DEFINITELY MAYBE: STATUS OF SERVICE BY MAIL UNDER ARTICLE 10(a) OF THE HAGUE CONVENTION IN THE ELEVENTH CIRCUIT STATES

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INTRODUCTION

The United States is a signatory to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 UST 361, TIAS No. 6638 (1969) (the "Hague Service Convention"), a multilateral treaty designed to simplify the methods for serving process abroad to assure that defendants sued in foreign jurisdictions receive actual and timely notice of suit and to facilitate proof of service abroad.

Under the Hague Service Convention, the *primary* method of service is through the Central Authority established by each member state. However, service through the Central Authority is often time-consuming and costly. An often overlooked fact is that the Central Authority for service is not necessarily *mandatory* under the Hague Service Convention.

As an alternative to service through the Central Authority, service of process may be effectuated by mail under Article 10(a) of the Hague Service Convention, provided that the state of destination does not object. Article 10 provides in relevant part as follows:

> 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,
>
> (b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,
>
> (c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

The current list of countries where such service method can be used (assuming the U.S. court agrees) are: Albania; Australia; Belarus; Belgium; Bosnia and Herzegovina; Bulgaria; Canada; China (including Hong Kong and Macau); Cyprus; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Iceland; Ireland; Israel

Italy; Japan; Latvia; Luxembourg; Malta; Mexico; Monaco; Morocco; Netherlands; Portugal; Romania; Serbia; Slovakia; Slovenia; Spain; Sri Lanka; Sweden; United Kingdom; Antigua and Barbuda; Bahamas; Barbados; Belize; Botswana; Malawi; Pakistan; Saint Vincent and the Grenadines; San Marino; Seychelles.[1]

Of course, nothing is ever that simple. There is a dispute in the U.S. federal courts as to whether service of process (i.e., summons and complaint and other "jurisdictional" papers, as opposed to motions) may be effectuated under Article 10(a). This question hinges on whether the word "send" in Article 10(a) means the same thing as the word "service" in paragraphs (b) and (c) of Article 10 of the Hague Service Convention.

Five of the federal circuit courts of appeal have addressed the issue. The Second and Ninth Circuits both held that Article 10(a) permits service of process via postal channels. The Eighth and Fifth Circuits have held otherwise.

In the first federal appellate decision to consider the issue, *Akermann v. Levine*, 788 F.2d 830, 839-40 (2d Cir. 1986), the Second Circuit concluded that the word "send" was intended to mean "service." In a more detailed opinion many years later, the Ninth Circuit agreed in *Brockmeyer v. May*, 383 F.2d 798 (9th Cir. 2004). In *Brockmeyer*, the court considered the purpose of the Convention and concluded that the word "send" in Article 10(a) includes service of process. *Brockmeyer*, 383 F.2d at 802. The court relied on commentaries on the history of the negotiations leading to the Hague Service Convention and a letter written by the State Department disagreeing with contrary authority. The Seventh Circuit also addressed the issue, in passing in *Research Systems Corp. v. IPSOS Publicite*, 276 F.3d 914, 926 (7th Cir. 2002), where it noted that service "by simple certified mail … [is]a method permitted by Article 10(a) of the Hague Convention, so long as the foreign country does not object."

If the *Ackermann, Brockmeyer* and *Research Systems Corp.* decisions were the only cases on point, the issue would be far less complicated. However, in *Bankston v. Toyota Motor Corp.*, 889 F.2d 172 (8th Cir. 1989), the Eighth Circuit compared the use of the word "send" in Article 10(a) to the use of the words "serve" or "service" throughout the rest of the Convention and concluded that the difference was intentional. *Bankston*, 889 F.2d at 174.

The *Bankston* decision drew an immediate rebuke from the United States Department of State. Specifically, On March 14, 1990, Alan J. Kreczko (the then incumbent legal advisor to the Department of State) wrote a letter (the "Kreczko Letter")[2] to the National Center for State Courts that criticized the Eighth Circuit's

[1] A full text of the Hague Convention, along with information with respect to the identities of the member states, and the status of each member's position with respect service by mail under Article 10(a) may be found at http://www.hcch.net/index_en.php?act=text.display&tid=44.

[2] A copy of the Krezcko Letter can be accessed at: http://www.carltonfields.com/files/upload/Kreczko_letter.pdf. This author obtained a copy of the Krezcko Letter through a Freedom of Information Act to the United States Department of State.

decision in *Bankston*. Kreczko asserted United States Department of State position is that the that the *Bankston* decision was incorrect and concluded that permitting service by mail would spare plaintiffs in the United States time and expense. Furthermore, the Kreczko Letter that a Japanese delegate at a meeting of new Hague Convention members expressed Japan's position on Article 10(a), which was that service by mail did not violate Japan's judicial sovereignty. Kreczko, on behalf of the Department of State, asked the Center to distribute his letter to the state courts. The Kreczko Letter is particularly significant because of the longstanding proposition that the views of the State Department should be given special weight in construing treaties. *See, e.g., Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982); *Bush v. United States (The Yulu)*, 71 F.2d 635, 636 (5th Cir. 1934); *see also* 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 112 cmt. c, at 59 (1987).

So what does this mean for practicing lawyers in the courts of the Eleventh Circuit? While the Eleventh Circuit has not interpreted Article 10(a), several federal district courts within the circuit and the Alabama Supreme Court have addressed this issue. The following is a summary of those opinions for Florida, Georgia and Alabama lawyers to consider.

FLORIDA CASES

A. Service By Mail Under 10(a) Permitted

The earliest reported case in Florida finding that service can be made by mail under Article 10(a) of the Hague Service Convention dates from 1996. Specifically, in *Lestrade v. U.S.*, 945 F. Supp. 2d 1557 (S.D. Fla. 1996), Judge William M. Hoeveler of the Southern District of Florida found that the Hague Service Convention permits service of process via postal channels. *Lestrade*, 945 F. Supp. at 1559. The court was persuaded by *Ackerman v. Levine*, 788 F.2d 830 (2nd Cir. 1986). *Id.* Fourteen years later, in *TracFone Wireless, Inc. v. Bequator Corporation, Ltd.*, 717 F. Supp. 2d 1307 (S.D. Fla. 2010), Judge Hoeveler once again found that Article 10(a) of the Hague Service Convention permits service of process by mail and supported his finding by citing to several district court opinions within the Eleventh Circuit. *See TracFone Wireless*, 717 F. Supp. 2d at 1309. Judge Hoeveler also cited several other federal circuit and district court opinions. *Id.*

Also in the Southern District of Florida, in *TracFone Wireless, Inc. v. Sunstrike Int'l Ltd.*, No. 10-24386-CIV, 2011 WL 1319022 (S.D. Fla. 2011), Judge Jose E. Martinez found that Article 10(a) of the Hague Service Convention permits service of process via postal channels. *TracFone Wireless, Inc. v. Sunstrike Int'l Ltd.*, No. 10-24386-CIV, 2011 WL 1319022, at 1 (S.D. Fla. 2011). In support of his conclusion, Judge Martinez cited several Southern District of Florida opinions reaching a similar conclusion. *Id.*

Two cases from the Middle District of Florida also support the proposition that service by mail is allowed under Article 10(a) of the Hague Service Convention. First, in

Conax Florida Corp. v. Astrium Ltd., 499 F. Supp. 2d 1287 (M.D. Fla. 2007), Judge Thomas G. Wilson found that service of process via postal channels is permitted under Article 10(a) of the Hague Service Convention. *See Conax*, 499 F. Supp. 2d at 1293. In reaching his conclusion, Judge Wilson relied on *Brockmeyer v. May*, 383 F.3d 798 (9th Cir. 2004). *Id.* Also, the court found that service of process by mail is consistent with the purpose of the Hague Service Convention, which is to facilitate international service of judicial documents. *Id.* Lastly, Judge Wilson noted that his interpretation of Article 10(a) is shared by several other member countries of the Hague Service Convention. *Id.* Likewise, in *Julien v. Williams*, No. 10-CV-2358T-TBM, 2010 WL 5174535 (M.D. Fla. 2010), Judge Susan C. Bucklew found that service of process via postal channels is permitted under Article 10(a) of the Hague Service Convention. *Julien v. Williams*, No. 10-CV-2358T-TBM, 2010 WL 5174535, at 2 (M.D. Fla. 2010). Judge Bucklew was persuaded by *Brockmeyer v. May*, 383 F.3d 798 (9th Cir. 2004). *Id.*

The Florida state courts have not directly addressed service by mail under Article 10(a) in any reported appellate decisions. One decision—*Chabert v. Bacquie*, 694 So. 2d 805, 812 (Fla. 4th DCA 1997)—mentions Article 10(a) in passing, but only in support of its finding that Article 15 of the Hague Service Convention, which relates to service of judgments, did not apply. However, one trial court judge in Florida state court, entered a highly detailed order allowing service by mail under 10(a) in *Safra Nat'l Bank of N.Y. v. Crystal Springs Partners, Ltd*., Case No. 11-09045 CA 30 (Fla. Cir. Ct. (Miami-Dade County) May 13, 2010). (A copy of this order is available at http://www.carltonfields.com/files/upload/2011_05_13_Order_on_Service_of_Process.pdf.

B. Service By Mail Under 10(a) Not Permitted

The very first reported decision from any Florida court on 10(a) service by mail came from the Northern District of Florida in *McClenon v. Nissan Motor Corporation* in *U.S.A.*, 726 F. Supp. 822 (N.D. Fla. 1989), where Judge Clyde R. Vinson found that service of process via postal channels is impermissible under Article 10(a) of the Hague Service Convention. *See McClennon*, 726 F. Supp. at 826. Specifically, Judge Vinson stated that "it strains plausibility that the Conventions' drafters would use the word 'send' in Article 10(a) to mean service of process, when they so carefully used the word 'service' in Articles 10(b) and (c)." *Id.* Judge Vinson's opinion in *McClennon* remains the only Northern District of Florida case on 10(a) service by mail.

The next year in *Wasden v. Yamaha Motor Co., Ltd.*, 131 F.R.D. 206 (M.D. Fla. 1990), Judge Elizabeth A. Kovachevich found that service of process via postal channels is not permitted under Article 10(a) of the Hague Service Convention. *Wasden*, 131 F.R.D. at 209. Judge Kovachevic solely relied on the Eighth Circuit's opinion in *Bankston* and did not consider the Second Circuit's contrary view in *Akermann* or the State Department's objection to *Bankston.*

Two years later, the Southern District of Florida joined in completing the trifecta of the Florida federal districts finding that service by mail was not permitted under 10(a). In *ARCO Electronics Control LTD. v. Core Int'l*, 794 F. Supp. 1144 (S.D. Fla. 1992),

Judge Norman C. Roettger, Jr. found that service of process via postal channels is impermissible under Article 10(a) of the Hague Service Convention because of the difference between the language used in Article 10(a) and the language used in the rest of the Convention. *Core Int'l*, 794 F. Supp. at 1147. Persuaded by Judge Kovachevic's decision in *Wasden v. Yamaha Motor Co., Ltd.*, 131 F.R.D. 206 (M.D. Fla. 1990), Judge Roettger expressed his belief that treaty conventions act intentionally. *Id*. He further concluded that the drafters of the Hague Service Convention intentionally used the word "send" rather than the word "serve" when drafting Article 10(a). *Id.*

After the initial trifecta, the only Florida decision finding service by mail was not permitted under 10(a) until 2010 came in 2002. In *In re Greater Ministries International, Inc.*, 282 B.R. 496 (Bankr. M.D. Fla. 2002), Bankruptcy Judge Thomas E. Baynes found that service of process by use of postal channels is not permitted under Article 10(a) of the Hague Service Convention. *See In re Greater Ministries International, Inc.*, 282 B.R. at 502-03. Judge Baynes concluded that the drafters could have simply used the word "service" if they intended to provide for an additional method of service under Article 10(a). *Id*.

After being an issue that came up in a reported Florida federal opinion about once every 3 years between 1989 and 2010, service by mail under 10(a) become a frequent topic in 2010, as there were 4 separate reported decisions on the issue in that year. In addition to the *TracFone v. Bequator* and *Julien* decisions discussed above, finding that service by mail was permitted under 10(a), two different Florida federal judges found that service by mail was not permitted under 10(a).

First, in *In re Mak Petroleum*, 424 B.R. 912 (Bankr. M.D. Fla. 2010), Bankruptcy Judge Paul M. Glenn found that Article 10(a) of the Hague Service Convention should not be read to permit service of process by mail. *See In re Mak Petroleum*, 424 B.R. at 918. Judge Glenn noted that Article 10(a) refers to "sending" documents by mail while Article 10(b) and 10(c) refer to "effecting service" through judicial officers. *Id*. Recognizing that the word "service" has a well established technical meaning, the judge found that Article 10(a) should not be read to include the word "serve." *Id.* Rather, Article 10(a) should be read only to enable parties to send documents such as motions and discovery responses. *Id.* at 918-19.

Next, in *Intelsat Corp. v. Multivision TV LLC*, 736 F. Supp. 2d 1334 (S.D. Fla. 2010), Judge Cecilia M. Altonaga found that service of process via postal channels is not permitted under Article 10(a) of the Hague Service Convention. *See Intelsat Corp.*, 736 F. Supp. 2d at 1343. In reaching her conclusion, Judge Altonaga noted that the majority of district courts in Florida tend to follow the line of cases rejecting service by postal channels under Article 10(a). *Id.* Judge Altonaga also emphasized the difference between the language used in 10(a) and the language used throughout the Convention. While the rest of the Convention uses the word "service," 10(a) uses the word "send." *Id.* at 1342. Judge Altonaga reasoned that this difference in language was intentional and stated, "Where a legislative body uses language in one place but not in another, it is generally presumed that the body acts intentionally." *Id.* at 1342-43.

GEORGIA CASES

Unlike Florida, the Georgia federal courts have been consistent in construing Article 10(a) and have all found that service by mail was permitted under 10(a). First, in *Curcuruto v. Cheshire*, 864 F. Supp. 1410 (S.D. Ga. 1994), Judge Anthony A. Alaimo found that Article 10(a) of the Hague Service Convention contemplates service of process via postal channels. *See Curcuruto*, 864 F. Supp. at 1412-13. In reaching his conclusion, the judge found that such an interpretation provides adequate notice to those served and respects the protocol of the receiving countries. *Id*. at 1412.

Next, in *Patty v. Toyota Motor Corp.*, 777 F. Supp. 956 (N.D. Ga. 1991), Judge Harold L. Murphy found that Article 10(a) of the Hague Service Convention contemplates service of process via postal channels. *Patty*, 777 F. Supp. at 959. Judge Murphy found that such an interpretation followed from the language of the Convention. *Id.* The judge also found that such an interpretation serves the purposes of the Convention and the Federal Rules of Civil Procedure by providing adequate notice of the complaint and its grounds to those who are served. *Id.*

The most recent Georgia case on 10(a) came in 2000, in *Schiffer v. Mazda Motor Corp.*, 192 F.R.D. 335 (N.D. Ga. 2000), where Judge Thomas W. Thrash found that service of process by mail is permitted under Article 10(a) of the Hague Service Convention. *Schiffer*, 192 F.R.D. at 338. Judge Thrash took a broader view and determined that the purpose of the Convention is to create a means to serve documents. *Id*. Judge Thrash found support for his conclusion in the preamble of the Convention. *Id.* Judge Thrash also noted that all of the articles in the Convention involved service of process and not one involved later aspects of a case. *Id.* Notably—and properly under *Sumitomo Shoji Am., Inc.*— Judge Thrash considered the State Department's position, as set forth in the Kreczko letter. *See Id.* at 339.

ALABAMA CASES

Like Georgia, the Alabama courts have found that service by mail was permitted under 10(a)—though it has been more than 20 years since a court in Alabama has examined the issue. In *Coblentz GMC/Freightliner, Inc. v. General Motors Corp.*, 724 F. Supp. 1364 (M.D. Ala. 1989), Judge Myron H. Thompson found that service of process by mail was permissible under Article 10(a) of the Hague Service Convention. *See General Motors Corp.*, 724 F. Supp. at 1373. In support of his finding, the court noted that Sweden had not objected to Article 10(a) of the Convention. *Id.* at 1372.

Justice Hugh Maddox of the Supreme Court of Alabama indirectly acknowledged that service of process via postal channels is acceptable under the Hague Service Convention. *See Parsons v. Bank Leumi Le-Israel, B.M.*, 565 So. 2d 20, 25 (1990). Justice Maddox was faced with the question of whether a foreign bank was required to serve an Alabama citizen with a translation of the summons and complaint. *Id.* Justice Maddox held that no translation was required because service of process was

effectuated via postal channels. *Id.* He noted that "the procedures used for obtaining service of process complied with the Hague Convention." *Id.*

CONCLUSION

The courts within the Eleventh Circuit have not reached the same conclusions regarding the scope of Article 10(a). Until the Eleventh Circuit weighs in on the issue, lawyers in the circuit should carefully review the existing case law on the topic from lower federal courts and from state courts before attempting to serve a party by mail under Article 10(a) of the Hague Service Convention. This method should be a safe bet in Alabama, as it enjoys support from the Alabama Supreme Court and an Alabama federal court. Likewise, in Georgia, there is no contrary authority. Florida is another case all together. It is possible, though, to ask the court in advance for an order permitting service by mail under Article 10(a), and such a request would likely be wise in Florida. This would avoid wasting time with an after the fact challenge to service.