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Southern District Civil Practice Roundup

Expert Analysis

# Service of Process by Email On Defendants Located Outside the U.S.

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A plaintiff seeking to serve an individual or organizational defendant located overseas can face substantial, sometimes insurmountable logistical challenges. Service of process on a defendant outside the United States is governed by a range of laws and treaties, including, most importantly the 1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Convention), which often requires use of the foreign government's Central Authority to effectuate service. Although service under the Hague Convention works well in some instances, depending on the government in question, it can be unreliable and often entails extensive delays. Some governments are openly uncooperative and unwilling to facilitate service of process in connection with an action brought in a U.S. court.

Several recent decisions from judges in the Southern District of New York have permitted plaintiffs frustrated by elusive defendants or uncooperative foreign governments to serve defendants through email under Federal Rule of Civil Procedure 4(f)(3), providing a modern-day solution to an age-old problem.

### Treaties and Rules

Federal Rule of Civil Procedure 4(f) governs service of process in a foreign country in cases brought in federal court. Rule 4(f)(1) provides for service by any internationally agreed means reasonably calculated to give notice. The United States is a party to two international treaties on service of process: the Hague Convention and the Inter-American Convention on Letters Rogatory and its Additional Protocol. The most commonly used method for international service is the Hague Convention, which since 1965 has provided a simplified means for cross-border service of legal documents, requiring each contracting state to designate a central authority to accept incoming requests for service. The Hague Convention also provides other potential methods of service, including through international postal channels; however, signatories to the Hague Convention may opt out of any of the specified forms of service.

Rule 4(f)(2) provides for service in certain circumstances: (A) by a method used under the foreign country's law for service in its own courts; (B) as the foreign authority directs in response to a letter rogatory or letter of request; or (C) where not prohibited by the country in question, by: (i) personal delivery; or (ii) through any form of mail that the clerk addresses and that requires a signed receipt.

> Decisions in the Southern District have permitted plaintiffs to serve defendants through email under Federal Rule of Civil Procedure 4(f)(3).

Finally, Rule 4(f)(3) allows U.S. courts to order service by any other means that are not prohibited by international agreement.

### Recent Decisions

Southern District Judge Jed S. Rakoff issued a decision late last year in *Sulzer Mixpac AG v. Medenstar Industries Co.*,[1] authorizing service by alternative means under Rule 4(f)(3). In that action, plaintiff Sulzer Mixpac, a Swiss corporation, brought suit asserting trademark, patent and unfair competition claims against Medenstar Industries, a Chinese entity. Sulzer Mixpac had sought for months to serve Medenstar through the Hague Convention without success. When, after more than seven months, it was informed by the Chinese Central Authority that its request was "pending in the court system," plaintiff sought leave under Rule 4(f)(3) to serve the defendant (1) through electronic mail to the contact email address listed on the defendant company's website, and (2) through international mail to the address listed on the defendant company's website.[2]

### Threshold Requirements

Judge Rakoff began his analysis with the observation that the decision whether to permit alternative service under Rule 4(f)(3) is committed to the sound discretion of the court, and that Rule 4(f)(3) is "neither a last resort nor extraordinary relief. It is merely one means among several which enables service of process on an international defendant."[3] This holding echoes the approach of other judges in the Southern District of New York,[4] as well as the Advisory Committee notes to Rule 4(f)(3) which suggest that in cases of "urgency," Rule 4(f)(3) may allow courts to order a "special method of service" where other methods of service have not been attempted or completed.[5]

Notwithstanding that 4(f)(3) theoretically can be invoked before other methods have been tried, Judge Rakoff noted that service under Rule 4(f)(3) must comport with due process, and that courts in the Southern District of New York "generally impose two additional threshold requirements before authorizing service under Rule 4(f)(3): (1) a showing that the plaintiff has reasonably attempted to effectuate service on the defendant, and (2) a showing that the circumstances are such that the court's intervention is necessary."[6]

### Postal Channels

Turning first to plaintiff's request for leave to serve via international postal mail, Judge Rakoff declined to authorize service by regular mail, holding that such service was "at least arguably" prohibited by international agreement, and therefore impermissible under Rule 4(f)(3).[7] Specifically, Article 10 of the Hague Convention allows judicial documents to be sent via postal

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channels to persons abroad, provided that the country of destination does not object to that method of service.

The People's Republic of China has objected to the methods of service set out in Article 10 of the Hague Convention, including service via mail. Citing the Supreme Court decision in *Volkswagenwerk Aktiengesellschaft v. Schlunk* that "compliance with the [Hague] Convention is mandatory in all cases to which it applies,"[8] Judge Rakoff concluded that service via international mail to China was "prohibited by international agreement" and thus unavailable to the plaintiff.[9]

### Email

Judge Rakoff went on to find that China's objection to service by regular mail did not extend to service by email—the second method of alternative service covered by plaintiff's request. He noted that courts are divided on the question of whether a country's objection to service by regular mail under Article 10 precludes service via email. Although some courts have held that if a nation objects to service through postal channels, that objection applies to service via email as well,[10] Rakoff found more persuasive the reasoning of other courts, who "have declined to extend a countries' objections to specific forms of service permitted by Article 10 …, such as postal mail, to service by alternative means, including email."[11]

Judge Rakoff concluded that China's objection to service by postal mail did not encompass service via email. He found that postal and email communication "differ in relevant respects," and that email communications may be more reliable than postal communications, and the receipt of email communications may be more readily tracked.[12]

In holding that email service is different from service by regular mail, and thus not subsumed within an objection under the Hague Convention to service through postal channels, Judge Rakoff joins several other judges from the Southern District of New York who have permitted plaintiffs to exploit a gap in the scope of the Hague Convention created by technological advancement since the Convention was ratified. As Judge John F. Keenan observed in *U.S. v. Besneli*, "given that the Convention was ratified in 1965, email would not have been contemplated by the signatories."[13] The majority view, and the unanimous view in the Southern District, is thus that email is simply beyond the scope of the Hague Convention: Because Article 10 does not speak to service by email or through other electronic means, objections to service in accordance with Article 10 are similarly circumscribed.

### Receiving by Email

Despite the lack of strict requirements for invocation of Rule 4(f)(3), Judge Rakoff observed that "'[a]s a general matter, in those cases where service by email has been approved, the movant supplied the Court with some facts indicating that the person to be served would be likely to receive the summons and complaint at the given email address.'"[14] He concluded in this case that plaintiff had made the required showing, holding that service to the email address listed on the defendant's website was "'reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'"[15] He reasoned that the email address in question was listed prominently on the defendant's Internet homepage, and that the defendant presumably relied at least partially on contact through the listed website to conduct overseas business, making it reasonable to expect defendant to learn of the suit against it through this email address.

Although Rakoff concluded that service to the email address on the defendant's website was sufficient to satisfy due process notice requirements, in other circumstances, judges in the Southern District of New York have required more. In the most recent decision in *Fisher v. Petr Konchalovsky Foundation*,[16] Judge Alison J. Nathan allowed service to an email address that the defendant had recently used to communicate with plaintiff's counsel.

> Judge Rakoff found that postal and email communication "differ in relevant respects," and that email communications may be more reliable than postal communications, and the receipt of email communications may be more readily tracked.

In *Besneli*, Judge Keenan also allowed service to an email address through which the parties had communicated in the past. Additionally, Judge Keenan required service by publication, holding that "[s]ervice by publication will serve as a sensible set of suspenders to go along with the belt provided by email."[17] Finally, in a decision filed last July in *NYKCool A.B. v. Pacific International Services*, Judge Lewis A. Kaplan found service insufficient where the email was connected to a website associated with a defendant's charitable organization.[18] Drawing a distinction between email addresses used for business communications and email addresses only used as an informal means of accepting requests for information, Judge Kaplan found that the plaintiff's attempt to serve the defendant via email in *NYKCool* was not reasonably calculated to provide the defendant with notice of the claims against him.[19]

### Conclusion

Rule 4(f)(3) can provide a useful avenue for international service when other means are unavailing. The decision by courts to allow service via email can eliminate lengthy delays that plaintiffs can face, particularly when foreign countries insist on cumbersome procedures or withhold assistance altogether. Moreover, as Judge Rakoff explained, email is in many respects a more reliable and trackable means than postal communication.[20] One wonders, however, how long it will take for countries that have objected to service through postal channels to interpose formal objections to international service by electronic means.

1. 312 F.R.D. 329 (S.D.N.Y. 2015) (Rakoff, J.).

2. Id. at 330.

3. Id. (quoting *Advanced Aerofoil Techs., AG v. Todaro*, 2012 WL 299959, at *1 (S.D.N.Y. Jan. 31, 2012) (Carter, J.)).

4. See *U.S. v. Besneli*, 2015 WL 4755533, at *1 (S.D.N.Y. Aug. 12, 2015) (Keenan, J.); *AMTO, LLC v. Bedford Asset Mgmt.*, 2015 WL 3457452, at *4 (S.D.N.Y. June 1, 2015) (Karas, J.); *NYKCool A.B. v. Pac. Int'l Servs.*, 66 F.Supp.3d 385, 390 (S.D.N.Y. 2014) (Kaplan, J.); *S.E.C. v. Anticevic*, 2009 WL 361739, at *3 (S.D.N.Y. Feb. 13, 2009) (Wood, J.).

5. Fed. R. Civ. P. 4 Advisory Committee's note to 1993 amendment.

6. 312 F.R.D. at 331 (quoting *Devi v. Rajapaska*, 2012 WL 309605, at *1 (S.D.N.Y. Jan. 31, 2012) (Buchwald, J.)).

7. Id.

8. 486 U.S. 694, 705 (1988).

9. 312 F.R.D. at 331 (quoting Fed. R. Civ. P. 4(f)(3)).

10. Id. (citing *Agha v. Jacobs*, 2008 WL 2051061, at *1–2 (N.D.Cal. May 13, 2008); *Jian Zhang v. Baidu.com*, 293 F.R.D. 508, 515 n. 2 (S.D.N.Y. 2013) (Furman, J.)).

11. Id. at 331-32 (citing *F.T.C. v. PCCare247*, 2013 WL 841037, at *3–*4 (S.D.N.Y. March 7, 2013) (Engelmayer, J.); *Gurung v. Malhotra*, 279 F.R.D. 215, 219–20 (S.D.N.Y. 2011) (Marrero, J.); *S.E.C. v. Anticevic*, 2009 WL 361739, at *4; *In re S. African Apartheid Litig.*, 643 F.Supp.2d 423, 434 (S.D.N.Y. 2009) (Scheindlin, J.)).

12. Id. at 332.

13. 2015 WL 4755533, at *2; see also *Fisher v. Petr Konchalovsky Found.*, 2016 WL 1047394, at *2 (S.D.N.Y. Mar. 10, 2016) (Nathan, J.); *AMTO, LLC v. Bedford Asset Mgmt.*, 2015 WL 3457452, at *7.

14. 312 F.R.D. at 331 (quoting *Philip Morris USA Inc. v. Veles* Ltd., 2007 WL 725412 at *2 (S.D.N.Y. March 12, 2007) (Daniels, J)).

15. Id. at 332 (quoting *NYKCool A.B. v. Pac. Int'l Servs.*, 66 F.Supp.3d at 391).

16. 2016 WL 1047394.

17. 2015 WL 4755533, at *2.

18. 66 F.Supp.3d at 391.

19. Noting that the defendant had actual knowledge of the lawsuit, Judge Kaplan ordered service via email on the attorneys who had appeared on defendant's behalf. Id. at 391-92.

20. 312 F.R.D. at 332.