

# THE ONE THAT ALMOST GOT AWAY:

Using The  
Hague Convention  
To *“Hook And Reel In”*  
Foreign Nationals  
Living Abroad

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Service of a Summons (or Rule 2004 Subpoena) on a foreign national living abroad can be a challenging, time consuming and expensive process. If these targets have not submitted themselves to the jurisdiction of the court by appearing and actively participating in the case, a trustee must determine what methods of service are authorized under the rules of procedure. Unfortunately, these targets cannot be served by first class mail because Bankruptcy Rule 7004(b) limits this method to service “within the United States”.<sup>1</sup> Instead, Federal Rule 4(f) establishes the permissible methods of service on individuals in foreign countries and states as follows:

(f) Serving an Individual in a Foreign Country. Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served at a place not within any judicial district of the United States:

(1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

(2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:

(A) as prescribed by the foreign country’s law for service in that country in an action in its courts of general jurisdiction;

(B) as the foreign authority directs in response to a letter rogatory or letter of request; or

(C) unless prohibited by the foreign country’s law, by:

(i) delivering a copy of the summons and of the complaint to the individual personally; or

(ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or

(3) by other means not prohibited by international agreement, as the court orders.<sup>2</sup>

In order to effectuate valid service under the Hague Service Convention (“Convention”), these initial steps should be followed:

1. Determine whether the country in which service is to be made is a party to the Convention. For a listing of the eighty two countries that are parties to the Hague Service Convention see: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=17>

2. Read the Convention. If you have not previously read the Convention, you will be surprised to see that it is concise and will provide answers to frequently asked questions. The full text of the Hague Service Convention can be found at [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=17](http://www.hcch.net/index_en.php?act=conventions.text&cid=17); and

3. Obtain a copy of the Hague Service Convention Request Form (“Request Form”) that must accompany a request pursuant

to Article 3 of the Convention. See <https://www.hcch.net/en/publications-and-studies/details4/?pid=6560&dtid=65>.

Instructions for completing the Request Form can be found here: <https://www.hcch.net/en/publications-and-studies/details4/?pid=27>.<sup>3</sup>

In general, the Request for Service Abroad of Judicial or Extrajudicial Documents (“Request”) must contain the following information:

1. Identity and address of the applicant;
2. Address of receiving authority (Central Authority for the Receiving State). See [http://www.hcch.net/index\\_en.php?act=conventions.authorities&cid=17](http://www.hcch.net/index_en.php?act=conventions.authorities&cid=17) for contact information and country specific practical information;
3. Identity and address of the person or entity to be served (include date of birth and other identifying information if available);
4. Check box “a”, “b” or “c” to indicate the method of service sought;
5. List all documents attached to the Request and all of the documents to be served;
6. “Certificate” page - Leave blank (to be completed by Receiving State’s Central Authority);
7. “Warning” page – recommended, but not required;
8. “Summary of Document to be Served” – complete all sections and include certified translations of all documents (in duplicate) for service in non-English speaking countries; and
9. Mail completed Request (in duplicate and on top of package) as well as copies of documents to be served (in duplicate along with any necessary translations) to the Central Authority in the Receiving State.<sup>4</sup>

The Convention does not establish a time frame for service. However, a trustee can follow-up concerning the status of service by contacting the Central Authority in the Receiving State after a reasonable period of time (e.g., 45-60 days). After service has been made, one copy of the documents served and the completed Certificate will be returned to you.

Of course, a trustee must perform the normal cost-benefit analysis in considering whether and how a foreign national living abroad should be served. A trustee can choose to complete the service paperwork herself or hire a company that specializes in service under the Hague Convention. If a do-it-yourself  
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#### About the Author



Robert F. Elgidedly is a seasoned litigator whose practice focuses on complex bankruptcy disputes and commercial litigation matters. In his bankruptcy practice, Robert regularly represents court-appointed fiduciaries in connection with Chapter 7 and Chapter 11 cases stemming from fraud and financial crimes. He has developed a reputation as a thorough and tenacious litigator who prosecutes fraudulent transfer, preference and professional liability claims with the objective of maximizing distributions to creditors. Robert also regularly represents debtors, creditors, creditors’ committees and liquidating trustees.

approach is chosen, a trustee should consult with counsel in the foreign jurisdiction to ensure all of the i's are dotted and all of the t's are crossed under local law. Otherwise, service may be substantially delayed and/or unsuccessful.

In the terms of "how" service should be attempted, trustees should keep in mind that there is no hierarchy among the subsections in Rule 4(f).<sup>5</sup> In other words, a litigant is not required to first exhaust the potential for service under the Hague Convention before a court may permit alternative service by "other means not prohibited by international agreement" under Rule 4(f)(3).<sup>6</sup> Citing to Rule 4(f) by analogy, the U.S. Bankruptcy Court for the Middle District of Florida recently held that a trustee's service of a Rule 2004 Subpoena by email on U.S. counsel for a foreign national living abroad was valid and effective because it was reasonably calculated to ensure the foreign national's receipt of the subpoena.<sup>7</sup> In *Procom*, the witness was the Debtor's sole owner, consented to entry of an Order for Relief, testified at the meeting of creditors, signed the schedules, and actively participated in the bankruptcy case through his U.S.-based counsel.<sup>8</sup> Under these circumstances, the court had no trouble concluding that the method of service employed was reasonably calculated to apprise the witness of the Rule 2004 Subpoena and give him a chance to respond.

As the foregoing demonstrates, a trustee can reach in her tackle box and use Federal Rule 4(f) and the Hague Service Convention to prevent a foreign national living abroad from being the one that got away. ♣

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#### ENDNOTES:

<sup>1</sup> Fed. R. Bankr. P. 7004(b).

<sup>2</sup> Fed. R. Civ. P. 4(f).

<sup>3</sup> The Convention of the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention), *done* Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163).

<sup>4</sup> Unless otherwise specified by the Receiving State's Central Authority (see practical information provided at link in #2 above), the applicant does not have to include payment with the Request. Under Article 12 of the Convention, the services performed by the Central Authority are free. However, you may be billed for expenses incurred by the foreign judicial official or other competent person to effect service. The Central Authority will inform you of any charges and will specify the manner of payment. It is important for these expenses to be paid promptly.

<sup>5</sup> See *Wash. State Inv. Bd. v. Odebrecht S.A.*, No. 17 Civ. 8118 (PGG), 2018 WL 6253877, at \*3 (S.D.N.Y. Sept. 21, 2018); accord *In re GLG Life Tech Corp. Sec. Litig.*, 287 F.R.D. 262, 265 (S.D.N.Y. 2012); *Advanced Aerofoil Techs., AG v. Todaro*, No. 11 Civ. 9505(ALC), 2012 WL 299959, at \*1 (S.D.N.Y. Jan. 31, 2012). "[C]ourt-directed service under Rule 4(f)(3) is as favored as service under Rule 4(f)(1)," *GLG Life Tech*, 287 F.R.D. at 265 (quoting *Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1015 (9th Cir. 2002), and "[a] plaintiff is not required to attempt service through the other provisions of Rule 4(f) before the Court may order service pursuant to Rule 4(f)

(3)." *S.E.C. v. Anticevic*, No. 05 CV 6991(KMW), 2009 WL 361739, at \*3 (S.D.N.Y. Feb. 13, 2009); see also *Madu, Edozie & Madu, P.C. v. Socketworks Ltd. Nigeria*, 265 F.R.D. 106, 115 (S.D.N.Y. 2010) ("Service of process under Rule 4(f)(3) is neither a last resort nor extraordinary relief.").

<sup>6</sup> *GLG Life Tech*, 287 F.R.D. at 266.

<sup>7</sup> See *In re Procom America LLC*, 638 B.R. 634 (Bankr. M.D. Fla. 2022).

<sup>8</sup> *Id.* at 639 and 644.

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reach your hand to the other side. Allow the other side to save face and walk away with dignity.

What are some tips on how to deal with vexatious or uncivil people? Remember, incivility results when a lawyer erroneously equates aggressiveness with advocacy. They're not the same thing. Being overly aggressive and discourteous in dealings with others helps nobody. Always return phone calls/email messages even if you are not fond of the opposing party or their counsel. If emailing, do not be a keyboard warrior – do not use all capitals, ad hominem attacks or any inflammatory language. Always be courteous and always confer with the other side prior to any contested matter. If you are dealing with opposing counsel who is unprofessional and discourteous, be sure to communicate directly with opposing counsel to convey your concerns; a face-to-face meeting may be needed. Try to understand what is motivating the attorney and try to reason with them. Do not reply in anger or with like-kind aggression. Wait and send prepared responses. If the behavior is really bad or ethical violations occurred, alert your AUST and consider filing a Rule 9011 Motion, if one is appropriate. ♣

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