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Service of process in the United States under Insolvency Rule 12.12

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Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965

Case: Busytoday Ltd, Re [1992] 1 W.L.R. 683 (Ch D (Companies Ct))

***Insolv. Int. 58** The purpose of this article is to examine the provisions of r.12.12 of the Insolvency Rules, regarding service of insolvency proceedings on parties located in the United States.

In a previous article,[1] David Griffiths considered the interaction of r.12.12 and the EC Regulation 1348/2000 on the service in the Member States of judicial and extra-judicial documents in civil or commercial matters,[2] concluding that it would be dangerous to rely on the apparent breadth of the court's discretion in r.12.12(3) as regards mode of service. This article pursues a similar course, but with reference to service of insolvency proceedings in the United States rather than Europe.

To take a simple example, let us suppose that an English liquidator wishes to bring avoidance proceedings under either ss.238 or 239 of the Act against a party located in the state of Illinois. Apart from the dealings with the Illinois party, the administration of the estate is entirely domestic.[3] The liquidator will be concerned to ensure that if judgment is entered in the English proceedings, it can be successfully exported to Illinois and enforced against assets situated there.[4] For the purposes of entering judgment in the English Court, it goes without saying that the liquidator will be required to prove service. In addition, we submit that the proceedings should be served in accordance with local law to maximise the prospects that the Illinois courts will recognise the judgment and assist in its enforcement notwithstanding apparent statements to the contrary in *Re Busytoday Ltd.* [5]

For convenience, we start by setting out the provisions of r.12.12:

"**12.12 Service outside the jurisdiction**

12.12(1) CPR Part 6 paragraphs 6.17 to 6.35 (service of process, etc out of the jurisdiction) do not apply in insolvency proceedings. [6]

12.12(2) A bankruptcy petition may, with the leave of the court, be served outside England and Wales in such manner as the court may direct.

12.12(3) Where for the purposes of insolvency proceedings any process or order of the court, or other document, is required to be served on a person who is not in England and Wales, the court may order service to be effected within such time, on such person, at such place and in such manner as it thinks fit, and may also require such proof of service as it thinks fit.

12.12(4) An application under the Rule shall be supported by an affidavit stating:

(a) the grounds on which the application is made; and

(b) in what place or country the person to be served is, or probably may be found.

12.12(5) Leave of court is not required to serve anything referred to in this Rule on a member State liquidator."

Obtaining leave of the court under Insolvency Rule 12.12

It is clear from r.12.12(1) that the rules on service outside the jurisdiction in the CPR do not apply in relation to “insolvency proceedings”, which are defined by r.13.7 as “any proceedings under the Act or Rules” and therefore include avoidance proceedings under ss.238 and 239.[7] It follows that the leave of the court will be required under r.12.12(3) before proceedings can be served in another jurisdiction, even where the leave of the court would not normally be required to serve proceedings falling within the scope of the CPR in that same jurisdiction.[8]

As a matter of English law, ss.238 and 239 are capable of applying extraterritorially.[9] However, before the court will grant leave to serve avoidance proceedings outside the jurisdiction, it will consider whether, in all the circumstances, the case has a sufficient connection with England and Wales. Thus, the ***Insolv. Int. 59*** application for leave operates as a filter to ensure that the wide extraterritorial jurisdiction conferred by the avoidance provisions is not exercised exorbitantly.[10] In practical terms, there is little point in the English Court ordering service of proceedings outside the jurisdiction if the foreign court is unlikely to accept the assertion that the proceedings have extraterritorial effect.

For present purposes, let us assume that our liquidator will be able to persuade the court that the transaction sought to be impugned satisfies the “sufficient connection” test despite the fact that the prospective defendant is in Illinois, and return to the question of the appropriate method of service.

The court's discretion as to the manner of service under Insolvency Rule 12.12(3)

Rule 12.12(3) simply tells us that the court “may order service to be effected within such time, on such person, at such place and in such manner as it thinks fit …”. But what if the manner of service directed by the English Court does not conform to local procedural rules in the foreign jurisdiction? In those circumstances, compliance with the English Court's direction may not be sufficient to guarantee that the foreign court will recognise the English judgment. As David Griffiths pointed out[11] :

“[T]he real danger … lies in … a reliance on the literal wording of [Rule 12.12(3)]. To make an obvious point, it is one thing to subject an overseas defendant to the insolvency jurisdiction of the English courts but quite another thing to ensure recognition of an order made by a UK court exercising jurisdiction in relation to insolvency law elsewhere, including for that purpose the defendant's home state.”

It follows that a party seeking a direction as to manner of service in the order granting leave must consider the ultimate enforceability of the proceedings in the foreign jurisdiction. Otherwise, that party runs the risk that the foreign court may refuse to accept that the proceedings were validly served.[12] In this light, the decision of Mummery J. in *Re Busytoday Ltd* [13] makes somewhat curious reading. The case concerned an application to set aside an order for service outside the jurisdiction on the ground that the method of service specified in the order was not in accordance with the law of the country where service was to be effected. The relevant proceedings were brought under ss.212 and 239 of the Act against a former director of a company that was in creditors' voluntary liquidation. Having purportedly resigned from office, the director left England just under three weeks before the company went into liquidation. He claimed to have established residence in the Turkish Republic of Northern Cyprus.[14] Following earlier attempts to serve the proceedings at various addresses within the jurisdiction, the liquidator applied successfully under r.12.12 for leave to serve the proceedings outside the jurisdiction, the registrar ordering that service by first-class prepaid letter at the director's address in Northern Cyprus would be deemed good and sufficient service on the 31st day after posting.

On the director's application to set aside the registrar's order, the court considered evidence to the effect that under the law of the Turkish Republic of Northern Cyprus proceedings were required to be served personally through the local court and to be in Turkish or accompanied by a Turkish translation. It is not clear from the law report whether or not “the law of the Turkish Republic of Northern Cyprus” for these purposes included its private international law. In other words, we cannot tell whether the evidence of local law adduced concerned the local law applicable to the service of purely domestic process or the local law applicable to the service of foreign process.[15] On review of the registrar's refusal to set aside the order, Mummery J. held that r.12.12 does not expressly require service out of the jurisdiction to be in accordance with the law of the country where service is to be effected. In reaching this conclusion, the judge placed considerable emphasis on the fact that RSC O.11, r.5(3) (which provided that English process, where it was not served personally, should be served in accordance with the law of the relevant country) had been disapplied by r.12.12(1). Given the width of the discretion in r.12.12(3), it was sufficient that the proceedings were effectively communicated to the director so that he was aware of them and could take steps to resist them. In

this respect, it was clear that the director could understand English and would have derived no benefit from process being served on him in Turkish.[16] *Busytoday* therefore supports the proposition that failure to conform with the *letter* of local procedural law is not a ground on which the English Court will set aside an order for service outside the jurisdiction made pursuant to r.12.12. Although it is idle speculation, the judge may have calculated that the local courts would co-operate as it was clear that the originating process had been received and understood.[17] Alternatively, there may have been some indication that the director would submit to the jurisdiction were he to fail in his application to have the order for leave set aside. We doubt that Mummery J. would have reached the same conclusion had service been effected by a method that infringed local criminal law or local notions of public policy. Be that as it may, it is still one thing to resist an application to set aside an order for leave under r.12.12 (as *per Busytoday*), but quite another to persuade the foreign court to recognise the English proceedings. On the latter point, *Busytoday* provides limited comfort. Accordingly, we suggest that the prudent course would be for our liquidator to ask the court for a direction that the proceedings be served on the Illinois party in a manner consistent with local law.

Service by a method accepted in the United States

On the assumption that, in our hypothetical example, it would be possible to obtain leave to serve under r.12.12 on the basis of a sufficient degree of connection to England and Wales, would it also be necessary to establish that our proposed method of service is recognised by the state of Illinois? The answer for the purposes of the English Court following *Busytoday* appears to be “no”. However, for the purposes of the foreign court, we suggest that local law should be followed and that the English Court should be asked to direct service by locally acceptable means. Compliance with a direction to this effect should ensure that the ***Insolv. Int. 60*** judgment entered in the English Court can later be enforced through the courts in Illinois.

The Hague Convention

The United Kingdom and the United States are parties to the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters.[18] As between the contracting states, Art.1 provides that the Hague Convention:

“shall apply in all cases, in civil and commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.”

It is customary for common law countries, including the United States, to interpret “civil and commercial matters” to include all proceedings that are not criminal.[19] Accordingly, English insolvency proceedings appear to fall squarely within the scope of Art.1.

The principal method for service of foreign process under the Hague Convention is through transmitting and receiving agencies. Article 2 requires each contracting state to designate a central authority to receive requests for service coming from other contracting states. In accordance with Art.3, requests for service of process originating in one state are usually transmitted by the central authority of the originating state (“the transmitting agency”) to the central authority of the state where service needs to be effected (“the receiving agency”). Article 5 of the Hague Convention provides that the receiving agency:

“…shall itself serve the document or shall arrange to have it served by an appropriate agency, either:

(a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory; or

(b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the state addressed”. [20]

Once the receiving agency has effected service, a certificate of service is completed and sent to the transmitting agency which forwards it on to the claimant.[21] Where the request complies with the Convention, the state addressed (via its receiving agency) has only limited grounds for refusing it. In particular, it cannot refuse to comply solely on the ground that, under its internal law, it claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not permit the action upon which the application is based.[22] Furthermore, Art.15 imposes minimum notice requirements that must be met before the courts in the originating state can enter a default judgment. [23]

Whilst it is compulsory for each contracting state to designate a central authority under the Hague Convention, service does not have to be effected through a transmitting and receiving agency. Articles 8-10 provide for a range of alternative methods of serving process. Unless a contracting state declares its opposition, the Convention allows documents to be served directly through (i) diplomatic or consular agents or channels, (ii) "judicial officers, officials or other competent persons" or (iii) through postal channels.[24] In addition, the Convention does not prevent some other method of service being used if (i) it has been agreed to separately by two or more contracting states[25] or (ii) it is permitted by the local law applicable to service of foreign process.[26]

For practical purposes, service of English insolvency proceedings can therefore be effected in the United States under the Hague Convention by the following methods[27] :

1. the central authority route provided for by Arts 2-6;

2. through an attorney or process server being a "competent person" for the purposes of Art.10(b)-(c);

3. by post; or

4. by any other method permitted by local law applicable to the service of foreign process.

We now turn to consider the relative merits of the various methods.

The central authority route

As we have seen, the central authority route is the primary method of service under the Hague Convention. The central authority for England and Wales is the Foreign Process Department located at the Royal Courts of Justice.[28] To make use of this method, the following items must be sent to the Foreign Process Department:

• completed relevant practice form (PF7)[29] ;

• documents for service in duplicate (one set being the originals);

• a banker's draft for US$93.00[30] payable to Process Forwarding International (the organisation which carries out the central authority function in the United States)[31] ; and

• a response pack in duplicate.

Once in receipt of the papers, the Foreign Process Department will send them direct to Process Forwarding International which, in turn, will serve them in the United States and send a certificate of service back to the Foreign Process Department for onward transmission to the claimant.

According to Process Forwarding International's website:

"Personal service will be the preferred method used on all requests. In the event personal service is impossible to effect, Process Forwarding International will serve process by such other method or methods as may be permitted under the law of the jurisdiction. In addition, Process Forwarding International is required to complete service of documents for return to the foreign requesting authority within six weeks of receipt."

We were told by staff at the Foreign Process Department that, in their experience, they would expect to receive the certificate of service on average some two to three months after the date on which the documents were lodged with them. However, there is some evidence that the process has become quicker and more efficient since the central authority function in the United States was privatised.[32]

***Insolv. Int. 61** Going down the central authority route provides the best guarantee that service will be recognised as valid by the courts in England and the United States. It is also relatively cheap and procedurally straightforward. However, the trade-off is that there may be some delay before the outcome is known.

The United States has not registered any objection to the use of the alternative methods referred to in Art.10 of the Hague Convention. In theory, it should therefore be possible to serve originating process in the United States either by instructing a local process server who is competent to serve process as a matter of local law (under Art.10(c)) or by international registered mail (under Art.10(a)). This impression is reinforced by the Federal Rules of Civil Procedure ("FRCP") which, in relation to originating process issued in a United States district court, expressly authorise service outside the

United States in accordance with the Hague Convention.[33] Practitioners may consider that it is safer to rely on an affidavit of service from a process server than a return slip confirming delivery by post to a stated address. If either method is used, it would be prudent to ensure that there is conformity with local procedural rules, especially any local rules governing the service of foreign process.[34] However, such compliance may not strictly be necessary as the Supreme Court has ruled that international treaties entered into by the United States supersede any conflicting national laws by virtue of the Supremacy Clause in the United States Constitution.[35] In other words, compliance with the Hague Convention (and, in practice, any local interpretation of the Hague Convention) is crucial.

Some doubts have been expressed by the American courts over whether Art.10(a) permits service of originating process by mail or whether it merely authorises the sending of subsequent documents such as interrogatories.[36] The source of the doubt is the use of the phrase "to *send* judicial documents" in Art.10(a) rather than the phrase "to *effect service* of judicial documents" which is used elsewhere in the Convention.[37] Although the better view, as expressed in the *Practical Handbook on the Operation of the Hague Convention,* is that postal service of originating process falls squarely within Art.10(a), this difference of opinion in the American Courts is another reason for practitioners to proceed with caution when considering postal service.[38]

Conclusion

It is trite, but nevertheless true, to say that the whole purpose of service is to ensure that the proceedings are adequately drawn to the attention of defendants and that defendants are given a proper opportunity to take steps to protect their position. The practitioner serving process abroad wants security and efficiency, i.e. to effect service by the safest and quickest means available. It is clear that it would be unwise to rely on *Busytoday* to the extent that it endorses the service of English process outside the jurisdiction by methods that do not comply with local law for the reasons we have given. In the case of the United States, as long as the method of service complies with the Hague Convention, there should be no problem. However, the practitioner must decide between the various methods of service permitted by the Convention. The safest route is the central agency route which provides the comfort of an official certificate of service from the receiving agency. It has the merits of being simple and relatively cheap. However, there may be a price to pay because of possible delays. On a robust view, service by international registered mail can be considered and would have obvious benefits in terms of efficiency. However, the view of some American courts that service of originating process is not permitted by Art.10(a) is a possible source of discomfort. For this reason, recourse to a local process server may be a preferable, albeit more expensive, alternative. Practitioners who are considering using Art.10 as an alternative to the central agency route would be well advised to instruct a reputable US attorney experienced in transnational litigation to assist. This will obviously be more expensive than the central agency route and, no doubt, the circumstances of the case (including the size of the claim) will dictate whether the expenditure is justified.

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1. "Service outside the jurisdiction--some reflections on Insolvency Rule 12.12" (2005) 18 *Insolvency Intelligence,* 54-57.

2. [2000] O.J. L160/37, July 30, 2000, *http://europa.eu.int/.*

3. The question of ancillary proceedings in the United States does not arise.

4. As the focus here is on mode of service, discussion of other relevant considerations is suspended. For example, depending on the circumstances, the Illinois party may have substantive grounds for contesting jurisdiction. There may also be an issue of applicable law: see, e.g. Jay L Westbrook, "Choice of Avoidance Law in Global Insolvencies" [1991] 17 B.J.I.L. 499. Moreover, doubts persist over

whether a default judgment can be entered in English avoidance proceedings given that the threshold relief sought is declaratory in nature. Thus, in practice, mode of service cannot be considered wholly in isolation from other matters.

5. [1992] 1 W.L.R. 683.

6. As substituted by the Insolvency (Amendment) Rules 2005 (SI 2005/527) with effect from April 1, 2005.

7. *Re Paramount Airways Ltd* [1993] Ch. 223, 241.

8. For example, proceedings falling within the scope of CPR r.6.19(1A) and Council Regulation EC 44/2001 of December 22, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

9. *Re Paramount Airways Ltd* [1993] Ch. 223, 230-239 (English presumption against extraterritoriality displaced by statutory words purporting to have universal effect).

10. *Ibid.,* 240.

11. Above at fn.1.

12. In some jurisdictions, it is a criminal offence for service to be made by any person other than an organ of the state: see, e.g. Art.271 of the Swiss Penal Code discussed by David Griffiths, fn.1 above.

13. [1992] 1 W.L.R. 683.

14. There was no evidence before the court that the director was evading service: *ibid.,* 688.

15. By way of example, see CPR, rr.6.32-6.35 which govern service of foreign process in England and Wales.

16. [1992] 1 W.L.R. 683, 694.

17. See *ibid.* : “Given that the paramount object of the selected method of service is to give notice to a party so that he is aware of the proceedings and able to resist them, the…order was…appropriate to achieve that purpose. That order does not infringe the territorial sovereignty of whatever government may be recognized as exercising or entitled to exercise sovereignty in Northern Cyprus, nor does it offend the comity of nations.”

18. Concluded November 15, 1965. Entered into force on February 10, 1969.

19. See Emily F Johnson, “Privatizing the Duties of the Central Authority: Should International Service of Process be up for Bid” (2005) 37 G.W.I.L.R. 769, 777. By contrast, civil law countries tend to regard tax and administrative matters as well as criminal matters as falling outside the scope of Art.1.

20. Article 5(b) raises a strong presumption that compliance by the receiving agency with local law is necessary if challenges to the validity of service and to future enforcement are to be avoided.

21. Hague Convention, Art.6. If the receiving agency fails to effect service, an explanation must be given in the certificate.

22. *Ibid.,* Art.13.

23. It appears that the desire for such safeguards was a factor which motivated the United States to participate in the Convention: see Johnson, fn.19 above.

24. The United States has not registered any objection to methods (ii) and (iii).

25. Hague Convention, Art.11.

26. *Ibid.,* Art.19.

27. Given the availability of more convenient methods, service via consular or diplomatic channels is not considered further. It should be

noted that consular officers of the United States are prohibited by federal regulation from serving legal process or appointing others to do so though this appears to be of greater relevance to the service of process originating from the United States in other contracting states.

28. Room E.10, Royal Courts of Justice, Strand, London, WC2A 2LL, Tel: 020 7947 6691, Fax: 020 7947 6237.

29. This is designed with CPR Pt 6 in mind and may therefore require some modification.

30. Increasing to US$95 in 2006-2007.

31. The Department of Justice is the central authority in the United States for the purposes of Art.2 of the Hague Convention. However, it delegated its foreign process serving functions to Process Forwarding International, a Seattle-based private process server, with effect from June 1, 2003. Process Forwarding International has a useful website containing information on service: see *www.hagueservice.net.* See also Johnson, fn.19 above.

32. Johnson, fn.19 above.

33. FRCP r.4(f).

34. FRCP r.4 (proceedings in a district court) and any applicable state law (proceedings in a state court). Note that in respect of service of domestic process on individuals and corporations the Federal Rules of Civil Procedure defer in some respects to state law: see, in particular, r.4(e)(1), (h)(1).

35. *Volkswagen Aktiengesellschaft v Schlunk* [1988] 486 U.S. 694 (albeit on the facts the case was concerned with the question of whether process issued in the United States was validly served on a German company where it was left with a local subsidiary in accordance with the procedural rules of the lex fori).

36. See Jeffrey A Fuisz & Carly Henek, "Recent Developments in the Service of Process Abroad" [2004] 38 I.L. 320; Alexandra Amiel, "Recent Developments in the Interpretation of Article 10 of the Hague Convention" [2001] 24 S.T.L.R. 387.

37. Compare *Bankston v Toyota Motor Corporation* 889 F2d 172 (8th Circuit, 1989) and *Ackermann v Levine* 788 F2d 830 (2nd Circuit, 1986). The issue has arisen where American courts have been asked to consider whether process issued in the United States was validly served in another jurisdiction as a matter of American law. Even so, we suggest that these opinions on the scope of the Hague Convention would be highly relevant in determining the acceptability of postal service of English process in the United States before an American court.

38. See further Amiel, fn.36 above.