



Simply Speaking

Obscure legal concepts or terms in a loan document explained in plain English

June 2019

Service of Process Agent

Example

“The [Obligor] hereby agrees that service of process in any such action or proceeding brought in New York may be made upon it by serving a copy of the summons and other legal process in any such action or proceeding on the [Obligor] by mailing or delivering the same by hand to the [Obligor] at the address indicated for notices in Section 9 hereof. The service, as herein provided, of such summons or other legal process in any such action or proceeding shall be deemed personal service and accepted by the [Obligor] as such, and shall be legal and binding by the [Obligor] for all the purposes of any such action or proceeding. In the event that the [Obligor] shall not be conveniently available for such service, the [Obligor] hereby irrevocably appoints [Service of Process Agent] as its agent for service of process in respect of the proceeding before such courts (and agrees that service on such agent shall be deemed personal service).”

What is it and what does it do?

A service of process agent is either a person or business that a person or corporate entity can designate so that other parties know where to send important legal documents. This designation is primarily intended to facilitate service on persons who are absent from the state, but this absence is not a requirement for one to appoint a service of process agent. The concept of a service of process agent exists in many jurisdictions, but we focus on how it works in the United States in this piece.

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Why is it there?

In the United States, to bring a civil action, a party must notify the opposing parties of the litigation. This is done by serving “process.” Process is any legal document or writ by a court that tells the person an action has been taken against them. A party serves process by giving notice, and a party can satisfy the notice requirement in any reasonable way. When one brings a suit against a natural person, it is easy to decide who that party must notify (the natural person). However, in the context of suing a business, deciding who to notify and where to send notice becomes much more difficult because the business consists of many different people and a process server (that is, the person initiating a suit) cannot be expected to know a corporation’s internal practices. A service of process agent allows the company to designate either a person or business who can receive legal documents on behalf of the company. This eliminates any confusion as to the proper place for legal documents to be sent.

In addition to notice, the service of process agent acts as the point of contact for all things relating to lawsuits. Any delivery of legal documents can be sent to the service of process agent, and it is the job of the agent to receive and forward these documents to the appropriate place.

Every state in the United States allows a business wishing to register as a legal entity (LLC, partnership, corporation) within that state to appoint a service of process agent. In the case of a domestic business entity, the appointed agent must have a business address within that state, and the written appointment of an agent must be filed in the office of the clerk of the county in which the company to be served resides or has its principal office. A business can appoint itself, a different business, or any employee over the age of eighteen as a service of process agent, so long as the agent has a street address within the state.

Why is it important (or not so important) to Lender?

Service of process agents are important to a lender because they allow the lender to successfully bring a lawsuit against or deliver important legal documents to the borrower.

In addition to the option of appointing a service of process agent upon incorporation, the individual parties to a loan agreement may include a clause which appoints a service of process agent for the specific agreement. When this is done, the appointed agent becomes a valid place for the lender to send notice to in the event they need to bring a lawsuit to enforce the agreement. This becomes important in the context of a non-U.S.-based borrower. Normally, a U.S.-based borrower agrees to receive process at its mailing address in the U.S. In fact, in New York, every domestic corporation (and every authorized foreign corporation) must appoint the secretary of state as the agent of service. This must be done in the entity’s articles of incorporation, and no domestic corporation will be formed or authorized to do business until the secretary of state is properly appointed. Non-U.S. borrowers who do not have a physical presence in the country must appoint a service of process agent who can receive process in the United States.

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How does it affect a Borrower in practical terms?

Borrowers in the United States are usually registered as a legal entity in some state. As such, they often have already appointed a service of process agent. However, service of process agents allow borrowers to choose different agents for specific agreements. This is helpful when the borrower is an international company and notice may be difficult to satisfy. International businesses may not have registered as a legal entity within the United States, and as such, lenders will not know where to send important legal documents. Appointing a service of process agent to the transaction documents removes this confusion.

Additionally, appointing one entity to control the receipt of important notices and documents regarding lawsuits ensures that the borrower will never miss a communication regarding their active legal matters. This protects the borrowers from liability due to simple miscommunication.

How is it relevant to shipping?

In the shipping arena, obligors to the contracts are often not entities incorporated within the United States. Since many of these businesses do not have offices within the United States, they can appoint a service of process agent which will serve as the point of contact for the business within the country. A similar concept exists and can apply in many other jurisdictions that are familiar to shipping companies, such as England and Wales and Germany, and the contracts governed by the laws of those jurisdictions may contain a similar provision requiring appointment of a service of process agent.

How is it negotiated?

Including a provision appointing a service of process agent is rarely resisted by the borrower because lenders need certainty that they can bring a claim against the borrower without having to worry about where to serve process. Because appointing an agent involves costs, sometimes borrowers resist appointing an agent in jurisdictions that are not significant in the context of the business transaction.

Questions?

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