

**TRANSNATIONAL LITIGATION: CONTRASTING AMERICAN AND ISRAELI
APPROACHES TO ALTERNATIVE MODALITIES OF SERVICE UNDER THE
1965 HAGUE SERVICE CONVENTION**

CAT 2002, Inc. v. Evans, CV-04-1715, Mem. Op. (E.D.N.Y. Sept. 22, 2005)

ISRAELI DEFENDANTS IN U.S. FEDERAL CIVIL ACTION
SUCCESSFULLY REPRESENTED BY ZGC'S SHELDON SCHORER

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ZGC attorneys act frequently for Middle Eastern clients in United States federal and state courts. Recently in a precedent setting decision, ZGC Counsel, **Sheldon Schorer**, representing two Israeli defendants in a civil action brought in the United States District Court for the Eastern District of New York succeeded in preventing the entry of a default judgment and having the complaint dismissed for **improper service of process** for failure to comply with the requirements of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, [citation]. *CAT 2002, Inc. v. Evans*, CV-04-1715, Mem. Op. (E.D.N.Y. Sept. 22, 2005). At issue in the *CAT 2002* was the effectiveness of service in Israel on the defendants by a law firm and a private investigator both hired by the plaintiff for the express purpose of serving the federal civil complaint and summons. Adv. Schorer contended that under Article 10 of the Hague Convention service in Israel could only be made through the Administrator of Courts within the Ministry of Justice. Service by private process server was not allowed. Judge Seybert of the Eastern District noted that in ratifying the Hague Convention, Israel had expressly refused to accept subsections (b) and (c) of Article 10. Those subsections expressly permit service of process through other “competent persons” in the State where service is to be effected. Judge Seybert went on to say that in rejecting subsections (b) and (c), “Israel manifested a preference that its attorneys and other competent process servers be excused from the burdens of process-serving in actions filed abroad.” Service of process in Israel must be made, according to Judge Seybert, only through the Administrator of Courts and only after the foreign party seeking to have documents served obtained authorization from a judicial or diplomatic authority in their home country.”

Here, Plaintiff impermissibly side-stepped this directive by hiring an Israeli law firm and a private investigator to deliver the Complaint by “in hand” service.” This is more than a mere technical error [citation omitted] and the Court will not uphold such service as effective.

Mem. Op. at p.7

The U.S. court also rejected the theory that Article 19 of the Hague Convention permits a foreign party to serve persons within the destination State (Israel in this instance) where the law of such State permits service by means other than those specified

in the Convention itself. In an important ruling in the evolving Hague Convention jurisprudence, the Court reasoned:

Article 19 only pertains to circumstances where a ratifying Country has already provided in its internal laws a designated means by which a party abroad could permissibly serve citizens within its territory. [Citation omitted]. Article 19 does not create a multilateral Convention whereby all signatories may automatically avail themselves of each other's civil practice rules.

Id. at p. 8.

The decision in *CAT 2002* is another important milestone in the developing law of international civil procedure. The United States cases are divided on the question of whether the methods of service specified in the Hague Convention are exclusive or whether Article 10 of the Convention permits alternative modalities of service, such as service by registered mail. Compare, e.g., *Bankston v. Toyota Motor Corp.*, 889 F.2d 172, 174 (8th Cir. 1989); *Anbe v. Kikuchi*, 141 F.R.D. 498, 500 (D. Haw. 1992). *Knapp v. Yamaha Motor Corp.*, 60 F. Supp. 2d 566, 573 (S.D. W.Va. 1999); *Ackermann v. Levine*, 788 F.2d 830, 839-40 (2d Cir. 1986); *Eli Lilly & Co. v. Roussel Corp.*, 23 F. Supp. 2d 460, 470-74 (D.N.J. 1998); *R. Griggs Group Ltd. v. Filanto Spa*, 920 F. Supp. 1100 (D. Nev. 1996).

The Israel Supreme Court has taken a "liberal" view of the Convention at least with respect to service by mail under Article 10(a). In another case brought by ZGC attorneys in 2002, the Israeli high court ruled that Article 10 does not prohibit an Israeli plaintiff seeking to serve a foreign defendant in the United States under Israel Civil Rule 500 from doing so by registered international mail. Art. 10 of the Hague Convention does not require that service of process be effected through the United States Department of State or central authority in the state of the defendant's residence. *Raytheon v. Ashborn Agencies, Ltd.*, *App. Leave to Appeal*, 8402/03 (Isr. S. Ct. , Sept. 1, 2003). The long-standing practice has been to permit service of non-resident defendants abroad under Israeli Civil Rule 500 by registered international mail. This was so prior to and after the implementation of the Hague Convention in Israel in 1975. Prior to the decision in *Raytheon* (by way of a denial of leave to appeal an interlocutory order of the Tel Aviv-Jaffa District Court), the Israel Supreme Court dealt directly with the interpretation of Article 10 only in the 1975 case of *Frankel v. Kaufman*, [Citation omitted]. In that case the late Judge Zusman stated in dicta that Article 10(a) did not prohibit service by international registered mail under Rule 500, even though service there was effected prior to the implementation of the Hague Convention in Israel. See also *Berg Yaakov & Sons (Furniture) Ltd. v. Berg East Imports, Inc.* [Citation omitted](which also is not dispositive of the Hague Convention issue). In *Raytheon* a single judge of the Supreme Court reasoned that the Israeli practice of permitting service abroad by mail notwithstanding the arguable requirements of the Hague Convention was adequate to allow Israel to acquire jurisdiction over foreign defendants, so long as the requirements of Rule 500 have been met and the foreign defendant actually received process. In the eyes of this judge at least the rules regarding the manner in which process is served are

technicalities only and will not be grounds for dismissal where the defendants have actually received notice of the proceedings by alternative means.

The rationale of the Israeli Supreme Court in *Raytheon* conflicts with the views taken by many American courts, including the Eastern District of New York in *CAT 2000*. In *CAT 2000* the Israeli defendants had unquestionably been served by private process server, a procedure which the federal court held was prohibited under Israel's reservations to Article 10 of the Hague Convention. Had the American court applied the rationale of the Israel Supreme Court in *Raytheon*, service would have been held to have been technically erroneous but not fatal to the exercise of the court's personal jurisdiction over the non-U.S. resident Israelis. A possible difference in the Israeli and US approaches may lie in the US Constitutional requirements of Due Process which are more stringent than those of the Israeli Supreme Court. In Israel, the court did not wish to let a mere technicality obfuscate the fact that delivery of the summons and complaint had actually been accomplished. The US Constitution, however, places emphasis on whether the method employed in effecting service was proper, with actual receipt of the papers not the defining factor.

The failure of the Israel Supreme Court to address the merits of the Hague Convention argument in *Raytheon* is problematic, since to this date the Israeli high court has not construed the language of the Convention. If the rule of law in transnational litigation is to have any meaning, it is incumbent upon national courts to address the requirements of the Convention at a minimum. It is no answer to say, as did the solitary justice in *Raytheon*, that national rules of procedure permit a particular means of service of original process, if the Hague Convention expressly prohibits it. It is to be hoped that the Israel Supreme Court will properly address the requirements of the Hague Service Convention at the earliest possible opportunity if only to articulate a principle basis for the long-standing Israeli practice of permitting service of foreign defendants by mail.

The reviewed *CAT 2002* case is particularly significant since service by a lawyer or private detective is a commonly used method of service in Israel, particularly since this method seems to have been sanctioned in Israel in the *Raytheon* case. The *CAT 2002* case should cause attorneys to reconsider the use of this method, as other Federal courts might adopt Judge Seybert's reasoning as detailed in *CAT 2002*.