

# EXHIBIT A

## MEMORANDUM OF LAW IN SUPPORT OF IV-D AGENCIES USING CONVENTIONS TO SERVE CIVIL PROCESS IN MEXICO

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## INTRODUCTION

The United States of America (USA) and the United Mexican States (Mexico) are both members of two service of process conventions and one protocol. These conventions and protocol are identified with hyperlinks to the full text and status of the conventions, dates of signature, ratification and entry into force in the tables below.

### **Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 5, 1965<sup>1</sup> (“The Hague Convention”)**

[\(Full Text\)](#) [Status Table](#)

USA	Signed 11/15/1965	Ratified 8/24/1967	Entry into Force 2/10/1969
Mexico	n/a	Adhesión 11/2/1999	Entrada en Vigor 6/1/2000

### **InterAmerican Convention on Letters Rogatory<sup>2</sup> (“The InterAmerican Convention”)**

[\(Full Text\)](#) [Status Table](#)

USA	Signed 4/15/1980	Ratified 11/10/1986	Entry into Force 7/28/1988
Mexico	Firmado 10/27/1977	Ratificado 2/27/1978	Entrada en Vigor 3/27/1978

### **Additional Protocol to the Inter-American Convention on Letters Rogatory<sup>3</sup>**

[\(Full Text\)](#) [Status Table](#)

USA	Signed 4/15/1980	Ratified 11/10/1986	Entry into Force 7/28/1988
Mexico	Firmado 8/3/1982	Ratificado 1/21/1983	Entrada en Vigor 3/9/1983

## EXCLUSIVITY OF THE CONVENTIONS

Treaty Provisions and USA Case Law and statutes provide that the Hague Service Convention is Exclusive. If due process requires that a Respondent be personally served with process and that Respondent resides in or is otherwise physically present in a foreign country and

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<sup>1</sup> 20 U.S.T. 361, T.I.A.S. No. 6638

<sup>2</sup> O.A.S.T.S. No. 43, Jan. 30, 1975, reprinted in 14 I.L.M. 339 (1975), (entered into force Aug. 27, 1988)

<sup>3</sup> O.A.S. T.S. No. 56, May 8, 1979, reprinted in 18 I.L.M. 1238 (1979) (entered into force Aug. 27, 1988)

said country is a member of the Hague Service Convention, then service shall be made in accordance with that Convention.

“The present Convention *shall apply in all cases, in civil or commercial matters where there is an occasion to transmit a judicial or extrajudicial document for service abroad.*”<sup>4</sup>

“By virtue of the Supremacy Clause, U.S. Const., Art. VI, the Convention pre-empts inconsistent methods of service prescribed by state law in all cases to which it applies...If the internal law of the forum state defines the applicable method of serving process as requiring the transmittal of documents abroad, then the Hague Service Convention applies.” [Volkswagenwerk Aktiengesellschaft v. Schlunk](#), 486 U.S. 694 (U.S. 1988) (Service of Illinois wrongful death suit upon German Company by serving German Subsidiary in IL – allowed because no occasion to transmit documents abroad when subsidiary is in U.S.)

"Because service of process was attempted abroad, the validity of that service is controlled by the Hague Convention, to the extent that the Convention applies... We therefore hold that the Convention permits -- or, in the words of the Convention, does not "interfere with" - service of process by international mail, so long as the receiving country does not object...*Rule 4(f)(2)(A)*...does not authorize ordinary international mail service to England” [Brockmeyer v. May](#), 383 F.3d 798, 801 (9th Cir. 2004) (Service of summons and complaint for trademark infringement upon British defendant by first class international mail – not only not provided for by FRCP but also not allowed by England).

“Serving an Individual in a Foreign Country. Unless federal law provides otherwise, an individual--other than a minor, an incompetent person, or a person whose waiver has been filed--may be served at a place not within any judicial district of the United States:

(1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

(2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:

(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*; or

(3) by other means not prohibited by international agreement, *as the court orders*. USCS Fed Rules Civ Proc R 4(f). (Emphasis added).

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<sup>4</sup> Hague Service Convention, Article 1.

It should be noted, however, that the Hague Service Convention Article 25 contemplates that it shall not prejudice the operation of other instruments pertaining to service between member countries. Thus, as between the USA and Mexico, USA law and jurisprudence allow a Respondent to be served in Mexico by either of the Hague or InterAmerican Service Conventions.

With regard to exclusivity, the Inter-American Convention, by its own terms and USA judicial interpretation thereof, suggest that convention is not the exclusive method for serving process in member countries.

"This Convention *shall apply to letters rogatory*, issued in conjunction with proceedings in civil and commercial matters held before the appropriate judicial or other adjudicatory authority of one of the State Parties to this Convention, that have as their purpose:

a. The performance of procedural acts of a merely formal nature, such as service of process, summons or subpoenas abroad...." <sup>5</sup> (Emphasis added)

"The Inter-American Convention states that it shall apply to letters rogatory; it does not state that letters rogatory are the only means of serving process in the signatory countries. By merely outlining the procedures necessary to effectively use a *letter rogatory*, the Inter-American Convention does not prohibit other methods of service of process." [\*Pizzabioche v. Vinelli\*, 772 F. Supp. 1245 \(M.D. Fla. 1991\)](#) (Emphasis added) (Personal Service of FL summons and tort action complaint upon Defendants in Argentina not prohibited by Inter-American Convention).

"As rogatory letters (or letters of request) are--by definition--merely one of many procedural mechanisms by which a court in one country may request authorities in another country to assist the initiating court in its administration of justice...Thus, *nothing in the language of the Convention expressly reflects an intention to supplant all alternative methods of service*. Rather, the Convention appears solely to govern the delivery of letters rogatory among the signatory States. (Emphasis added) [\*Kreimerman v. Casa Veerkamp, S.A. de C.V.\*, 22 F.3d 634 \(5th Cir. Tex. 1994\)](#) (service on Mexican defendant by direct mail through the Texas Secretary of State under the Texas Long-Arm Statute).

Brazilian law mandates that foreign legal pleadings be served upon corporate citizens of Brazil by means of letters rogatory issued to the Ministry of Foreign Relations.

"[s]ervice of process of legal pleadings/documents instituted by a foreign citizen in a foreign court of law that has been conducted upon a corporate citizen of Brazil by means of Federal Express is null, void and without effect." [\*Lake Charles Cane Lacassine Mill, LLC v. Smar Int'l Corp.\*, 2007 U.S. Dist. LEXIS 41941 \(W.D. La. June 8, 2007\)](#) (Service under the LA Long Arm Statute upon Brazilian defendant by federal express).

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<sup>5</sup> *Id.* Art. 2. (Emphasis added)

However, with regard to the InterAmerican Convention and Mexico, a New York Court found that “Letters rogatory are but one of several procedural devices by which a court in one country may request authorities in another country to assist the requesting court in the administration of justice (see, Fed Rules Civ Pro, rule 4 [f]; rule 28 [b]; CPLR 3108, 3113 [a] [3]). Notably, the Inter-American Convention is silent as to any requirement that letters rogatory are the exclusive means of service of process in the signatory nations. It has been held that this silence is significant.” [Laino v. Cuprum S.A. de C.V., 235 A.D.2d 25, 29 \(N.Y. App. Div. 2d Dep't 1997\)](#) (Service of NY product liability suit by Mexican attorney with power of attorney granted by plaintiff to serve process in Mexico – served security guard at gate of MX corporate defendant when person designated by defendant as having authority to accept service failed to show at gate as promised).

“Exclusivity of the Convention” with regard to the Hague Service Convention does not mean merely using the prescribed forms and sending them to the receiving country’s designated central authority. Article 10 expressly allows a Country to designate other methods for serving process in its territory.

“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 of the State of destination.” Hague Convention Article 10.

Mexico’s 1999 original Declaration, in Spanish, with respect to Article 10 provided “...In relation to Article 10, the United Mexican States are opposed to the direct service of documents through diplomatic or consular agents to persons in Mexican territory according to the procedures described in sub-paragraphs a), b) and c), unless the Judicial Authority exceptionally grants the simplification different from the national regulations and provided that such a procedure does not contravene public law or violate individual guarantees. The request must contain the description of the formalities whose application is required to effect service of the document. (Emphasis added).

Further to the questionable meaning of the previous sentence, what added to the confusion with regard to properly obtaining service in Mexico was that for years, and despite its membership in the two service conventions, practitioners justifiably believed that Mexico appeared to permit service by private process servers. These were usually Mexican attorneys who did not use either Convention forms and simply served whatever documents they were provided by the forum court and the executed and sent back the return of service as instructed by the forum. It took action by Mexico and a federal court in the USA to finally resolve the matter.

“...Because the United States and Mexico are both signatories to the Hague Convention, the Hague Convention provides the exclusive means by which Plaintiff can serve ... Unfortunately, however, when Mexico filed its declarations with the Ministry, the Ministry

prepared an erroneous "courtesy translation" of Mexico's declarations from the original Spanish text into English, which makes it appear that Mexico did not [\*8] object to certain of the alternative methods of service under Article 10. ...Apparently relying on the English courtesy translation, a section on the U.S. State Department's website, entitled "International Judicial Assistance in Mexico," stated that service may be accomplished in Mexico by international registered mail or by personal service because "[t]here is no provision in Mexico law specifically prohibiting service" by these methods. *See* [http://travel.state.gov/law/info/judicial/judicial\\_677.html](http://travel.state.gov/law/info/judicial/judicial_677.html) (last visited April 14, 2009).<sup>6</sup> Several courts, relying on the State Department's website and/or the erroneous English courtesy translation, have concluded that Mexico did not object to certain of the alternative methods of service under Article 10. *See, e.g., Casa de Cambio Delgado, Inc. v. Casa de Cambio Puebla, S.A. de C.V.*, 196 Misc. 2d 1, 7, 763 N.Y.S.2d 434 (N.Y. Supr. Ct. 2003)... *In re Alyssa F.*, 112 Cal. App. 4th 846, 854, 6 Cal. Rptr. 3d 1 (2003)... *NSM Music, Inc. v. Alvarez*, 2003 U.S. Dist. LEXIS 2964, 2003 WL 685338, at \* 2 (N.D. Ill. Feb. 25, 2003) ("Mexico does not appear to have a prohibition on service by registered mail, at least according to a U.S. State Department Web site.")...The Court is bound by the original Mexican declaration, not the "courtesy translation," the U.S. State Department's website ...[T]he State Department web site is not authority and lacks the force of law . . . ***Accordingly, based on the original Mexican declaration, the Court concludes that Mexico has in fact objected to service through the alternative methods specified in Article 10 of the Hague Convention,<sup>7</sup> and that service through Mexico's Central Authority is the exclusive method by which Plaintiff can serve Televisa in Mexico.*** *OGM, Inc. v. Televisa, S.A.*, 2009 U.S. Dist. LEXIS 33409 (C.D. Cal. Apr. 15, 2009) (Emphasis added, footnotes omitted) (Service of CA Complaint and Summons for copyright infringement and breach of contract upon Defendants in MX by International Registered Mail, Return Receipt Requested. This is a good discussion of cases considering service by mail.

Mexico's contribution to resolving the matter began legislatively. On December 7, 2010, the Mexican senate approved modifications to Mexico's declarations under the Hague Service Convention which had been presented to it by the executive branch of the Mexican government. These were officially published March 3, 2011, and are intended to confirm Mexico's objections to the alternative methods of service provided for under Article 10 of the Convention.

In May, 2011, Mexico transmitted and deposited with the Ministry of Foreign Affairs of the Netherlands the following modifications to its Declarations respecting the Hague Service Convention:

"... Declaration of May 2011:

1. The Government of the United Mexican States modifies the declarations made at the moment of acceding to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, done at The Hague on 15 November 1965, to read as follows:

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<sup>6</sup> The cite has been amended and now provides "...Mexico's accession to the Hague Service Convention indicates that service through the Mexico Central Authority is the exclusive method available ..."

I. In relation to Article 2, the Government of Mexico appoints the Directorate-General for Legal Affairs of the Ministry of Foreign Affairs as the Central Authority to receive requests for service of process of judicial and extrajudicial documents from other Contracting States who will forward them to the competent judicial authority for service.

II. In relation to Article 5, where the judicial or extrajudicial documents written in a language other than Spanish are to be served in Mexican territory, they must be accompanied by the corresponding Spanish translation.

...

IV. In relation to Article 7, second paragraph, it will be much appreciated if the blanks of the forms could be filled in Spanish.

...

VI. In relation to Article 12, second paragraph, the costs incurred by serving judicial or extrajudicial documents will be covered by the applicant.

...

2. In accordance with Article 21, second paragraph, subparagraph a), Mexico declares that it is opposed to the use in its territory of the methods of transmission provided for in Article 10. (emphasis added)

....” Emphasis Added See, [Full Text of Declaration of May 2011](#)

To summarize, Mexico has formally declared a) that Hague Convention Service of Process must be done through the Central Authority, b) that the documents served must be translated into Spanish, c) that it would “be appreciated” if the applicant would fill out the forms in Spanish (the Convention expressly allows the forms to be filled out in English or French and d) that private service of process, postal service or other methods optionally available pursuant to Article 10 are prohibited.

On November 28, 2011. Hague Conference on Private International Law Permanent Bureau Met with the Mexican Central Servicing Authority for the Hague Convention to further clarify and improve upon the processing of Hague Convention service requests in Mexico. The [Conclusions and recommendations](#) included, *inter alia*:

“...

4. The participants acknowledged that the competence of forwarding authorities is determined by the law of the requesting State.

5. The participants acknowledged that the Contracting States are not obliged to designate forwarding authorities under the Convention or notify other Contracting States of their identity or competence.

6. The participants recalled C&R No 49 of the 2003 SC that in the case of doubt as to the competence of the forwarding authority, the authorities in the requested State should seek to confirm that competence by either consulting the Hague Conference website or by

making expeditious informal inquiries of the forwarding authorities, including by way of e-mail.

7. The participants acknowledged that where permitted by the law of the requesting State solicitors, attorneys and process servers are competent to forward requests for service to the Central Authority of the requested State and recognised (sic) the benefits of forwarding authorities specifying their competence on the Model Form.

8. To avoid any misunderstandings, the participants were informed that the private contractor “Process Forwarding International” [now ABC LEGAL SERVICES] acts on behalf of the US Central Authority (*i.e.*, the U.S. Department of Justice) for *incoming* requests only. In contrast, there are multiple forwarding authorities in the United States for outgoing requests. Depending on applicable rules, forwarding authorities include any court official, any attorney, or any other person or entity (incl. process servers) authorized by the rules of the court. (Author’s Note: “ABC Legal Services”) is also contractor for all *outgoing requests* for service made under the InterAmerican convention)

....

10. The participants noted that the Model Form is to be signed and/or stamped by the applicant, *i.e.* the *forwarding authority*. There is no requirement for the Model Form to be signed by the court seised [seized].

....

12. The participants noted that according to the modified declaration made by Mexico with reference to Article 7 of the Service Convention, Contracting States are encouraged to fill out the Model Form in Spanish. However, this does not affect the right for Contracting States to fill out the Model Form in English or French; a request form filled out in either of these languages must be received and, if it complies with the requirements of the Convention (Arts 4 and 13), executed by the Central Authority.

13. The participants acknowledged that the law of the requesting State determines the type and content of documents to be served, including the number of documents as well as the inclusion of information relating to time limits for responses, regulations, practice or rules.

....

*No legalisation [legalization] or equivalent formality*

15. The participants acknowledged that request for service and the documents to be served annexed thereto are not subject to legalisation [legalization] or any equivalent formality.

...

17. Regarding costs, the participants reaffirmed that pursuant to Article 12(2) *a)* of the Service Convention, the Central Authority may require a forwarding authority to pay or



reimburse the costs occasioned by the employment of a judicial officer or other competent authority to serve the documents.

#### *Verifying compliance of requests*

18. Pursuant to Article 4 of the Service Convention, the Central Authority may verify whether a request complies with the Convention; however it may not condition compliance on requirements of its own internal law or existing judicial decisions. In particular, the participants noted that a request is not non-compliant by reason alone of any of the following:

- a. The Model Form is filled out in English or in French;
- b. The documents to be served are not “original”;
- c. There is a discrepancy between information on the Model Form and on the annexed documents;
- d. The request does not include a document that is required by the internal law of the requested State;
- e. The request does not include copies or extracts of the laws, regulations and procedures that relate to the proceedings;
- f. The request does not specify the fee for filing documents;
- g. The request does not specify the address of the court seised in the proceedings;
- h. Time limits specified in the request are not formulated in terms of calendar days, business days, or other method that does not comply with methods used under the internal law of the requested State.

....

20. To promote the proper functioning of the Service Convention, the participants recommended that Central Authorities adopt the following practices when handling requests:

- a. Central Authorities should determine whether a request is compliant with the Convention within 30 calendar days after receipt.
- b. Central Authorities should respond within a reasonable time to enquiries from forwarding authorities about the status of a request.
- c. Where practicable, all informal communication between Central Authorities and forwarding authorities after receipt of a request should be carried out by e-mail.
- d. If at any time during the execution of a request, an obstacle arises which may significantly delay or prevent execution, the Central Authority should inform the forwarding authority as promptly as possible about the obstacle and its likely impact on the execution of the request.
- e. If execution is prevented or otherwise not possible, the Central Authority should ensure that the Certificate of service is completed and forwarded to the applicant as promptly as possible.

#### *Judges*

21. The participants recognised the great importance of completing the Certificate of service given the rebuttable presumption it confers and its wide recognition. Judges were encouraged to properly complete these Certificates in addition to sending domestic proof of service.

### *Inter-American Convention*

22. The participants noted the different requirements under both the Hague Service Convention and the 1975 Inter-American Convention on Letters Rogatory and its Protocol. Given the different nature of the proceedings under both Conventions, it was acknowledged that the requirements under the Inter-American Convention should not be transposed to those of the Service Convention (and *vice versa*).

### *Return of the Certificate*

23. The participants acknowledged that Certificates should be returned via the Central Authority to the applicant *i.e.* the forwarding authority. Diplomatic channels must be avoided.

### *Amparo*

24. It was noted that *amparo* proceedings have impeded or suspended the execution of requests for service. Service of process may be contested via *amparo* proceedings since it is regarded as an act of an official authority. Taking Article 133 of the Mexican Constitution into account, the participants encouraged the dissemination of information of the Service Convention and the findings of this seminar to district court judges and other federal judges to make them aware of the requirements under the Service Convention.

## **CONCLUSION**

Mexico clearly requires international service of process requests from the USA to be effectuated using the forms, procedures and central authorities of the USA and Mexico. From a practical USA legal perspective therefore, if a goal is recognition and/or enforcement in Mexico of a resultant order, then service must be done by one of the Conventions. Further, if a Respondent though duly served pursuant to one of the Conventions in Mexico fails to appear or answer and suffers a default order by a US Court, care should be taken to ensure that the absent respondent is represented by an attorney *ad litem*.

If, on the other hand, the forum court is satisfied with a non-convention service alternative upon a Mexico-based respondent, and enforcement of the resultant order may be obtained in the USA, then that alternative option may suffice. With one or more of the many enforcement tools available to IV-D agencies, such enforcement may be a reasonable option - especially if the Respondent is a USA citizen residing in Mexico with licenses that may be revoked, tax refunds intercepted, passport renewal denied, etc. Then again, if the author or other attorney familiar with *OGM* happens to represent the ex-pat Respondent at an enforcement hearing, the agency may find itself having to perform formal service per one of the Conventions after all.