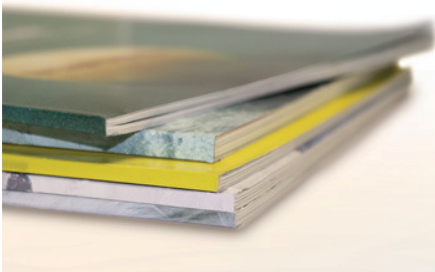


Out of Reach – Service Out of the Jurisdiction

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This article examines how to serve Jersey proceedings on parties which are neither resident nor incorporated in the Island.

The general rule is that proceedings in Jersey must be served on the defendant within the jurisdiction. The basic English principle that a country will not interfere in the affairs of citizens of another country when outside its borders, as expressed by Lord Goff in the case of **Spiliada Maritime Corporation v. Cansulex Ltd** [1987] AC, has been adopted:-

“It becomes a very serious question ... whether this court ought to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country, ... this court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction”

In certain circumstances however, proceedings may be served on a party residing outside Jersey. The leave of the Master is required pursuant to Rule 7 of the **Service of Process (Jersey) Rules 1994** (“the Rules”) and the **Service of Process and Taking of Evidence Law 1960** and the case must fall within one of the specified circumstances of Rule 7.

Rule 9 provides that an application for the grant of leave under Rule 7 must be supported by affidavit. The relevant sub-paragraph of Rule 7 must be identified in the affidavit, together with a statement that the plaintiff has a good cause of action, and a good arguable case, together with an indication as to where the defendant is likely to be found.

As the application is made *ex parte* there is an obligation of full and frank disclosure on the part of the applicant. Leave will not be granted unless it is made sufficiently clear to the court that the case is a proper one for service out.

The test for service out is as set out in the case of **Koonmen v. Bender** [2002] JLR 407, where the court held that the applicant must satisfy a three-fold test, namely:

1. Does the court have jurisdiction under one or more of the limbs of Rule 7 of the Rules?
2. Is there a serious issue to be tried in respect of each cause of action?
3. Is Jersey clearly the appropriate forum for the trial of the action? (What is the most natural forum with which the action has the most real and substantial connection?)

Another Forum

The court will then consider any factors which point towards another forum being more appropriate than Jersey. These include the availability of witnesses, local knowledge, the places where the parties reside and carry on business, the law governing the relevant transaction, and whether justice can only be obtained elsewhere at excessive cost, delay or inconvenience.

Rule 13 of the Rules makes reference to the procedure to be adopted for service in the event that “any relevant convention” applies. Absent such

Convention, it is advisable to effect service in accordance with the proper law of the jurisdiction. Proper regard should therefore be given to the Hague Convention On The Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (“the Convention”) when looking at the issue on service out as to whether the intended defendant resides within a jurisdiction who is signed up to the Convention.

The purpose of the Convention is to “to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time”, and “to improve the organisation of mutual judicial assistance for that purpose by simplifying and expediting the procedure”. By virtue of Article 1, the Convention applies “in all cases, in civil and commercial matters where there is occasion to transmit a judicial or extrajudicial document for service abroad”.

In those circumstances, every application must be served in compliance with the Convention. This may have a significant impact on the availability of a hearing date for any application.

When an application is made to the Master, one should be careful to leave an appropriate length of time for the defendant to return before the court, or one may find that a refresher order must be sought to extend the time limit for service and the whole process may have to be gone through again.

Central Authority

Under Article 2 of the Convention, each State is required to designate a Central Authority to receive requests for service of documents. Its use is not compulsory and there is provision (in Articles 8 to 11 of the Convention) for service through other channels outside the Central Authority, including

service by diplomatic or consular authorities. Thus, the proper method of service varies for each member state as member states may object to any of the optional methods in Articles 8 to 11.

One of the most pertinent of the provisions is Article 10(a), which states that provided the state of destination does not object, the Convention does not interfere with the entitlement to serve judicial documents by post.

Switzerland

Some countries, for example Switzerland, which, when ratifying the Convention, did so on the basis that service pursuant to Article 10 shall not be effected and it specifically objected to service by post thus service must be through the Central Authority. In Switzerland, service of documents is deemed an official act, which is within the exclusive competence of official authorities. Indeed the service of documents without using the official judicial assistance channel may constitute a criminal offence and a breach of territorial sovereignty.

Breach of Territorial Sovereignty

The logistics for making such an application are laborious for one situated in Jersey. Once the plaintiff has obtained an order for service out, a request must be made to the Bailiff to transmit an application under the Hague Convention to the UK Secretary of State. The Secretary of State then forwards the plaintiff’s application to the relevant Central Authority. This peculiar procedure has arisen by virtue of the fact that Jersey is considered an extension of the UK for these purposes.

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