

ARTICLE

PRACTICE AND PROCEDURE

THE HAGUE CONVENTION ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL AND COMMERCIAL MATTERS¹

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On June 4, 1994, the Hague Convention entered into force for Ireland. The Convention was signed on behalf of Ireland on October 20, 1989. It was incorporated into the procedural law of Ireland by two statutory instruments a short time later, which amended the Superior Court Rules and the District Court Rules.² No changes have yet been made to the Circuit Court Rules. This has led to the anomalous position in the Circuit Court whereby the provisions of the Hague Convention are expressed by statute to be applicable in Brussels Convention matters³ but are not applicable in other matters.⁴ This anomaly is examined later in this article.

The question arises as to whether the Convention has been validly incorporated into Irish law. Irish law holds to the dualist system of municipal and international law. Each system of law, both municipal and international exists separately and cannot purport to have an effect on, or overrule, the other. Before a treaty can be rendered applicable directly within the state, an intermediate stage after ratification and before domestic operation must be undertaken. Otherwise the executive would be able to legislate without the legislature. Whilst it is clear that Ireland must lay every international agreement to which it becomes a party before Dáil Éireann, a second stage is necessary before that agreement becomes part of Irish law.

Under Article 29(6) no international agreement may become part of the domestic law of Ireland save as may be determined by the Oireachtas. It is dubious whether the making of a statutory instrument by the Rules of the Superior Court Committee can be said to be a valid incorporation of the Hague Convention into Irish law. To incorporate the Convention into Irish

law, the proper course would have been to pass appropriate legislation⁵.

The incorporation of the Convention has led to changes to Irish practice and procedure, including a system for ease of recognition of foreign service. Fundamental issues arise as to whether these changes have been properly implemented. Questions arise also as to how the Rules of the Superior Court Committee can confer jurisdiction on the Master of the High Court in relation to service in foreign proceedings, as the powers given to the Rules Committee do not extend to foreign proceedings. The statutory basis for the purported exercise of this jurisdiction is doubtful.

In relation to service abroad of Irish proceedings, the conferral of jurisdiction on the Master of the High Court is, it is submitted, *ultra vires* the powers given to the Rules of the Superior Court Committee by section 14(3) of the Courts (Supplemental Provisions) Act 1961 to confer jurisdiction on the Master of the High Court. This arises because the Rules Committee is given power by that subsection to confer jurisdiction on the Master only in uncontested cases. No system can be set up for

distinguishing between contested and uncontested cases in relation to service. At present the Master has no jurisdiction in relation to *inter partes* service orders unless this is expressly conferred by statute, e.g. under the Settled Land Acts.⁶ However, additional powers may be given to him by the Court and Court Officers Act 1995 which may solve this problem.⁷

Moreover, it is difficult to see how the District Court Rules Committee has power to confer any jurisdiction on the Master of the High Court. The statutory basis for the purported exercise of that jurisdiction is doubtful.

Furthermore, effective incorporation of the Convention requires changes to substantive Irish law as well as alterations to domestic practice and procedure. This cannot properly be effected by merely altering rules of court, as these cannot alter substantive rules of law.⁸ The Convention should have been implemented by means of an Act of the Oireachtas which would have facilitated changes not merely to Irish practice and procedure, but also changes to substantive Irish law which would have given full effect to the Convention.

The primary focus of this article are the Rules of the Superior Courts which seek to give effect to the provisions of the Convention. Where relevant, reference is made to the provisions of the District Court Rules. The article first considers the Convention as adopted, its mode of incorporation into Irish law, the relevant provisions of the Superior Court amendments, its inter-relationship with the Brussels Convention and the current situation in the Circuit Court.

BACKGROUND TO THE CONVENTION

The Convention resulted from the Tenth Session of the Hague Conference on Private International Law in 1964. It was passed unanimously by all 23 countries

1 Treaty Series No. 17 of 1994

2 A new Ord. 11B and Ord. 121A were inserted into the Superior Court Rules by S.I. No. 101 of 1994; A new set of District Court (Service Abroad of Documents in Civil or Commercial matters) Rules, 1994 was enacted by S.I. No. 120 of 1990.

3 Due to Protocol IV of the Brussels Convention, which is part of the First

Schedule to the Jurisdiction and Enforcement of Judgments (European Communities) Act 1988.

4 Due to the combined provisions of Ord. 59, r. 14 of the Circuit Court Rules and the lack of any amendments to the Circuit Court Rules.

5 See Kelly, Hogan and White *The Irish Constitution* (3rd. ed., 1994) p. 295 fn. 3

6 Sixteenth Interim Report of the Committee on Court Practice and Procedure (1972) p.8

7 S.25

8 See s.36 of the Courts of Justice Act 1924 and Henchy J. in *People (Director of Public Prosecutions) v. Quilligan (No.2)* [1989] I.R. 46 at 53

represented at the session, which included Ireland.⁹ It came into force following the deposit of the third instrument of ratification of it¹⁰ on November 15, 1965. The Convention is unusual in that it provides, by Article 28(2), that non-members of the Conference could only join if no objection is interposed by any state then party to the Convention. One of the drafters of the Convention records the reason for this provision as the restriction of the application of the Convention to states whose procedural standards meet those of the members of the original Conference.¹¹

OBJECT OF THE CONVENTION

The object of the Convention was to provide a system whereby service of judicial documents of one country, in another, would be greatly simplified. It further seeks to ensure that proof of service has been effected. It sets out to achieve these twin aims whilst ensuring that actual notice of the document has been brought to the recipient in each case in sufficient time to enable him to defend the action.

It is intended to achieve these objectives by laying down a procedure to follow in each circumstance which guarantees acceptance of the fact that service has been properly effected. This thereby removes issues as to whether or not service has been properly carried out in the country addressed. It is also intended to avoid costly and complex issues of fact concerning foreign law and whether service has been properly effected in accordance with the relevant foreign law.

To this end, the Convention provides for a government sponsored "Central Authority", which will undertake responsibility for the service of papers emanating from countries which are signatories to the Convention. In Ireland, the Master of the High Court has been designated the Central Authority.

Whether or not an applicant for service utilises the foreign Central Authority in ensuring service is effected in the foreign jurisdiction is a matter of choice. Articles 9 to 11 of

the Convention permit wide use of alternative channels for the transmission of the documents for the purpose of service except to the extent that a particular country formally objects to a particular method. The effect of Article 19 of the Convention is to leave unimpaired any internal legislation in the state of destination which may authorise channels other than those provided in the Convention.

The Convention does not affect the forms of service which prevail in Contracting States. The forms of service which apply in these states in respect of domestic actions will apply. Where a document is transmitted for service abroad, the Convention applies. The main change effected by the Convention occurred in many continental countries where it led to the removal of the previously used system of *notification au parquet* to serve parties abroad. This system permitted the plaintiff to serve process merely by delivery to a local court official. Diplomatic channels were then used to try to give notice to the defendant abroad, but failure to do so did not invalidate the service.¹²

LIMITS

The 1965 Hague Convention is only applicable to civil or commercial matters. This phrase has received a generous interpretation by the Central Authority in most Contracting States.¹³ This assists defendants as well as plaintiffs as it ensures they have notice of the relevant proceedings.

INTERRELATIONSHIP WITH THE BRUSSELS CONVENTION

One important point is the interrelationship between this Convention and that other important Convention applicable to civil and commercial matters – the Brussels Convention on the Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters. Under the Annexed Protocol to the Brussels and Lugano Conventions, it is provided by Article IV:

"Judicial and extrajudicial documents drawn up in one Contracting State

which have to be served on persons in another Contracting State shall be transmitted in accordance with the procedures laid down in the conventions and agreements concluded between the Contracting States."

Each of the existing signatories of the E.C. Treaty is a party to the Hague Convention. Accordingly, where a court exercises jurisdiction pursuant to the Brussels and Lugano Conventions, the provisions of the Hague Convention govern the service of judicial and extrajudicial documents between Contracting States.

RATIFICATION BY IRELAND

On April 5, 1994 Ireland deposited its instrument of ratification of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial matters. Ireland, in depositing its instrument of ratification made an objection pursuant to Article 10 and made a declaration pursuant to Articles 3 and 15. These are set out below.

INCORPORATION INTO IRISH LAW

The Convention has been incorporated into Irish law by statutory instrument amending the previously existing rules of court. A similar method was used in England and Wales.¹⁴

i) Constitutional Issues

When the Law Reform Commission considered the Convention in its Report,¹⁵ it recommended that the view of the Attorney General be taken as to whether the Convention, being an international agreement, needed the approval of the Dáil prior to ratification. It drew attention to the provisions of Article 12 of the Convention which provides that the service of judicial documents coming from a Contracting State shall not give rise to any payment of taxes or costs for services rendered by the State addressed. Under the provisions of Article 29.5.2 of the Constitution, such approval by the Dáil is necessary where a charge is imposed upon public funds, except where the convention is of a technical and administrative character.¹⁶

9 Mr Patrick Terry, now with the Department of Equality and Law Reform attended on behalf of Ireland.

10 Art. 27(2)

11 Amram (1965) 29 A.J.I.L. 87 at 91

12 *Ibid.*

13 See the *Practical Handbook on the Operation of the Hague Convention of 15 November 1965 on the Service Abroad of*

Judicial and Extrajudicial Documents in Civil or Commercial Matters (1983) at p.30

14 See Ord. 69

15 LRC 22-1987 Report on the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965)

16 *In the State (Gilliland) v. Governor of Mountjoy Prison* [1987] I.R. 201, Finlay

C.J. stated that Article 29(5) envisaged three separate categories of international agreement, one of which were those of a technical or administrative character, which need neither to be laid before Dáil Éireann nor irrespective, apparently, of whether it involves any charge on public funds, do its terms require the approval of Dáil Éireann.

The Attorney General, in considering this issue, appears to have taken the view that the Convention is of a technical and administrative character. Although this may be correct on an interpretation of the Constitution, a number of points can be made. Most legal agreements may be said to be technical in nature. By definition anything which sets up a scheme of some sort is also administrative. As a result of the interpretation given by the Attorney General, very few international agreements or conventions will require either Dáil approval or to be laid before the Dáil – even if they impose a charge on public funds. In the present instance, this procedure has led to some oversight which may have been ameliorated by a more thorough airing of the relevant issues in the Dáil. This is dealt with further below.

However, a second issue arises under Article 29.6 of the Constitution. This is the issue as to whether the Hague Convention on Service Abroad requires to be consented to by Dáil Éireann before it can be incorporated into Irish law. It is submitted that it ought to have come before the Dáil before it could have been incorporated into Irish law. If this were not the case, it would amount to an abrogation of the legislative function by the executive if every international agreement ratified by the executive organ of the State automatically became incorporated into Irish law.

Article 29¹⁷ recognises the dualistic nature of the international and municipal systems of law in Irish law. There is a dual process before an international agreement can become part of Irish law. The first stage is that the State becomes a party to the international agreement. This process is called ratification and is governed in the internal Irish legal order by Article 29.5. The second stage requires that the international agreement be incorporated into Irish law. This part of the process is governed in the internal Irish legal order by Article 29.6. The determination of the Oireachtas is necessary before an international agreement becomes part of Irish law.

It is submitted that the making of rules by the Superior Courts Rules Committee does not and cannot amount to a determination by the Oireachtas as to whether an

international agreement can become part of domestic Irish law. The Oireachtas is given a function in relation to the international relations of the State by Article 29(6). It is debatable whether this function is one which can be delegated to a subordinate legislature in accordance with Article 15(2)(2) for determination of this issue by a subordinate body is not determination by the Oireachtas. The language of Article 29.6. is in absolutist terms. It provides:

“No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas.”

It is submitted that to seek to import the Hague Convention by means of a statutory instrument made as part of the Rules of the Superior Courts is unconstitutional.

ii) Legislative Issues

Under the scheme of amendments to the Rules of the Superior Courts which have been adopted, a separate regime has been adopted for domestic proceedings which require service abroad and for foreign proceedings for which service is required to be effected here.

(a) *Service in a Foreign Country.*¹⁸ In relation to the internal scheme which has been set up for incorporation of the Hague Convention, a number of oversights have occurred. These stem in the main from a failure to appreciate the fundamental distinction between domestic and international law and the need for appropriate incorporation measures to be followed. Several of the relevant legislative provisions which are applicable have been either ignored or disregarded. So too has the distinction, which runs throughout our law, between substantive legal matters and those which merely deal with practice and procedure, been ignored. The position has been further exacerbated by the failure to appreciate the nature of the original jurisdiction of the High Court. The original jurisdiction of the High Court applies only to Irish court matters. It does not extend to matters in aid of foreign proceedings unless this jurisdiction has been expressly conferred by statute.

The flaws in the scheme adopted result in the main from the recommendations put forward by the Law Reform Committee in the 1987 Report. In that Report it was recommended that the Convention be adopted into Irish law by amending the Rules of the Superior Courts. A similar method had been adopted in England and Wales.¹⁹ However, the legislative scheme subsisting in England is markedly different from that obtaining in Ireland and proper account was not taken of that fact.²⁰

In relation to domestic proceedings which require service abroad, Order 11B purports to give jurisdiction to the Master of the High Court, a practising solicitor, a county registrar and a District Court clerk to act as competent judicial officers for the purposes of the Convention.

Firstly, the Master of the High Court has no jurisdiction to make an order in respect of service *inter partes* except where he is given such power by a specific statute. This was accepted by the Committee on Court Practice and Procedure in 1972 in their Sixteenth Interim Report.²¹ They took the view that no residual power regarding service orders devolved on the Master of the High Court by section 31(3) of the 1924 Court Officers Act. Amendments have recently been made in the Court and Court Officers Act 1995 to amend the jurisdictional limits of the Master of the High Court.²² As such the Master of the High Court possesses no jurisdiction in relation to service orders generally unless power is otherwise conferred on him – no such power has been conferred.

Secondly, section 14(3) of the Courts (Supplemental Provisions) Act 1961 gives power to the Rules of the Superior Courts Committee to confer jurisdiction on the Master of the High Court only in relation to uncontested cases. It provides:

“(3) Rules of Court may, in relation to proceedings and matters (not being criminal proceedings or matters or matters relating to the liberty of the person) in the High Court and Supreme Court, authorise the Master of the High Court and other principal officers, within the meaning of the Courts Officers Acts 1926 to 1951, to exercise functions, powers and jurisdictions in uncontested cases and to take accounts,

17 Sub-articles 5 and 6

18 Ord. 11B

19 See Ord. 69 Supreme Court Practice (White Book).

20 See s.99(4) of the Supreme Court of Judicature (Constitution) Act 1925; Administration of Justice Act 1977.

21 p.8

22 S.25

conduct inquiries and make orders of an interlocutory nature."

As not all cases under the Hague Convention will be uncontested, this conferral of jurisdiction by the Superior Court Rules Committee is *ultra vires* their powers and invalid. It is submitted that section 25(3) of the Court and Court Officers Act 1995 further fails to ameliorate this deficiency as it does not deal with the jurisdiction of the Rules Committee to confer power on the Master of the High Court.

It must be mentioned at this juncture that section 36(ix) of the Courts of Justice Act 1924 apparently permits rules of court to be made by the Superior Court Rules Committee for "the adaption or modification of any statute that may be requisite for any of the purposes of this Act and all subsidiary matters". However, as Walsh J. stated in *Thompson v. Curry*²³ this power cannot be used to amend a statutory provision. In that case the court accepted the provision allegedly conferred power to modify or adapt an Act. However this reasoning is of doubtful validity if one follows the reasoning of the Supreme Court in cases such as *City View Press Ltd. v. AnCO*²⁴ for the power to modify or adapt legislation is one which cannot be validly delegated to the Rules Committee. Article 15.2.1 of the Constitution provides that the Dáil is the sole legislative authority.

(b) Service of Foreign Process in Ireland: In relation to the service of foreign process within the jurisdiction, a number of points may be made. The High Court has original jurisdiction in relation to Irish proceedings. However, it is submitted that a statute is required to give jurisdiction to the High Court in respect of foreign proceedings. This is what occurred in relation to the Brussels Convention, although that was part of our obligations as members of the E.C.

Similar points to those above may be made regarding the lack of power of the Superior Court Rules Committee to give jurisdiction to the Master of the High Court over contested proceedings and the lack of jurisdiction of the Master of the High Court over *inter partes* service orders.

(c) Form Adopted Generally: In

relation to the scheme adopted generally, several changes to substantive Irish law are required by the incorporation of the Convention. The jurisdiction of the Superior Court Rules Committee extends only to pleading, practice and procedure generally.²⁵ It does not extend to matters of substantive law, which can only be dealt with by statute under Article 15. A more appropriate method would have been to enact an Act of the Oireachtas to implement appropriate changes. The making of orders for substituted service, matters of status and default judgments required substantive law amendments.

OVERVIEW OF THE IRISH SCHEME

In depositing their instrument of ratification, Ireland designated the Master of the High Court as the Central Authority who will receive requests for service from other Contracting States.²⁶ As the Central Authority, the Master of the High Court ensures that the document is properly served, either in accordance with domestic forms of service, or in accordance with a particular method requested by the applicant, unless the particular method is incompatible with Irish law. Voluntary acceptance of service by the recipient dispenses with the need for formal service.²⁷ In any case where service has not been effected or a particular form of service has not been effected, the Central Authority may make an order for substituted service, following an application from the State Solicitor. A summary of the document to be served must also be served with the document itself²⁸ in the form laid down in the Convention. Where service of process can not be effected, the Central Authority may return the request for service stating the reasons why service has not been effected.²⁹

SERVICE OF FOREIGN PROCESS IN IRELAND

The Master of the High Court is the Central Authority for the receipt of requests for service coming from other Contracting States. However, a solicitor is also a competent person for effecting service in accordance with the Convention. This follows from the fact that Ireland, when depositing its instrument of ratification, made an

objection under Article 10, by which it objects to:

- i. the freedom under Article 10(b) of judicial officers, officials or other competent persons of the State of origin to effect service in Ireland of judicial documents directly to judicial officers, officials or other competent persons and
- ii. the freedom under Article 10(c) of any person interested in a judicial proceeding to effect service in Ireland of judicial documents directly through judicial officers, officials or other competent persons.

However this objection is not intended to preclude any person in another contracting State who is interested in a judicial proceeding or his lawyer, from effecting service in Ireland directly through a solicitor in Ireland.

This objection gives rise to two questions which have to be answered before the service of foreign process in Ireland is valid. The first is whether the mode of service followed is valid under the law of the State of origin. The second question which is important is the competency of the Irish official who effects service. Under the terms of this objection, there are only two officials who possess the necessary competence to effect service under the Convention in Ireland. These are the Central Authority and a solicitor. No one else is permitted to validly effect service in Ireland under the terms of the Convention. This has the effect that, although service may ultimately be valid according to the law of the State of origin, it is not good service for the purposes of the Convention.

This has the practical effect that any solicitor in Ireland can act as agent for a foreign solicitor so as to effect service in Ireland. However, it prevents town agents or legal services agents from validly effecting service in Ireland for a foreign firm in accordance with the Convention. Therefore any foreign firm of lawyers, in Germany for example, cannot utilise an Irish agent for the purpose of effecting service in Ireland, unless that Irish agent is a solicitor where it is desired to properly effect service in accordance with the Convention. This is an important limitation, for nowhere

23 [1970] I.R. 61

24 [1980] I.R. 381

25 S.36 of the Courts of Justice Act 1924

26 Under Art. 2

27 Art. 5. para. 2

28 Art. 5

29 Ord. 121A, r.3(9)b

is it explicitly stated. It arises by implication from the terms of the objection to the ratification of the Convention. Many foreign legal firms are unaware of this limitation and many, at present, seek to effect service in Ireland in accordance with the Convention through an agent of some sort. Arguably it would even prevent a foreign litigant in person in the state of origin from effecting personal service of his own action in Ireland in accordance with the Convention, for he would neither be a solicitor nor the Central Authority, who are the only competent persons to effect service in Ireland under the Convention. This limitation on the competency of persons to effect service in accordance with the Convention of foreign proceedings in Ireland should be explicitly stated in legislation.

Postal service is also a valid method of service under the Convention.³⁰ If the foreign country mandates postal service as part of its law then this is good service in Ireland for the purposes of the Convention. This is so even where a similar document would not be served by post under Irish law. This has the effect of weakening the protection to Irish defendants from being taken by surprise by a judgment registered abroad against them, as service will be deemed good even if the wrong address is used.

Where it is sought to effect service of foreign process in Ireland using the Central Authority it is necessary to lodge with the Central Authority a request which conforms to the form set out in the Annex together with the relevant proofs.³¹

- i. The request for service in duplicate. This should also contain, in the form attached to the Convention a summary of the document to be served;
- ii. The document to be served, or a copy of it,³² in duplicate. These should be translated into either the Irish language or English because of the power given to the Irish Central Authority to request translation under Article 5;
- iii. An undertaking to reimburse the costs of service.

A particular method may be requested by the applicant who desires service³³.

This will be given effect to by the Central Authority unless it is satisfied that the method requested is incompatible with the law of Ireland or the practice and procedure of "the Court".³⁴ Where a particular method of service is requested, but is incompatible with the law of Ireland or the practice and procedure of the State, it is provided that personal service shall be effected on the person sought to be served.³⁵ However this absolute rule is mitigated by the provisions of Order 121A, rule 3(9) which provides that the Central Authority, on the application of the Chief State Solicitor, may make such order for substituted service as appears necessary. This amounts to a change in the substantive law and, it is submitted, would require legislation. The Superior Court Rules Committee have no power to effect a change in the substantive law in this manner.³⁶

CERTIFICATES

Where a foreign legal document has been served in Ireland under the provisions of the Convention, the Master of the High Court is the appropriate authority for completion of certificates that the Convention has been complied with.³⁷ These must be completed in accordance with a model form provided under the Convention. This certificate states the document has been served and includes the method, the place and the date of service and the person to whom the document was delivered.³⁸ Where the document has not been served, the certificate shall set out the reasons which have prevented service. This certificate will form an essential proof of service in any subsequent application, where the document has been served abroad in accordance with the terms of the Hague Convention.

The Central Authority of the state of destination may refuse to comply with a request for service only if it deems that compliance would infringe its sovereignty or security.³⁹ No refusal is justified on the basis of want of jurisdiction of the requesting state.

SERVICE OF IRISH PROCESS ABROAD

Where it is sought to utilise the provisions of the Convention in order to effect service abroad of a judicial or

extrajudicial document, then the document must be forwarded to the Central Authority of the foreign state by a "judicial officer" in this state. A judicial officer is someone competent under the Convention to forward documents to the Central Authority of another State.⁴⁰ By Ireland's instrument of ratification it was declared that a practising solicitor, a County Registrar, a District Court Clerk and the Central Authority (the Master of the High Court) were the persons competent to deliver judicial and extrajudicial documents to another State under Article 3 of the Convention. This is further enacted into Irish law under the provisions of Order 11B, rule 2(3).

Use of either the Irish Central Authority or the foreign Central Authority is purely optional for the applicant for service under the Hague Convention. Articles 9 to 11 of the convention permit wide use of alternative channels for the transmission of the documents for the purpose of service except to the extent that a particular country objects to a particular method. There are several avenues open if an Irish solicitor wishes to serve a judicial or extrajudicial document abroad — absent the voluntary acceptance of the document by the recipient under Article 5(c), *for voluntary acceptance renders reference to the procedural mechanisms of the Convention unnecessary*.

A solicitor can either:

- i. seek the assistance of the office of the Master of the High Court to forward the document to the relevant Central Authority of the state of destination, where it will be served in accordance with the Convention;
- ii. forward the document to the foreign Central Authority of the state of destination with a request for service by it;
- iii. provided the state of destination does not object, enlist the assistance of the judicial officers, officials or other competent persons of the state of destination to effect service either through the judicial officers of Ireland,⁴¹ or of his own accord.⁴²
- iv. provided the state of destination

30 Art. 10(a)

31 Ord.121A, r.3(2)

32 Art. 3

33 Art. 5(b)

34 Presumably where a certain form of service is not part of the procedure of that court

generally, this will not preclude use of it in relation to service in aid of a foreign proceedings.

35 Ord. 121A, r. 3(4)

36 Section 36 of the Courts of Justice Act 1924

37 Ord.121A, r. 3(8)

38 Art. 6

39 Art. 13

40 See definition in Ord.11B, r. 1

41 Art. 10(b)

does not object and provided it is mandated by an Irish court, serve the documents through postal channels,⁴³ e.g. under the Circuit Court Rules;

FORMS OF PROCESS COVERED

The Convention applies to judicial and extrajudicial documents.⁴⁴ By Order 11(B)2, the method of service provided by that Order applies to the service of any summons, notice, document, citation, petition, affidavit, pleading, order or any form either issued pursuant to the Rules of the Superior Courts or lodged for service with a request to the Central Authority for service under the Convention.

Extrajudicial documents are, by nature, not connected with lawsuits. However they require the intervention of an "authority" of the State addressed. The inclusion of extrajudicial documents was included at the request of the experts of Ireland and the U.K. It had previously been the intention of the drafters to exclude documents emanating from private persons from the scope of the Convention. Examples of extrajudicial documents are demands for payment, notices to quit in connection with leaseholds, certain consents to adoption and protests in relation to bills of exchange but all on the condition that they emanate from an authority or from a process server. In both Ireland and England, certain of these documents could be served by a private person. In certain other countries the assistance of an appropriate authority is necessary where service is sought to be effected.

PROCEDURE – SERVICE ABROAD

Where it is sought to effect service abroad using the Central Authority it is necessary to lodge with the Central Authority:

- i. A request for service of the document and a copy in the form set out in the Annex to the Convention;
- ii. Two copies of the document to be served with an additional copy for each person to be served;
- iii. A translation of each document into the official language or one of the official languages of the State addressed unless the said document is already in one of the official languages of the State

addressed. It is important to note that this is a requirement of internal Irish law.

- iv. An undertaking to pay the costs of service;

The documents must be lodged by either a party to the proceedings or a competent judicial officer, as defined in the Convention.

A request for service in accordance with the terms of the Convention must conform with the form set out in the Annex to the Convention. The request must either;

- i. conform with a method of service prescribed by the internal law of the state of destination for service of documents in domestic actions upon person resident in the territory of the state of destination; or
- ii. if a particular method is requested by the applicant, this method must not be incompatible with the law of the State of destination⁴⁵;

Where the request complies with the necessary proofs and has been lodged by an appropriate person, then the documents will be forwarded to the Central Authority of the State where service is to be effected.⁴⁶

Where a solicitor wishes to forward the relevant process for service to the foreign Central Authority himself, reference should be made to the office of the Master of the High Court to find out the address of the relevant foreign Central Authority to which the document or process should be sent so as to ensure effective service. A full list is maintained. It is further important to check the list of objections which the state of destination has made in ratifying the Convention. This may affect the manner, mode or person who can effect service in the state of destination. A full list is maintained in the office of the Master of the High Court.

If a solicitor decides to effect service himself he needs to be aware of several of the provisions of the Convention and the manner in which the Convention has been incorporated into the law of the State where service is sought to be effected. The first requirement is that the solicitor be aware of the countries which are a party to the Hague Convention. The

Master of the High Court is obliged to maintain a list of all countries which have adopted the Convention together with the official languages of each and the address of the Central Authority in each country.⁴⁷ This list is available for inspection in the Central Office and copies are available on request. Reference should be made to this list to ascertain whether the country in which service is sought to be effected is a party to the Convention. At present all countries in the E.C. with the exception of Austria, almost all U.K. colonies, Canada, the U.S., Israel, China, Norway, the Czech and Slovak republics, Egypt, Cyprus, Turkey, Japan and Switzerland are parties to the Convention.

An important point to note where the recipient state is Germany is the number of different addresses to which process might be sent, owing to the internal delegation of the functions of the Central Authority under the Convention to each *land* under Article 18.

APPROVAL PROCEDURE

Where a solicitor wishes to effect service himself but wants to know if all the relevant documents have been properly included by him before forwarding them to the Central Authority of the State of destination, then there is an approval procedure set out in Order 11B, rule 3(3) whereby the Central Authority may certify that the necessary conditions for transmission to the Central Authority of the state of destination have been complied with. This is a novel feature of the Irish rules which is not included in the original Convention. Where the provisions have not been complied with, the Central Authority will inform the applicant and specify the objections to the request.⁴⁸

OTHER METHODS OF SERVICE

A permissive provision is included in Article 8 of the Convention which allows service by the state of origin upon persons abroad, through its diplomatic or consular agents in the state of destination. This must be effected without compulsion. However a contracting State may declare it is opposed to this form of service unless the person to be served is a national of the State of origin of the document.

Article 9(1) also permits each

42 Art. 10(c)

43 Art. 10(a)

44 Art. 1

45 This was a Swiss proposal – see Graveson (1965) 14 I.C.L.Q. 528 at 540

46 Ord. 11B, r. 3(2)

47 Ord. 11B, r. 3(5)

48 Ord. 11B r.3(4)

contracting State to use consular channels to forward documents to the authorities of the state of destination if it so wishes. If exceptional circumstances so require, diplomatic channels may also be used by a Contracting State to forward the relevant judicial and extrajudicial documents to the state of destination.⁴⁹ There is also power given to any two Contracting States to stipulate channels of transmission other than those provided in the Convention.

JUDGMENT IN DEFAULT

Where judgment in default of appearance is sought to be obtained on the basis that service has been effected under Order 11B which incorporates the Hague Convention, it shall not be given until it is established that the defendant was served either in accordance with the internal law of the state of destination or by some other method provided for in the Convention in sufficient time to enable him to defend.⁵⁰ The application for leave to enter judgment will be with the leave of the court,⁵¹ and will be supported by the proceedings.⁵² Where the Central Authority of the destination state has been used to effect service, a certificate in the form set out in the Annex to the Convention should be adduced as proof that service has been properly effected.

When ratifying the Convention, Ireland made a declaration under Article 15 of the Convention that a judge in Ireland may give judgment even if no certificate of service or delivery had been received, provided that certain conditions were fulfilled. The text of Article 15 has been substantially incorporated into the Rules of the Superior Courts as part of Order 11B, rule 4(5). This states:

"Notwithstanding rule 4(1) the Court may give leave to enter judgment if no certificate of service or delivery has been received from the Central Authority of the State addressed, provided that

(a) The document was transmitted by one of the methods provided for in the Convention.

(b) A period of time (of not less than six months) considered adequate by the Court has elapsed since the transmission of the document.

(c) No certificate of any kind has been received and that every reasonable effort has been made to obtain it through the competent authorities of the State addressed."

Any provisional or protective measures in support of the judgment are automatically possible.

JUDGMENT IN DEFAULT AND BRUSSELS CONVENTION

Where service out has been effected under Order 11A, rule 2 as well as the defendant being served abroad, then the requirements of Order 11B, rule 4 and Order 13A which prescribes certain requirements for compliance with the Brussels Convention, are cumulative⁵³.

Article 20 of the Brussels Convention provides:

"Where a defendant domiciled in one Contracting State is sued in a court of another Contracting State and does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of this Convention.

The court shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.

The provisions of the foregoing paragraph shall be replaced by those of Article 15 of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, if the document instituting the proceedings or notice there of had to be transmitted abroad in accordance with that Convention."

Hereafter all documents served abroad under the Brussels and Lugano Conventions (except for service in

Austria) will in the future have to be served in accordance with the Hague Convention, as the provisions of the final paragraph will govern all such cases. Accordingly the provisions of Article 15 of the Hague Convention will govern the giving of judgment in default where jurisdiction has been founded on the Brussels Convention.⁵⁴

SETTING ASIDE A DEFAULT JUDGMENT

Where it is sought either to set aside or to extend time for appealing a judgment obtained in default, a court needs to be satisfied that:

- (a) the application was made within a reasonable time after the defendant had knowledge of the judgment, and
- (b) the defendant, without any fault on his part, where it is a judgment in default, did not have knowledge of the document in sufficient time to defend or, in the case of an appeal, did not have knowledge of the judgment in sufficient time to appeal, and
- (c) that the defendant has disclosed a *prima facie* defence to the action on the merits.⁵⁵

If satisfied of the above criteria, then the court may set aside the judgment or extend the time for appeal, on such terms and conditions as appear just.

One lacuna which is present in Irish law is the non-incorporation of the rule that judgments relating to matters of status or capacity of persons are not subject to the above rules. At the time of the drafting of the Convention, another Convention of matters relating to marriage and divorce was before the Conference and it was considered by the drafters that this provision should not apply to such matters.⁵⁶ This is the better view as it puts an end to uncertainty in such cases as decrees of divorce and nullity.⁵⁷ An amendment to exclude the application of this rule to family matters would be preferable. However, as this would involve matters relating to substantive law rather than mere matters of procedure, an Act of the Oireachtas is the appropriate method to proceed if seeking to ameliorate this deficiency.

49 Art. 9(2)

50 Ord. 11B, r. 4(2)

51 Ord. 11B, r. 4(3)

52 Ord. 11B, r. 4(4)

53 Ord. 11B, r. 4(1)

54 See Case 228/81 *Pendy Plastic Products BV v. Pluspunkt Handelsgesellschaft GmbH* [1982] E.C.R. 2733

55 Ord. 11B, r. 4(6)

56 Amram, above at n. 11

57 See *Graveson* (1965) 14 I.C.L.Q. 528 at 541

COSTS

The applicant for service is to pay the cost of the services of judicial officers or competent process servers. Where service is effected in aid of a foreign proceeding, then the process server will swear an affidavit of service which will include, where the cost of service exceeds the normal cost of effecting service, the costs actually incurred.⁵⁸ Where service is effected abroad, the costs incurred in effecting service are recoverable upon taxation as part of the normal costs incurred.

THE CIRCUIT COURT

To date no amendments have been made to the Circuit Court Rules so as to give effect to the Convention. Whilst it is submitted that this is not the appropriate course to follow so as to give effect to the Convention in that court, the present position is that the Hague Convention on Service Abroad can be utilised in the Circuit Court where matters relating to the Brussels Convention are being dealt with.

As the Circuit Court Rules already

possess rules dealing with service of documents, there is no room for the implication of the relevant High Court Rules which incorporate the Hague Convention under Circuit Court Rules.⁵⁹ However the provisions of section 3 and the First Schedule of the Jurisdiction of Courts and Enforcement of Judgments (European Communities) Act 1988 provides that the Hague Convention on Service Abroad shall have effect in Brussels and Lugano Conventions matters. As set out above, Article IV of the Annexed Protocol to the Brussels Convention provides that Conventions and agreements concluded between the Contracting States shall govern the transmission of judicial and extrajudicial documents. As the Hague Convention on Service Abroad is applicable in each E.C. State, save for Austria, it governs the transmission of all documents under the Brussels Convention. Accordingly it should be possible to utilise the provisions of the Hague Convention on Service Abroad to serve Circuit Court proceedings

where it is a Brussels Convention matter. This would ensure easy proof that service has been validly effected in the state of destination.

CONCLUSION

The appropriate course to seek to follow to give full and proper effect to the Hague Convention on Service Abroad is to pass an Act of the Oireachtas incorporating its provisions into Irish law. The mode of incorporation by amendments to the Superior Court Rules is seriously flawed. The present system, it is argued, is both unconstitutional and unlawful.

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