

# Service of foreign process on Bermuda resident persons and entities under the Hague Convention

September 2020

Bermuda, as a British Overseas Territory, is a party to the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters (the Convention) (the United Kingdom being the relevant contracting state on behalf of Bermuda, having ratified the Convention on Bermuda's behalf).<sup>1</sup>

By its terms, the Convention is mandatory and must be followed by foreign entities seeking to serve process in Bermuda.

## Service through the designated central authority

The main provisions dealing with the transmission of documents for service under the Convention are set out in Chapter 1 (Articles 2-16 of the Convention). The Convention provides for the designation of a central authority to receive requests for service coming from other contracting states and execute them (Article 2). The designated central authority, in the case of Bermuda, is the Registry of the Supreme Court of Bermuda.<sup>2</sup>

Service through the designated central authority can be time-consuming and unpredictable, and there can be no guarantee of expedited service in cases of urgency.

## Service by other means under Article 10

The Convention does, however, allow means other than use of the central authority for the purpose of effecting service, and those other means are set out in Article 10. In practice, Article 10 is often relied upon for effecting service of foreign process in Bermuda, instead of service through the designated central authority (for the reasons identified above).

Article 10 provides that:

*“Provided the State of destination does not object, the present Convention shall not interfere with:*

- a) the freedom to send judicial documents, by postal channels, directly to persons abroad,*
- b) the freedom of judicial officers, officials, or other competent persons of the state of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,*
- c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons at the State of destination.”*

## Service by postal channels

The United Kingdom (which is the relevant Contracting State so far as Bermuda is concerned, Bermuda being a British Overseas Territory) has not derogated from or “objected to” the application of Article 10(a) to the United Kingdom or to the British Overseas Territories.

There are differing views as to whether service of process on a Bermuda person or entity by post constitutes valid service under the Convention and there is no reported Bermuda case directly on point.

Based on the English case of *Noirhomme v Walklate* [1992] (which would be persuasive, though not binding, authority in Bermuda), it can be argued that service of foreign process by postal channels (including private courier services) is legally permissible in Bermuda, on a true interpretation of Article 10(a) (subject to the service requirements imposed by the rules of the foreign jurisdiction).

However, there is potentially some uncertainty and scope for legal argument as to whether Article 10(a) does enable service of originating foreign court process in Bermuda by postal channels, in circumstances where (a) there is no reported Bermuda case directly on point, (b) there are a number of reported US cases which reflect a difference of judicial opinion on the significance to be attached to the use of the word “send” rather than “serve” in Article 10(a),<sup>3</sup> (c) service of domestic Bermuda proceedings cannot ordinarily be effected by postal channels (but must be effected by personal service), and (d) it is potentially unclear whether “postal channels” within the meaning of Article 10(a) is limited to the public postal services, or whether it also includes private courier services.<sup>4</sup>

We also note that, as a matter of fact, there is no guarantee that documents sent to Bermuda by regular post will actually arrive at their intended destination within a reasonable period of time.

### Service by Bermuda attorneys

It should be noted that, although the United Kingdom did derogate from and “*object to*” the full application of Articles 10(b) and (c),<sup>5</sup> it has not derogated from the ability of foreign litigating parties to instruct Bermuda attorneys (being competent persons in Bermuda) to effect personal service of foreign process in Bermuda.<sup>6</sup>

Subject to the facts of the particular case, this method of service may be the most reliable, and the most likely to be effective, both as a matter of fact and as a matter of Bermuda law (subject to the service requirements imposed by the rules of the foreign jurisdiction).

*The content of this paper is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*

### Further information

To find out more about our services and expertise, and key contacts, go to: [kennedyslaw.com/bermuda](http://kennedyslaw.com/bermuda) or call us at: + 1 441 296 9276

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## References

1. By an extension Declaration dated 20 May 1970, which entered into force on 19 July 1970.
2. <https://www.gov.bm/supreme-court>
3. See, for example, the US case of *Brockmeyer v May*, 2003, 383 F. 3d 798, in which the US Court of Appeals, 9th circuit, reviewed the two different lines of authority, and concluded that the word “send” in Article 10(a) included the word “serve”. Issues in relation to the service of US proceedings under the Convention have also been the subject of review by the US Supreme Court in *Water Splash, Inc. v Menon* 581 U.S. (2017)
4. We understand that at least one US court has determined that service by DHL is not service by “postal channels” (*Metizis v Metizis* N.Y.S.C 21 November 1995), although we believe that the Practical Handbook suggests that service by private courier service should be treated as valid service by postal channels.
5. In the United Kingdom’s extension Declaration dated 20 May 1970, it is stated that “(d) *With reference to the provisions of paragraphs (b) and (c) of Article 10 of the Convention, documents sent for service through official channels will be accepted in a territory listed in the Annex by the designated authority and only from judicial, consular or diplomatic officers of other Contracting States*”. It should be noted that this derogation only applies to “documents sent for service through official channels”. In a letter dated 11 September 1980 addressed by the Foreign and Commonwealth Office to the Permanent Bureau, the UK’s FCO stated as follows, by way of clarification of the UK’s position in its own 1967 Declaration (which was in materially similar terms to the 1970 extension Declaration): “*Thank you for your letter of 31 July in which you ask for assistance in the interpretation of the declaration made by the United Kingdom on 17 November 1967 in relation to Article 10 c) of the Convention. I am happy to confirm that our declaration does not preclude any person in another Contracting State who is interested in a judicial proceeding (including his lawyer) from effecting service in the United Kingdom “directly” through a competent person other than a judicial officer or official, e.g., a solicitor*”. The 2003 Special Commission has also noted in its 2003 conclusions that the UK has confirmed its position expressed at the Special Commission meeting of 1989, indicating its preference for the use of direct service through English solicitors on residents of England and Wales.
6. See, for example, the US case of *Koehler v Dodwell*, 1998, 152 F. 3d 304, in which the US Court of Appeals, 4th circuit, held that “*Dodwell also argues that even if the United Kingdom did not reject Article 10(c) on Bermuda’s behalf, that provision nevertheless does not permit service by all persons competent to effect service under Bermuda law, but rather allows service only by government officials. Specifically, Dodwell asserts that “competent persons of the State of destination” in the context of “judicial officers, officials or other competent persons of the State of destination,” refers only to competent persons who are employed by the destination State. That is clearly a tortured reading, however. Furthermore, such a restrictive interpretation simply does not fit within the context of the liberal service options provided in the treaty, which include service by mail. See Hague Service Convention art. 10(a), 20 U.S.T. at 363, 658 U.N.T.S. at 169. We therefore conclude that Koehler’s service was effective under the Hague Service Convention.*”

