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Litigation & Arbitration

Studies on Service of Process Aboard

域外送达制度研究

◇ 何其生 著

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何其生 男，1974年4月生，籍贯河南省固始县。1996年，河南大学法律系本科毕业；1996年至2002年，在武汉大学法学院攻读并先后取得国际法硕士和博士学位；2002至2004年在北京大学做博士后研究工作。现为武汉大学国际法研究所副教授、武汉市江汉区人民法院副院长、《武大国际法评论》副主编。先后在《中国法学》、《法学研究》、《光明日报》等报刊上发表文章三十余篇，已出版专著一部(《电子商务的国际私法问题》，法律出版社2004年版)，参编著作五部。先后曾前往英国Cardiff大学和荷兰海牙国际法学院学习，于2005年7月作为中国政府代表团成员之一前往维也纳参加联合国国际贸易法委员会第三十八届年会，参与了有关公约的谈判。博士学位论文《电子商务的国际私法问题》先后被评为湖北省和全国“优秀博士学位论文”。

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诉讼与仲裁论丛

Litigation & Arbitration

中文摘要

域外送达是国际民事诉讼中一个非常重要的环节，它不仅直接关涉诉讼程序的顺利进行，而且影响着当事人权益的保护。但近年来，我国的域外送达效率低下，成功率偏低，不仅导致了许多涉外民事诉讼案件审理的严重拖延和滞后，而且浪费了不少司法资源。鉴于此，笔者在本书中考察我国域外送达效率低下之成因，试图揭示有关送达问题的关键之所在，并借鉴外国和国际条约之制度，力图对其中所涉及的问题提出一些解决的思路和方案。

全书共七章，四十多万字。

绪言部分主要揭示我国域外送达在实践中所存在的问题，论证这一论题在研究上的必要性。作者通过总结近年来我国域外送达中所广为人知的一些事件和对笔者调研数据的分析，提出主权的观念和效率的低下是目前域外送达问题的关键所在。

本书的第一章主要从理论上考察送达的功能和性质，认为，随着时间的推移和各国法律制度的变化，人们对送达的定性（即作为私人的行为抑或法院行使司法职权的体现）也会发生变化。为保证程序公正，广泛利用各种方式实现送达的功能才是送达制度设计的根本。

第二章在第一章的基础上，进一步探讨各国在送达制度上的分歧、送达实践上的斗争和合作，即对国际范围内域外送达的现状进行高度的概括。

第三章首先介绍了美国域外送达制度的发展现状和趋势：（1）送达不再是法院行使管辖权的充分必要条件；（2）法院官员一般不再执行送达；（3）“放弃送达”制度在法律上得以确立；（4）当面送达的地位降低，邮寄送达得以彰显；（5）公告送达受到了越来越严格的限制。然后结合美国法律的规定和判例，介绍了现代美国的域外送达规则、《海牙送达公约》在美国的实施、美国对外国国家的送达以及美国对外国向其境内送达的态度。在此章的行文中，比较注重判例的实证研究，并重点体现美国域外送达制度在实践中与其他国家所发生的冲突。

第四章共六节，研究《海牙送达公约》及其实施中的问题。第一节介绍了公约产生的历史背景和现状。第二节虽然是讨论公约的适用范围，但有不少理论上的深入思考，如公约的强制性和排他性问题，“民商事”、“送达”、“司法文书和司法外文书”的界定等，认为在这些问题上应主要根据法院地法来进行处理。

第三节主要讨论了公约所规定的送达途径，包括中央机关途径和替代性送达途径。在替代性送达途径中，本书主要着墨于公约体制下各国对邮寄送达的不同态度和法律效果，并重点考察了目前公约的成员国中对邮寄送达提出保留国家的做法。在理论上则介绍了1977年《海牙送达公约》特别委员会会议上的结论，即通过邮寄途径递送司法文书不应视为侵犯了目的地国主权。第四节针对被告权利的保护，对《海牙送达公约》第15条要求法官在送达被执行的一定期限范围内不要作出判决和第16条允许被告在其知悉该判决后的合理期间内提出免除丧失上诉权效果的申请，分别进行了论述。该节之后文章以图表的形式详细地介绍了公约成员国对公约这两条的声明，以供实践中我国当事人参考。第五节讨论了电子送达（主要是电子邮件和传真）作为新技术手段在送达领域的应用。本节不仅讨论了其在送达公约中实施的可行性和必要性，而且对送达公约成员国的立法和实践中对电子送达的态度，进行了广泛的考察，认为电子送达从无到有，并开始为一些国家所认可与接受，体现了一个逐渐发展的过程，但很多技术有待完善和普及。这一送达方式将会在各国的立法上得到越来越多的规定，并有可能代表着未来送达方式的发展趋势。第六节对公约机制的评价，认为公约是两大体制妥协的产物。公约在送达机制上的创新——中央机关途径，有着重要的价值和意义；而且公约在地域范围、对送达制度本身的发展以及对各国送达立法上，都有着广泛的影响。公约所面临的挑战主要来自于以下三点：(1) 各种不确定因素容易致使公约的适用发生分歧；(2) 美国“中央机关”的私人化可能会带来中央机关性质的变革；(3) 新技术的发展也给公约的适用带来一定的挑战。

第五章中国涉外送达制度。第一节分析了我国现行的送达制度，并在制度层面上认为，我国现行的送达制度有如下缺陷：(1) 法出多门，相互之间缺乏连贯性和系统性；(2) 法律规定之间存在着冲突，有的甚至前后矛盾；(3) 内容模糊，缺乏可操作性；(4) 域外送达的某些具体程序尚无相应的法律法规规定，造成法律适用方面的空白和混乱；(5) 域外送达缺乏系统、完整的法律体系，各法院的变通做法混乱不一，使其他相关诉讼程序的公开性和透明度也受到一定的影响。第二节通过对廖某在美国诉魏某离婚案的分析，认为在观念上，邮寄送达侵犯了国家主权的认识应该有所改变，并主张扩大我国邮寄送达的适用范围。对于有学者提出“建议撤回对《海牙送达公约》的保留”，本书持保守态度。第三节从对湖广铁路债券案及仰融案的分析中，认为如果域外送达损害一国的主权，无疑成为该国拒绝送达协助的理由，但从维护国家尊严的角度，对于外国向我国政府发出的司法文书，一律予以拒绝（除我国政府放弃豁免的案件以外）；对于外国向我国公司发出的司法文书，尽管其中也将我国国家列为被告之

一，仍可予以送达，但在复照时需表明我国享有主权豁免的原则立场。第四节在关于域外送达与代表机构、分支机构和业务代办人的讨论中，主要借助奔驰案，剖析跨国公司借助我国送达制度的缺陷规避我国法律的行为，认为中国的送达制度多的是刚性的规定，少的是弹性的内容。在对待这些跨国公司的送达问题上，建议在立法中规定跨国公司应该指定一个在我国境内的送达代理人的内容，同时增加利用传真、电子邮件送达的灵活性规定，并允许当事人对送达问题事先在合同中进行明确约定。第五节通过对日本国民五味晃申请承认和执行日本国法院作出的生效债务判决案的分析，认为基于对败诉方当事人的保护，内国法院在承认或执行外国法院判决时，要求在判决作出的程序中，对败诉一方当事人的送达要合法。

第六章中国区际送达制度，本章分四节，前三节分别对内地与香港、澳门和台湾的送达现状进行分析，并在最后一节重点分析了我国区际送达所面临的共同性问题。在对香港的区际送达上，本章认为最高人民法院《关于内地与香港特别行政区法院相互委托送达民商事司法文书的安排》所规定的委托送达与其他送达的关系并非排他性的，应该是委托送达与其他送达并进，广泛利用通过诉讼代理人送达、邮寄送达等为香港所认可的送达方式，对于广东等地区曾经利用中国法律服务（香港）有限公司送达的方式应继续加以利用。在对澳门的送达上，最高人民法院《关于内地与澳门特别行政区法院就民商事案件相互委托送达司法文书和调取证据的安排》所确定的委托途径也只是众多送达途径中的一种，如果在具体的案件中存在着其他更为快捷的途径，则不应排除之。对于向台湾的送达，由于两地目前没有达成任何送达的协议，应充分利用两岸律师在送达中的作用、民间团体方式、邮寄送达和公告送达，并尽快达成两岸的送达协议。

本书的第七章，在总结全书的基础上，就我国对于送达观念的认识、送达效率的提升和送达立法的完善阐述了作者的观点。

Abstract

Service abroad is a very important part of international civil procedure. It not only affects smoothly carrying on litigation proceeding, but also impacts the protection of parties' interests. In recent years, there exist a lot of problems in Chinese practice of service abroad. It is inefficient. The success rate is also low. These problems results in severely delay and lag of hearing in many civil cases, and wasted plenty of judicial recourses. In this book; the author tries to find the reasons causing inefficiency of service abroad, and reveal the key parts of service process problems. Using the systems of foreign countries and international conventions for reference, the book endeavors to put forward some thoughts and proposals to resolve relative questions.

The book consists of 7 chapters, about 400,000 Chinese characters.

The introduction of the book mainly uncovers existing problems in Chinese practice of service abroad, and demonstrates the necessity of study on this theme. By summarizing the known matters about service abroad in recent years in China and analyzing the data which the author surveyed, the introduction points out the concept of sovereignty and inefficiency are the key problems to present service abroad.

Chapter 1 theoretically reviews the functions and nature of service abroad. The author deems the nature of service process, as a private action or as a court performing judicial powers, will alter, with time elapsing and changes of different nations' legal system. The most important thing of designing the system of service abroad lies in the realizing of the functions of service abroad through various ways of service and the guarantee of the procedure justice.

On the basis of Chapter 1, Chapter 2 further discusses the divergences of different nations' service system, their struggle and cooperation. That is to say, the part highly generalizes the status quo of service abroad in international fields.

Chapter 3 firstly introduces the development status quo and trend in the U. S. A. The development status quo and tendency are the following: (1) Service is no longer sufficient and essential condition for the judicial exercising of jurisdiction. (2) The court clerks no longer perform service. (3) The waiver of service is stipulated in American law. (4) Personal service decreases gradually, on the contrary, service by

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mail increases. (5) Service by advertising in a newspaper is restricted more and more strictly. Then connecting the U. S. legislations and cases, the book discusses modern service abroad rules in U. S. , the U. S. implementation of the Hague Service Abroad Convention, U. S. service systems to foreign countries, U. S. position on foreign service documents to U. S. . Chapter 3 attaches much importance to cases and stresses the conflicts of service abroad systems happened between U. S. and other countries in practice.

Chapter 4 consists of 6 sections, which study on the Hague Service Abroad Convention and some problems in its implementation. Section 1 introduces the historical background and status quo, and lists 52 contracting countries at present. Section 2 is about the applicable scope of the Convention, in which the author also made an in-depth theoretical analysis, including the mandatory character and exclusive character of The Hague Service Abroad Convention, the definitions of "*civil or commercial matters*", "*service*", "*judicial or extrajudicial documents*", and so on. The book holds these terminologies should be defined according to lex fori. Section 3 mainly expounds the channels stipulated in the Hague Convention including the Central Authority channel and subsidiary or alternative channels. As for alternative channels, the book focuses on the standpoints held and legal effects ascribed by different countries to postal channels under the Convention system, and specially investigate the current member States who oppose to the use of postal methods of transmission. In theory, the book introduces the conclusion that 1977 Special Commission reviewing the practical operation of the Hague Service Convention reached: transmission of the judicial document through postal channels should not be treated as an infringement of the sovereignty of destination state. In consideration of the protection of the defendant's rights, Section 4 separately elaborates on article 15 of the Hague Convention which requires the judge not to give judgment until service has been performed within a certain period and article 16 which allows relief from expiry of the time for appeal when a judgment has been known or notified only after expiry of the time for appeal. At the end of this section, the book gives a table of the declarations made by contracting states pursuant to article 15 and 16 for reference to Chinese parties. Section 5 makes a study on electronic service, mainly including e-mail and fax. The book not only considers the possibility and necessity that the Hague Convention permits the use of electronic service, but widely inspects the position that Contracting States execute electronic service in their legislations and practices. The author draws a conclusion that electronic service has

experienced a gradually developing process from nothing to something, and begins to be recognized and accepted by some countries. But some technologies need to be improved and popularized. Service through the new technologies will be provided more and more in the legislations of different countries and maybe represents the development tendency of service channels in the future.

Section 6 evaluates the service mechanisms of the Hague Convention. The book believes that the Hague Convention is the outcome of compromise between two systems. The innovative service mechanism of the Convention, i. e. the Central Authority channel, has important value. In addition, the Hague Convention has a broad influence on the scope of geographic, the development of service system and the legislations on service in different countries. The challenges that the Hague Convention faces come from three aspects as follows: (1) various uncertain factors easily lead to divergences during the application of the convention; (2) the privatization of the central authority in the U. S. may change the nature of the central authority; (3) new technological developments will produce some challenges to the application of the Hague Convention.

Chapter 5 explores service abroad system in China. The book firstly analyzes the actual system in our country, and points out the defects of China service system mainly displayed as: (1) the legislations on service abroad were from different departments and shortage of consistency and systematism; (2) the conflicts exist among different statutes. Some statutes even do not cohere with themselves; (3) the contents of some laws are very ambiguous and inoperative; (4) some specific procedures of service abroad have not been established, which constitutes loopholes and causes chaotic applications; (5) because of the lack of systematic and comprehensive legal system on service abroad, the judicial practice is also disordered, which affects the openness and transparency of others related proceeding.

Through the analysis of a divorce case in U. S. court, Section 2 of the Chapter deems that the ideas should be changed that transmission of the judicial document through postal channels is an infringement of sovereignty, and stands for enlarging the applicable scope of postal channel in China. As for the advice to withdraw the reservation to the Hague Convention, the book does not agree with it. Through the analysis of Yang Rong case, Section 3 holds that the States should refuse to supply judicial assistance if service abroad will do some damages to their sovereignty. From the perspective of the protection of national dignity, we should uniformly refuse to serve the

documents when foreign countries deliver to China under above condition (except the case that Chinese government has given up immunity). As regards to the judicial documents foreign countries delivery to China, we may still perform service even though China is one of the defendants in the documents. However, we should declare clearly the principle stand that China enjoys sovereignty immunity. During the discussion between service abroad and representative agency, branch agency and business deputy, Section 4 analyzes through Benz cases how a transnational corporation avoids Chinese law by utilizing the defects of Chinese service system. The analysis concludes that Chinese service system has more rigid regulations and less flexible rules. In order to resolve the service problems about transnational corporations, the author suggests that transnational corporation should be statutorily required to appoint a service agent in China, and at the same time, flexible regulations, for example, service by means of fax or e-mail should be permitted. In addition, our laws should also permit parties' arrangement on service in the contract in advance. Section 5 firstly discusses the case in which a Japanese WUWEIHUANG applied for the recognition and enforcement of obligation judgment decided by a Japanese court. The book deems that domestic courts, when recognizing and enforcing a judgment by a foreign court, must serve proceedings legally and properly upon the party against whom the judgment is unfavorable.

Chapter 6 concentrates on interregional service system, and analyses service status quo between Mainland and Hong Kong, Macao, Taiwan. This Chapter stresses discussing the common problems which China's interregional service system faces in the last section. This chapter is made up of four parts. As far as service to Hong Kong is concerned, the book believes, the entrusting service in *Arrangement of the Supreme People's Court on the Service of the Civil and Commercial Judicial Documents by Reciprocal Mandate between the Courts of the Mainland and the Hong Kong Special Administrative Region* is not exclusive to other service channels, and they should be parallel to each other. We should widely make use of those service channels recognized by Hong Kong laws, such as service through litigation agent, postal service, etc. We also should continue the practice of the service channel existing in Guangdong Province through China legal service Ltd. Co. (Hong Kong). As for service to Macao, the entrusting service regulated in *Arrangement of the Supreme People's Court on the Service and the Taking of evidence of the Civil and Commercial Judicial Documents by Reciprocal Mandate between the Courts of the Mainland and the Macao Spe-*

cial Administrative Region is also one of the many service channels. We should not exclude the more swift service channels when they exist in specific case. Because there is no agreement between Mainland and Taiwan, we should make the best of service channels through lawyers and private organizations, postal channels, service by publications, and try our best to reach such agreements as soon as possible.

On the basis of summarizing the above discussions, chapter 7 expounds the author's opinions on how to understand the service system, how to improve the service efficiency and how to perfect the service legislations.

目　录

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