June 2, 2017

# Client Alert: Water Splash, Inc. v. Menon

## Supreme Court Holds that Hague Convention Does Not Prohibit Service by Mail

On May 22, 2017, the United States Supreme Court held, in a unanimous decision in *Water Splash, Inc. v. Menon*, 581 U.S. __ (2017), that the Convention on the Service Abroad of Judicial and Extrajudicial Documents (the "Hague Convention") does not prohibit service of process by mail unless the country in which service is being attempted has specifically objected to service by mail under Article 10(a).

The plaintiff in *Water Splash* is a Texas corporation that brought suit against its employee in state court in Texas. Because the employee resided in Canada, the plaintiff sought and obtained permission from the trial court to effect service by mail. The trial court entered a default judgment after the defendant failed to appear in the case. The trial court subsequently denied the defendant's motion to set aside the judgment on the grounds that the defendant had not been properly served. In a split decision, the majority of the Texas Court of Appeals reversed and held that the Hague Convention prohibits service by mail. After the Texas Supreme Court denied discretionary review, the United States Supreme Court granted certiorari to determine whether the Hague Convention authorizes service of process by mail.

### Service of Process through the Central Authority under Articles 3 – 7

The Supreme Court began by acknowledging that the Hague Convention requires each contracting state to establish a central authority to receive requests for service of documents from other countries and to either serve or arrange for service of such documents. To serve a party through the central authority under Articles 3-7 of the Hague Convention, the party requesting service must send two copies of the mandatory request for service abroad form and any case initiating documents (including the summons and complaint). Most, if not all, contracting states require these documents to be translated into the country's official language pursuant to Article 5. In addition, the serving party cannot file proof of service until it receives the certificate of service from the central authority pursuant to Article 6. While serving through the central authority is the most common method of service under the Hague Convention, the Supreme Court held that it is not the only permissible method under the Convention.

### Service of Process via Postal Channels under Article 10(a)

The Supreme Court held that Article 10(a) may permit service of process by mail under certain circumstances. That provision 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." The Court held that the phrase "send judicial documents" must be broadly construed to encompass sending documents for the purpose of effecting service. It explained that such an interpretation was mandated by the text and structure of the Hague Convention, which is limited to the transmission of documents for purposes of

service, and was supported by the Convention's drafting history. While the Court held that Article 10(a) encompasses service by mail, it explicitly cautioned that "this does not mean that the Convention affirmatively *authorizes* service by mail." Rather, "Article 10(a) simply provides that, as long as the receiving state does not object, the Convention does not 'interfere with ... the freedom' to serve documents through postal channels."

Accordingly, the Supreme Court held that service by mail is permissible under the Hague Convention if two conditions are met: (1) the receiving state has not objected to service by mail and (2) service by mail is authorized under otherwise-applicable law. The Court found the first prong satisfied because Canada did not object to service by mail under Article 10(a). Nevertheless, the Court remanded the case to the Texas Court of Appeals to determine whether Texas law authorizes service by mail.

## Potential Time & Cost Savings of Service by Mail

If a court concludes that the two prerequisites for permitting service abroad by mail set forth in *Water Splash* are satisfied, the plaintiff can probably bypass all of the time-consuming and expensive requirements of attempting service through the central authority under Articles 3-7. For example, a plaintiff can probably avoid the time-consuming and costly process of translating the documents into the official language of the receiving state – as required by most, if not all, central authorities under Article 5. Although the Supreme Court did not explicitly address the issue, courts that previously upheld service by mail under Article 10(a) have held that there is no requirement to translate the documents being served. *See Bankston v. Toyota Motor Corp.*, 889 F. 2d 172, 173 (8th Cir. 1989); *Smith v. Dainichi Kinzoku Kogyo Co., Ltd.*, 680 F. Supp. 847, 850 (W.D. Tex. 1988).

## Many States Have Objected to Service by Mail under Article 10(a)

Several considerations may blunt the impact of the Supreme Court's decision in *Water Splash*. First, more than 30 countries, including Argentina, China, Germany, India, Mexico, Russia and Venezuela, have objected to service by mail under Article 10(a) as of December 2015. *See* Table Reflecting the Applicability of Articles 8(2), 10(a)(b) and (c), 15(2) and 16(3), dated December 2015, *available at* https://assets.hcch.net/docs/6365f76b-22b3-4bac-82ea-395bf75b2254.pdf.

## The Federal Rule of Civil Procedure Do Not Authorize a Plaintiff to Directly Serve a Foreign Defendant by Mail

The Federal Rules of Civil Procedures do not explicitly authorize a plaintiff to directly serve a foreign defendant by mail. In a federal court action, a plaintiff would need to either have the clerk of the court serve the documents by registered mail pursuant to Rule 4(f)(2)(C)(ii) or seek permission from the court to serve by mail pursuant to Rule 4(f)(3).[1] And, with respect to state court actions, it is unclear how many states, if any, permit service abroad by mail.

[1] While Rule 4(f)(2)(A) authorizes service abroad "in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction," courts have repeatedly held that Rule 4(f)(2)(A) is limited to

### Foreign Sovereigns Cannot Be Served through Postal Channels

Finally, plaintiffs cannot serve foreign sovereign defendants via mail. As the United States government stated in its *amicus* brief in support of the plaintiff in *Water Splash* "additional considerations apply in cases involving efforts to serve sovereign defendants." The Foreign Sovereign Immunities Act ("FSIA") sets forth the exclusive methods for serving foreign sovereigns. *See, e.g., Transaero, Inc. v. La Fuerza Aerea Boliviana,* 30 F.3d 148, 154 (D.C. Cir. 1994). While the FSIA permits service in accordance with the methods authorized under the Hague Convention, the Supreme Court's decision in *Water Splash* makes clear that the Convention does not affirmatively authorize service by mail. And, as the United States explained in its *amicus* brief in *Water Splash*, the FSIA does not permit a plaintiff to directly serve a foreign sovereign through postal channels.

## About Curtis

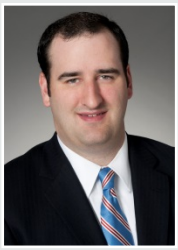
Curtis, Mallet-Prevost, Colt & Mosle LLP is a leading international law firm. Headquartered in New York, Curtis has 17 offices in the United States, Latin America, Europe, the Middle East and Asia. Curtis represents a wide range of clients, including multinational corporations and financial institutions, governments and state-owned companies, money managers, sovereign wealth funds, family-owned businesses, individuals and entrepreneurs.

For more information about Curtis, please visit www.curtis.com.

*Attorney advertising. The material contained in this Client Alert is only a general review of the subjects covered and does not constitute legal advice. No legal or business decision should be based on its contents.*

### For further information, contact:

**Joseph D. Pizzurro**
Partner
jpizzurro@curtis.com
212.696.6196



**Kevin Meehan**
Associate
kmeehan@curtis.com
212.696.6197

personal service and does not authorize service by mail even where the foreign jurisdiction permits service by mail in domestic cases. *See Brockmeyer v. May*, 383 F. 3d 798, 806-808 (9th Cir. 2004) (collecting cases).