Supreme Court Requires Strict Compliance with FSIA's Service of Process Provisions to Serve a Foreign State

On March 26, 2019, the United States Supreme Court held that service of process on a foreign state was ineffective because the plaintiff failed to comply strictly with all the requirements of the Foreign Sovereign Immunities Act (FSIA). The Court held that it was not enough to send the relevant judicial papers in a manner that was reasonably calculated to provide actual notice.[1]

The FSIA, 28 U.S.C. § 1608(a), sets out in hierarchical order the four exclusive methods for serving process on a foreign state: (1) "in accordance with any special arrangement;" (2) "in accordance with an applicable international convention on service of judicial documents;" (3) by "any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs," or (4) "through diplomatic channels."[2] Once service is completed, the foreign state has sixty days to respond or it risks having a default judgment entered against it.[3] If a default judgment is entered, a plaintiff must then send a copy of the judgment to the foreign state in the same manner prescribed for service of process.[4] Once notice of the default judgment has been given, a plaintiff must still obtain a court order declaring that a "reasonable period of time has elapsed" before it can proceed to enforce the judgment.[5]

At issue in this case was whether service by mail had been perfected under the FSIA's third method of service, section 1608(a)(3), and the question arose in proceedings to enforce a default judgment entered against the Republic of Sudan.

I. The District Court Enters a Default Judgment against Sudan

In October 2000, a small boat pulled up next to the USS *Cole*, a United States Navy guided-missile destroyer, and detonated explosives killing several of the ship's crewmembers and injuring dozens more. Al-Qaeda claimed responsibility for the bombing. Ten years later, victims of the bombing and their family members brought an action in the federal district court in Washington, D.C., alleging that Sudan had materially supported Al-Qaeda in carrying out the attack.

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[1] *Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1058, 1062 (2019). Eight of the nine justices joined the majority opinion written by Justice Alito. Justice Thomas dissented.

[2] 28 U.S.C. § 1608(a)(1)-(4).

[3] 28 U.S.C. § 1608(d).

[4] 28 U.S.C. § 1608(e).

[5] 28 U.S.C. § 1610(c).

The plaintiffs purportedly served Sudan by having the clerk of the court mail the relevant judicial documents to the country's foreign minister as required under section 1608(a)(3). However, instead of addressing the package to the minister's office at the foreign ministry in Sudan, they addressed it to Sudan's embassy in Washington, D.C.

After Sudan failed to appear, the plaintiffs successfully moved the district court for a default judgment and then proceeded to give notice of the judgment using the same method of service, *i.e.*, by mail to Sudan's embassy in Washington, D.C. The plaintiffs then took their judgment to the federal district court in the Southern District of New York and sought orders requiring several banks to turn over property belonging to Sudan. After determining that a sufficient period of time had elapsed, the court authorized three turnover orders.

II. Sudan Appears to Contest Service of Process in the Court of Appeals

At that point, Sudan appeared for purposes of contesting personal jurisdiction and appealed each of the turnover orders, asserting that the underlying default judgment was void for ineffective service of process. Specifically, Sudan argued that under the FSIA's third method of service, section 1608(a)(3), service by mail had to be made by sending the relevant documents to the foreign minister's principal office in Khartoum, the capital of Sudan, and that addressing the service package to the Sudanese embassy in Washington, D.C., was insufficient.

The Court of Appeals for the Second Circuit disagreed. It held that the method of service chosen by the plaintiffs was consistent with section 1608(a)(3), which specified only the person to whom the package should be addressed and was silent as to the location where the service package was to be sent, because it was reasonable to expect that the package would be delivered to the foreign minister through the embassy. Sudan petitioned for rehearing by the full court (*en banc*), and the United States' appeared as *amicus curiae* in support of Sudan's position. The Second Circuit denied the petition.

Meanwhile, other victims of the same bombing obtained a default judgment against Sudan in the federal district court in the Eastern District of Virginia. They, too, attempted to serve Sudan by mail to its embassy in the United States. Sudan appeared in the district court and moved to vacate the default judgment for ineffective service of process. The court denied the motion, and Sudan appealed. The Court of Appeals for the Fourth Circuit adopted Sudan's position and ruled that service on Sudan at its embassy in the United States was ineffective under section 1608(a)(3).[6]

[6] *Kumar v. Republic of Sudan*, 880 F.3d 144, 158 (4th Cir. 2018). The Fourth Circuit sent the case back to the district court with instructions to vacate the default judgment and allow the plaintiffs the opportunity to perfect service. *Id.* at 161.

III. The Supreme Court Resolves the Circuit Split in Favor of Sudan

In light of the circuit split, the Supreme Court granted Sudan's petition to review the Second Circuit's decision.

The Court first turned to the statute's text and found that the most natural reading of section 1608(a)(3) was to require the service package to "bear the foreign minister's name" and to be "addressed and dispatched" *directly* to his usual place of business, *i.e.*, his office in Sudan, rather than *indirectly* through the embassy in Washington, D.C.[7] The Court reasoned that the personnel at the ministry of foreign affairs would be better equipped to process mail for the foreign minister than the embassy's mailroom staff. The Court further observed that this interpretation avoided any potential conflicts with the United States' own understanding of its obligations under the Vienna Convention on Diplomatic Relations, which provides for the inviolability of a foreign state's embassy.

Furthermore, the Court rejected the plaintiffs' argument that sending the service package to the embassy should be deemed proper "if reasonably calculated to give actual notice," a standard that is expressly included in the FSIA's provisions for serving a foreign state's agencies or instrumentalities but not for serving the foreign state itself.[8] Finally, although the Court recognized that Sudan may have been aware of this "highly publicized litigation" before the default judgment was entered, the Court nevertheless rejected the notion that equitable considerations, such as curtailing any delays in granting the plaintiffs' right to relief, should outweigh strict compliance with the FSIA's technical service requirements.[9]

This recent decision confirms that a foreign state has no obligation to respond to a suit in United States courts until it has been served in strict compliance with the FSIA's service of process provisions. It also lends strong support for a foreign state's decision to wait until after a default judgment is entered and enforcement proceedings have commenced to appear and contest service of process.

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[7] *Harrison*, 139 S. Ct. at 1057.

[8] *Id.* at 1058 (quoting 28 U.S.C. § 1608(b)(3)).

[9] *Id.* at 1062.

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