D.C. Court Authorizes Service by Mail on Foreign State under Hague Convention; Leaves Open Key Defenses

Last week, a federal district court in Washington, D.C., found that service of process on a foreign sovereign via private courier was proper under the Convention on the Service Abroad of Judicial and Extrajudicial Documents (the "Hague Convention"), without considering the limitations imposed by the Foreign Sovereign Immunities Act (FSIA).[1]

In the United States, the FSIA provides the exclusive methods for serving a foreign state. One of those methods includes "delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents," such as the Hague Convention.[2] If service cannot be made under an applicable convention, then the FSIA authorizes service "by any form of mail requiring a signed receipt," subject to a series of requirements including that the mailing "be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned."[3] If service by mail is unavailable or cannot be made within thirty days, then the foreign state may be served via diplomatic channels.[4]

In the recent case, the issue arose from efforts to serve a petition to enforce a foreign arbitral award on the Government of Romania using the Hague Convention. The "primary innovation" of the Convention is the commitment by each contracting State, under article 3, to designate a central authority through which it processes requests for service of judicial documents sent by a competent authority in the originating State.[5] Additionally, article 10(a) states that, "[p]rovided 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." The Convention does not distinguish between service on private parties and service on the State itself.

The petitioners tried to serve Romania in two ways. Relying on article 10(a), they first sent the relevant judicial documents directly to Romania via private courier. The court does not specify to whom the documents were addressed or where they were sent. Counsel for the petitioners also forwarded the documents to Romania's central authority for service under article 3.

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[1] *Micula v. Gov't of Romania*, No. 17-cv-2332 (APM), slip. op. (D.D.C. May 22, 2018).

[2] 28 U.S.C. § 1608(a)(2) (emphasis added).

[3] *Id.* at § 1608(a)(3).

[4] *Id.* at § 1608(a)(4).

[5] *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 1508 (2017) (citations omitted).

In a motion to dismiss the case, Romania challenged both service attempts as insufficient under the Hague Convention, but did not raise the FSIA's service provisions as a defense.[6] Instead, it claimed that it had never authorized service by mail as contemplated by article 10(a), and argued that such authorization should not be inferred from the fact that it had not objected formally to service by mail. Furthermore, it contended that, under Romanian law, only its U.S. embassy, not a private attorney, was a competent authority for sending service requests to its central authority under article 3. The court rejected Romania's arguments and found that service had been proper both through the central authority and by private courier.[7]

The most novel aspect of the court's decision was its approval of service by mail directly on a foreign state under article 10(a). The court relied on the recent U.S. Supreme Court decision in *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504 (2017), which held that service by mail on private parties residing abroad was 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 acknowledged that the Hague Convention does not "affirmatively *authorize*[] service by mail."[8] However, since it understood Romania's arguments as challenging only the first condition, the court did not address the second prong.

The court noted that Romania had not objected to service by mail when it ratified the Convention, or anytime thereafter. On that basis alone, it concluded that Romania could be deemed to have allowed service by mail under article 10(a) and thus could not now refuse it. But there was more. In connection with Romania's participation in the Hague Conference, the inter-governmental organization responsible for managing the Hague Convention, Romania had repeatedly affirmed that it does not object to service by mail under article 10(a). And, according to the Hague Conference's website, Romania still appears as having "No opposition" to service by mail.[9] Additionally, in response to a recent questionnaire issued by the Hague Conference, Romania "expressly represented" that its domestic law "authorizes service of process by mail and private courier."[10] Through those statements, Romania "made crystal clear its acceptance of service by mail" under article 10(a) and thus the court found its current representations to the contrary to be "disingenuous."[11] The court denied Romania's motion to dismiss.

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[6] *Micula*, slip. op. at 1.

[7] The court found that the petitioners' attorney was a competent authority under the laws of the United States, "the State in which the documents originate[d]," as provided under article 3. *Id.* at 8. Romanian law was irrelevant for purposes of that analysis.

[8] *Micula*, slip. op. at 2 (quoting *Water Splash*, 137 S. Ct. at 1513) (emphasis supplied).

[9] *Id.* at 4.

[10] *Id.* at 6.

[11] *Id.*

This is the first time a court extends *Water Splash* to a case involving service of process on a foreign state. Because the court focused only on *Water Splash*'s first prong, however, it did not have occasion to determine whether service directly on a foreign state by mail was authorized under otherwise applicable law. For instance, it did not consider whether the FSIA, as opposed to the Hague Convention, provides for service directly on a foreign state by private courier as attempted by the petitioners. Nor did the court have reason to assess the effect of a foreign state's requirements for accepting service under its own law, since Romania did not raise Romanian law as a defense to service by mail under article 10(a). As the court acknowledged, the outcome may have been different had Romania been able to show that its domestic law "clearly foreclosed service by mail,"[12] such as by offering a Romanian law expert in support of its position. In sum, the full impact of *Water Splash* on cases involving foreign state defendants has yet to fully materialize, and this recent decision alone does not close out future challenges to service by mail on a foreign state under the Hague Convention or the FSIA.

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[12] *Id.* at 3 n.3.

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Please feel free to contact any of the persons listed below if you have any questions on this important development:

Joseph D. Pizzurro
Partner
jpizzurro@curtis.com
New York: +1 212 696 6196

Robert B. Garcia
Partner
robert.garcia@curtis.com
New York: +1 212 696 6052

Kevin A. Meehan
Associate
kmeehan@curtis.com
New York: +1 212 696 6197

Juan O. Perla
Associate
jperla@curtis.com
New York: +1 212 696 6084