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Recommended Citation

Downs, Stephen F. (1969) "The Effect of the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters," *Cornell International Law Journal*: Vol. 2: Iss. 1, Article 5.
Available at: <http://scholarship.law.cornell.edu/cilj/vol2/iss1/5>

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THE EFFECT OF THE HAGUE CONVENTION ON SERVICE ABROAD OF
JUDICIAL AND EXTRAJUDICIAL DOCUMENTS
IN CIVIL OR COMMERCIAL MATTERS

The Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters¹ entered into force on February 10, 1969, having been ratified by three nations: the United States, Great Britain, and the United Arab Republic.² The Convention, a product of the Hague Conference on Private International Law, is now being considered by other Hague Conference member nations, many of which are expected to assent to the Convention.³

The Convention significantly changes prior United States law for service of documents abroad. Furthermore, the Convention is an example of an effort to improve and clarify private international law through a multilateral agreement. Thus, a survey of the effect of the Convention will be useful both to international lawyers and students of the development of international law.

I

A BRIEF HISTORY

It is highly significant that the United States was the first nation to ratify the Convention. Although a creditor and commercial nation might normally be expected to lead in encouraging international judicial assistance, the United States after the Second World War was reluctant to become involved in this field.⁴

¹For the full text of the Convention T.I.A.S. No. 6638; 14 INT'L. & COMP. L.Q. 564 (1965). For the French text see T.I.A.S. No. 6638.

²T.I.A.S. No. 6638. Nations having signed the Convention but not yet ratified -- Finland, West Germany, Israel, The Netherlands, Belgium, Turkey, Norway, Denmark, Sweden.

³The member nations of the Hague Conference on Private International Law are: Austria, Belgium, Denmark, Finland, France, West Germany, Greece, Ireland, Israel, Italy, Japan, Luxembourg, The Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, United Arab Republic, United Kingdom, United States, Yugoslavia.

⁴1964 U. S. CONG. & AD. NEWS 3782, 3783.

While international judicial cooperation was being ignored by the United States the problems were mounting. In 1958 it was reported that:

The problem is procedural.... It relates principally to the recognition by courts here and abroad of the service of process in foreign jurisdictions, proof of foreign laws, public and private documents, and the introduction of testimony taken abroad by way of depositions or letters rogatory. Existing means for serving judicial documents abroad, securing records or examining witnesses in a foreign territory have been found to be cumbersome or insufficient. Lawyers have discovered this in many parts of the world. It is all but impossible to serve a paper without costly intervention of a foreign attorney. A familiar American procedure of taking testimony of a witness before a notary public under oral questioning by an attorney is unknown in the laws of many foreign countries.... In those instances in which an attorney is successful in obtaining testimony in accordance with the foreign practices and procedures, he can never be certain whether such documents will be acceptable to the Federal and State courts in this country.⁵

The primary reason that the United States was reluctant to become involved in reform was its federal system. Any treaty or convention ratified by the Federal Government would have its greatest impact in modifying or overriding state procedural law -- traditionally a very sensitive area. Interestingly, it was this very characteristic that finally led the Federal Government to take action. As Lloyd Wright, then President of the American Bar Association, noted:

With 49 separate procedural jurisdictions in the U.S. a unitary approach is the only solution. We can hardly expect (a foreign government) to look favorably on a program of separate negotiation with the representatives of each of the 48 states and with the representatives of the Federal Government. The problems must be solved through a single unified set of discussions, the results of which will be effective for all the 49 jurisdictions.⁶

Finally in 1956 the United States Government for the first time sent an observer delegation to the Hague Conference on Private International Law. The Hague Conference, in existence

⁵COMMISSION ON INTERNATIONAL RULES OF JUDICIAL PROCEDURE -- ESTABLISHMENT, S. REP. NO. 2392, 85th Cong.; 2d Sess. (1958); 1958 U.S.C.C. & A.N. 5201, 5202.

⁶S. REP. NO. 2392, 85th Cong., 2d Sess. (1958); 1958 U.S. C.C. & A.N. 5201, 5206.

since 1893, is now a permanent institution which meets every four years to discuss and draft conventions affecting international problems between member nations.⁷ In 1958 the Federal Government created a Commission on International Rules of Judicial Procedure to study and make recommendations designed to improve cooperation.⁸ The Commission's initial project was a general revamping of the procedural law of the United States. In 1964 it proposed a series of changes in the United States which would simplify: (1) serving documents in connection with proceedings before foreign and international tribunals; (2) obtaining evidence in the United States in connection with proceedings before foreign and international tribunals; (3) proving foreign official documents in proceedings in the United States; (4) obtaining evidence abroad in connection with proceedings in the United States; (5) subpoenaing witnesses in foreign countries in connection with proceedings in the United States; and (6) transmitting letters rogatory between the United States and foreign or international tribunals.⁹

The Commission plainly intended these changes to be unilateral to set an example of an enlightened and far-sighted policy. It was hoped that the initiative taken by the United States in improving her procedures would stimulate foreign countries to similarly adjust their procedures.¹⁰

On December 30, 1963, the President signed a resolution authorizing the United States to become a full member of the Hague

⁷After the United States declined an invitation to join the Hague Conference in 1951, no further official action was taken until 1956.

⁸COMMISSION ON INTERNATIONAL RULES OF JUDICIAL PROCEDURE - ESTABLISHMENT, S. REP. NO. 2392, 85th Cong., 2d Sess. (1958); 1958 U.S.C.C. & A.N. 5201, 5202.

⁹See Amram, Proposed International Convention on the Service of Documents Abroad, 51 A.B.A.J. 650 (1965).

¹⁰Act of Oct. 3, 1964, Pub. L. No. 88-619; 78 Stat. 995 (1963); 1964 U.S.C.C. & A.N. 3783. See Amram, Public Law No. 88-619 of Oct. 3, 1964, New Developments in International Judicial Assistance in the United States of America, 32 J.B.A.D.C. 24 (1965).

Conference on Private International Law.¹¹ Having demonstrated a willingness to act on the reforms recommended by the Commission and finally becoming a member of an international forum interested in reform, the United States was in a position to assert forceful leadership in the resolution of difficult international procedural problems.

At the 1964 meeting of the Hague Conference, by coincidence, one of the topics on the agenda was the subject of Notification and Transmission of Judicial and Extrajudicial Documents Abroad.¹² Although the United States had not participated in the preliminary drafts, it took the opportunity to exert its new found enthusiasm for international judicial assistance. The United States' suggestions had a considerable influence on the final draft of the Convention which the United States promptly signed on November 15, 1967.¹³

Thus, the Convention on the Service Abroad of Judicial and Extrajudicial Documents became the first judicial assistance convention which the United States has entered. It marks a dramatic change in policy toward cooperation with foreign judicial systems.

II

THE OBJECTIVES OF THE CONVENTION

A. European Objectives

Continental legal systems traditionally provide for service of legal documents by a government official or through some other official channel. This concept derives from the civil law notion that even at the early stages of the litigation the power of the sovereign is being exercised and therefore private parties are not competent to act.¹⁴ The effectiveness of this service depends upon the thoroughness of the official obliged to make service.

¹¹Pub. L. 88-244; 77 Stat. 775 (1963). See Amram, supra note 9.

¹²Amram; Report on the Tenth Session of the Hague Conference on Private International Law; 59 AM. J. INT'L L. 87 (1965).

¹³Ratified by the Senate April 14, 1967.

¹⁴Stern, International Judicial Assistance, 14 No. 8 PRACTICAL LAWYER 21 (1968).

When Europeans wish to make service in the United States they find no agency of the central government able to help them. Local American officials seldom perform such activities and are unfamiliar with the requirements of the civil law. Therefore, the primary objective of the Europeans in drafting the Convention was to obtain an agency of the United States Government capable of effecting service of documents in the United States.¹⁵

B. United States Objectives

The American lawyer has not had significant difficulties in making effective service abroad. Liberal statutes, federal and state, provide a number of alternative ways of making effective service.¹⁶ But the U.S. had definite changes that it wanted to effect vis a vis the civil law world through the Convention.

Americans have long objected to certain European methods of service that fail to give the United States defendant notice and result in default judgments in favor of European plaintiffs. Notification au parquet has been particularly notorious in this

¹⁵See Graveson, The 10th Session of the Hague Conference of Private International Law, 14 INT'L & COMP. L. Q. 528, 538 (1965).

¹⁶Forexample, in New York service abroad may be made by any New York resident authorized to make service within the state, or by any person authorized to make service by the laws of the foreign state, or by any qualified attorney, or equivalent in the foreign state. N.Y. C.P.L.R. 313. The Federal Rules of Civil Procedure are even more liberal; once it has been established that service may be made abroad pursuant to an appropriate federal statute or state rule, service may, in addition, be made under the law of the foreign country, through letters rogatory, by personal delivery by anyone older than 18 who is not a party to the action, by mail sent by the court and evidenced by a signed receipt, or by order of the court. FED. R. CIV. P. 4(e) and (i). In Federal court when service is made abroad under 4(e) and 4(i) pursuant to a state statute, such as N.Y. C.P.L.R. 313, care must be taken to see that under the same conditions the state court in whose district the federal court sits would have had long-arm jurisdiction over the defendant. This is particularly important in states such as New York where the appropriate statute (e.g., N.Y. C.P.L.R. 302) is not as broad an assertion of jurisdiction as is constitutionally allowable. Even in federal question cases, process served outside the federal court's territory pursuant to a state rule, is valid only if the state court would have had long-arm jurisdiction. See Gkiafis v. S.S. Yrosonas, 342 F. 2d 546 (4th Cir. 1965).

regard. Under this system a European plaintiff may serve process on a local European official. Notification must be sent to the defendant but the service is valid even if it never reaches him. Thus, a European plaintiff can win a default judgment against an American defendant who had no notice that an action had been instituted against him.¹⁷ Such a judgment is easily reopened for a certain time, generally a year, but after that it is difficult or impossible to reopen. The United States properly sought to stop this practice. The United States also gains from the institution of a governmental organ capable of effecting service of documents because such service is not open to the objections made by civil law countries to service by private parties, that the home nation's sovereignty is encroached upon.

The Convention seeks to satisfy the objectives of the drafters in three ways: (a) it creates a new and specific governmental method for service of documents from abroad by each signatory state; (b) it regulates previous methods of service; and (c) it regulates the method for obtaining default judgments when documents are served abroad. The manner in which the Convention alters American law and practice will now be examined.

III

METHODS OF SERVICE AFFECTED BY THE CONVENTION

Article 5 dictates that each state signing the Convention must create a Central Authority that will receive and attempt to satisfy requests from abroad for service upon persons within their borders. Article 5 of the Convention explains how the Central Authority is to make service:

The Central Authority of the State addressed 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 service of documents in domestic actions upon persons who are within its territory, or

¹⁷This situation is exacerbated by the rule in some civil law jurisdictions that any property of the United States defendant within the forum state gives that state personal jurisdiction over the defendant. See de Vries & Lowenfeld, Jurisdiction in Personal Actions -- A Comparison of Civil Law Views, 44 IA. L. REV. 306 (1959).

b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.

Subject to sub-paragraph (b) of the first paragraph of this article, the document may always be served by delivery to an addressee who accepts it voluntarily.

After effecting service, the Central Authority must forward a certificate to the applicant stating that the document was served, and relating the method, place, date of service, and the person to whom the document was delivered. If the document was not served, the certificate shall be returned to the applicant explaining the reasons. Costs are born by the applicant. This provision is primarily for the benefit of the Europeans, ensuring that there will be a governmental agency in the United States through which to make service. It also provides a useful alternate method for Americans who wish to effect service in Europe.

Article 1 of the Convention states that the Convention shall apply in all civil and commercial cases where there is occasion to transmit documents abroad. The Convention, through the Supremacy clause, supersedes all state and federal methods of service abroad, but specifically allows certain prior methods to remain in force. Article 1 limits the Convention to those cases in which the defendant's address is known.

Article 8 allows States freedom to use consular channels to effect service upon their own nationals, absolutely, and upon others, subject to the limitation that any State may object to such service within its borders. Article 9 indicates that the Convention does not intend to effect the present system of letters rogatory.¹⁸ Article 19 allows any method of service permitted under the internal law of the country in which service is made. Article 10 states:

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 or origin to effect

¹⁸See Jones, International Judicial Assistance, 62 YALE L.J. 515, 543-5 (1953); Everett, Letters Rogatory, 44 COLUM. L. REV. 72 (1944).

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.

Article 10's limitations on the scope of the Convention are so broad that most previous methods of service by Americans on Europeans may remain in force absent objection by state of destination. However, there are some prior methods that are no longer permitted by virtue of Article 1 of the Convention; these methods of service are no longer valid under American law.

For example, suppose an American party brings suit against a European party in an American court. Service is made under Federal Rule 4(i) or New York C.P.L.R. 313 whereby an American attorney serves the European party directly in Europe. Suppose further that the European party defaults. The service never passes through the Central Authority of the European nation as required in Article 5, and it is not authorized in Article 10. However Article 19 allows other methods of service if they are permitted under the internal law of the foreign country. Unfortunately there is no uniform position in Europe on most of these methods. For example Switzerland strongly objects to foreign attorneys making service within her borders; Great Britain permits any attorney to make service; many other countries are silent.¹⁹ Thus, a judgment rendered by the American Court may be completely void under United States law unless the internal law of the foreign state permits service by an American attorney. Of course if the

¹⁹Practice and theory should not be confused here. Continental European countries traditionally have objected to anyone other than local officials making service. In practice, however, many European countries have tolerated foreign methods of making service, by looking the other way when, for instance, United States attorneys make service. Such a live and let live attitude will not satisfy the Convention requirements. Under Article 19 the American plaintiff must show that the internal law of the foreign country permits such methods of service. As a practical matter this would be difficult to affirmatively prove since, where the European laws do not specifically prohibit methods of foreign service, what laws there are on the subject are few and vague. Service abroad by an American attorney, then, is a risky method except in another common law based jurisdiction, such as, Great Britain.

service is faulty it may be corrected by asking the Central Authority for permission under Article 5(b) to make service through the American attorney. If approved by the Central Authority, the service would be valid--small consolation if the statute of limitations has run on the cause of action.

As another example, suppose that the American party decides instead upon service by a European attorney practicing in the country in which the European party is located, as provided for under Federal Rule 4(i) and N.Y.C.P.L.R. 313. Service cannot be upheld under Article 5 since it did not pass through the Central Authority. However, under Article 10(c) service would be valid if the attorney is a "competent" person under the laws of the country in which service is to be made. Thus, the validity of the service in this case will depend on the law of the country in which the European party is located.

An examination of the law of the European countries reveals a wide range of possible definitions of "competent to serve."²⁰ At one extreme are Switzerland and Austria where local attorneys are not competent to serve process either for local or foreign actions. At the other extreme is Great Britain where local attorneys are competent to serve process for any type of action, local or foreign. Between these extremes are Italy and the Netherlands where attorneys are specifically held competent to serve foreign documents but not to serve local process. France and Sweden hold local attorneys not competent to serve for local actions but are silent as to whether local attorneys are competent to serve foreign documents. Therefore, to determine who is competent to serve, the law of each country where service is to be made will have to be examined, often at considerable cost and some risk to the plaintiff.

The preceding examples illustrate the problems that the Convention creates. They by no means illustrate all the present American methods of service which the Convention may have invalidated, because it excludes any method not permitted, thereby

²⁰The best summary of European rules on service is H. SMIT, INTERNATIONAL COOPERATION IN LITIGATION: Europe - Columbia Univ. School of Law Project on Int'l. Proced. (1964).

making exhaustive treatment impossible.

It is interesting to note that notification au parquet, is still probably a valid method of service under the Convention, providing the state of destination does not object. If a European plaintiff serves an American defendant by this method, he serves an official of his own country and notification is sent to the American defendant. This raises two questions: (a) Is this method of service covered by the Convention at all since service is local and not actually effected abroad?; (b) If this method is covered by the Convention, is it absolutely invalidated by the Convention, or does it come within the protection of article 10(a) by the fact that notification is sent to the defendant by mail? As to the first question, R.H. Graveson states:

The first article of the convention is, perhaps, the most ambiguous, for it states that the convention should apply "where there is occasion to transmit a judicial or extra-judicial document for service abroad." It is, perhaps, unfortunate that the Convention does not state more precisely the circumstances to which it shall apply, especially as one of its principle objects is to change the practice in which service of process against a defendant abroad can be made in the court of the plaintiff's own country. [i.e. notification au parquet]. Can it be said that where this form of proceeding is possible "there is occasion" to transmit process abroad? It is reassuring that the delegates of certain civil law countries regarded this situation as one to which the Convention should apply. What is disquieting is that the contrary argument could equally well be sustained, that because a form of proceeding in respect of defendants abroad already existed there was in such cases no occasion to transmit documents for service abroad. It is to be hoped that those countries which ratify this convention will apply it in the liberal spirit in which it is intended.²¹

The answer to the second question is no more certain than the first; however, relying on the spirit of the Convention, notification au parquet would probably be included in article 10(a). The United States has been the leader of the countries fighting for more liberal procedures in making service. The United States' objection to notification au parquet came not so much from theoretical consideration of the method itself but from

²¹See Graveson, The 10th Session of the Hague Conference of Private International Law, 14. INT'L & COMP. L.Q. 529 at 539 (1965).

the practical unfairness that results when the method breaks down and notice for some reason never reaches the defendant. Since this unfair situation can result only where the European plaintiff takes a default judgment against the American defendant, it could be expected that the United States would be generous in allowing many types of foreign service such as notification au parquet to exist under the convention by interpreting Article 10 liberally. In this way they might hope to get more toleration for the United States' liberal methods of service. However, regarding default judgments under Article 15, the United States could be expected to take a strict view against any method that failed to provide proper notice.²²

IV

VALID SERVICE OF PROCESS FOR TAKING DEFAULT JUDGMENTS

The first paragraph of Article 15 regulating default judgments states:

Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that -

(a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or

(b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention,

and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

The article is clearly designed to prohibit a party from obtaining an enforceable default judgment unless a reasonable effort to effect service has been made and the defendant has had an opportunity to defend. Under this article an American defendant must either receive actual notice under 15(b) or be served under American rules as provided for in 15(a). Thus, in either case the American defendant would be protected from having a default judg-

²²There is also some question whether any method covered by Article 10 is "another method [of service] provided for by this convention" and hence covered by Article 15. See discussion infra p. 138.

ment taken without receiving proper notice. Article 15 would at first also appear to favor the American plaintiff in not further restricting permissible methods of service. Aside from methods invalidated by the Convention, virtually all other methods provided for in America would fit under 15(b).²³ It would seem logical to conclude that in America it would be extremely rare to have service valid under the Convention, but insufficient to get a default judgment under Article 15.

A. Limitations When Trying to Serve a Foreign Corporation

Unfortunately, a closer look at Section (b) of the first paragraph of Article 15 shows that this pleasant picture is clouded by an ambiguity. The drafters, either intentionally or inadvertently, seem to have limited the effect of 15(b) to individual defendants, excluding corporations and partnerships. Article 15(b) states that the document must be actually "delivered to the defendant or to his residence."

Corporations are frequently "deemed a resident" for the purpose of locating them in a particular jurisdiction. However, the term "residence" can also mean a "dwelling or lodging." There can be no doubt that it is this second meaning which is intended in the Convention. This presents a grave problem since it is difficult to envision a corporation having a dwelling or lodging. In In re Kaufmann Alsbury²⁴ the court held that the place of business of a corporation is its "residence" within the meaning of N.Y. Civil Practice Rule 20 which provided that service of papers may be made by leaving the papers "at [the party's] residence within the state with a party of suitable age and discretion." It is significant however that the only authority relied on in Kaufmann-Alsbury was Golfbay Country Club, Inc. v. Oceanside Golfer Ass'n. Inc.,²⁵ a case holding that a corporation is located at its place

²³Due process does not require actual notice in all cases; only the best possible method under the circumstances. However, since this convention is limited to cases in which the defendant's address is known, it would seem that the best possible method would require in every case actual notice, and so any permissible American method of service would satisfy Article 15(b). Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1949).

²⁴30 Misc. 2d 1025, 220 N.Y.S. 2d 151 (Sup. Ct. 1961).

²⁵114 N.Y.S. 2d 175 (Sup. Ct. 1952).

of business for purposes of a venue statute using the term "residence."

This ambiguity in the term "residence" is increased by reference to the French text of the Convention which is of equal authority with the English.²⁶ The French text of the first paragraph of Article 15(b) reads as follows:

(b) ou bien que l'acte a été effectivement remis au défendeur ou à sa demeure selon un autre procédé prévu par la présente Convention, (Emphasis added)

The term "demeure" means "dwelling or lodging." This would seem to exclude the possibility of its referring to corporations, although it is possible that the term might include a corporate place of business. The ambiguity is almost exactly the same as that raised by the English term "residence." Probably the inference is stronger under the French text that corporations are not included in the term "demeure" because the French use the word "siege" to describe the place of business of corporations; thus, "siege" is not interchangeable with "demeure." The drafters may have intended to select words sufficiently broad in meaning to cover both dwelling and principle place of business, but their choice of words has created a most serious ambiguity.

If the courts interpret 15(b) as applicable to both corporations and individuals, the Convention's default judgment provision should operate smoothly. However, if the courts say corporations do not fit within 15(b), the Convention will have created a series of booby-traps for the unwary practitioner.

1. Traps When a Foreign Corporation is Served Under Article 5(b)

Article 5(b) provides that the Central Authority shall serve a document by a method requested by the applicant, unless such service is incompatible with the addressed country's law. Suppose an American wished to bring suit in America against a company located in a European Country X. The American sends a request to the Central Authority in Country X, pursuant to Article 5(b), requesting that service be made by personal

²⁶T.I.A.S. No. 6638, supra note 1.

delivery by an official. The Central Authority agrees and in due course sends back an appropriate certificate that service has been so effected. Suppose further that, like many European countries, Country X has a law which says local officials may serve documents for foreign proceedings directly, but for local actions process must be issued by the court prior to service. The American plaintiff has now successfully served the European defendant under Article 5(b). If the defendant fails to appear, plaintiff will move for a default judgment. The court may deny his motion reasoning: "It is true that under Article 5(b) service in this case is valid, and the action was properly begun. Service was not made according to Country X domestic law because it did not first pass through a local court, but service was not incompatible with Country X law and hence under Article 5(b) service is valid. However, to get a default judgment under Article 15(a) service must be made according to the internal domestic law of Country X. Since the method chosen did not satisfy the internal domestic law of Country X, the plaintiff has failed to satisfy Article 15(a) and the motion must be denied."

In the case of individuals, this argument could be met by saying the certificate from the Central Authority proves actual delivery, and service was accomplished under the method provided for in Article 5(b). Therefore, a default judgment is valid under Article 15(b). But as discussed above, this argument is difficult to make with respect to corporations because of the peculiar wording of 15(b). It is possible therefore that the court would reject the plaintiff's argument.

2. Traps When a Foreign Corporation is Served under Article 10

Suppose instead the American has previously signed an agreement with a European Company whereby the Company agreed to be sued in America and would receive service by registered mail. The law of Country X, in which the company is located, does not permit service by mail. A dispute arises and the American begins an action in an American court. He sends a registered letter to effect service on the European Company. The Company defaults. Once again, the plaintiff's motion for a default judgment may be denied. Service is valid under Article 10, but because it was not made pursuant to the internal law of Country X, a default

judgment cannot be taken under 15(a) and the court may not accept the argument that 15(b) applies to corporations.

But here the plaintiff has another argument which is based on Article 10 overriding Article 15. The plaintiff can argue Article 15 is limited to those cases in which documents "had to be transmitted abroad for the purpose of service, under the provisions of the present Convention." But does this include the methods excluded from the Convention in Article 10? The Convention was not to "interfere" with these methods. A holding that in some situations they are no longer sufficient to get a default judgment is a significant interference. Moreover, such a holding would create an awkward situation in which service is valid, but no default judgment can be taken. If no default judgment can be taken, there is no reason why the defendant should appear; except for tolling the statute of limitations the service would be useless. The case cannot be dismissed because service is valid, but it cannot proceed because the defendant is under no compulsion to appear. The court should avoid such judicial stalemates if possible, and here the problem is easily eliminated by a holding that Article 10 overrides Article 15. Thus, the plaintiff concludes, service by mail suffices for a default judgment even if the requirements of Article 15 are not met. On the surface this argument looks substantial but further analysis reveals a strong rebuttal.

While it is true that a holding that Article 15 overrides Article 10 creates a judicial stalemate, the stalemate is easily broken by plaintiff's serving again under the internal domestic law of Country X. Indeed, the stalemate helps the plaintiff since it halts the statute of limitations while he corrects his earlier mistake. But more importantly, if we help the American plaintiff in this case by saying Article 10 overrides Article 15 we may well hurt American defendants. The plaintiff is in effect asking the court to hold that because Article 15(b) does not apply to corporations, default judgments should be allowed under Article 10. Because of the strict notice requirements of due process under United States law, any method sanctioned under Article 10 will almost certainly lead to actual notice where

the defendant's address is known and so the safeguards in Article 15(b) will have been met in spirit. Thus an American plaintiff's obtaining a default judgment under Article 10 is not unreasonable. However, if we make such a holding, American defendants will not be protected against unreasonable methods of service under Article 10 that do not give proper notice. If Article 10 overrides Article 15, then a method such as notification au parquet will be sufficient to obtain a default judgment against Americans. For example, if a French plaintiff were to serve an American defendant by notification au parquet and no notice ever reached the defendant, the resulting default might be analysed by the French court as follows: "We decide that notification au parquet to an American defendant is a type of service abroad and so comes under the general provisions of the Convention. Moreover, we hold that it is a type of service by mail and thus the Convention under Article 10(c) does not interfere with its effectiveness. We note that Article 15, on default judgments, is limited to those cases where service is made under the provisions of the present convention, and Article 10 indicates that the Convention shall not interfere with the effectiveness of service by mail. We interpret this to mean that service by mail is not a method of service under the provisions of the present Convention. Therefore Article 15 does not apply to notification au parquet and therefore this French court has the power to render a default judgment even though no notice ever reached the defendant." Such an interpretation would be disastrous to the United States depriving it of the major points bargained for at the Conference. It would be even more unfortunate if, in a careless moment, this type of interpretation was made by an American court.

It is unfortunate that the Convention left an ambiguity in the relationship between Articles 10 and 15. This is particularly true because the American courts will probably pass on this point only indirectly. This problem will undoubtedly first arise when a European court must decide whether service by a method like notification au parquet is sufficient for a default judgment even though actual delivery was not proved. Hopefully the European court will hold that Article 15 overrides Article 10.

B. The Limitation of Due Process

At this point an American plaintiff may decide to play it safe and serve the European corporation under Article 5(a), to obtain a default judgment under 15(a). Plaintiff thus instructs the Central Authority to serve the process in accordance with the internal law of that foreign country. However, the internal law of the foreign country may be like the law of Belgium, where process, if mailed, is deemed completed upon the mailing and not the receipt.²⁷ The Central Authority will regard the service as complete upon the mailing of the letter and will forward the certificate of service to the American corporation. When the European Corporation fails to appear, the American moves for a default judgment. The American court will consider the method by which service was made. It is true that Article 15(a) of the Convention is satisfied and so as far as the Convention is concerned a default judgment could be taken. However, the Convention will not supersede the United States constitutional requirements of due process. Thus service is open to the attack that it was not the best possible method under the circumstances and if proven, a default judgment would be denied as an unconstitutional violation of due process of law.

Thus, the American, to serve with absolute confidence, must specify the the Central Authority under 5(b) not only a method provided for in the internal law of the foreign country but also one known to satisfy the requirements of due process.

CONCLUSION

The Convention marks a significant milestone in international judicial cooperation and in bringing about respect and toleration for foreign systems of procedure. However, the need for cooperation will not end with the signing of the Convention. Unless all participating countries avoid strained constructions that play on ambiguities and interpret the Convention in the light of its clear objectives, the spirit of cooperation could give way to confusion and bad feeling. It is hoped that in interpreting the Convention

²⁷See H. SMIT supra note 20.

the courts will go beyond narrow, overly-literal interpretations in order to forward its spirit and objectives.

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