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INTERNATIONAL SERVICE OF PROCESS UNDER THE HAGUE CONVENTION

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Service of process – i.e., the formal delivery of documents that are legally sufficient to charge the defendant with notice of a pending action[1] – is generally necessary before any significant step in a lawsuit, such as entry of judgment against a party, may be taken.[2] This is true whether the parties to the lawsuit are located within or outside the United States. When faced with a challenge to the validity of service on a party within the United States, however, the court's inquiry may be straightforward. Rule 4(j) of the North Carolina Rules of Civil Procedure authorizes the use of a variety of alternative methods of service. Proof of service by any of these methods will suffice to establish jurisdiction over any party otherwise subject to the personal jurisdiction of the court.[3]

It is increasingly common, however, for litigation to involve parties located outside the United States. The expansion of international trade and the growing ease of international travel have resulted in a large number of international business and other relationships that may result in litigation.[4] These disputes have appeared in state and federal courts in great

1. *See Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700 (1988).

2. *See, e.g.,* G.S. § 1-75.3; *First Union Nat'l Bank v. Rolfe*, 83 N.C. App. 625, 628, 351 S.E.2d 117, 119 (1986) (noting constitutional "mandate[] that a party be given notice and an opportunity to be heard before he can be deprived of a legal claim or defense").

3. *See* G.S. § 1A-1, Rule 4(j)(1)-(9); *see also* G.S. §§ 1-75.3(b)(1); *State ex rel. Desselberg v. Peele*, 136 N.C. App. 206, 208, 523 S.E.2d 125, 127 (1999).

4. *See, e.g.,* Senate Commission on International Rules of Judicial Procedure – Establishment, S. REP. NO. 2392 at 3 (1958), *reprinted in* 1958 U.S.C.C.A.N. 5201, 5202-03 (stating that the "extensive increase in international, commercial and financial transactions involving both individuals and governments and the resultant disputes, leading sometimes to litigation, has pointedly demonstrated the need and desirability for a comprehensive study of the extent to which international judicial assistance can be obtained").

variety, from product liability suits by U.S. residents against foreign defendants,[5] to international business disputes between U.S. and foreign companies,[6] to personal injury and other suits by U.S. residents based on a foreign defendant's conduct while in the United States.[7] Likewise, the ease of international travel, not to mention the presence of members of the U.S. Armed Forces overseas, lends an international dimension to disputes, such as paternity, divorce, and child custody and support, more traditionally viewed as "domestic" in character.[8]

As in a lawsuit between domestic parties, the court may not render a judgment against a party located outside the United States unless that party has been properly served.[9] But unlike domestic service of process, which can often be accomplished with relative ease, international service of process has been described as "complex and time consuming,"[10] and "bordered on all sides with fatal pitfalls."[11] Not surprisingly, then, courts are frequently called upon to decide the validity of a party's attempts to serve an adversary located overseas.[12]

This bulletin addresses some commonly-encountered issues related to international service of process, particularly those arising under the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, also known as the Hague Convention (the "Convention").[13] Although the bulletin provides an

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5. *See, e.g., Warzynski v. Empire Comfort Sys., Inc.*, 102 N.C. App. 222, 401 S.E.2d 801 (1991); *Hayes v. Evergo Tel. Co., Ltd.*, 100 N.C. App. 474, 397 S.E.2d 325 (1990); *Bush v. BASF Wyandotte Corp.*, 64 N.C. App. 41, 306 S.E.2d 562 (1983).

6. *See, e.g., Koehler v. Dodwell*, 152 F.3d 304 (4th Cir. 1998); *Eplus Technology, Inc. v. Aboud*, 155 F. Supp. 2d 692 (E.D. Va. 2001).

7. *See, e.g., Hocke v. Hanyane*, 118 N.C. App. 630, 456 S.E.2d 858 (1995); *Randolph v. Hendry*, 50 F. Supp. 2d 572 (S.D. W. Va. 1999).

8. *See, e.g., Tataragasi v. Tataragasi*, 124 N.C. App. 255, 477 S.E.2d 239 (1996); *see also* Maj. Wendy P. Daknis, *Home Sweet Home: A Practical Approach to Domicile*, 177 Mil. L. Rev. 49, 62 n.75 (2003) (noting that, in 2001, the U.S. Army's Legal Assistance Offices assisted over 29,000 clients with divorce-related issues); Maj. Alan L. Cook, *The Armed Forces as a Model Employer in Child Support Enforcement: A Proposal to Improve Service of Process on Military Members*, 155 Mil. L. Rev. 153, 153-54 & nn. 4-6 (1998) (noting varying estimates that the federal government, and primarily the Department of Defense, employed up to 100,000 parents who were in arrears on child support obligations).

9. *See Warzynski*, 102 N.C. App. at 228, 401 S.E.2d at 805 (evaluating validity of service on defendant located outside U.S.).

In addition to service of process, or an exemption to service, the court must have personal jurisdiction over the defendant. North Carolina's "long-arm" statute, G.S. § 1-75.4, identifies the circumstances under which courts have personal jurisdiction over parties who have been served with process "pursuant to Rule 4(j), Rule 4(j1), or Rule 4(j3)" of the North Carolina Rules of Civil Procedure. G.S. §§ 1-75.3 and 1-75.6 authorize courts to enter judgment against, or exercise personal jurisdiction over, a party subject to jurisdiction under the "long-arm" statute if the party has been served "pursuant to" or "in accordance" with "Rule 4(j) or 4(j1)." Service outside the U.S., however, is authorized by Rule *4(j3)*, to which these sections do not refer at all.

This seems to be an oversight. G.S. §§ 1-75.3 and 1-75.6 were enacted in 1967. *See* 1967 N.C. Sess. Laws c. 954 § 2. Rule 4's international service provisions were added two years later, as Rule 4(j)(9)d, *see* 1969 N.C. Sess. Laws c. 895 § 4, and therefore fell within the existing references in these sections to "Rule 4(j)." The international service provisions were later moved to 4(j3). *See* 1981 N.C. Sess. Laws c. 540 § 3. But although in 1995 the long-arm statute was amended to include a reference to Rule 4(j3), *see* 1995 N.C. Sess. Laws c. 389 § 1 (amending G.S. § 1-75.4), no such amendment was made to G.S. §§ 1-75.3 or 1-75.6. *Compare* 1983 N.C. Sess. Laws c. 231 (amending G.S. §§ 1-75.3, 1-75.4, and 1-75.6 to add a reference to Rule 4(j1) after provisions governing service by publication, formerly in Rule 4(j), were moved to 4(j1)).

10. *Loral Fairchild Corp. v. Matsushita Elec. Indus. Co., Ltd.*, 805 F. Supp. 3, 5 (E.D.N.Y. 1992).

11. Gary B. Born, *International Civil Litigation in United States Courts* 757 (Kluwer Law Int'l, 3d ed. 1996) (quotation omitted) [herein, "Born"].

12. *See, e.g., Hayes*, 100 N.C. App. 474, 397 S.E.2d 325; *Warzynski*, 102 N.C. App. at 222, 401 S.E.2d at 801; *Hanyane*, 118 N.C. App. 630, 456 S.E.2d 858; *see also* G.S. § 1-75.11 (requiring court to verify proper service and existence of personal jurisdiction before entering judgment against non-appearing defendant).

13. *See* Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Done at the Hague November 15, 1965 (entered into force for the United States February 10, 1969), 20 U.S.T. 361; T.I.A.S. 6638; 658 U.N.T.S. 163; 28 U.S.C. (Appendix

overview, it does not purport to be an exhaustive guide to the Convention or to international service of process generally.[14] Instead, the bulletin focuses on the interaction between the Convention and Rule 4(j3) of the North Carolina Rules of Civil Procedure, which authorizes service of process "in a place not within the United States." In particular, the bulletin focuses on several issues that judges commonly encounter, including:

- when and where the Convention applies;
- what methods of service the Convention authorizes;
- the countries in which service by mail is available;
- the procedural requirements for service by mail, where it is available; and
- the rules applicable to service of process on U.S. servicemembers stationed overseas.

This is not an area of the law characterized by great certainty. Nevertheless, this bulletin summarizes those areas where the law provides clear guidance and, in areas where guidance is lacking, attempts to provide guidance consistent with the likely direction of North Carolina law. The bulletin contains only a brief discussion of international service on members of the Armed Forces. Readers interested in a more thorough discussion of service on members of the Armed Forces, whether located in the United States or abroad, should read Administration of Justice Bulletin No. 2004/08, *Service of Process and the Military* (Dec. 2004).

following Fed. R. Civ. P. 4) [herein, "the Convention"]. A searchable, electronic copy of the Convention can be found on the website of the Hague Conference on Private International Law <http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=17> (last visited Nov. 30, 2004).

14. There are any number of useful guides to international service, particularly Bruno A. Ristau, *International Judicial Assistance: Civil and Commercial* (Int'l Law Inst. 2000) ("Ristau") and Born, *supra* note 11. The U.S. Department of State website also contains a variety of materials related to international judicial assistance, including a flyer discussing service of process abroad and links to country-specific requirements <http://travel.state.gov/law/judicial_assistance.html> (last visited Nov. 30, 2004).

International service of process under North Carolina law

Any inquiry into the validity of international service of process begins with Rule 4(j3) of the North Carolina Rules of Civil Procedure. Because Rule 4(j3) is nearly identical to federal Rule 4(f), federal cases are useful interpretive guides.[15]

Rule 4(j3) establishes three basic categories of international service methods.[16] First, Rule 4(j3)(1) directs parties to use an "internationally agreed means" of service if one is available. Second, if there is no

15. *See, e.g., Sutton v. Duke*, 277 N.C. 94, 101, 176 S.E.2d 161, 165 (1970) ("[S]ince the federal and, presumably, the New York rules are the source of NCRCP we will look to the decisions of the[se] jurisdictions for enlightenment and guidance . . ."). When added in 1969 as Rule 4(j)(9)d, the international service provisions of N.C. Rule 4 were modeled on the comparable provisions then contained in Fed. R. Civ. P. 4(i). *See* G.S. § 1A-1, Rule 4, comment to 1969 Amendment.

16. In relevant part, Rule 4(j3) provides:

> Unless otherwise provided by federal law, service upon a defendant, other than an infant or an incompetent person, may be effected in a place not within the United States:
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> (1) By any internationally agreed means reasonably calculated to give notice, such as those means authorized by the [Convention] . . .; or
>
> (2) If there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:
>
> a. In the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction;
>
> b. As directed by the foreign authority in response to a letter rogatory or letter of request; or
>
> c. Unless prohibited by the law of the foreign country, by
>
> 1. Delivery to the individual personally of a copy of the summons and the complaint and, upon a corporation, partnership, association or other such entity, by delivery to an officer or a managing or general agent;
>
> 2. Any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or
>
> (3) By other means not prohibited by international agreement as may be directed by the court.

internationally agreed means of service, or if the "applicable international agreement" allows service by other means, Rule 4(j3)(2) authorizes a number of additional service methods, including:

- service in a manner prescribed by the law of the foreign country in an action in any of its courts of general jurisdiction;
- service in a manner directed by the foreign authority in response to a letter rogatory; or
- unless prohibited by the law of the foreign country, service by personal delivery or by any form of mail requiring a signed receipt, if the mail is addressed and dispatched by the clerk of court to the party to be served.[17]

Finally, Rule 4(j3) permits the court to order service by other means, provided the method used is not prohibited by international agreement.

In each case, the manner of service must be reasonably calculated to give notice to the defendant of the lawsuit. This constraint ensures that the method of service is consistent with constitutional due process requirements of the North Carolina and U.S. Constitutions.[18]

Rule 4(j3)(1): Service by "internationally agreed means" such as the Hague Convention

Rule 4(j3)(1) authorizes service by "any internationally agreed means reasonably calculated to give notice" of the action. The primary "internationally agreed means" of service, and the only one expressly referenced in Rule 4(j3)(1), is the Hague Convention, a multilateral treaty developed at the Tenth Session of the Hague Conference on Private International Law in October 1964.[19] The Convention represents an attempt to "improve the organization of mutual judicial assistance . . . by simplifying and expediting the procedure" for international service of process.[20] Table A, at the end of this bulletin, lists the countries (including any territories, possessions, or other jurisdictional entities) in which the Convention is presently in force.

When service is to be made in a country that has ratified or acceded to the Hague Convention (a "Contracting State"), the serving party must use the Convention's procedures.[21] This is true whether the lawsuit in which service is to be made is pending in state or federal court.[22] The Convention, however, does not apply to every lawsuit involving a party outside the United States, even a party physically located in a Contracting State. Rather, by its terms the Convention applies "in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad."[23] Two questions must therefore be answered before determining that the Convention applies in a particular case: is the lawsuit a "civil or commercial matter," and does service require the transmission of documents abroad?

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17. *See* G.S. § 1A-1, Rule 4(j3)(2)a, b, & c.

18. "An elementary and fundamental requirement of due process in any proceeding . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information and it must afford a reasonable time for those interested to make their appearance." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *see also McDonald's Corp. v. Dwyer*, 338 N.C. 445, 448, 450 S.E.2d 888, 891 (1994) (noting same requirement under N.C. Constitution). Whether service meets this standard depends on the circumstances of each case, including the availability of other methods of service. *See Mullane*, 339 U.S. at 313-15; *Greene v. Lindsey*, 456 U.S. 444, 451-54 (1982).

19. *See* Born, *supra* note 11 at 797.

20. *See* Convention, preamble.

21. *See Schlunk*, 486 U.S. at 705 (stating that "compliance with the Convention is mandatory in all cases to which it applies"); *see also* G. Gray Wilson, *North Carolina Civil Procedure* § 4-24 (Michie, 2d ed. 1995) (same); *Lafarge Corp. v. Altech Environment, U.S.A.*, 220 F. Supp. 2d 823, 831 (E.D. Mich. 2002); *Darden v. DaimlerChrysler North Am. Holding Corp.*, 191 F. Supp. 2d 382, 387 (S.D.N.Y. 2002); *Taft v. Moreau*, 177 F.R.D. 201, 203 (D. Vt. 1997).

22. *See Schlunk*, 486 U.S. at 699. It is also true even if the party to be served is a U.S. national living overseas. Rule 4(j3) applies to "service upon a *defendant* . . . [to] be effected in a place not within the United States," G.S. §1A-1, Rule 4(j3) (emphasis added), and does not distinguish between U.S. nationals and other potential defendants.

23. Convention, Art. 1.

What is a "Civil or Commercial" Matter?

The Convention does not define "civil or commercial matter," nor does the Convention's negotiating history shed much light on the meaning of this term.[24] The various Contracting States appear to have divergent views on its meaning. Some States, particularly civil law jurisdictions, distinguish matters of "public law," such as administrative proceedings, from "private law" civil and commercial matters. On this basis, some Contracting States have declined to serve legal documents issued by U.S. administrative agencies.[25] Likewise, some Contracting States may not apply the "civil or commercial" label to lawsuits seeking multiple or punitive damages or asserting claims under statutes, like the antitrust laws, viewed as establishing "public law."[26]

Notwithstanding these divergent views on what constitutes a "civil or commercial" matter, United States practice has traditionally viewed all non-criminal cases, including administrative proceedings, as "civil or commercial matters" to which the Convention applies.[27] State and federal courts in North Carolina have taken a similar view, applying the Convention broadly to family and domestic law matters, as well as to other types of civil litigation.[28]

If the Convention does not apply – either in a rare case not involving a "civil or commercial matter" or because the party to be served is not located in a Contracting State – then Rule 4(j3)(1) authorizes service only if another "internationally agreed means" is available.[29] If there is no alternative "internationally agreed means," service may be made by one of the methods authorized by Rule 4(j3)(2) or 4(j3)(3).[30]

Does Service Require Transmission of a Document Abroad?

Even in civil or commercial matters in which the party to be served is located in a Contracting State, the Convention does not apply unless "there is occasion to transmit a . . . document for service abroad."[31] Whether service requires the transmission of documents abroad is determined by the law of the forum state.[32] So, for example, a foreign corporation authorized to do business in North Carolina may be served by delivering a copy of the summons and complaint to its registered agent or, if it has no agent, to the Secretary of State.[33] Because service in this example does not require transmission of a document abroad, the Convention does not apply.

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24. *See* Born, *supra* note 11 at 800.

25. *See* Ristau, *supra* note 14 § 4-1-4(1), at 149.

26. *See* Born, *supra* note 11 at 800-01 & nn. 199-202.

27. *See* 17 I.L.M. 319 (1978) (report to Secretary of State by U.S. delegate to the 1977 Special Commission); *United Kingdom v. United States*, 238 F.3d 1312, 1318 (11th Cir. 2001) (Convention not applicable to criminal proceedings).

28. *See, e.g., Tataragasi*, 124 N.C. App. 255, 477 S.E.2d 239 (custody action); *In re Letter of Request from the Amtsgericht Ingolstadt, Federal Republic of Germany*, 82 F.3d 590, 593 (4th Cir. 1996) (paternity action; interpreting the Hague Convention on the Taking of Evidence Abroad); *Warzynski*, 102 N.C. App. 222, 401 S.E.2d 801 (product liability action).

29. The only other "internationally agreed means" of service appears to be the Inter-American Convention on Letters Rogatory (the "Inter-American Service Convention"), to which Argentina, Brazil, Chile, Columbia, Ecuador, Guatemala, Mexico, Panama, Paraguay, Peru, the United States, Uruguay, and Venezuela are parties. *See* 14 Int'l Leg. Mat. 339 (1975) (convention); 18 Int'l Leg. Mat. 1238 (1984) (additional protocol); U.S. Department of State flyer, *Service of Legal Documents Abroad* <http://travel.state.gov/law/ service_general.html> (last visited Nov. 30, 2004). Unlike the Hague Convention, the Inter-American Service Convention does not purport to be the exclusive mechanism for serving parties located in signatory countries. *See, e.g., Kreimerman v. Casa Veerkamp, S.A.*, 22 F.3d 634, 639-44 (5th Cir. 1994); *Pizzabiocche v. Vinelli*, 772 F Supp. 1245, 1249 (M.D. Fla. 1991); Born, *supra* note 11 at 835.

30. The service methods set forth in Rule 4(j3)(2) are also available if the applicable international agreement allows service by other methods.

31. Convention, Art. 1; *see also* G.S. § 1A-1, Rule 4(j3) (setting forth rules for effecting service "in a place not within the United States").

32. *See Schlunk*, 486 U.S. at 700.

33. *See* G.S. § 1A-1, Rule 4(j)(6); G.S. § 55-15-07 (requiring foreign corporations authorized to transact business in North Carolina to maintain a registered agent); G.S. § 55D-33 (authorizing service on registered agent or, if no registered agent exists, upon the Secretary of State). *Cf. Bush v. BASF Wyandotte Corp.*, 64 N.C. App. 41, 306 S.E.2d 562 (1983) (holding that service may be made upon Secretary of State where Secretary is proper agent for service of process, but incorrectly concluding that Secretary was proper agent in that case); Wilson, *supra* note 21 § 4-24, at 74 n. 230 (noting incorrect conclusion in *Bush*).

Available Methods of Service Under the Hague Convention

Under Rule 4(j3)(1), a party to a civil or commercial case requiring the transmission of service papers to a defendant in a Contracting State must use one of the procedures established by the Hague Convention.[34] The principal innovation of the Convention, and its primary and favored service mechanism, is service through the Central Authority of the country in which service is to be made.

Article 2 of the Convention requires each Contracting State to establish a Central Authority to receive requests for service from other Contracting States.[35] The Central Authority of the receiving State is obliged to execute service requests, either by formal service under the local law of the receiving State, or by a method requested by the serving party (unless that method is incompatible with the law of the receiving State), or by informal delivery to an addressee who voluntarily accepts service.[36] Each Contracting State may require documents served by its Central Authority pursuant to local law to be translated into one of its official languages.[37] After attempting – and hopefully completing – service, the Central Authority of the receiving State returns to the applicant a certificate describing the method, time, and place of service and identifying the person to whom the documents were delivered.[38]

The Convention, however, does not require use of the Central Authority mechanism. Indeed, because service via the Central Authority can be time consuming and cumbersome, many litigants opt to use alternative service mechanisms identified by the Convention. These include:

Service via consular or diplomatic channels: Each Contracting State may serve documents upon persons abroad directly through its diplomatic or consular agents. Each State, however, may object to such service unless the document is to be served on a national of the State from which the documents originate.[39] The Convention also permits Contracting States to use consular agents and, in exceptional circumstances, diplomatic agents to forward service documents to designated authorities in the receiving State.[40] U.S. litigants, however, typically may not rely on these methods of service, as U.S. law prohibits foreign service officers from serving process, or appointing others to do so, in most cases.[41]

Service through judicial officers, officials, or other competent persons: The Convention also permits service to be made "directly through the judicial officers, officials, or other competent persons" of the State in which service is to be made, thus bypassing the Central Authority mechanism.[42] Contracting States may also object to this form of service.[43]

34. *See Schlunk*, 486 U.S. at 705 (stating that "compliance with the Convention is mandatory in all cases to which it applies"); Convention Art. 1 (in civil or commercial matters, Convention applicable "in all cases" where documents must be transmitted abroad to obtain service).

35. *See* Convention Art. 2. Information about each State's Central Authority can be found in the country-specific declarations appended to Fed. R. Civ. P. 4 or on the Department of State's website. *See supra* note 14. The United States Department of Justice is the Central Authority for the United States. *See* 28 C.F.R. § 0.49(b). Each Contracting State may also require that any requests for service originating *from* that country be channeled through its Central Authority. Parties to U.S. litigation, however, need not channel requests for service in other Contracting States through the Department of Justice. Instead, American attorneys may send requests directly to the Central Authority in the Contracting State where service is to be made. *See* Ristau, *supra* note 14 § 4-2-1, at 173.

36. *See* Convention Art. 5.

37. *See* Ristau, *supra* note 14 § 4-2-3(5), at 184-89 (suggesting that a State may require translation only if documents are to be served via its local law, rather than in a manner requested by the serving party).

38. *See* Convention Art. 6 (also requiring Central Authority to explain why documents were not served, if applicable).

39. *See* Convention Art. 8; *see also* Ristau, *supra* note 14 § 4-3-5(4), at 217 (listing countries that have objected to service pursuant to Article 8).

40. *See* Convention Art. 9.

41. *See* 22 C.F.R. § 92.85.

42. Convention Art. 10(b), (c) (referring to "the freedom" of forum judicial officers, officials, or "other competent persons," as well as "any person interested in a judicial proceeding," to effect service directly through judicial officers, officials, or other competent persons of the State of destination).

43. *See id.*; *see also* Ristau, *supra* note 14 § 4-3-5(4), at 217 (listing countries that have objected).

> Side agreements between Contracting States: Contracting States may also enter into separate agreements establishing additional service mechanisms.[44] The United States does not appear to be a party to any such agreements.[45]

Perhaps the most significant alternative service mechanism contemplated by the Convention, however, is service via "postal channels." This provision, contained in Article 10(a), has generated a substantial body of conflicting case law. Because of this, and because service by mail is perhaps the most frequently attempted form of international service, the following sections of this bulletin discuss service by mail in detail.

Service bv mail under the Convention and the effect of Rule 4(j3)(2)c.2

Article 10(a) "has engendered more litigation in the United States than any other section of the Convention."[46] Courts in the United States, for example, are sharply divided on whether Article 10(a) permits international mail service at all, a question the North Carolina Court of Appeals appears to have answered in the affirmative.[47] Moreover, there remain unanswered questions about the mechanics of international mail service, among them whether litigants or the clerk of court are responsible for mail service and whether the Convention, Rule 4(j3), or constitutional principles require translation of service papers. The following sections attempt to provide guidance in answering these questions.

The Hague Convention permits service by mail, provided the country in which service is to be made has not objected.

At first glance, Article 10(a) of the Convention would seem to permit a litigant in one Contracting State to serve documents by mail on a party in another State. On closer scrutiny, however, the language of Article 10(a) is less clear:

> 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.

Unlike other provisions of the Convention, which expressly refer to methods of "serving" judicial documents,[48] Article 10(a) refers merely to "the freedom to *send* judicial documents" by postal channels.[49] Noting this distinction, many courts have interpreted Article 10(a) narrowly to allow litigants only to send case-related documents through the mail *after* service has been formally accomplished by other means.[50] These courts reason that, because the

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44. *See* Convention Art. 11. Article 11 appears primarily to contemplate "side agreements" permitting "direct communication between [the] respective authorities" of the Contracting States. *Id*. (referencing such agreements "in particular").

45. *See* Ristau, *supra* note 14 § 4-3-5(3), at 216. Article 19 of the Convention is a "savings provision," which makes clear that the Convention does not abrogate more liberal service rules under which a Contracting State "permits methods of transmission . . . of documents coming from abroad, for service in its territory." Convention Art. 19; *see also* Born, *supra* note 11 at 812 & 822 n.8.

46. Born, *supra* note 11 at 811.

47. *See infra* notes 55 through 58 and accompanying text.

48. *See, e.g.,* Convention Art. 5 (requiring Central Authority to "serve the document or . . . arrange to have it served"); Art. 8 (Contracting States "shall be free to effect service" in some cases through diplomatic or consular agents); Art. 9 (Contracting States "shall be free" to use consular agents to forward documents "for the purpose of service" to authorities in country where service is to be made); Art. 10(b) & (c) (Convention "shall not interfere with . . . the freedom" of judicial officers and others "to effect service" through competent person of State where service is to be made); Art. 19 (raising prospect of alternative methods "for service" of documents permitted by internal law of country where service is to be made).

49. Convention Art. 10(a) (emphasis added).

50. *See, e.g., Nuovo Pignone, SpA v. STORMAN ASIA M/V*, 310 F.3d 374, 384 (5th Cir. 2002); *Sardanis v. Sumitomo Corp.*, 279 A.D.2d 225, 229 (N.Y. App. Div. 2001); *Knapp v. Yamaha Motor Corp. U.S.A.*, 60 F. Supp. 2d 566, 573 (S.D. W.Va. 1999); *Golub v. Isuzu Motors*, 924 F. Supp. 324, 327-28 (D. Mass. 1996); *Brand v. Mazda Motor of America*, 920 F. Supp. 1169, 1172 (D. Kan. 1996); *Pennebaker v. Kawasaki Motors Corp.*, 155 F.R.D. 153, 157 (S.D. Miss. 1994); *Bankston v. Toyota Motor Corp.*, 889 F.2d 172, 174 (8th Cir. 1989); *Suzuki Motor Co. v. Superior Court*, 249 Cal. Rptr. 376, 381-82 (1988); *Prost v. Honda Motor Co.*, 122 F.R.D 215, 216-17 (E.D. Mo. 1987); *Cooper*

Convention uses the term "service" repeatedly in other Articles, the omission of that term from Article 10(a) must have been deliberate.[51] By contrast, other courts disagree with this narrow interpretation and read Article 10(a) to permit service of process by mail.[52] These courts note that the express purpose of the Convention is to "create appropriate means to ensure that . . . documents *to be served abroad* shall be brought to the notice of the addressee,"[53] and typically attribute the absence of the term "service" from Article 10(a) to "careless drafting."[54]

The North Carolina cases are consistent with the broader interpretation of Article 10(a). In *Hayes v. Evergo Telephone Co.*, for example, the North Carolina Court of Appeals held that service upon a defendant in Hong Kong by international registered mail, return receipt requested, was consistent with the Hague Convention.[55] Although the Court did not hold that Article 10(a) permits service by mail in all cases,[56] in subsequent cases the Court of Appeals has again stated that mail service is consistent with the Convention and Article 10(a).[57] The Court of Appeals has thus aligned itself with those courts that have concluded that the Convention permits service by mail.[58]

Numerous Contracting States object to service by mail.

Although Article 10(a) may permit service by "postal channels," each Contracting State retains the right to object to this manner of service.[59] A number of States have exercised this right, including those on the following list:

- Argentina
- Bulgaria
- China
- Czech Republic
- Egypt
- Germany
- Greece
- Hungary
- Latvia
- Lithuania

v. Makita, U.S.A., Inc., 117 F.R.D. 16, 17 (D. Me. 1987); *Pochop v. Toyota Motor Co*., 111 F.R.D. 464, 466 (S.D. Miss. 1986); *Mommsen v. Toro Co.*, 108 F.R.D. 444, 446 (S.D. Iowa 1985).

51. *See, e.g., Mommsen v. Toro Co.*, 108 F.R.D. 444, 446 (S.D. Iowa 1985).

52. *See, e.g., Brockmeyer v. May*, 383 F.3d 798, 802 (9th Cir. 2004); *Ackermann v. Levine*, 788 F.2d 830, 839-40 (2d Cir. 1986); *Eli Lilly & Co. v. Roussel Corp.*, 23 F. Supp. 2d 460, 470-74 (D.N.J. 1998); *R. Griggs Group Ltd. v. Filanto Spa,* 920 F. Supp. 1100, 1104-08 (D. Nev. 1996); *Gapanovich v. Komori Corp.*, 605 A.2d 1120, 1123-24 (N.J. Super. Ct. App. Div. 1992); *Patty v. Toyota Motor Corp*., 777 F. Supp. 956, 959 (N.D. Ga. 1991); *Meyers v. ASICS Corp.*, 711 F. Supp. 1001, 1007-08 (C.D. Cal. 1989); *Hammond v. Honda Motor Co.*, 128 F.R.D. 638, 641 (D.S.C. 1989); *Nicholson v. Yamaha Motor Co.*, 566 A.2d 135, 143 (Md. Ct. Spec. App. 1989); *Lemme v. Wine of Japan Import, Inc.*, 631 F. Supp. 456, 464 (E.D.N.Y. 1986); *Weight v. Kawasaki Heavy Indus., Ltd.*, 597 F. Supp. 1082, 1085-86 (E.D. Va. 1984).

53. Convention, preamble (emphasis added).

54. *Sandoval v. Honda Motor Co., Ltd.*, 527 A.2d 564, 566 (Pa. Super. 1987).

55. 100 N.C. App. 474, 479, 397 S.E.2d 325, 328 (1980).

56. *See id.* The Court held that service was proper "in this case," relying in part on Article 19 of the Convention, which allows service by methods permitted by the internal law of the State where service is to be made. The Court indicated that Hong Kong's "internal law" permitted mail service, although it did not explain whether Hong Kong's internal law permitted service by mail "of documents coming from abroad," as Article 19 requires. *See supra* note 45.

57. *See, e.g., Warzynski*, 102 N.C. App. at 228, 401 S.E.2d at 805 (not mentioning Article 10(a) but affirming mail service on Spanish company under Rule 4(j3)(2)c.2); *Peele*, 136 N.C. App. at 208-09, 523 S.E.2d at 127 (stating that Article 10(a) permits mail service). Note, however, that Article 10(a) may not have been at issue in *Peele*. In that case, a German court apparently sent service papers in a German lawsuit to the U.S. Marshals Service, which served the defendant by mail in North Carolina. Thus, service seems to have been made via the Central Authority mechanism – the Marshals Service formerly served documents on behalf of the U.S. Central Authority – and not via Article 10(a), which contemplates mail service "sent directly to persons abroad." Convention Art. 10(a).

58. *See supra* note 52. This broader interpretation of Article 10(a) draws additional support from the negotiating history of the Convention and, apparently, is shared by the U.S. State Department. *See* Ristau, *supra* note 14 § 4-3-5(2), at 205 (reviewing drafting history and concluding that "the draftsmen of the Convention intended the language 'to send judicial documents, by postal channels' to include the service of process"); Letter from Alan J. Kreczko, U.S. Dep't of State Deputy Legal Advisor, to the Admin. Office of the U.S. Courts (Mar. 14, 1991), *quoted in* U.S. Dep't of State Op. Regarding the *Bankston* Case, 30 I.L.M. 260 (1991) (disagreeing with federal case holding that the Hague Convention does not permit service by registered mail).

59. *See* Convention Art. 10 & 21.

- Luxembourg
- Norway
- Poland
- Rep. of San Marino
- Rep. of South Korea
- Slovak Republic
- Sri Lanka
- Switzerland
- Turkey
- Ukraine
- Venezuela[60]

Courts have generally held that service by mail is improper in the countries that have objected to Article 10(a).[61] The few relevant North Carolina cases are consistent with this rule. In *Hayes*, for example, the Court of Appeals upheld service by mail upon a defendant in Hong Kong, finding "particularly compelling the fact that . . . Hong Kong has not objected to any portion of Article 10."[62] Likewise, in *Tataragasi v. Tataragasi*, the Court of Appeals held that Article 10(a) did not authorize service on a defendant in Turkey, which has objected to service by mail.[63] Therefore, litigants may not effect service by mail upon parties located in the Contracting States listed above. Service by mail is permitted, however, in the remaining States listed in Table A.[64]

The fact that Article 10(a) permits service by mail in a particular State, however, does not end the inquiry, because Article 10(a) says nothing about what procedures, if any, govern mail service. The following sections therefore address two unanswered procedural questions. First, must parties attempting mail service in a Contracting State comply with North Carolina Rule of Civil Procedure 4(j3)(2)c.2, the only provision that expressly authorizes service by mail in foreign countries? Second, must service papers be translated into an official language of the country in which service is to be made, or translated into a language spoken by the defendant?

Procedural requirements governing service by mail

Rule 4(j3)(2) authorizes a number of alternative methods of service in cases where there is no "internationally agreed means of service" or "the applicable international agreement allows other means of service."[65] Of particular relevance here is 4(j3)(2)c.2, the only provision in the Rules of Civil Procedure expressly to authorize international mail service.[66] The rule imposes two significant

60. *See* Fed. R. Civ. P. 4, accompanying materials (listing declarations of Contracting States); U.S. Dep't of State flyer, *Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters* <http://travel.state.gov/law/ hague_ service.html> (listing States that have objected to service via postal channels); Hague Conference on Private Int'l Law, *Declarations of the Republic of Hungary* <http://hcch. e-vision.nl/index_en.php?act =status.comment& csid=912& disp=resdn>; *Declarations of the Republic of San Marino* <http://hcch.e-vision.nl/index_en.php?act= status.comment& csid=437&disp=resdn>; *Declarations of the Republic of Bulgaria* <http://hcch.e-vision.nl/index_en.php?act=status. comment&csid=28&disp=resdn> (last visited Nov. 30, 2004).

61. *See, e.g., Shenouda v. Mehanna*, 203 F.R.D. 166, 171 (D.N.J. 2001); *Davies v. Jobs & Adverts Online, Gmbh*, 94 F. Supp. 2d 719, 721 n.6 (E.D. Va. 2000); *Lyman Steel Corp. v. Ferrostaal Metals Corp.*, 747 F. Supp. 389, 399-400 (N.D. Ohio 1990); *Dr. Ing. H.C.F. Porsche A.G. v. Superior Court*, 123 Cal.App.3d 755, 761-62 (Cal. Ct. App. 1981); *see also DeJames v. Magnificence Carriers, Inc.,* 654 F.2d 280, 288 (3d Cir.1981) (Convention authorizes methods of service in addition to Central Authority mechanism "as long as the nation receiving service has not objected to the method used").

62. 100 N.C. App. at 479, 397 S.E.2d at 328; *see also Peele*, 136 N.C. App. at 208-09, 523 S.E.2d at 127 (noting that the Convention authorizes service by mail and that the United States had not objected to such service).

63. *See* 124 N.C. App. at 263, 477 S.E.2d at 243 (approving service notwithstanding this defect after holding that formal defects in service are not necessarily fatal in child custody cases where defendant has actual notice of the action).

64. The fact that a State has not objected to a method of service, however, does not necessarily mean that the State's courts will enforce the resulting U.S. judgment. Japan, for example, does not object to service by mail but has stated that its failure to object "does not necessarily imply that [mail service] . . . is considered valid service in Japan; it merely indicates that Japan does not consider it as an infringement of its sovereign power." *See* Hague Conf. on Private Int'l Law: Special Comm'n Report on the Operation of the Hague Service Convention and the Hague Evidence Convention, 28 Int'l Legal Mat. 1556, 1561 (1989); *see also* U.S. Dep't of State flyer, *Service of Process in Japan* <http://travel.state.gov/law/japan_service.html> (noting potential enforcement problems) (last visited Nov. 30, 2004).

65. G.S. § 1A-1, Rule 4(j3)(2).

66. Although Rule 4(j)(1)c authorizes service "within or without" North Carolina by registered or certified mail, return receipt requested, this general service provision presumably does not authorize international mail service in a manner inconsistent with the more specific provisions contained in Rule 4(j3). *Cf. Fowler v. Valencourt*, 334 N.C. 345, 349, 435 S.E.2d 530, 532 (1993) ("Where one of two

requirements: service must be by "any form of mail requiring a signed receipt," and the documents must be "addressed and dispatched by the clerk of court to the party to be served."[67] These procedures generally must be followed if there is no "internationally agreed means" of mail service available under Rule 4(j3)(1), as when the party to be served is located in a country that has not ratified or acceded to the Hague Convention. The question remains, however, whether service by mail must *always* satisfy Rule 4(j3)(2)c.2, even when the party to be served is located in a Contracting State.

The answer to this question depends on whether Rule 4(j3)(1) authorizes the use of all methods of service identified by the Convention. Recall that Rule 4(j3)(1) directs litigants to effect service "[b]y any internationally agreed means . . . such as those means authorized by the Hague Convention." Because the Convention clearly authorizes use of its Central Authority mechanism, this method of service is available to litigants under Rule 4(j3)(1).[68] But matters are not so clear with respect to Article 10(a).

Is service via postal channels an "internationally agreed means" of service, or one "authorized" by the Convention? If it is, then this method of service is available under Rule 4(j3)(1). And, because neither Rule 4(j3)(1) nor Article 10(a) require any particular type of mail service,[69] litigants could presumably use any form of mail reasonably calculated to notify the defendant of the action.[70] By contrast, if Article 10(a) merely *permits* litigants to use postal channels *if* forum law specifically authorizes them to do so, a North Carolina plaintiff arguably would have to comply with Rule 4(j3)(2)c.2.[71]

Although there is little law in North Carolina or elsewhere on this issue, there is some reason to believe that international mail service must comply with Rule 4(j3)(2)c.2. First, if the Convention is meant to authorize mail service even where forum law provides no such authority, then the text of Article 10(a) is poorly suited to achieving that goal. Article 10(a) simply provides that the Convention "shall not interfere with . . . the freedom" to send documents by mail.[72] This of course begs the question: what freedom? Presumably, if a litigant is "free" to effect service in a particular way, it is because other (non-Convention) law authorizes service to be made in that manner.[73]

The negotiating history of the Convention appears to be consistent with the view that forum law must authorize international mail service. According to a report on the text of the draft convention:

> It should be stressed that in permitting the utilization of postal channels, provided the state of destination does not object, the draft convention did not intend to pass on the validity of this mode of transmission under the law of the forum state: in order for the postal channel to be utilized, it is necessary

statutes might apply to the same situation, the statute which deals more directly and specifically with the situation controls over the statute of more general applicability."). Likewise, although 4(j3)(2)a authorizes service "in a manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction," it is unlikely that this provision was intended to authorize international service by mail. *See, e.g., Brockmeyer v. May*, 383 F.3d 798, 806-08 (9th Cir. 2004) (so holding with respect to Fed. R. Civ. P. 4(f)(2)(A)).

67. G.S. § 1A-1, Rule 4(j3)(2)c.2.

68. *See* Born, *supra* note 11 at 808 n.5(b).

69. *See* Ristau, *supra* note 14 § 4-3-5(2), at 205 (quoting report on draft Convention: "The Commission did not accept the proposal that postal channels be limited to registered mail").

70. *See* G.S. § 1A-1, Rule 4(j3)(1) (authorizing service by any internationally agreed means reasonably calculated to give notice); *see also Mullane*, 339 U.S. at 314 (due process requires notice reasonably calculated to apprise defendant of the action and an opportunity to present objections).

71. Because under this reading the Convention would allow, but not authorize, service by "postal channels," the mail service provisions of Rule 4(j3)(2) would be available. *See* G.S. § 1A-1, Rule 4(j3)(2) (listing service methods available if there is no "internationally agreed means" of service or if the "applicable international agreement" allows other methods).

72. Compare this language to the detailed provisions governing service via the Central Authority mechanism. *See* Convention Art. 3-7.

73. *Cf. Schlunk*, 486 U.S. at 700 (looking to forum law to determine whether service required transmittal of document abroad, thus implicating the Convention).

> that it be authorized by the law of the forum state.[74]

Although this report commented on a prior draft of Article 10, except for "minor editorial changes" the final text corresponds to that of the draft.[75]

The U.S. Department of State likewise appears to assume that international mail service must comply with Fed. R. Civ. P. 4(f)(2)(C)(ii), the federal counterpart to North Carolina's Rule 4(j3)(2)c.2. A Department of State circular discussing service of legal documents abroad states:

> **SERVICE BY INTERNATIONAL REGISTERED MAIL:** *(Rule 4(f)(2)(C)(ii), F.R. Cv. P.)* registered or certified mail, return receipt requested may be sent to most countries in the world. Rule 4(f)(2)(C) provides that this method of service may be used unless prohibited by the law of the foreign country.[76]

Notwithstanding the text of Article 10(a) and the negotiating and interpretive history discussed above, federal courts have disagreed about the need to comply with the procedures set out in federal Rule 4. Some courts have held that the Convention provides independent authority for international mail service regardless whether the serving party complies with Rule 4.[77] Other courts, however, have required litigants to comply with federal Rule 4. In *Brockmeyer v. May*,[78] for example, a federal district court declined to set aside a default judgment that had been entered against a company registered under the law of the United Kingdom. The defendant had been served by ordinary first class mail addressed and dispatched by the plaintiff. The Ninth Circuit Court of Appeals reversed, explaining that, although the Hague Convention *permitted* mail service, "Article 10(a) does not itself affirmatively authorize international mail service."[79] The Court reasoned:

> [W]e must look outside the Hague Convention for affirmative authorization of the international mail service that is merely not forbidden by Article 10(a). Any affirmative authorization of service by international mail, and any requirements as to how that service is to be accomplished, must come from the law of the forum in which the suit is filed.[80]

Based on this reasoning, the court held that the plaintiff's chosen method of service – sending the summons and complaint by ordinary first class mail to a post office address for the defendant – was not authorized by any provision of federal Rule 4. This holding echoes that of *Borschow Hospital & Medical Supplies, Inc. v. Burdick-Siemens Corp.*, in which a federal district court concluded that service must conform to the international mail provisions of federal Rule 4.[81]

The few North Carolina cases to address the validity of international mail service do not make clear whether service must comply with Rule 4(j3)(2)c.2. At times, courts seem to have assumed that parties

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74. Ristau, *supra* note 14 § 4-3-5(2), at 205 (quoting Service Convention Negotiating Document at 90) (translated from French by Ristau).

75. *See id.* (citing Service Convention Negotiating Document at 373).

76. U.S. Department of State flyer, *Service of Legal Documents Abroad* ¶ E <http://travel.state. gov/law/service_general.html> (last visited Nov. 30, 2004). The Department of State flyer lists no source of authority for international mail service other than Fed. R. Civ. P. 4(f)(2)(C)(ii), the text of which is identical to that of North Carolina's Rule 4(j3)(2)c.2.

77. These courts typically have reached this conclusion by reasoning that the Convention "supplements" federal Rule 4, rather than by interpreting Rule 4(f)(1) – the twin of N.C. Rule 4(j3)(1) – to authorize international mail service. *See, e.g., Ackermann v. Levine*, 788 F.2d 830, 840 (2d Cir. 1986) (evaluating service by German plaintiff on U.S. defendant and stating that the Convention "'supplements' – and is manifestly *not* limited by – [federal] Rule 4"); *Modefine, S.A. v. Burlington Coat Factory Warehouse Corp.*, 164 F.R.D. 24, 25-26 (S.D.N.Y. 1995) (applying *Ackerman* to service by U.S. plaintiff on foreign defendant: "Even though the use of international registered mail may be invalid under Fed. R. Civ. P. 4 to effectuate service upon a foreign party, the rule of this Circuit is clear and broad: the Hague Convention "'supplements'" the Federal Rules thereby providing an independent manner of service").

78. 383 F.3d 798 (9th Cir. 2004).

79. *Id.* at 803.

80. *Id.* at 804.

81. 143 F.R.D. 472, 486 (D. Puerto Rico 1992) (mail service on a foreign defendant is proper but must conform to the international mail service provisions of Fed. R. Civ. P. 4, then contained in Rule 4(i)).

must comply with the rule. In *Warzynski v. Empire Comfort Systems*, for example, the Court of Appeals upheld service by mail on a Spanish defendant. In a brief analysis, the Court noted that the plaintiff had complied with Rule 4(j3)(2)c.2.[82] Likewise, in *Hocke v. Hanyane*, the Court of Appeals affirmed a default judgment entered against a South African defendant after evaluating whether service complied with Rule 4(j3)(2)c.2.[83] These holdings are consistent with the text of Rule 4(j3) itself, which requires that "[p]roof of service by mail shall include an affidavit or certificate of addressing and mailing *by the clerk of court.*"[84]

In *Hayes v. Evergo Telephone Company, Ltd.*, however, the Court of Appeals upheld the validity of mail service upon a defendant in Hong Kong, even though the plaintiff, rather than the clerk, apparently mailed the service papers.[85] Although the Court discussed whether Article 10(a) permitted service by mail and ultimately concluded that service "was in conformity with the provisions of the Hague Convention," it did not discuss the fact that service was *not* in conformity with Rule 4(j3)(2)c.2. [86]

Under North Carolina law, therefore, it is not certain whether international mail service must comply with Rule 4(j3)(2)c.2. A variety of factors, however, suggest that litigants must comply with the rule. As discussed above, these factors include the text and negotiating history of the Convention, which arguably suggest that service by mail is not an "internationally agreed means" of service available to litigants under Rule 4(j3)(1).[87] Moreover, by requiring an affidavit or certificate from the clerk as proof of service by mail, Rule 4(j3) arguably envisions compliance with 4(j3)(2)c.2 in all cases. Until the appellate courts provide definitive guidance on this issue, a litigant who wishes to use the mails to serve a party located in a Contracting State to the Hague Convention would be prudent to comply with Rule 4(j3)(2)c.2.[88]

Translation requirements for service papers

A plaintiff's failure to comply with Rule 4(j3)(2)c.2 is only one of the grounds on which a defendant may challenge international mail service. Another common challenge is to the plaintiff's failure to translate the service papers.[89] This challenge typically takes one of two forms. In some cases, a defendant may argue that the Hague Convention requires translation into the official language of the country in which service is made. As will be explained, courts are nearly uniform in rejecting this argument. A more serious objection is that due process requires that the summons and

82. 102 N.C. App. at 228, 401 S.E.2d at 805 ("Rule 4(j3) establishes procedures for service of process in a foreign country. The rule allows for service by any form of mail requiring a signed receipt and addressed and dispatched by the clerk of court to the party to be served.").

83. 118 N.C. App. at 632-634, 456 S.E.2d at 859-60.

84. G.S. § 1A-1, Rule 4(j3) (emphasis added).

85. *See* 100 N.C. App. at 476, 397 S.E.2d at 327 (noting that "Plaintiff effected service of process . . . by sending the summons, together with the complaint via registered mail, return receipt requested").

86. *Id.* at 479, 397 S.E.2d at 328. And in *Tataragasi v. Tataragasi*, 124 N.C. App. 255, 477 S.E.2d 239 (1996), the Court of Appeals upheld the validity of service by mail, in a child custody action, on a defendant in Turkey, even though Turkey has objected to Article 10(a) *and* the plaintiff failed to comply with Rule 4(j3)(2)c.2. *Tataragasi* is an unusual case, however, and the Court appeared to limit its holding to child custody cases in which the plaintiff attempts in good faith to comply with the Convention and the defendant has actual notice of the action. *See id.* at 264, 477 S.E.2d at 244.

87. Though the text of the Convention and Rule 4(j3) may permit this reading, note the potential for unusual (arguably undesirable) results if a similar analysis is applied to the Convention's other "alternative" service methods. Consider, for example, an interpretation under which the Central Authority mechanism is the only "internationally agreed means" of service available under Rule 4(j3)(1). *See supra* note 48 (quoting Art. 8-10, each of which, like Article 10(a), refers to the "free[dom]" to use particular service methods). Under this interpretation, litigants could use the Convention's numerous "alternative" service methods only if they were listed in Rule 4(j3)(2) or ordered by the court under Rule 4(j3)(3). *See* Born, *supra* n. 11 at 808 n.5(c). But Rule 4(j3)(2) does not list some of the Convention's "alternative" service methods, such as service through diplomatic or consular channels. *See id.* & n.5(d) (also noting that Convention might "supplement" Rule 4).

88. Note that Rule 4(j3)(3) permits service upon defendants in foreign countries "[b]y other means not prohibited by international agreement as may be directed by the court." Under this rule, mail service that did not comply with 4(j3)(2)c.2 might be proper if made pursuant to a court order and if the method chosen was not prohibited by an international agreement. *See, e.g., Brockmeyer*, 383 F.3d at 805-06; *Levin v. Rush Trading Co.*, 248 F. Supp. 537, 540 (S.D.N.Y. 1965) (upholding service by ordinary mail on defendant and his attorneys pursuant to court order).

89. *See, e.g., State ex rel. Dusselberg v. Peele*, 136 N.C. App. 206, 211, 523 S.E.2d 125, 128 (1999).

complaint be translated into a language understood by the defendant. Each of these potential objections to service is addressed below.

Litigants who attempt service through the receiving State's Central Authority may be required to translate the summons and complaint into an official language of the receiving State. Recall that service via the Central Authority mechanism includes three potential methods of service: service "by a method proscribed by [the receiving State's] internal law" for service in domestic actions upon persons located within its territory; service by a method requested by the serving party; or voluntary acceptance by the party being served.[90] Under Article 5 of the Convention, Contracting States may require translation of documents served by the first of these methods.[91]

In a number of cases, defendants have attempted to extend this translation requirement to service by mail. The text of the Convention offers little support for such a requirement: Article 10 does not expressly authorize receiving States to impose translation requirements, and Article 5 is plainly limited to service via the receiving State's Central Authority.[92] Nor do the federal or relevant state rules of civil procedure contain such a requirement. Not surprisingly, then, in virtually every case courts have limited the Convention's translation provisions to service via the Central Authority mechanism.[93]

90. *See* Convention Art. 5; *see also supra* notes 35-38 and accompanying text (discussing Central Authority mechanism).

91. *See id.*; *see also* Ristau, *supra* note 14 § 4-2-3(5), at 184-89 (discussing translation requirement); Born, *supra* note 11 at 802-03 (same).

92. *See* Convention Art. 5 ("If the document is to be served under the first paragraph above [referring to Central Authority mechanism], the Central Authority may require" translation).

93. *See, e.g., Taft v. Moreau*, 177 F.R.D. 201, 204 (D. Vt. 1997); *Parsons v. Bank Leumi Le-Israel, B.M.*, 565 So. 2d 20, 25 (Ala. 1990); *Hammond v. Honda Motor Co., Ltd.*, 128 F.R.D. 638, 640 (D.S.C. 1989); *Lemme v. Wine of Japan Import, Inc.*, 631 F. Supp. 456, 464 (E.D.N.Y. 1986); *Weight v. Kawasaki Heavy Indus., Ltd.*, 597 F. Supp. 1082, 1086 (E.D. Va. 1984). *But see Borschow Hospital & Med. Supplies, Inc. v. Burdick-Siemens Corp.*, 143 F.R.D. 472, 480 (D. Puerto Rico 1992) (holding that service by mail must be translated in order to achieve the notice goals of service, although not basing this holding on the Convention).

The North Carolina appellate courts have not clearly addressed whether Rule 4(j3) requires litigants to translate service documents. The most pertinent case appears to be *State ex rel. Dusselberg v. Peele*,[94] in which the Court of Appeals entertained a North Carolina defendant's challenge to the alleged failure to translate a summons and complaint. In *Peele*, the U.S. Marshals Service received process issued by a German court in a child support action and served the defendant by mail. The German court entered a judgment against the defendant, which the plaintiff registered in North Carolina. The defendant moved to vacate registration of the judgment, in part because the service papers he received allegedly had not been translated into English. The Court of Appeals, however, held that the evidence was sufficient to find that the defendant had, in fact, received a translation of the summons and complaint and, therefore, that "the trial court could have found that defendant was properly served."[95]

For a number of reasons, however, *Peele* does not answer whether Rule 4(j3) or Article 10(a) require translation of service documents. First, the defendant in *Peele* appears to have been served via the Central Authority mechanism, and the case therefore did not require interpretation of Article 10(a).[96] Second, the mail service in *Peele* was accomplished under Rule 4(j)(1)(c), and the Court of Appeals therefore was not required to interpret Rule 4(j3), which governs service of U.S. process on defendants in foreign countries.[97] Third, the *Peele* court did not expressly hold that a translation was required and did not identify the source of such a requirement.

The likeliest source of any translation requirement – whether documents are served by mail or any other means – is the constitutional requirement of due process, which guarantees a defendant "notice reasonably calculated, under all the circumstances, to

94. 136 N.C. App. 206, 523 S.E.2d 125 (1999).

95. *Id.* at 211, 523 S.E.2d at 128.

96. Until recently, the U.S. Marshals Service handled service for the U.S. Central Authority, the Department of State. *See, e.g., Ackerman v. Levine*, 788 F.2d 830, 839 n.8 (2d Cir. 1986). Thus, service in *Peele* appears to have been made by the first method authorized by Article 5: service by the Central Authority in a manner prescribed by the internal law of the receiving State. *See* Convention Art. 5; *see also supra* note 57 (discussing *Peele*).

97. *See Peele*, 136 N.C. App. at 208, 523 S.E.2d at 127.

apprise [him or her] of the pendency of the action and afford . . . an opportunity to present [his or her] objections."[98] As a number of courts have noted, due process may require service of documents translated into a language understood by the defendant.[99] Like these courts, the Court of Appeals in *Peele* seems to have been concerned primarily with whether the defendant received notice sufficient to enable him to understand the action and to present any objections. Indeed, the Court emphasized that the defendant had received and signed for the summons and complaint, had taken these papers to his lawyer, and had acknowledged "'that he knew what [the papers were] concerning."[100]

In this respect, *Peele* is consistent with numerous cases from other jurisdictions and indicates that, in North Carolina, failure to translate documents into a language understood by the defendant may raise due process concerns. Whether due process requires translation in a particular case will necessarily be a fact-specific inquiry.[101] A thorough discussion of this due process issue is beyond the scope of this bulletin, but as a general rule courts have upheld service of untranslated documents where the defendant understands the documents or takes the papers to an attorney who understands them.[102] In other cases, failure to translate service papers may violate a defendant's right to due process.

Service of process on members of the U.S. armed forces

Lawsuits requiring international service of process frequently involve members of the U.S. Armed Forces stationed abroad. Members of the Armed Forces are subject to the same rules governing service of process as other persons living abroad.[103] Military policies, however, can affect the method and availability of service in particular cases. This section briefly discusses how these policies impact service on members of the Armed Forces. Readers interested in a more thorough treatment of service of process on members of the Armed Forces should read Administration of Justice Bulletin No. 2004/08, *Service of Process and the Military* (Dec. 2004).

Military authorities are not responsible for serving process on members of the Armed Forces or civilians working or residing on military installations.[104] Military authorities, however, will generally determine whether a servicemember will accept service and will convey documents to the servicemember if he or she agrees to accept them. Absent voluntary acceptance, however, military authorities generally play no further role in service and, instead, inform the serving party to

98. *Mullane*, 339 U.S. at 314; *McDonald's Corp. v. Dwyer*, 338 N.C. 445, 448, 450 S.E.2d 888, 891 (1994).

99. *See, e.g., Mario Valente Collezioni, Ltd. v. Confezioni Semeraro Paolo, S.R.L.*, 115 F. Supp. 2d 367 (S.D.N.Y. 2000); *Lafarge Corp. v. M/V MACEDONIA HELLAS*, 2000 WL 687708 at *12 (E.D. La. 2000); *Heredia v. Transport S.A.S., Inc.*, 101 F. Supp. 2d 158, 162 (S.D.N.Y. 2000); *Taft v. Moreau*, 177 F.R.D. 201, 204 (D. Vt. 1997); *Lemme v. Wine of Japan Import, Inc.*, 631 F. Supp. 456 (E.D.N.Y. 1986); *Parsons v. Bank Leumi Le-Israel, B.M.*, 565 So. 2d 20, 25 (Ala. 1990).

100. 136 N.C. App. at 211, 523 S.E.2d at 128.

101. *See, e.g., Bliek v. Palmer*, 102 F.3d 1472, 1475 (8th Cir. 1997) ("Due process is a flexible concept and a determination of what process is due, or what notice is adequate, depends upon the particular circumstances involved."); *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1099 (D.C. Cir. 1996) (precise requirements of due process depend on circumstances; in every case, adequate notice and opportunity to be heard is required).

102. *See, e.g., Confezioni Semeraro Paolo, S.R.L.*, 115 F. Supp. 2d at 372 (serving untranslated summons and complaint on Italian defendant did not violate due process where defendant immediately took papers to English speaking attorney); *Lafarge Corp.*, 2000 WL 687708 at *12 (serving untranslated documents did not violate due process where defendant did not claim inability to understand documents); *Heredia*, 101 F. Supp. 2d at 162 (no due process violation where evidence demonstrated some competence in English and defendant signed return receipt that accompanied service of process); *Taft*, 177 F.R.D. at 204 (service of untranslated document did not violate due process where defendants did not claim lack of notice or inability to understand document); *Lemme*, 631 F. Supp. at 464 (no due process violation where summons, but not complaint, was translated into defendant's language).

103. Rule 4(j3) applies to "service upon a defendant . . . effected in a place not within the United States" and does not distinguish members of the Armed Forces from other civil litigants.

104. The military has generally avoided directly serving process on servicemembers, in part due to a concern that providing such assistance to civil litigants would violate the Posse Comitatus Act, 18 U.S.C. § 1385, which criminalizes "willfully us[ing] any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws." *See* Cook, *supra* note 8 at 173.

comply with service procedures established by the law of the pertinent foreign country.[105]

A servicemember stationed abroad in a Contracting State may be served by the Central Authority of that State. In certain cases, however, the Central Authority mechanism may be unavailable or inefficient. For example, the foreign Central Authority may not have the right to enter the military installation to serve process. Whether the Central Authority has this right is governed by the applicable Status of Forces agreement between the United States and the country in which the military installation is located. If not allowed to enter the installation, the Central Authority may attempt service outside the installation, but there is no guarantee that it will successfully complete service. Some foreign Central Authorities, moreover, may decline to attempt service at all under the applicable Status of Forces agreement.[106]

Because the Central Authority mechanism may be unreliable or inefficient, many litigants attempt to serve members of the Armed Forces via international mail. Once again, the same rules governing mail service apply to servicemembers as to civilians who are not affiliated with the military. Therefore, as discussed above, litigants would be prudent to comply with the requirements of Rule 4(j3)(2)c.2 in all cases, even if the servicemember is stationed in a Contracting State. And, as discussed above, service by mail is not allowed in those countries that have objected to service by "postal channels."[107]

The Department of Defense operates Military Post Offices (MPOs) for military personnel overseas or on ships where the U.S. Postal Service does not operate.[108] Military policy appears to require MPO personnel to obtain the addressee's signature prior to delivering mail for which a return receipt has been requested and to "return the receipt(s) promptly to the source."[109] If a servicemember refuses to accept certified or registered mail, MPO personnel should endorse the document "refused" and return it to the sender.[110] Proof that the summons and complaint were delivered to the servicemember should therefore be available in most cases.

Conclusion

International service of process, though "complex and time consuming,"[111] has become considerably more regularized in recent years. If the Hague Convention applies, the receiving State's Central Authority may be able to serve the summons and complaint. Moreover, service by mail is often available, both in countries where the Hague Convention applies and in countries not party to such international agreements. Rule 4(j3)(2)c.2 establishes the procedures governing mail service. While there remains some question whether these procedures must be followed to complete mail service in Contracting States to the Hague Convention, there is a substantial argument that litigants must comply with Rule 4(j3)(2)c.2 in all cases. Because members of the U.S. Armed Forces must be served in the same manner as civilian litigants, these procedures apply to mail service on members of the military as well.

105. *See* 32 C.F.R. 516.12(c) (Army regulation establishing policies for service of state court process outside the U.S.); 32 C.F.R. 516.13 (listing contact information for those seeking assistance or information concerning service of process overseas); 32 C.F.R. § 720.20(a)(2) (Navy policies governing service of out-of-state process).

106. *See* U.S. Dep't of State Flyer, *Service of Legal Documents Abroad* ¶ N (Sept. 2000) <http://travel.state.gov/law/service_general.html> (last visited Nov. 30, 2004).

107. *See supra* page 9.

108. *See* U.S. Dep't of Defense, Dir. 4525.6-M, DEPARTMENT OF DEFENSE POSTAL MANUAL at 17 (Aug. 15, 2002). Servicemembers in the Army or Air Force have Army Post Office (APO) addresses, and members of the Coast Guard, Navy, and Marine Corps. have Fleet Post Office (FPO) addresses. *See id.*

109. *Id.* ¶ C3.2.7.1.10, at 73.

110. *See id.* ¶ C3.2.5.8.1, at 71.

111. *See supra* note 10.

Table A

States that have ratified or acceded to the Hague Convention[112]

- Anguilla
- Antigua and Barbuda
- Argentina
- Aruba
- Bahamas
- Barbados
- Belarus
- Belgium
- Belize†
- Bermuda
- Botswana
- British Virgin Islands
- Bulgaria
- Canada
- Cayman Islands
- China
- Cyprus
- Czech Republic
- Denmark
- Djibouti (formerly Afars and Issas)†
- Egypt
- Estonia
- Falklands Islands
- Fiji†
- Finland
- France (incl. French Overseas Depts.)
- French Polynesia†
- Germany
- Gibraltar†
- Greece
- Guernsey
- Hong Kong Special Administrative Region
- Hungary‡
- Ireland
- Isle of Man
- Israel
- Italy
- Japan
- Jersey
- Korea, Republic of (South Korea)
- Kuwait
- Kiribati (formerly Gilbert Islands and Central and Southern Line Islands) †
- Latvia
- Lithuania
- Luxembourg
- Macau Special Administrative Region
- Malawi
- Mexico
- Montserrat
- Netherlands
- Nevis†
- Norway
- Pakistan
- Pitcairn
- Poland
- Portugal
- Romania‡
- Russian Federation
- St. Christopher (Kitts)
- St. Helena and Dependencies
- St. Lucia
- St. Vincent and the Grenadines†
- San Marino
- Seychelles
- Slovak Republic
- Slovenia
- Solomon Islands†
- Spain
- Sri Lanka
- Sweden
- Switzerland
- Turkey
- Turks and Caicos Islands
- Tuvalu (formerly Ellice Islands) †
- Ukraine
- United Kingdom of Great Britain and Northern Ireland
- United States (incl. Guam, Puerto Rico, and the Virgin Islands)
- Venezuela

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112. *See* Fed. R. Civ. P. 4, accompanying materials (listing parties to Convention and declarations of Contracting States).

† *See* U.S. Dep't of State flyer, *Hague Convention on the Serv. Abroad of Judicial and Extra-Judicial Documents in Civil and Comm. Matters* <http://travel.state.gov/law/hague_service.html> (last visited Nov. 30, 2004). The list assumes the Convention remains in force in countries that have achieved independence after it was extended to them, including Belize, Djibouti, Fiji, Kiribati, Nevis, St. Christopher, St. Lucia, St. Vincent and the Grenadines, Solomon Islands, and Tuvalu. *See id.*

‡ *See* Hague Conference on Private International Law, *Status Table: Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* <http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=17#nonmem> (last visited Nov. 30, 2004) (noting recent accession of Hungary and Romania; Convention enters into force in Hungary April 1, 2005).