2023 WL 7209982
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United States District Court, M.D. Florida,
Tampa Division.

Hung Phi DUONG, and Kim Nhung Thi Nguyen, d/b/a DDG Digital Design Group, Plaintiffs,
v.
DDG BIM SERVICES LLC, et al., Defendants.

Case No: 8:23-cv-01551-KKM-JSS
|
Signed November 2, 2023

Attorneys and Law Firms

Griffin C. Klema, Klema Law, P.L., Tampa, FL, for Plaintiffs.

ORDER

Kathryn Kimball Mizelle, United States District Judge

***1** Plaintiffs Hung Phi Duong and Kim Nhung Thi Nguyen move, ex parte, to: (1) extend the service deadline as to four foreign defendants; (2) authorize alternative service on those defendants under Federal Rule of Civil Procedure 4(f)(3); and (3) extend the deadline to move for default judgment against defendant DDG BIM Services LLC. I grant Plaintiffs' motion as to the third request and deny it without prejudice as to the other two.

I. BACKGROUND

On July 12, 2023, Plaintiffs filed suit against five defendants—two individuals, Sarath Babu and Shamla Aboobacker—and three corporate entities, DDG BIM Services LLC, DDG BIM Services Pvt. Ltd., and DDG Engineering Services Pvt. Ltd. *See* Compl. (Doc. 1). Babu and Aboobacker are Indian citizens and domiciliaries. *Id.* ¶¶ 3–4, 72. DDG BIM Services LLC is a Florida limited liability company, and the remaining defendants are Indian corporate entities. *Id.* ¶¶ 5–7. All four foreign defendants have known postal addresses located in India. *See* Mot. to Authorize Alternative Service (MAAS) (Doc. 11) at 9–10. Plaintiffs' seven-count complaint alleges violations of the Lanham Act and the Defend Trade Secrets Act in addition to common-law claims such as breach of contract, conversion, and civil conspiracy. *See* Compl. ¶ 75–125.

The Clerk issued a summons as to each defendant, (Doc. 5), and on July 20, Plaintiff served the single domestic entity defendant via its registered agent, *see* Return of Service Executed (Doc. 7). A week later, Plaintiffs' counsel emailed the remaining summons and the complaint to the Indian Ministry of Law and Justice, Department of Legal Affairs, in an attempt to serve the foreign defendants under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 (entered into force Feb. 10, 1969) (hereinafter the Convention). Despite following up, Counsel never received a reply beyond an automatic notification that an email address listed as a point-of-contact by the Indian government had "been deactivated." MAAS at 3–4; Klema Dec. (Doc. 11-1) at 4, 13. Soon after, Plaintiffs' foreign counsel filed process on the docket in a separate civil action proceeding against the foreign defendants in the Indian court system. Klema Dec. at 4. Plaintiffs now move for an ex parte order authorizing service by email, with confirmatory postal service, on the foreign defendants and their foreign counsel. *See generally* MAAS.

II. LEGAL STANDARD

The Federal Rules of Civil Procedure provide three pathways to serve an individual outside the United States. First, a plaintiff may use "any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention." FED. R. CIV. P. 4(f)(1). If "there is no internationally agreed means, or if an international

agreement allows but does not specify other means," a plaintiff may resort to a method that is reasonably calculated to give notice:

> ***2** (A) As prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;
>
> (B) as the foreign authority directs in response to a letter rogatory or letter of request; or
>
> (C) unless prohibited by the foreign country's law, by:
>
> (i) delivering a copy of the summons and of the complaint to the individual personally; or
>
> (ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt

Id. 4(f)(2). Finally, courts may allow service "by other means not prohibited by international agreement." *Id.* 4(f)(3). Subject to one exception not applicable here, the same rules apply to foreign corporations, partnerships, and other associations. *Id.* 4(h)(2).

III. ANALYSIS

In the light of their difficulties perfecting service via the Indian government, Plaintiffs move for an order permitting alternative service. They propose that I allow them to serve the individual defendants (both in their individual capacities and as representatives of the foreign entities) and their foreign counsel by email, with postal copies to follow. MAAS at 3.

In considering whether I may allow service in this manner, I begin with the Convention. Because Plaintiffs admit that each foreign defendant has a known address located in India, the Convention applies. *See* Convention, Art. 1; MAAS at 9–10. "Thus compliance ... is mandatory ...." *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 705, 108 S.Ct. 2104, 100 L.Ed.2d 722 (1988).[1] For a method of service to comply with the Convention, the method must be either (1) affirmatively authorized, or (2) not prohibited under the circumstances. *Cf. Water Splash, Inc. v. Menon*, 581 U.S. 271, 284, 137 S.Ct. 1504, 197 L.Ed.2d 826 (2017) (explaining that, unlike the provisions of the Convention authorizing service through a designated central authority, Article 10 does not "affirmatively authorize[ ] service by mail" (emphasis omitted)). If Plaintiffs' proposal complies with the Convention, I must then consider whether it is appropriate under domestic law, here the Due Process Clause and Rule 4(f).

A. Plaintiffs' Motion is Governed by the Convention and Rule 4(f)(3)

I begin by concluding that Plaintiffs' proposed methods of service implicate only the Convention and Rule 4(f)(3). Rule 4(f)(1) does not apply because, although the Convention discusses service by mail and service on foreign judicial officers, *see* Arts. 8, 10, those methods of service are not "affirmatively authorize[d]," *Water Splash, Inc.*, 581 U.S. at 284, 137 S.Ct. 1504 (emphasis omitted); *see also* FED. R. CIV. P. 4(f)(1) (contemplating service "by any internationally agreed means ... reasonably calculated to give notice, *such as those authorized by the Hague Convention*" (emphasis added)). Rule 4(f)(2) kicks in "if there is no internationally agreed means, or if an international agreement allows but does not specify other means." FED. R. CIV. P. 4(f)(2). Because the Convention affirmatively authorizes service via at least one means—a contracting party's central authority—the first clause is inapplicable. And although some alternative methods of service are not prohibited by the Convention under appropriate circumstances, that does not mean that the second clause applies. Rather, the universe of "non-prohibited" means is bounded, either expressly, *see, e.g.*, Convention, Art. 10 (service by postal mail is not prohibited unless a contracting party objects), or implicitly, *see, e.g.*, *id.* Art. 11 (service by other means is not prohibited if the subject of a bilateral or plurilateral agreement).[2]

***3** That leaves Rule 4(f)(3), which authorizes me to discretionarily order alternative service so long as the proposed method is "not prohibited by international agreement." FED. R. CIV. P. 4(f)(3); *cf. Prewitt Enters., Inc. v. Org. of Petroleum Exporting Countries*, 353 F.3d 916, 926–27 (11th Cir. 2003) (denial of relief under Rule 4(f)(3) reviewed for abuse of discretion).

B. Plaintiffs' Proposed Methods of Alternative

Service are Ordinarily Prohibited by International Agreement and Unavailable Under Rule 4(f)(3)

To justify an alternative service order under Rule 4(f)(3), Plaintiffs must show that three requirements have been met. First, Plaintiffs must move for relief. That requirement is met here. Second, the proposed alternative service method(s) must comply with due process. "Due process ... requires that 'before a court may exercise personal jurisdiction over a defendant, there must be *more than* notice to the defendant ... [t]here also must be a *basis* for the defendant's amenability to service of summons. Absent consent, this means there must be *authorization* for service of summons on the defendant.' " *Prewitt*, 353 F.3d at 924–25 (emphases in original) (quoting *Omni Cap. Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 104, 108 S.Ct. 404, 98 L.Ed.2d 415 (1987)). The failure to demonstrate either (a) notice or (b) a basis for the defendant's amenability to service is fatal. Because I conclude that Rule 4(f)(3) does not currently authorize me to grant Plaintiffs' motion, I need not decide the notice question today.

Plaintiffs propose combining two methods of service: (1) service on the foreign defendants and on foreign counsel by postal mail and (2) service on the same by email. MAAS at 7. I address whether Rule 4(f)(3) authorizes each in turn.

1. Service by Postal Mail and Service on Foreign Counsel Are Prohibited by the Convention

Article 10 of the Convention provides that, so long as "the State of destination does not object," service by postal mail and service on foreign judicial officers is not prohibited. *See* Convention, Art. 10(a)–(c). But India has objected "to the methods of service provided in Article 10." Hague Conference on Private Int'l Law, *India: Declarations & Reservations*, https://perma.cc/3TAT-M5MD (last visited Nov. 2, 2023). India's objection tracks its official guidance on service of process, which states that "[d]ocuments cannot be served via mail"; "[d]ocuments must be served in India indirectly via proper authority"; and "[d]ocuments under the Hague Convention cannot be served directly to the defendants in India by private judicial officer." Ministry of External Affairs, Consular, Passport, and Visa Division, *FAQ—Service of Summons Abroad*, https://perma.cc/8VWV-8QX4 (last visited Nov. 2, 2023). Thus, the Convention, which " 'pre-empts inconsistent methods of service' wherever it applies," prohibits both proposed methods of service as applied to defendants located in India. *Water Splash, Inc.*, 581 U.S. at 273, 137 S.Ct. 1504 (quoting *Schlunk*, 486 U.S. at 699, 108 S.Ct. 2104). Neither is available under Rule 4(f)(3).

2. Service by Email Is Also Ordinarily Prohibited by the Convention

Plaintiffs are left with a request that I allow them to serve Babu and Aboobacker by email. Whether the Convention prohibits district courts from entering an order authorizing email service on a defendant located in India (or a similarly situated contracting party) is an issue of first impression in the Eleventh Circuit. District courts around the country are deeply split.[3] Absent binding precedent, I must interpret the Convention to determine whether it ordinarily prohibits email service on foreign defendants located in India. I conclude that it does.

***4** "In interpreting treaties, '[courts] begin with the text of the treaty and the context in which the written words are used.' " *Water Splash, Inc.*, 581 U.S. at 276, 137 S.Ct. 1504 (quoting *Schlunk*, 486 U.S. at 699, 108 S.Ct. 2104). The Convention's goal is clear—"to simplify, standardize, and generally improve the process of serving documents abroad." *Id.* at 273, 137 S.Ct. 1504. Its "primary innovation," *id.* at 275, 137 S.Ct. 1504, requires each contracting party to "designate a Central Authority which will undertake to receive requests for service coming from other Contracting States and to proceed in conformity with the provisions of Articles 3–6," Convention, Art. 2. "When a central authority receives an appropriate request, it must serve the documents or arrange for their service, Art. 5, and then provide a certificate of service, Art. 6." *Water Splash, Inc.*, 581 U.S. at 275, 137 S.Ct. 1504. Service on a foreign defendant via a contracting party's central authority is the primary internationally agreed means of service "authorize[d]" by the Convention. *Cf. id.* at 284, 137 S.Ct. 1504 (emphasis omitted). India has designated its Ministry of Law and Justice, Department of Legal Affairs, as its central authority. Hague Conference on Private Int'l Law, *India: Central Authority & Practical Information*, https://perma.cc/XK3K-ZJJ2 (last updated Jan. 19, 2022).

"Submitting a request to a central authority is not,

however, the only method of service" that can comply with the Convention. *Water Splash, Inc.*, 581 U.S. at 275, 137 S.Ct. 1504. Article 8 provides that, absent a contracting party's objection, service through diplomatic or consular agents is not prohibited. Article 10 says the same thing about service by mail and service through judicial officers. Article 11 provides that the Convention does not prohibit alternative methods of service based on a bilateral or plurilateral agreement between contracting parties. And Article 19 reserves the right for contracting parties to provide plaintiffs with greater flexibility under domestic law. These provisions, whether opt-out like Article 8 and Article 10, or opt-in like Article 11 and Article 19, establish a limited universe of alternative service methods that are, under appropriate circumstances, "not prohibited" by the Convention. None, however, contemplate email service on these facts.[4] That is unsurprising, given the Indian government's guidance channeling plaintiffs to its central authority.

Faced with this silence, Plaintiffs claim that Rule 4(f)(3) nevertheless authorizes email service, arguing that the Convention does not prohibit service by undiscussed methods. *See* MAAS at 6–7, 11–13; *Prem Sales, LLC v. Guangdong Chigo Heating & Ventilation Equip. Co.*, 494 F. Supp. 3d 404, 415 & n.5 (N.D. Tex. 2020) (collecting cases and summarizing this argument before rejecting it). That is wrong as a matter of text, structure, and precedent.

To begin with, interpreting the Convention as Plaintiffs suggest would neuter Article 11 and Article 19, which combine to "leave countries free to consent, either unilaterally or together, to means of service that are not specifically authorized by the Convention." *Anova Applied Elecs., Inc. v. Hong King Grp., Ltd.*, 334 F.R.D. 465, 471 (D. Mass. 2020). The assumption underlying these provisions is that, without consent, alternative means of service are verboten. Otherwise, what use is there for supplemental agreements between contracting parties or domestic law reforms if every undiscussed method is available by default? *See Smart Study Co. v. Acuteye-Us*, 620 F. Supp. 3d 1382, 1394 (S.D.N.Y. 2022); *see also* Brief for *Amici Curiae* Professors **William** S. **Dodge** & Maggie K. Gardner 9–11, *Smart Study Co. v. Happy Party-001*, No. 22-1810 (2d Cir.); Theodore J. Folkman, Gurung v. Malhotra *Is Wrongly Decided* 6–8 (Dec. 21, 2013), https://perma.cc/5K2H-PZ7Y. Both Supreme Court precedent interpreting the Convention and the traditional tools of construction disfavor such a "structurally implausible" interpretation. *Water Splash, Inc.*, 581 U.S. at 278, 137 S.Ct. 1504; *see also* ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, § 26, at 176 (2012) (explaining the surplusage canon, under which courts generally avoid readings of a text that would render some of its words or phrases "altogether redundant").

***5** Plaintiffs' reading is also implausible in the light of several Articles' reservation of a contracting party's right to object. *See* Convention, Arts. 8, 10. This sovereignty-enhancing feature would be a dead letter on Plaintiffs' view, as contracting parties have no procedural mechanism to object to an alternative method of service that is not discussed in the Convention. *See Prem Sales, LLC*, 494 F. Supp. 3d at 415–16. The claim becomes even more unlikely considering that email service relies on technology that did not exist when the Convention was drafted in 1965 or ratified in 1969. So even if contracting parties could object to service methods that the drafters did not contemplate, their objections would inevitably be outpaced by technological progress. There is no evidence that the contracting parties bound themselves to such an impractical regime.

In sum, the Convention was enacted to create a uniform system for the service of process abroad. *See Water Splash, Inc.*, 581 U.S. at 273, 137 S.Ct. 1504. It accomplished that goal by obliging the contracting parties to designate a central authority for service of process and to operate according to procedures specified by the Convention. *Id.* at 275, 137 S.Ct. 1504. And although the Convention does not prohibit a limited universe of alternative service methods, subject to a contracting party's consent, when it comes to defendants located in India, email service is not one of them.[5]

C. Plaintiffs' Difficulties Perfecting Service Via India's Central Authority Do Not Currently Justify Email Service

Plaintiffs argue that Rule 4(f)(3) still authorizes email service in the light of their inability to perfect service via India's central authority, citing a decision from the Ninth Circuit broadly construing the rule, and district court decisions from this Circuit favorably citing the Ninth. MAAS at 4–6 (citing *Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007 (9th Cir. 2002) and collecting district court cases). These authorities are unpersuasive for two reasons. First, *Rio* conceded that "[a] federal court

would be prohibited from issuing a Rule 4(f)(3) order in contravention of an international agreement, including the Hague Convention referenced in Rule 4(f)(1).” 284 F.3d at 1015 n.4. As I explained above, the best reading of the Convention prohibits email service on defendants located in India in the ordinary course. Second, binding precedent has already rejected an expansive interpretation of Rule 4(f)(3) based on *Rio*. In *Prewitt*, the Eleventh Circuit emphasized that *Rio* should be understood narrowly, cautioning that it concerned only whether Rule 4(f) “should be read to create a hierarchy of preferred methods of service of process, requiring a party to attempt service by the methods enumerated in [Rule 4(f)(2)] before petitioning the court for alternative relief under [Rule 4(f)(3)].” 353 F.3d at 927. That narrow reading is appropriate, given *Rio*’s peculiar facts and its failure to engage with foreign law governing the service of process. *Id.* at 927–28.

***6** To reject Plaintiffs’ expansive readings of Rule 4(f)(3) and the Convention, however, is not to leave them without recourse if India’s central authority fails to hold up its end of the bargain. Although the Convention generally prohibits email service, Article 15, which governs default judgments, appears to provide a safety valve if service remains unperfected for more than six months despite “every reasonable effort” to do so “through the competent authorities of the State addressed.” *See* Convention, Art. 15 (providing that a contracting party may authorize its courts to enter default judgments in this context and reserving the right of courts to “order, in case of urgency, any provisional or protective measures”). The United States has filed the necessary declaration, so I may invoke the safety valve under the Convention. Hague Conference on Private Int’l Law, *United States: Declarations* (last visited Nov. 2, 2023), https://perma.cc/S3G9-JRQW.

The safety valve requires that three pre-conditions be met. First, “a writ of summons or an equivalent document” must have been “transmitted abroad for the purpose of service, under the provisions of the present Convention,” and by one of the methods provided for in the Convention. Convention, Art. 15. Second, “a period of time of not less than six months, considered adequate by the judge in the particular case,” must have “elapsed since the date of the transmission of the document.” *Id.* Third, a plaintiff must show that “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.” *Id.* Upon meeting these conditions, any method of service—or no service at all—becomes “not prohibited” under the Convention for purposes of entering a default judgment.

Eligible plaintiffs must still perfect service on a foreign defendant as required by due process and Rule 4(f) as a matter of domestic law. But empowered by the safety valve, they may move for an order permitting alternative service under Rule 4(f)(3) so long as the proposed method of service complies with the Due Process Clause and is not prohibited by some other international agreement. Thus, if Plaintiffs remain unable to perfect service via India’s central authority despite making every reasonable effort to do so under the Convention, they may eventually renew their motion and explain why an order allowing alternative service is appropriate under Article 15 and Rule 4(f)(3). Until then, Plaintiffs will not be prejudiced because Rule 4’s strict 90-day time limit for service of process does not apply to foreign defendants. *See* FED. R. CIV. P. 4(m).

IV. CONCLUSION

Accordingly, the following is **ORDERED:**

1. Plaintiffs’ Motion to Extend the Default Judgment Deadline as to Defendant DDG BIM Services LLC is **GRANTED**. Plaintiffs must move for default judgment with respect to DDG BIM Services LLC no later than thirty-five days after either (1) the service and entry of default with respect to the remaining defendants or (2) the appearance and entry of final judgment with respect to the remaining defendants.

2. Plaintiffs’ Motion to Extend the Service Deadline as to the Foreign Defendants is **DENIED without prejudice**.

3. Plaintiffs’ Motion for an Order Allowing Alternative Service is **DENIED without prejudice**.

ORDERED in Tampa, Florida, on November 2, 2023.

All Citations

--- F.Supp.3d ----, 2023 WL 7209982

Footnotes

[1] Both the United States and India are contracting parties to the Convention. *See* Hague Conference on Private Int'l Law, *Status Table: Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, https://perma.cc/JGK5-RYBK (last updated June 23, 2023).

[2] I need not decide whether Article 15's safety valve provision, discussed below, implicates Rule 4(f)(2) because Plaintiffs have not invoked it.

[3] *Compare* MAAS at 6–7 (collecting cases allowing the email service of defendants located in countries that are contracting parties to the Convention under Rule 4(f)(3)), *with Smart Study Co. v. Acuteye-Us*, 620 F. Supp. 3d 1382, 1392–93 (S.D.N.Y. 2022) (collecting cases taking the opposite view).

[4] Plaintiffs' motion does not demonstrate, and I am otherwise unaware of, any Article 11 or Article 19 basis for allowing the email service of a defendant located in India. Should such a basis exist, Plaintiff may raise it in a renewed motion.

[5] Some courts have considered whether email service might be "not prohibited" under Article 10's "postal channels" clause. *See, e.g.*, *Smart Study Co.*, 620 F. Supp. 3d at 1394–95. Commentators have differing views. *Compare* Folkman, *supra* at 8–12, 12 ("[W]hile it is impossible to draw a firm conclusion with certainty, there are strong reasons to believe that e-mail is not within the postal channel for purposes of Article 10(a) of the Convention."), with DAVID P. STEWART & DAVID W. BOWKER, RISTAU'S INTERNATIONAL JUDICIAL ASSISTANCE: A PRACTITIONER'S GUIDE TO INTERNATIONAL CIVIL AND COMMERCIAL LITIGATION 104 (2d ed. 2021) ("[U]nder the 'functional equivalence approach,' electronic service *may* be permitted under Article 10(a) ...." (emphasis added) (citing HAGUE CONFERENCE ON PRIVATE INT'L LAW, PRACTICAL HANDBOOK ON THE OPERATION OF THE SERVICE CONVENTION ¶ 35, p. 177 (4th ed. 2016))). I need not decide this question, however, as India has objected to the entirety of Article 10. Hague Conference on Private Int'l Law, *India: Declarations & Reservations, supra.* Thus, even if Article 10(a) could be extended to email service (not a wholly unreasonable proposition), it would still be prohibited by the Convention with respect to foreign defendants located in India.

