Article

Application of Article 15 of the Hague Service Convention 1965: When Can a Court Give a Judgment if Service of the BVI Proceedings is Unsuccessful?

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An aggrieved party which has started proceedings in the BVI must seek court permission to serve the claim form out of the jurisdiction on a foreign defendant. The most common method of service is via the Hague Service Convention[1].

An issue arises when the service has not yet taken place, but the twelve month time period for service of the claim form is about to expire. Although under the Eastern Caribbean Supreme Court Civil Procedural Rules 2000 ("ECSC CPR") the claimant may seek an extension of six months, any second extension may only be granted if there is evidence that the defendant is deliberately avoiding the service or there is "some other compelling reason" why the extension should be granted. The number of extensions that the claimant may get is not indefinite even if there exists no prescribed limit, as the question of abuse of process must arise at some point. This is particularly the case if there is some supporting interim relief granted in the meantime and the issuing Court is keen to know progress of the underlying claim. The question is whether in those circumstances the court may consider service effected and go on to give a judgment against a foreign defendant? We discuss the application of Article 15 of the Hague Service Convention which deals with circumstances when the defendant is avoiding the service and/or the service is taking excessive time.

In the English Court decision in *Punjab National Bank (International) Limited v Boris Shipping Limited & Ors*[2] the claimant applied for summary judgment against inter alia three defendants residing in India. The claimant arranged service of the English proceedings on three defendants under the terms of the Hague Service Convention through Foreign Process Section of the Royal Courts of Justice ("FPS"). The bailiff attempted to effect service on three individuals on 6 July, 7 July and 9 November 2017, but the service was unsuccessful. This was communicated by the FPS to the Claimant.

After that the Claimant extended the validity of the claim form until 1 June 2019 and lodged the documents again with the FPS on 23 March 2018. This time the claimant received letters from the FPS on 23 November 2018 simply acknowledging matters. No further update was received by the claimant in relation to the progress of that service. The Court considered application of Article 15 of the Hague Service Convention.

Article 15 deals with two types of unsuccessful service. The first paragraph concerns situations when the defendant has not appeared when the service was attempted:

> *Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that -*
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> *a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or*
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> *b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention,*
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> *and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.*

[1] The Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965
[2] [2019] EWHC 1280 (QB)

The second paragraph deals with circumstances if no certificate of service or delivery has been received back from the relevant authority of a foreign country[3].

> *Each Contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this Article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled -*
>
> *a) the document was transmitted by one of the methods provided for in this Convention,*
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> *b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,*
>
> *c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.*

The Courts of the Contracting State could apply second paragraph of Article 15 if that Contracting State formally declared its acceptance of the provisions of the second paragraph of Article 15 of the Hague Service Convention.

The judge considered the facts of the *Punjab National Bank* case against the first paragraph of Article 15 and found that the claim form was transmitted in accordance with the Hague Service Convention and was served by a method prescribed by Indian law. The judge was shown evidence of the attempted service and the opinions of Indian lawyers confirming this. The judge also found that the defendants had sufficient time to engage with the action and to properly defend the action. The judge was then satisfied that the defendants had knowledge of the proceedings. The judge was not shown evidence that the service was effected by the Indian central authorities and although the judge was prepared to hold that despite lack of such evidence the facts of the case were sufficient to satisfy first paragraph of Article 15 of the Hague Service Convention, he went on to consider second paragraph of Article 15 which deals with circumstances when no certificate of service or delivery was returned by the relevant authority of the foreign country.

The judge noted that the UK declared its acceptance of the provisions of the second paragraph of Article 15 of the Convention. He found that the claim form was sent to the FPS and the requirement that the claim form must be transmitted by one of the methods provided under the Hague Convention was satisfied. A period of 12 months lapsed since the claim form was sent to the FPS and no certificate of service was obtained despite reasonable efforts of the claimant to obtain it. As previously noted, the judge was satisfied that the defendant had knowledge of the proceedings other than through service. As a result, the evidence was sufficient for him to conclude (i) that the claim form was served and (ii) that it was open to the claimant to seek summary judgment against three defendants.

Importance of the defendant's knowledge of the proceedings for the purposes of application of Article 15 was noted *obiter* in another case *Marashen Ltd v Kenvett Ltd*[4]. In that case the judge was prepared to accept that knowledge about the process brought to the attention of a foreign party by means "otherwise than by service" would be sufficient to apply for a judgment under Article 15. Article 15 is especially useful in those circumstances where a foreign country has opposed to methods of alternative service set out in Article 10 of the Hague Service Convention[5].

Further, *Marashen Ltd v Kenvett Ltd* the Judge indicated obiter that a period of 6 months after transmission of the documents for service under the Hague Service Convention would be sufficient for Article 15 to be used:

> *… I accept, that the effect of article 15 is that, if [claimant] had sought to effect service under the Hague Service Convention, whilst at the same time taking steps to bring the … application to [defendant's] attention otherwise than by service, it would be open to it to apply to the court for judgment once a period of six months had elapsed from transmission[6].*

Apart from the two above examples, there are not many cases discussing application of Article 15 of the Hague Service Convention. Possibly this is due to a number of the following challenges that may arise.

First, ECSC CPR contains no clear procedural route for application of Article 15. The application for a default judgment, as a minimum, requires proving service of the proceedings on the foreign defendant and may be set aside if this requirement is not met[7]. The application for summary judgment requires for that application to be served on the defendant[8]. There is no provision in ECSC CPR which will deals with set aside application of the judgment made under Article 15 and there is no clarity whether a party may apply to extend the claim if the set aside application is successful. Therefore, it is not currently clear how procedure set out in Article 15 of the Hague Service Convention interacts with ECSC CPR.

Second, there is no clear guidance as to how long the claimant should wait before invoking Article 15. This may largely depend on the circumstances of a particular case and possibly statistics of length of service under the Hague Service Convention in a particular country. The pro-longed time period may pose risk to continuation of any injunction obtained in support. However, Article 15 specifically states that "notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or

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[3] Certificate of Service would usually be provided by the relevant authority upon successful service of the claim form on a foreign defendant.
[4] [2017] EWHC 1706 (Ch), para 71
[5] Such reservation was made, for example, by India and Russia.
[6] *Ibid*.
[7] ESCS CPR 12.4(a) and 13.2(1)(a)
[8] ESCS CPR 15.5(1)(b)

protective measures". Therefore, one may suggest to the Court that the injunction should not be discharged until it becomes open for the claimant to make an application under Article 15.

Third, it seems that Article 15 is of no particular advantage in those cases where the claimant is struggling to prove that the defendant has knowledge of the proceedings.

Fourth, if the judgment obtained under Article 15 is set aside, the claimant may find that the time for extending the validity of the claim has lapsed. Failure to extend the validity of the claim form and effect service within 12 months may result in the claim being dismissed, unless the Claimant may show that special circumstances exist for the validity of the claim form to be extended in those circumstances[9].

Finally, if alternative service of foreign proceedings is not prohibited, the claimant may apply for permission to effect service by one of the methods alternative to service under the Hague Service Convention. However, the Court would usually permit alternative service if service under the Hague Convention is impracticable and in doing so could consider whether or not application under Article 15 was open for the claimant to make. Possibly, it would be appropriate for the claimant to exhaust its right to seek judgment under Article 15 before seeking Court permission for alternative service. So much of the deliberation as to merits of an alternative service application is dependent on judicial discretion which can vary from court to court. Of course while there is nothing to prevent collateral applications seeking to get the court's relief on a first come basis, this is an expensive way to litigate before even reaching the fruits of enforcement.

To conclude, it is well known that service under the Hague Service Convention is a bureaucratic process and usually may take months and years. Under ECSC CPR the validity of the claim is limited and one has to seek extension if the service of the claim form out of jurisdiction on a foreign defendant has not taken place within 12 months of the date of issue[10]. Even if the extension is granted, the number of extensions that the claimant may apply for is not indefinite. If the foreign defendant is avoiding service and/or no certificate of service has been delivered despite the claimant's reasonable efforts to obtain one, the claimant may seek a judgment from the court under Article 15 of the Hague Service Convention. Although this option may be attractive, there are number of important considerations which the claimant should take into account before concluding that Article 15 is advantageous in his case.

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[9] BVIHCMAP2016/0047 *JSC VTB Bank v Alexander Katunin v Sergey Taruta*
[10] ESCS CPR 8.12(2)(a) and 8.13