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Service of English Originating Process on a foreign defendant

This Article looks at the law and procedure concerning service of a Claim Form issued in the English courts for service out of the jurisdiction in circumstances where there is an agreement between the parties (the English claimant and foreign defendant) that the law of the contractual relationship between them is English law and the courts of England should have exclusive jurisdiction over any disputes.

For the purposes of legal proceedings the United Kingdom is divided into three areas, England and Wales, Northern Ireland and Scotland. This Article concerns the position in England and Wales. It does not address the position in Northern Ireland or Scotland. The discussion is confined to starting legal proceedings and serving them on the defendant. This Article is further confined to cases where the State in which the defendant to the claim is based is a signatory to the Hague Convention. In this context, the Hague Convention is the Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters signed at the Hague on 15 November 1965. The question addressed is whether the claimant is obliged to follow the Hague Convention or whether there are other means of validly serving the defendant.

In some cases where a claimant starts proceedings in the courts of England and Wales, the permission of the court is required to serve the proceedings outside the jurisdiction. In other cases, service outside the jurisdiction does not require the court's permission. A claimant looking to start proceedings against an overseas defendant must first determine whether an application to the court for permission to serve out (as it is commonly referred to) is required. This mainly depends on the type of claim that is being made and the remedy that is being sought.

In the common commercial scenario under discussion in this Article there is an agreement between the parties which confers jurisdiction on the English courts. Since the parties have agreed that the English courts are to have jurisdiction over their disputes, the court already has jurisdiction and there is no need to establish that jurisdiction as a preliminary matter by applying to the court for permission to serve out. So, in our scenario, no application for permission to serve out is required. All the claimant is required to do is to set out its grounds for saying that the court does have jurisdiction in a formal notice (Form N510) and send it to the defendant with the Claim Form.

What is the correct method of service to ensure that service is valid?

There are two broad options. The first is service by any method permitted by a Civil Procedure Convention or Treaty (such as the Hague Convention, but it could be a bilateral service treaty between two countries). The second is service by any other method permitted by the law of the country in which it is to be served.

As to the first, the rule is that where a party wishes to serve a claim form in any country which is a party to a Civil Procedure Convention or Treaty providing for service in that country, it may be served through the authority designated under the Hague Convention or any other Civil Procedure Convention or Treaty (where relevant) in respect of that country; or if the law of that country permits (i) through the judicial authorities of that country, or (ii) through a British Consular authority in that country (subject to any provisions of the applicable convention about the nationality of persons who may be served by such a method).

A common issue is that service through the Hague Convention route takes a very long time. It varies from county to country but delays of up to (and some instances) beyond 12 months are not unusual.

If the destination country does not permit any method of service other than by the Hague Convention, is it possible to circumvent the Hague Convention?

1. Civil Procedure Rule 6.15 provides:

> *Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place.*
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> *On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service.*

This rule permits the English court to authorise service inside and outside the jurisdiction by an alternative method. The claimant has to show a "good reason". This is a question of fact and it is for the claimant to make its case for a "good reason". The court's permission can be given prospectively (before service takes place) or retrospectively, that is after attempts at service have been made and the court is asked to validate those attempts.

Alternative service as a mode of service must be a method such as could reasonably be expected to bring the proceedings to the defendant's attention. This is a flexible rule, which can accommodate modern communication methods such as social media or email. Rules of court permitting substituted service were first introduced when virtually the only prescribed method for service of originating process on an individual was personal service and were designed to assist claimants where defendants were deliberately evading service. The introduction of methods of service other than personal service (especially service by post) reduced the need for reliance on these rules. It is not now the practice to make orders for what is commonly referred to as "deemed or substituted service" prospectively unless there is a high degree of likelihood that the claim form will come to the intended recipient's notice.

Let us take a look at some important cases where the State of the defendant is a Hague Convention signatory.

If service is carried out under the Hague Convention Article 5 of the Convention requires the central authority of the defendants' country to serve (or arrange the service through an agency) the documents by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or by a particular method requested by the claimant, unless such a method is incompatible with the law of the defendant's country. Service by email is not necessarily excluded, but it would have to take place by or on behalf of the Central Authority and not directly.

Service under the Convention may require the documents that are to be served to be translated. The claimant will, in due course, receive a certificate of service or non-service as the case may be. The Convention does not restrict the right of the claimant to serve proceedings directly by post on the defendant in the overseas territory.

In *Bayat Telephone Systems International Inc & Ors v Lord Michael Cecil & Ors* [2011] EWCA Civ 135 (18 February 2011) the English Court of Appeal ruled that service on a party to the Hague Convention by an alternative method should be regarded as exceptional, to be permitted in special circumstances only. It accepted that while the fact that proceedings served by an alternative method will come to the attention

of a defendant more speedily than proceedings served under the Hague Convention, when deciding whether to authorise an alternative service method speedier service is in general not a sufficient reason.

Having said that, the court accepted that service by alternative means may be justified by facts specific to the defendant, as where there are grounds for believing that he has avoided or may try to avoid personal service or by facts relating to the proceedings, for example where an injunction has been obtained without notice, or where an urgent application on notice for injunctive relief is required to be made after the issue of proceedings.

In *Deutsche Bank AG v Sebastian Holdings Inc* [2014] EWHC 112 (Comm); [2014] 1 All E.R. (Comm) 733 the court said that where there is a bilateral service convention between two States, because the two States in question have specifically agreed to the service of foreign process in accordance with it, the Convention must represent the prime way of service in such a contracting State. Even if service by alternative means is not to be seen as "exceptional" and to be permitted in special circumstances only, there must still be good reason for allowing service by a means other than in accordance with a relevant convention. Otherwise, the Convention would be subverted.

So service under the Hague Convention is the starting point. The alternative requires the court to be satisfied there is good reason for not following the Convention. Neither convenience nor speed is of itself a good reason. In the absence of evidence that the defendant is avoiding service, it will be better to attempt methods of service first and then apply to the court to permit alternative service retrospectively rather than prospectively.

Koza Ltd v Akcil [2018] EWHC 384 (Ch) was the same as that assumed in this Article, namely where permission to serve out was not required. The court doubted whether permitting service by alternative means to those of the Hague Convention requires exceptional or special circumstances. The court thought that the requirements for a “good reason” is the only requirement. The court was clear that the more restrictive the relevant contracting State has been in what it regards as appropriate to permit by way of service, the more cogent the reason would have to be for it to amount to a "good reason". In a case in which the country in which service is to be effected has stated its objections under Article 10 of the Hague Convention to service otherwise than through its designated authority, would or might be a case where the court should contemplate making an order under CPR 6.15 only in "exceptional"

circumstances. Local law advice on how the Convention is applied in the service State will be important. The English court will expect to be informed about this.

In *Interbunker Holdings SA v W SrL* [2021] EWHC 2649 the claimant was required to seek permission to serve out in Italy. The question arose as to whether or not it was appropriate to order alternative service having regard to the fact that the Hague Service Convention was engaged. The Judge did not think that "exceptional circumstances" had to be shown because the Government of Italy had decided not to confine service in Italy to service by a centrally nominated authority. He applied the "good reason" test which was satisfied in that case because of the existence of a pre-trial injunction restraining the disposal of assets.

In *Brown v Innovatorone Plc* [2009] EWHC 1376 (Comm); [2010] 2 All E.R. (Comm) 80; [2010] C.P. Rep. 2 (Andrew Smith J), the Judge ruled that, (in the circumstances), service by fax of a claim form should not be permitted to stand as good alternative service and stated that (1) the expression "a good reason" in r.6.15(1) is a general one and is not confined to specific and limited categories of case, (2) the mere absence of prejudice to a defendant will not usually, in itself, be sufficient reason to make an order under r.6.15, and (3) "exceptional circumstances" are not required to justify a respective order under r.6.15(2), but the court should adopt a rigorous approach.

In *Mex Group Worldwide Ltd v Ford & Ors* [2024] EWHC 3243 (KB) the Judge was satisfied that there were special or exceptional circumstances to depart from the Hague Convention because there was an application for a world-wide freezing order sought on the basis of a reasoned fear of the dissipation of assets, and where key defendants were in Luxembourg. He reasoned that the whole purpose of the freezing order would be undermined in the event that it had to await service through the State Authority in Luxembourg. This would involve a delay of months. The need to avoid the delay was not a mere desire for speed. It was that there was the serious and well-founded risk that the freezing order would prove ineffective due to months of delay in effecting service.

Whilst there may be some ongoing doubt about whether a claimant has to show exceptional or special circumstances or only a good reason for alternative service to that of the Hague Convention, the use of alternative service is often likely to be a point of contention where a defendant may consider it appropriate to challenge the validity of service, but where a claimant will want to find a sound basis for an alternative service order so as to avoid the lengthy delay associated with

Convention service. A claimant should always take local law advice and a defendant served by alternative means should always take English law advice.

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