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Hague Service, or Substituted Service, of Cayman Islands Court Proceedings: Not Just a Technical Game

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The Cayman Islands, as a British Overseas Territory, is a party, through the United Kingdom, to the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters ('the Hague Service Convention').

Service of documents in the Cayman Islands

Given the United Kingdom's agreement to certain provisions of Article 10 of the Hague Service Convention to both the United Kingdom and to British Overseas Territories such as the Cayman Islands, and given the provisions of sections 70 and 71 of the Cayman Islands' Companies Act providing for additional methods of service on Cayman Islands companies, it is generally very quick, cheap and easy to effect service of foreign Court proceedings on Cayman Islands incorporated entities, whether by delivery by hand, delivery by postal channels or delivery of documents through the use of Cayman Islands attorneys (without then needing to effect service through diplomatic channels and the Designated Central Authority).

Service of documents outside of the Cayman Islands

It can, however, be much more expensive and time-consuming for a litigant seeking to effect service of Cayman Islands Court proceedings on foreign companies or foreign individuals that are outside of the jurisdiction of the Cayman Islands, depending on (a) the willingness of the target to accept service voluntarily, by an agreed method of service; (b) the nature and location of the foreign jurisdiction in which service is to be effected; and (c) the extent of the foreign jurisdiction's own ratification of, or derogation from, the provisions of the Hague Service Convention.

There are, indeed, a number of foreign jurisdictions that have derogated from the provisions of Article 10 of the Hague Service Convention, and whose Governments and legal systems ordinarily require that service of foreign proceedings must only be affected through diplomatic channels and the Designated Central Authority of the states in question.

This means that it can be very attractive, in appropriate circumstances, for a Plaintiff or Claimant to apply for a Cayman Islands Court order authorizing 'substituted service' or 'alternative service' by a quicker and cheaper method than service through a Designated Central Authority.

These applications are often made with a genuine desire to progress the conduct of the litigation so as to avoid serious litigation prejudice; but they are sometimes also made for cynical strategic purposes, or through mere impatience, either with a view to avoiding costs and expense, or with a view to exerting settlement pressure and settlement leverage sooner than might otherwise be the case following the ordinary litigation process.

When is 'substituted service' appropriate?

The question of when it is appropriate for the Cayman Islands Court to make an order for substituted service or alternative service of documents on a foreign defendant should, in principle, be clear under the rules, as it is now well-trodden ground in the case law in England and Wales and a number of similar jurisdictions.

Recent Cayman Islands case law suggests, however, that the legal position is less clear than it should be, and that it is, in any event, highly sensitive to the facts, evidence, and arguments presented in any particular case.

The fact that an application for 'substituted service' is ordinarily made on an *ex parte* basis means that it also attracts duties of full and frank disclosure and fair presentation on the part of the applicant and its lawyers, so great care needs to be taken in the preparation and presentation of any such application, given the scope for protracted argument at a later date.

Order 1, rule 4 of the Companies Winding Up Rules (CWR) provides that the Grand Court Rules (GCR) for service and substituted service apply to every winding-up petition, summons or other documents required to be served under the CWR, in the same way that the GCR apply to Writs and other originating court documents in civil and commercial litigation.

Grand Court Rule ("GCR") Order 11, rule 6(3a) provides, in turn, that if serving a document on a party in a country that is subject to the Hague Service Convention, proceedings may be served through the Designated Central Authority: that is, indeed, the primary, starting position under the rules.

The Grand Court's jurisdiction to make an order for substituted service is provided by GCR Order 65, Rule 4(1). This provides that *"if, in the case of any document by which virtue of any provision of these Rules is required to be served personally on any person, it appears to the Court that it is* ***impracticable for any reason to serve that document personally on that person****, the Court may make an order for substituted service of that document."*

In the recent case of *MaplesFS Limited v B&B Protector Services et al,* Grand Court of the Cayman Islands, FSD 213 of 2021, unreported judgment dated 14 July 2022, Mr Justice Doyle considered a number of arguments and authorities relating to the validity of an *ex parte* order granting permission to effect 'substituted service', involving the service of Cayman Court proceedings on two Russian banks in Russia, and on their English solicitors in London, by alternative methods other than service through the Designated Central Authority.

Mr Justice Doyle approved the summary of the law that had been set out by Mr Justice Segal in his earlier judgment in the case of *China Shanshui Cement Group Limited*, FSD 161 of 2018 (NSJ), unreported judgment dated 27 January 2021, following *Bush v Baines, Taylor and Attorney General* [2016] (2) CILR 274. In summary, the key issues that the Court has to consider in deciding whether to exercise the power to make an order for substituted service are:

- Is personal service "*impracticable*"?
- Are the steps, which are to be taken to effect service and bring the document to the notice of the person to be served, contrary to the general law of the country in which they are to be taken, in the sense of being "*expressly or impliedly prohibited*"?
- Are those steps reasonably likely to bring the document to the notice of the person to be served and otherwise appropriate?

Mr Justice Doyle added a fourth point to the three stage process, noting that *"the court must take care not to equate delay, even lengthy delay, with impracticability, otherwise substituted service would become the norm when it should be the exception"*, having regard to the primacy of the Hague Service Convention.

In doing so, Mr Justice Doyle acknowledged the points made in a line of English Court authorities, to the effect that, in a Hague Service Convention case, an order for substituted service should be exceptional and permitted in special circumstances only, having regard to specific evidence of litigation prejudice associated with delay (but not the mere fact of delay itself): see, for example, *Cecil v Bayat* [2011] 1 WLR 3086, *Societe Generale v Goldas* [2018] EWCA Civ 1093, and *Marashen Ltd v Kenvett Ltd* [2018] 1 WLR 288.

Mr Justice Doyle made a similar point in another recent case in which he dismissed an application for permission to effect 'substituted service', *Orient TM Parent Limited*, Grand Court of the Cayman Islands, FSD 299 of 2021 (DDJ), unreported judgment dated 27 July 2022. In that case, where the applicant was concerned with the ongoing delays associated with service in the People's Republic of China (PRC) under the Hague Service Convention, the Judge noted that *"mere delay or the desire for speed are not sufficient to justify substituted service"*.

In that case, the Judge was also concerned by the absence of formal expert opinion evidence from a PRC lawyer confirming that the proposed method of substituted service was not expressly or impliedly prohibited by PRC law, although the Judge recognised that the need for formal expert opinion evidence may depend on the circumstances of each particular case.

The Judge's approach might be said, in that respect, to be consistent with the observations of Mr Justice Jack in the recent BVI Court decision of *Zhao Long v Lunan Pharmaceutical*, Eastern Caribbean Supreme Court, BVI High Court, 2017/0151, unreported judgment dated 1 September 2022, in which the Court noted that "*service in the People's Republic of China is always a matter which requires careful consideration*".

Indeed, it can fairly be said that any application for 'substituted service' requires careful consideration, but particularly so when dealing with foreign jurisdictions such as Russia and the PRC, and other civil law jurisdictions whose legal systems may be far removed from those of common law jurisdictions.

Conclusion

During the COVID-19 pandemic, the Cayman Court granted a number of *ex parte* applications for orders for substituted service, having regard to 'lockdown' conditions both locally and globally, which were not the subject of challenge or full argument, whether for commercial reasons or otherwise.

Now that most jurisdictions have reverted to ‘business as usual’, however, it seems likely that the number of contested applications relating to substituted service will increase, as claimants continue to complain of delays associated with service through diplomatic channels and the Hague Service Convention, and foreign defendants often seek to benefit from the delays associated with protracted service procedures, and also from jurisdictional challenges and associated procedural skirmishing.

Since the issue of effecting valid service is closely connected to the issue of establishing jurisdiction, however, it would not be fair to characterise every argument as to the validity of service as just a question of technical games, especially if the issue arises, quite properly, in the context of a serious, or meritorious, jurisdictional challenge.

Despite the guidance contained in the GCR, and in the most recent Cayman case law, it seems likely that ‘substituted service’ is a topic that will continue to be contested on a regular basis before the Grand Court of the Cayman Islands, and which will be ripe for review at an appellate level in due course.

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