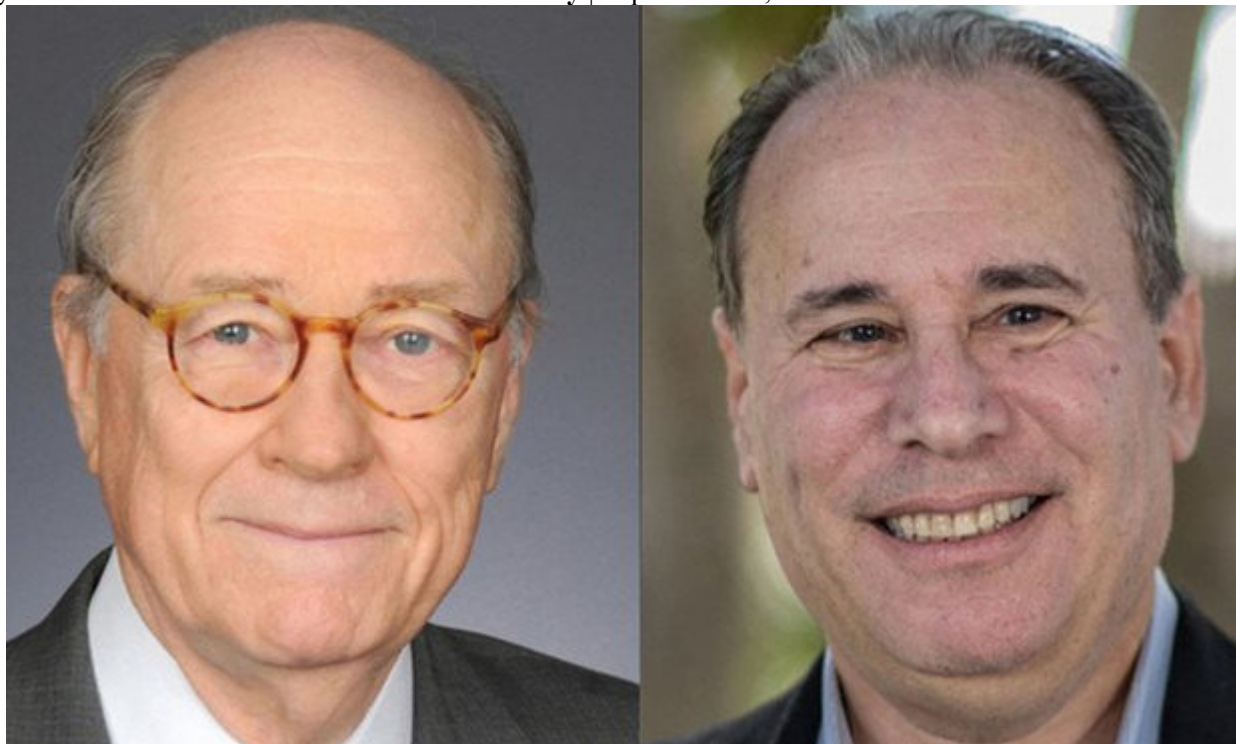


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Service by Electronic Means Under the Hague Service Convention

This article examines the issue of serving by electronic means under the Hague Convention, including whether email service is permitted in countries that have specifically invoked their right under the convention to object to service by mail.

By **Lawrence W. Newman and David Zaslow** | September 27, 2023 at 12:00 PM



According to the U.S. Supreme Court, compliance with the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the Hague Convention) is mandatory in all cases to which it applies. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 705 (1988). In this column, we look at the issue of serving by electronic means under the Hague Convention, including whether email service is permitted in countries that have specifically invoked their right under the convention to object to service by mail.

The backdrop for the discussion is Federal Rule of Civil Procedure 4, concerning service of process. More specifically, Rule 4(f) has three subsections setting forth the methods for serving individuals outside the United States.

The first, Rule 4(f)(1), is pursuant to internationally agreed means of service, such as the Hague Convention. The second, Rule 4(f)(2), sets forth available options (such as mail) when no international agreement is applicable or if the internationally agreed process methods are not intended to be exclusive. The third, Rule 4(f)(3), “authorizes the district court to approve other methods of service not prohibited by international agreements.”

Rule 4(h) further provides that service on corporations, partnerships or associations outside the United States may be made under the manners in Rule 4(f) for serving individuals, other than personal delivery.

As far as the [Hague Convention](#) is concerned, its main feature is service through a Central Authority (a government-designated agency) in the receiving country. Of particular relevance for this column is Article 10, which provides, in relevant part: “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”

There have been many cases in which courts have been asked to authorize service by email under Rule 4(f)(3). While a plaintiff is not *required* to attempt service through the other provisions of Rule 4(f) before a court may order service pursuant to Rule 4(f)(3), some courts have required parties to show that they have reasonably attempted to effectuate service on the defendant(s) and that the circumstances are such that the district court’s intervention is necessary. *FTC v. PCCare247*, No. 12 Civ. 7189 (PAE), 2013 U.S. Dist. LEXIS 31969, at * 7 (S.D.N.Y. Mar. 7, 2013).

When Rule 4(f)(3) is used, courts require that the requested means of service (1) is not prohibited by international agreement; and (2) comports with constitutional notions of due process (which is generally interpreted to mean the method is reasonably calculated to apprise the defendants of the pendency of the action and afford them an opportunity to present their objections).

The logical question that arises concerns service under Rule 4(f)(3) in a country that, pursuant to Article 10 of the Hague Convention, has “objected” to service by mail (*i.e.*, “postal channels”). Should that objection be considered an objection to service by email as well, such that email service in that country should be considered “prohibited” by international agreement?

Until recently, a majority of courts have held that an Article 10 objection does not preclude service by email. Most of the decisions have not included a detailed analysis of the issue, with many essentially saying not much more than that the term “postal channels” does not explicitly encompass email, so any objection to service by postal channels does not bar service by email.

For example, a leading case in the U.S. District Court for the Southern District of New York espousing this position is *Sulzer Mixpac AG v. Medenstar Industries*, 312 F.R.D. 329, 330 (S.D.N.Y. 2015), which limited its analysis to essentially the following: “China’s objection to service by postal mail does not cover service by email, and these forms of communication differ in relevant respects. Email communications may be more reliable than long-distance postal communications, and the arrival of an email at its destination address may be more readily tracked.”

In *Sulzer*, the court was also influenced by the fact that plaintiff had timely attempted service through the Hague Convention and made multiple queries to the Chinese Central Authority, but, eight months after submitting materials, had no indication of when service might be effectuated.

In a case concerning service in Turkey, which had also opted out of mail service under Article 10, the court allowed service by email and through social networks, saying: “Although Turkey has objected to the means listed in Article 10, its objection is specifically limited to the enumerated means of service in Article 10. Where a signatory nation objects to the methods of service listed in Article 10, the court can order alternative methods of service not explicitly stated in Article 10.” *WhosHere v. Orun*, No. 1:13-cv-00526-AJT-TRJ, 2014 U.S. Dist. LEXIS 22084, at * 9 (E.D. Va. Feb. 20, 2014).

Similarly, in *PCCare247*, 2013 U.S. Dist. LEXIS 31969, the court ruled, without significant legal analysis, that service by email and through social networks was valid in India, notwithstanding India’s objection to mail service under Article 10.

In contrast, in *Smart Study v. Acuteye-US, et al.*, 620 F. Supp. 3d 1382 (S.D.N.Y. 2021), a case concerning a request to make alternative service by email in China, U.S. District Judge Gregory Woods undertook a detailed analysis of the issue.

One argument on which he disagreed with many other opinions concerned the conclusion one should reach from the Hague Convention’s specifically allowing countries to object to service by “postal channels,” through “judicial officers,” or by “diplomatic and consular agents.” Many courts have concluded that a method not prohibited by Article 10 should be considered a proper means of service. But the district court in *Smart Study* rejected this logic, saying that the Supreme Court’s convention decisions establish that the purpose of the convention to “set forth simple and certain methods of service that can be used to serve foreign litigant,” which would be contravened by an inference that “the convention’s silence as to a particular method equates to an implied permission to use virtually *any* method not proscribed by the Convention.”

The court explained, “If the convention lays out specific means of service, countries can make specific objections to those means of service—just as a country can object to service by postal channels by objecting to Article 10(a). But if the convention’s silence as to a method of service implicitly authorizes that service, there would be no ready way to object to that method of service. Indeed, there would nothing affirmative to object to.”

Judge Woods also dug deeply into Chinese law on service of process, including seeking advice on Chinese law from Benjamin Liebman, the director of Columbia Law School’s Hong Yen Chang Center for Chinese Legal Studies, regarding whether service via email by foreign litigants on individuals located in China is prohibited by Chinese law.

Professor Liebman, along with Geoffrey Sant, a partner and co-chair of Pillsbury Winthrop Shaw Pittman’s China practice, provided an amicus brief in which they brought to the court’s attention recent guidance from the Supreme People’s Court of China, stating that it presumed a country that has objected to service by mail under Article 10 would also not allow service by email. Thus, the guidance provided, for purposes of service under the Hague Convention for cases brought in China, the Chinese courts will not use electronic service.

Judge Woods stated that this guidance provides significant support for the view that China’s objection to service by postal channels would preclude service by email in China under the Hague Convention.

In addition, it was clear to Judge Woods that, under Chinese law, a foreign party is in fact prohibited from serving defendants located in China by email. In lawsuits in China, it is the court that serves documents on litigants. Furthermore, Article 284 of the People’s Republic of China Civil Procedure Law expressly provides that, subject to exceptions not applicable to the case before the court, “no foreign agency or individual may serve documents or collect evidence within the territory of the People’s Republic of China without the consent of the in-charge authorities.”

Judge Woods also rejected the plaintiff’s argument that service under Rule 4(f)(3) should be permitted given the “exigent” circumstances the plaintiff faced. He held that he did not have to determine whether the request was truly urgent because it does not matter, as there was no exigent circumstances exception in Rule 4(f)(3).

A very recent case in the Southern District of New York, *Safavieh Intl v. Chengdu Junsen Fengrui Tech.*, No. 23 Civ. 22023 U.S. Dist. LEXIS 102843 (S.D.N.Y. June 23, 2013), said that it was following *Smart Study* and noted that many other courts in the U.S. Court of Appeals for the Second Circuit had done so since the decision was issued. It explained that “It seems beyond the remit of this court, and against the principles of international comity, to decide that Chinese defendants can be served by email simply because an international treaty does not mention this post-treaty technological development—especially given China’s recent pronouncement that the method is impermissible.”

The *Safavieh Intl* court made another important point as well. At least in the Second Circuit, the Hague Convention applies only where the defendant's address is "known." Therefore, if, after making the necessary effort, the plaintiff was able to convince the court that reasonable diligence had failed to uncover a legitimate physical address in China for the defendants, then the plaintiff would be free to renew its application for leave to effect service via email.

Under those circumstances, a court may authorize alternative service under Rule 4(f)(3) so long as the ordered means of service (1) is not prohibited by international agreement (which it would not be because the Hague Convention would not apply); and (2) comports with constitutional notions of due process.

Three final points. First, despite the focus in this column on recent cases that have held that service by email is not permitted in countries that objected to service by mail, there are many courts that do permit it.

Second, the *Smart Study* court made the salient observation that many Hague Convention cases are unopposed. It follows that courts are therefore often unlikely to be alerted to authority that questions the right to use email service under local law.

Judge Woods sought that information through an amicus brief and then based his decision on two grounds: (1) a reading of the Hague Convention that the specific methods of service referred to in the Convention are exclusive, and any methods not explicitly authorized are forbidden, and (2) service by a foreign litigant through email is prohibited by Chinese law. Will other courts follow Judge Woods's lead and seek information about the propriety of email service under the relevant local law?

Third, the issue before the court in *Smart Study* was service by email. However, the court's reasoning would seem to lead to the conclusion that service by X (formerly Twitter), Facebook or other such electronic means would likewise not be permitted in China (at least not without attempts to go through the Ministry of Justice).

It will be interesting to see if courts extend the *Smart Study* decision beyond service by email, both for China and perhaps other countries that have opted out of Article 10.

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