4-4-2017

Trending @ RWU Law: Louise Ellen Teitz's Post: The Supreme Court And Cross-Border Litigation 04-04-2017

Louise Ellen Teitz
Roger Williams University School of Law

April 4, 2017

Louise Ellen Teitz's Post

The Supreme Court and Cross-Border Litigation

Posted by Louise Ellen Teitz on 04/04/2017 at 08:18 AM

Does the Hague Service Convention permit service of process by mail? While it may seem, at first glance, to be a mundane and technical topic, the question has in fact created an almost 30-year split among circuits – one that soon may be resolved.

Water Splash, Inc. v. Menon presents a straightforward question of treaty interpretation for the Supreme Court: whether the Hague Service Convention under Article 10(a) permits service of process by mail when a country (in this case Canada) has not made a declaration to the contrary. The treaty governs service between the United States and 70 other countries when in civil or commercial matters "there is occasion to transmit a judicial or extrajudicial document for service abroad."

The Issue

The 1965 Hague Service Convention was designed to provide simple ways to serve process abroad while assuring that foreign defendants receive actual and timely notice. It authorizes transmission of judicial and extrajudicial documents for service of process from one Contracting State to another Contracting State. The Convention requires each State to establish a Central Authority to receive incoming requests for service. The Convention provides for one main channel of transmission and several alternative channels of transmission. Under the main channel of transmission, the authority or judicial officer competent under the law of the State requesting service transmits the document to be served to the Central Authority of the other State, which executes the request by: (i) informal delivery to the addressee who accepts it voluntarily; (ii) a method provided for under the law of the requested State; or (iii) a particular method requested by the applicant, unless it is incompatible with the law of the requested State. The alternative channels of transmission include consular or diplomatic channels (Articles 8 and 9) and under Article 10, if countries don't object, by postal channels and direct communication between judicial officers, officials or other competent persons of the State of origin and the State of destination.

In the US federal courts, service in civil matters is governed by Fed. R. Civ. P. 4, which incorporates the Hague Service Convention. In particular, whether the phrase "to send judicial documents by postal channels" includes the mailing of documents *for purpose of service of process* has been the source of

controversy in both federal and state courts for almost 30 years, with the Second, Fourth, Seventh and Ninth Circuits finding it does; and the Fifth and Eighth Circuits reaching the contrary result.

Why It Matters

The division among the circuits has often encouraged litigants to forum shop by selecting a court within a circuit that has allowed service by mail under Article 10(a), providing a faster and more economical way to initiate a lawsuit than the use of a Central Authority. More than one treatise author has recommended, when available, filing in a circuit that has upheld service by mail under Art. 10(a). Since the Hague Service Convention preempts state law, a decision by the Supreme Court resolving the conflict will provide clarity not only for federal courts but also for state court interpretation as well.

Finally, our treaty partners will also benefit from a uniform interpretation, one that might be consistent with the interpretation emphasized in the Special Commission meetings of Contracting States that review the practical operation of the Convention.

Initial service by mail – or as the Convention says by “postal channels” – under Article 10(a) also leaves open the possibility of acceptance by some countries of expanding their interpretations to cover more options than “snail mail.” For example, at an earlier Special Commission in 2003, countries generally agreed to accept private courier services as equivalent to “postal channels.” In 2003, 2009 and 2014, at the Special Commissions, one area for discussion was internet technology and whether “postal channels” might be expanded to cover email or electronic means of sending.

A reading by the Supreme Court construing Article 10(a) to apply to initial service would also pave the way for the Convention to continue to provide fast and cost-effective service and leaves open the possibility to extend this option to new technology, thereby assuring relevance to a more than 50 year old treaty.