PAUL HASTINGS

STAY CURRENT

August 2018

Follow @Paul_Hastings

Ninth Circuit Broadly Interprets Criminal Rules for Serving Foreign Companies

By Daniel Prince, Serli Polatoglu & Nate Brown

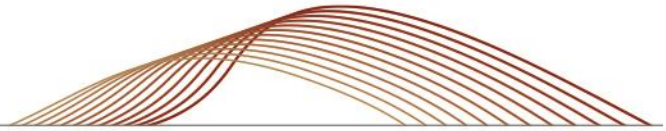
On August 23, 2018, the Ninth Circuit Court of Appeals upheld the U.S. government's attempt to serve a criminal summons on Pangang Group Company, Ltd. and its subsidiaries ("the Pangang Companies"), which are owned and operated by the Chinese government. In doing so, the Ninth Circuit held that service was proper under the amended Federal Rules of Criminal Procedure because the Pangang Companies had sufficient notice of the summons through their attorneys—a means of service courts previously held did not comport with Federal Rule of Criminal Procedure 4 ("Rule 4"). By holding that service of the summons upon the Pangang Companies' attorneys was sufficient, the Ninth Circuit has broadly interpreted the service requirements for foreign organizations, meaning that such organizations may have more limited options in contesting service of a criminal summons in the future.

Multiple Failed Attempts at Service

On February 7, 2012, the U.S. government indicted the Pangang Companies in the Northern District of California, alleging that the companies had engaged in conspiracy to commit economic espionage and attempted economic espionage in violation of 18 U.S.C. Section 1831(a)(3-5). The indictment claimed that the Pangang Companies had conspired with specific individuals to "to illegally obtain trade secrets from E.I. du Pont de Nemours & Company related to chloride-route titanium dioxide production technology."

After the indictment, the U.S. government attempted to serve summonses to the New Jersey offices of a U.S. subsidiary of one of the Pangang Companies and mailed them to the same location. On March 29, 2012, the Pangang Companies' attorneys made a special appearance in the district court to file a motion to quash service of the summonses. On July 23, 2012, the district court granted the motion to quash on the grounds that the government failed to meet the delivery requirement for three of the companies and failed to meet the mailing requirement for all of the companies.

From August 2012 to November 2012, the government attempted to serve the summonses on multiple individuals and addresses within the United States, and even formally requested that the Chinese government serve the Pangang Companies, all to no avail. On February 7, 2013, the Pangang Companies' attorneys made another special appearance and filed another successful motion to quash. The district court held that none of the agents or addresses served met the service requirements of the Federal Rules of Criminal Procedure.



If You Cannot Win, Change the Rules

The district court consistently quashed the service of the summonses because the government was unable to serve the Pangang Companies in accordance with Federal Rule of Criminal Procedure 4 ("Rule 4"). At the time, Rule 4 required that the government serve a summons on a foreign organization "by delivering a copy to an officer, to a managing or general agent, or to another agent appointed or legally authorized to receive service of process,"[1] and "mail[ing] [a copy] to the organization's last known address within the district or to its principal place of business elsewhere in the United States."[2]

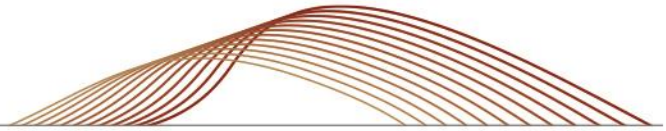
On October 25, 2012, the Department of Justice ("DOJ") formally requested that the Advisory Committee of the Criminal Rules alter Rule 4 to allow for service on a foreign organization. In response, the Advisory Committee proposed three amendments to Rule 4: (1) allow a judge to take "any action authorized by law" should an organizational defendant fail to appear in response to a summons; (2) eliminate the requirement to mail to an organizational defendant in the United States unless statutorily required; and (3) authorize service of a summons on foreign organizations via (a) delivery on a suitable individual under the foreign jurisdiction's law or (b) by "any other means that gives notice," including actions taken subject to stipulations by the parties, under a letter rogatory, or by an international agreement.[3] After the Advisory Committee's amendments were approved by the Committee on Rules of Practice and Procedure ("the Standing Committee"), the Standing Committee then opened the Amendments up for public discussion. Significantly, one of the comment letters received during this period was from the Pangang Companies' attorneys.[4] After considering the public comments, the Advisory Committee adopted the amendments without any changes. The Supreme Court and Congress subsequently approved these changes, and Rule 4 went into effect, as amended, on December 1, 2016.

While this process was ongoing, the government filed a third superseding indictment against the Pangang Companies. The government waited until the amended Rule 4 had taken effect, and then served the summonses on the president of a U.S. affiliate of the Pangang Companies, unsuccessfully requested service from the Chinese agency, and emailed and mailed copies of the summons to the Companies' attorneys. Although the attorneys maintained that they did not, and were not obligated to, send the summonses to Pangang, the attorneys later conceded that they had informed the Pangang Companies of the existence of the summonses.

When the Pangang Companies failed to appear for their January 2017 hearing, the government filed a motion for imposition of civil contempt sanctions. In a special appearance on behalf of the Pangang Companies on April 24, 2017, the Companies' attorneys moved to quash service and opposed the sanctions, but conceded that their "client has authorized me to be here so they plainly know about these proceedings." Ultimately, the district court deferred on the sanctions but denied the motion to quash, noting that the Pangang Companies, "received notice of the summonses from the [attorneys], even if they did not receive the actual documents." The district court held that the attorneys' "pre-existing relationship" in this matter, combined with the attorneys' admission that the Pangang Companies had received actual notice, was sufficient to prove that the companies' service of the summonses was done using a "means that gives notice" under Rule 4.

The Ninth Circuit Rejects a Narrow Interpretation of Rule 4

In its appeal, the Pangang Companies argued that the district court's interpretation of Rule 4 was improper because it did not comport with well-established principles of statutory interpretation, and it would undermine the "historical role" of special appearances to contest service.



The Pangang Companies' first argument was based on the canons of statutory construction known as the superfluity canon and the canon of ejusdem generis. The canon of superfluity stands for the premise that in drafting legislation, Congress does not intend to make any portion of a statute superfluous, and thus each word must be given effect. The Pangang Companies argued that if the court were to interpret the phrase "by any other means that gives notice" broadly, it would be unnecessary to include the subsequent list of methods of service via stipulations, letters rogatory, or international agreements.

Additionally, the Pangang Companies argued that the phrase "by any other means that gives notice" should be interpreted narrowly under the canon of ejusdem generis, which provides that any general term listed in a statute should be limited in its interpretation to those terms that are specifically enumerated. The Pangang Companies further argued that by highlighting three methods of service that "are formal processes that respect domestic and foreign law and procedure, and are otherwise legal and equitable," the more general term of "any other means" should be limited to "processes that share these characteristics."

Ultimately, the Ninth Circuit rejected each of these arguments. First, the Ninth Circuit stated that because the phrase "by any other means that gives notice" is unambiguous, further statutory interpretation is unnecessary. Further, the enumerated methods were not superfluous as they were provided as a non-exhaustive list for the purpose of "giv[ing] the government the benefit of a presumption that using the means in the list give[s] notice."

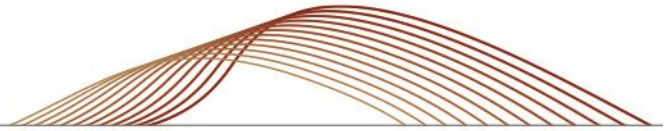
More importantly, the Ninth Circuit noted that the Pangang Companies' attorneys had raised the superfluity and ejusdem generis arguments in their letter to the Advisory Committee. Despite being aware of both of these arguments, the Advisory Committee made no changes to the proposed Rules, and in some instances expressly rejected the arguments made by the Pangang Companies.

In addition to their arguments on statutory interpretation, the Pangang Companies argued that by allowing delivery of the summonses to the attorneys to constitute effective service, the court "would effectively eliminate the possibility of a special appearance by a foreign corporation to contest service." The Pangang Companies argued that the Advisory Committee did not intend to contravene the long established role of special appearances in challenging defective service.

However, the Ninth Circuit also rejected this argument, noting that there is no "longstanding historical practice" of special appearances to contest service in *criminal* cases. Further, the Ninth Circuit noted that there is no Constitutional or statutory right that would require the court to interpret Rule 4 to avoid the limiting of special appearances.

Once again, the Ninth Circuit noted that the Pangang Companies' attorneys had raised these same arguments to the Advisory Committee, which expressly rejected these arguments. The Committee specifically stated that "the point of the amendment is to provide a means of service that gives notice, and there is no legitimate interest in allowing a procedure in which an institutional defendant can feign lack of notice."[5] The Advisory Committee had also noted that the amendments would not eliminate all special appearances on other grounds, as foreign organizations could still contest the constitutionality of Rule 4, object to retroactive application of the Rule, or claim that an organizational defendant was dissolved.

Importantly, the Ninth Circuit agreed with the Pangang Companies that merely delivering a summons to a previous attorney of a foreign organization did not automatically constitute valid service.



Since service on the organization's attorney was not one of the three enumerated methods, the validity of such services as "other means that gives notice" must be determined on a case by case basis. However, since the Pangang Companies' attorneys made a special appearance in 2017, and the attorneys had acknowledged that the Pangang Companies had notice of the most recent summons, there was sufficient evidence that the Pangang Companies had received notice under the revised Rule 4.

Conclusion and Key Takeaways

As a result of the *Pangang* decision, the Ninth Circuit's broad interpretation of the phrase "by any other means that gives notice" provides the U.S. government substantially more methods by which it can properly serve foreign organizations. When combined with the DOJ's increasing emphasis on prosecuting foreign organizations under U.S. criminal laws, foreign organizations should note that one of the major impediments to prosecution—effecting service on a foreign organization—has been limited by the Ninth Circuit's ruling. Further, foreign organizations should be aware that, while mailing a summons to the organization's American counsel alone may be insufficient to establish service, if the organization's attorneys appear before a federal court on behalf of the client—even if only for a "limited" or "special" appearance to contest service—*and* counsel acknowledges that it has communicated with the defendant regarding the summons/indictment, then a court could find that service has been effected under a flexible reading of Rule 4.

✧ ✧ ✧

If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings Los Angeles lawyers:

Daniel Prince
1.213.683.6169
danielprince@paulhastings.com

Nate Brown
1.213.683.6173
natebrown@paulhastings.com

Serli Polatoglu
1.213.683.6106
serlipolatoglu@paulhastings.com

[1] Fed. R. Crim. P. 4(c)(3)(C) (2011).

[2] *Id.*

[3] Advisory Comm. On Criminal Rules, May 2014 Report to Standing Committee, at 2, 6 (May 5, 2014), *available at* http://www.uscourts.gov/sites/default/files/fr_import/CR05-2014.pdf.

[4] Advisory Comm. on Criminal Rules, March 2015 Agenda Book, at 71 (Mar. 16–17, 2015), *available at* http://www.uscourts.gov/sites/default/files/fr_import/CR2015-05.pdf.

[5] Advisory Comm. on Criminal Rules, March 2015 Minutes, at 11 (March 16–17, 2015).