad via methods not otherwise allowed by the Convention. Thus, it could be argued that a sort of favor summonitio (borrowed by the principle of favor contractus) permeates the entire instrument, in that the Convention strikes a fair balance between the formal notice of a proceeding and the validity of an effective summon in favor of the latter, to allow for swift international litigations. Indeed, another fast method of service expressly approved by the Convention is through postal

channels, unless the receiving State objects by making a reservation to Article 10(a) of the Convention. This is considered the majority view shared by multiple jurisdictions. However, in the United States different interpretations existed on this point, because Article 10(a) of the Convention does not expressly refer to "service" of judicial documents (it instead uses the term "send"). Consequently, it was an unsettled question whether Article 10(a) encompassed sending documents by postal channels abroad for the purpose of service, until the US Supreme Court has been called to interpret this instrument.

US Supreme Court's interpretation of Article 10(a) of the Hague Service Convention

The USA did not make any reservation objecting to service by mail under Article 10 of the Convention. In Water Splash, Inc. v. Menon, 581 U.S. ___ (2017), the US Supreme Court pronounced itself on Article 10(a) of the Hague Service Convention to resolve these conflicting views, according to some of which the Convention was to be read as prohibiting service by mail.

After a detailed contextual treaty interpretation and also a comparison of the text with the French version (equally authentic), the US Supreme Court found that that Article 10(a) unmistakably allows for service by mail. The Supreme Court further clarified that "this does not mean that the Convention affirmatively authorizes service by mail." It held that "in cases governed by the Hague Service Convention, service by mail is permissible if two conditions are met: first, the receiving state has not objected to service by mail; and second, service by mail is authorized under otherwise-applicable law." This means that it is not The Hague Service Convention to authorize service by mail, but it must be the lex fori to do so (the Convention simply permits service by mail). So, where the Convention applies, it is not enough to make sure that a summon effectuated abroad is valid under the Convention just because that foreign jurisdiction allows for service by international registered mail. It further must be ascertained that the jurisdiction in which the case is pending authorizes service by mail requiring a signed receipt. However, by a simple reading of the US Federal Rules of Civil Procedure, it is possible to note how this set of rules misunderstood the scope of The Hague Service Convention.

The US Federal Rules of Civil Procedure and the Hague Service Convention

In cases pending before a US federal court where the Hague Convention applies and where the foreign jurisdiction (in which the defendant resides or is registered) allows for service by mail, the plaintiff – who serves the defendant

abroad – should further wonder whether US Federal law authorizes serving the defendant in a foreign country by mail.

Rule 4 of the Federal Rules of Civil Procedure (FRCP), dealing with summons, answers this question. In particular, Rule 4(h)(2) FRCP deals with serving a corporation abroad by remanding to Rule 4(f) FRCP, which in turn deals with serving an individual. So, the same rule applies to serving either an individual or a corporation abroad. Rule 4(f)(1) FRCP makes express reference to the Hague Service Convention:

"(f) Serving an Individual in a Foreign Country. Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served at a place not within any judicial district of the United States:

(1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;"

However, as stated by the US Supreme Court in Water Splash, Inc. v. Menon, the fact that Article 10(a) of the Hague Service Convention encompasses service by mail does not mean that it affirmatively authorizes such service. Rather, service by mail is permissible if the receiving State has not objected to service by mail and if such service is authorized under otherwise-applicable law.

Probably, the words "[…]as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;" in Rule 4(f)(1) FRCP should be more correctly rephrased with "[…]as those allowed by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;" in order to be in line with the jurisprudence of the US Supreme Court.

So, as Rule 4(f)(1) FRCP does not provide the final answer, the plaintiff needs to look at Rule 4(f)(2)(C)(ii) FRCP, which expressly authorizes the use of any form of mail that requires a signed receipt.

Hence, in cases pending before a federal US court where the Hague Service Convention applies and the receiving states permits service by mail, a plaintiff may serve a company or an individual abroad by means of international registered mail by virtue of Rule 4(f)(2)(C)(ii) FRCP (rather than Rule 4(f)(1) FRCP remanding to The Hague Service Convention). Consequently, the FRCP should be amended to avoid further misunderstandings as to the scope of application of the Hague Service Convention by replacing the word authorized with the term allowed at Rule 4(f)(1).