TRANSMITTING RULE 4(D)(2)'S COST-SHIFTING PROVISIONS ABROAD

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I. INTRODUCTION

The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents[1] is a multilateral treaty that establishes procedures for service of process across international borders.[2] The United States, along with most of the world's largest economies, are parties ("contracting states")[3] to the Hague Service Convention.[4] Absent a prior

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1. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 [hereinafter Hague Service Convention].

2. HAGUE CONFERENCE ON PRIVATE INT'L L., PRACTICAL HANDBOOK ON THE OPERATION OF THE SERVICE CONVENTION xlv (4th ed. 2016) [hereinafter Practical Handbook FAQ] https://assets.hcch.net/docs/aed182a1-de95-4eaf-a1ae-25ade7cd09de.pdf [https://web.archive.org/web/20210404225555/https://assets.hcch.net/docs/aed182a1-de95-4eaf-a1ae-25ade7cd09de.pdf]; Gary A. Magnarini, Note, *Service of Process Abroad Under the Hague Convention*, 71 MARQ. L. REV. 649, 657–58 (1988).

3. Hague Service Convention, *supra* note 1, art. 1.

4. Hague contracting states include the Group of Seven largest economies and China. *See Group of Seven (G-7)*, INVESTOPEDIA (OCT. 20, 2021), https://www.investopedia.

agreement waiving service or committing the dispute to arbitration,[5] the Convention applies for American plaintiffs whenever "'there is occasion' to transmit a judicial document for service abroad"[6] to a person or entity with a known address in one of the seventy-three contracting states.[7]

International commerce has exploded in the past several decades with the advent of the internet.[8] But the Convention's text, along with the methods of service it provides, have remained the same since 1965.[9] Unlike internet communications, which can span the globe in a fraction of a second,[10] service through the Convention's enumerated methods may take months, or even years.[11] Thus, while it may be possible to give a foreign defendant *notice* of a pending suit instantaneously, plaintiffs may face delay and other inconveniences in achieving Hague-compliant *service*.

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com/terms/g/g7.asp [https://web.archive.org/web/20210220132146/https://www.investopedia.com/terms/g/g7.asp]; *Status Table*, HAGUE CONFERENCE ON PRIVATE INT'L LAW (JUNE 17, 2021), https://www.hcch.net/en/instruments/conventions/status-table/?cid=17 [https://web.archive.org/web/20220111204144/https://www.hcch.net/en/instruments/conventions/status-table/?cid=17] (listing Hague Convention contracting states).

5. Parties with a prior relationship can agree to binding arbitration or other mechanisms that would obviate the need for service abroad. *See* Rockefeller Tech. Invs. (Asia) VII v. Changzhou SinoType Tech. Co., 460 P.3d 764, 767 (Cal. 2020), *cert. denied*, 141 S. Ct. 374 (2020); Alfred E. Mann Living Tr. v. ETIRC Aviation S.a.r.l., 910 N.Y.S.2d 418, 421–22 (N.Y. App. Div. 2010). Accordingly, most of the discussion in this Note applies to cases in which the parties have no prior relationship.

6. Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 702 (1988); Hague Service Convention, *supra* note 1, art. 2.

7. *See Status Table*, *supra* note 4.

8. *See* Aaron Smith & Monica Anderson, *Online Shopping and E-Commerce*, PEW RSCH. CTR. (Dec. 19, 2016), https://www.pewresearch.org/internet/2016/12/19/online-shopping-and-e-commerce/ [https://web.archive.org/web/20210327053359/https://www.pewresearch.org/internet/2016/12/19/online-shopping-and-e-commerce/] (finding that 79% of Americans made an online purchase in 2016, compared to just 22% in 2000); U.S. DEP'T OF HOMELAND SEC., COMBATTING TRAFFICKING IN COUNTERFEIT AND PIRATED GOODS: REPORT TO THE PRESIDENT OF THE UNITED STATES 7 (2020), https://www.dhs.gov/sites/default/files/publications/20_0124_plcy_counterfeit-pirated-goods-report_01.pdf [https://web.archive.org/web/20210318005801/https://www.dhs.gov/sites/default/files/publications/20_0124_plcy_counterfeit-pirated-goods-report_01.pdf] (noting the "rapid" growth of online commerce, including a 13.3% increase in online sales in the year 2019 alone).

9. *See* Hague Service Convention, *supra* note 1, proclamation.

10. *See* Anova Applied Elecs., Inc. v. Hong King Grp., 334 F.R.D. 465, 471 (D. Mass. 2020) (noting that e-mail delivery is "virtually instantaneous").

11. *See* HAGUE CONFERENCE ON PRIVATE INT'L LAW, SUMMARY OF RESPONSES TO THE QUESTIONNAIRE OF JULY 2008 RELATING TO THE SERVICE CONVENTION, WITH ANALYTICAL COMMENTS (SUMMARY AND ANALYSIS DOCUMENT) ¶¶ 58–59, fig. 2 (2009), http://hcch.e-vision.nl/upload/wop/2008pd14e.pdf [https://web.archive.org/web/20210404234154/https://assets.hcch.net/upload/wop/2008pd14e.pdf] [hereinafter Permanent Bureau Questionnaire].

In recent years, plaintiffs have attempted (often successfully) to circumvent Hague procedures by serving international defendants via e-mail or social media.[12] However, e-mail service between private parties is not clearly condoned by the text of the Hague Service Convention and violates the internal laws of many contracting states.[13]

This Note looks to the Federal Rules of Civil Procedure for a better solution.[14] Under Rule 4(d)(2), defendants who refuse to waive service of process without good cause must compensate the plaintiff for the costs of formal service.[15] The Rule, as originally drafted, applied to foreign defendants, but the Judicial Conference later limited the provision to domestic parties.[16] This Note argues that Rule 4(d)(2) should be amended to apply to foreign and domestic parties alike.[17] This change would create a stronger incentive to waive Hague Convention service and thus increase the speed and efficiency of international litigation.[18]

Part II discusses the history of the Service Convention and the methods of service it affirmatively authorizes.[19] That Part also discusses the attempt to revise the Federal Rules to encourage parties to waive service in international litigation, why it failed, and the ongoing controversy surrounding service via e-mail.[20] Part III.A discusses e-mail service as an alternative to Convention procedures, acknowledging its faults, but explaining why circumstances may render it necessary.[21] Part III.B argues that incentivizing parties to waive service would offer most of the benefits of e-mail service with fewer drawbacks.[22] Part IV thus concludes that applying Rule 4(d)(2)'s cost-shifting framework to foreign defendants—as the drafters of the 1993 Amendments originally

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12. *See generally* Michael A. Rosenhaus, Annotation, *Permissibility of Effectuating Service of Process by Email Between Parties to Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 14 A.L.R. Fed. 3d Art. 8 (2016) (collecting cases); Maggie Gardner, *Parochial Procedure*, 69 STAN. L. REV. 941, 999 n.313 (2017) (collecting cases).

13. *See* discussion *infra* Part III.A.

14. This Note proposes a federal rule change and primarily discusses federal caselaw. However, the author would not oppose a similar solution on the state level.

15. FED. R. CIV. P. 4(d)(2).

16. *See generally* Gary B. Born & Andrew N. Vollmer, *The Effect of the Revised Federal Rules of Civil Procedure on Personal Jurisdiction, Service, and Discovery in International Cases*, 150 F.R.D. 221, 231–35 (1993).

17. *See* discussion *infra* Parts III.B–IV.

18. *See* discussion *infra* Part III.B.

19. *See* discussion *infra* Parts II.A–D.

20. *See* discussion *infra* Parts II.D–E.

21. *See* discussion *infra* Part III.A.

22. *See* discussion *infra* Part III.B.

intended—is a better solution to the problems that the ad-hoc e-mail solution attempts to solve.[23]

II. BACKGROUND

A. Origins of the Hague Service Convention

International service of process before the Hague Service Convention was a messy affair.[24] American plaintiffs were required to use methods that simultaneously complied with the law of a foreign state and the Due Process requirements of the American Constitution, making effective service a challenge.[25] Although "letters rogatory" (requests to a foreign court to effect service)[26] were commonly permitted as a means of service under foreign law,[27] American plaintiffs could not prescribe the procedures through which letters rogatory would be delivered,[28] and thus could not assure that these procedures would provide the likelihood of actual notice that due process requires.[29] Alternative methods were not much better; American plaintiffs could not count on consular offices in foreign countries to deliver service in person,[30] and hiring local counsel in

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23. *See* discussion *infra* Part IV.

24. Magnarini, *supra* note 2, at 650. This Note discusses the pre-Hague state of affairs only briefly. For a more detailed discussion, *see generally id.* at 654–57; Eric Porterfield, *Too Much Process, Not Enough Service: International Service of Process Under the Hague Service Convention*, 86 TEMP. L. REV. 331, 333–39 (2014).

25. Magnarini, *supra* note 2, at 653.

26. *Id.* at 653 n.25; *see also Letter of Request*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("[A letter of request (or letter rogatory) is a] document issued by one court to a foreign court, requesting that the foreign court (1) take evidence from a specific person within the foreign jurisdiction or serve process on an individual or corporation within the foreign jurisdiction and (2) return the testimony or proof of service for use in a pending case.").

27. *See* Hans Smit, *International Aspects of Federal Civil Procedure*, 61 COLUM. L. REV. 1031, 1041–42 (1961).

28. Note, *Reciprocity for Letters Rogatory Under the Judicial Code*, 58 YALE L.J. 1193, 1193 n.2 (1949) (quoting EDWARD P. WEEKS, A TREATISE ON THE LAW OF DEPOSITIONS: COMPRISING ALSO ABSTRACTS OF THE STATUTORY LAW PERTAINING THERETO 151 (1880) ("We cannot execute our own laws in a foreign country[,] nor can we prescribe conditions for the performance of a request which is based entirely upon the comity of nations, and which, if granted, is altogether *ex gratia*.").

29. Smit, *supra* note 27, at 1041; *see* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

30. Magnarini, *supra* note 2, at 653, 653 n.23.

the receiving country often was not worth the cost.[31] Service by a foreign plaintiff on an American defendant was even more difficult,[32] because the federal government was not authorized to handle incoming requests to effect service, and state-level procedures for handling these requests varied from state to state.[33]

The need for a more workable approach was clear after the Second World War, as American business became increasingly entwined with the international economy.[34] Some American lawyers became particularly concerned with the difficulty of serving foreign defendants, as well as the risk of judgments against American defendants in foreign countries without notice.[35] These concerns strongly influenced the development of a new multilateral treaty at the Hague Conference on Private International Law in 1965.[36] The Conference ultimately adopted the Hague Service Convention with approval from representatives of all twenty-three drafting countries, including the United States.[37] The U.S. Senate ratified, and President Johnson signed, the treaty in 1967.[38]

B. Where the Convention Applies

The Hague Service Convention applies "in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad," except if the defendant's location is unknown.[39] By implication, the Convention does not apply when there is no "occasion to transmit" a document abroad.[40]

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31. *Id.* at 653; *see also* Porterfield, *supra* note 24, at 336 (2014) ("Service through U.S. consular officers was practically impossible and retaining local counsel to ensure compliance with local laws was prohibitively expensive.").

32. Magnarini, *supra* note 2, at 654 ("The procedural burdens imposed on foreign plaintiffs attempting to serve process on American defendants were undoubtedly even more onerous [than the burdens placed on Americans attempting to serve foreign defendants].").

33. Porterfield, *supra* note 24, at 337.

34. Magnarini, *supra* note 2, at 652.

35. HAGUE CONFERENCE ON PRIVATE INT'L LAW, 3 ACTES ET DOCUMENTS DE LA DIXIÈME SESSION 127 (1964), https://assets.hcch.net/docs/b6304b87-d5ee-4020-8587-c22ae19ec002.pdf [https://web.archive.org/web/20210404150119/https://assets.hcch.net/docs/b6304b87-d5ee-4020-8587-c22ae19ec002.pdf] [hereinafter 1964 Hague Conference Proceedings].

36. *See Unification of the Rules of Private International Law: Report of the U.S. Delegation to the 10th Session of the Hague Conference on Private International Law, October 7–28, 1964*, 52 DEP'T STATE BULL. 265, 268–69 (1965).

37. *Id.* at 268.

38. Hague Service Convention, *supra* note 1, proclamation.

39. *Id.* art. 1.

40. *Cf. id.*

The U.S. Supreme Court confirmed this interpretation in *Volkswagenwerk Aktiengesellschaft v. Schlunk*,[41] holding that the Convention did not apply where state law allowed a plaintiff to serve documents without sending them to a foreign jurisdiction.[42] The American plaintiff in *Schlunk* brought a products liability action against Volkswagen, a German corporation.[43] Rather than serving the defendant in Germany, the plaintiff served Volkswagen's wholly owned U.S. subsidiary, which Volkswagen had designated as its registered agent under Illinois law.[44] The Supreme Court observed that the mandatory language of the Convention required that parties comply with Convention procedures in any case where the Convention applies.[45] However, the Court held that the Convention did not apply in this case; because Illinois law allowed the plaintiff to serve Volkswagen within the state of Illinois, there was no "occasion to transmit" a complaint abroad, and therefore the Convention did not apply.[46] Under *Schlunk*, the law of the plaintiff's jurisdiction determines whether service abroad is necessary, and accordingly, whether the Hague Service Convention applies.[47]

Courts in other contracting states have reached similar holdings.[48] The Convention is thus described as "non-mandatory" but "exclusive."[49] The Convention is "non-mandatory" in the sense that the law of the forum state, not the Convention itself, dictates when the Convention applies.[50] But once service abroad is necessary, the Convention becomes "exclusive"

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41. 486 U.S. 694 (1988).

42. *Id.* at 707.

43. *Id.* at 696–97.

44. *Id.* at 697.

45. *Id.* at 699 (citing Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa, 482 U.S. 522, 534, n.15 (1987)).

46. *Id.* at 707; Hague Service Convention, *supra* note 1, art. 1.

47. *Schlunk*, 486 U.S. at 700 ("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.").

48. *See, e.g.*, Metcalfe Estate v. Yamaha Motor Canada Ltd. (2012), 536 A.R. 67, ¶ 37 (Can.) ("The law of the forum state determines whether or not a document has to be transmitted abroad."); HR juni 1986, NJ 1986, 764 m.nt. RvdW (Segers and Rufa BV/Manabaft Gmbh) (Neth.), *translated in* 28 I.L.M. 1584, 1586 ("The cases in which a document must be sent abroad 'for service' are not set out in the Convention. This point is entirely left to the domestic law of the Contracting State of origin of the document.").

49. *Metcalfe Estate*, 2012 536 A.R. ¶¶ 37, 41; HAGUE CONFERENCE ON PRIVATE INT'L LAW, CONCLUSIONS & RECOMMENDATIONS ADOPTED BY THE SPECIAL COMMISSION ON THE PRACTICAL OPERATION OF THE HAGUE APOSTILLE, EVIDENCE AND SERVICE CONVENTIONS ¶ 73 (2003), https://assets.hcch.net/docs/0edbc4f7-675b-4b7b-8e1c-2c1998655a3e.pdf [https://web.archive.org/web/20200921164131/https://assets.hcch.net/docs/0edbc4f7-675b-4b7b-8e1c-2c1998655a3e.pdf].

50. *Metcalfe Estate*, 536 A.R. ¶ 37.

because the plaintiff must use a means of service that the Convention permits or authorizes.[51]

C. Central Authorities

The "primary innovation" of the Hague Service Convention is that it requires each contracting state to establish or designate a "central authority" to receive incoming documents from abroad, deliver them to their intended recipients, and provide proof of service to the sender.[52] The central authority is a government entity, most commonly a "Ministry of Justice" or equivalent.[53]

An American lawyer can serve a defendant by transmitting a request for service directly to the receiving country's central authority.[54] Provided that the paperwork is in order—including a proper translation, if required—the receiving country's central authority must attempt to serve the defendant.[55] If the attempt is successful, the central authority returns a certificate of service.[56] If the central authority cannot effect service, it must return a document to the sender explaining the reasons for failure.[57]

In many respects, the central authority mechanism is an improvement over the prior regime of international service.[58] Feedback from

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51. Aaron Maar Page et al., *International Litigation*, 53 ABA YEAR IN REV. 175, 178 (2019). The *Schlunk* court used the term "mandatory" in the place of "exclusive" in a few places, making this distinction somewhat confusing. *Id.* The Convention's exclusivity is less restrictive than it may initially seem because the Convention preserves the right to effect service under other international agreements between two contracting states, or by any other means of service permitted by the law of the defendant's county. *See* Hague Service Convention, *supra* note 1, arts. 11, 19.

52. *Schlunk*, 486 U.S. at 698; Hague Service Convention, *supra* note 1, arts. 2–6.

53. Emily Fishbein Johnson, *Privatizing the Duties of the Central Authority: Should International Service of Process Be Up for Bid?*, 37 GEO. WASH. INT'L L. REV. 769, 773 (2005). For example, the central authority in the United States is the Justice Department, which delegates its duties to a private process server. *Id.* at 769.

54. *See* Hague Service Convention, *supra* note 1, art. 3. The Convention allows any "authority or judicial officer competent under the law of the State" to transmit the request. *Id.* The United States has declared that "any court official, any attorney, or any other person or entity authorized by the rules of the court" is "competent" to initiate service under Article 3. *United States of America—Central Authority & Practical Information*, HAGUE CONF. ON PRIV. INT'L L., https://www.hcch.net/en/states/authorities/details3/?aid=279 [https://web.archive.org/web/20210320200539/https://www.hcch.net/en/states/authorities/details3/?aid=279] (last visited March 20, 2021).

55. Hague Service Convention, *supra* note 1, art. 5.

56. *Id.* art. 6.

57. *Id.*

58. *See* Honorable Joseph F. Weis, Jr., *Service by Mail—Is the Stamp of Approval from the Hague Convention Always Enough?*, 57 L. & CONTEMP. PROBS. 165, 165 (1994) ("The

representatives of contracting states has been largely positive.[59] And because of the Convention's proof-of-service requirement,[60] American plaintiffs can be confident that service effected through a central authority satisfies American due process requirements as well as the law of the foreign state.[61]

However, central authority service presents some challenges for American plaintiffs.[62] First, service through a central authority can be expensive.[63] A central authority in a receiving country is entitled to charge the plaintiff for the costs associated with delivering the document to the defendant.[64] Translation may add to these expenses, since the receiving countries can require that the complaint be written in one of their official languages.[65] It is difficult to establish the average cost that a plaintiff would pay for translation,[66] but district court cases awarding costs to prevailing plaintiffs describe expenses in the hundreds, thousands, or in extraordinary cases, tens of thousands of dollars.[67]

Hague [Service] Convention . . . succeeded in providing a framework that substantially improved the means of serving process in transnational litigation."); *cf.* Magnarini, *supra* note 2, at 650 (describing the pre-Convention state of affairs as a "judicial nightmare.").

59. *See* PERMANENT BUREAU, HAGUE CONFERENCE ON PRIVATE INT'L LAW, SYNOPSIS OF RESPONSES TO THE QUESTIONNAIRE OF NOVEMBER 2013 RELATING TO THE HAGUE CONVENTION OF 18 MARCH 1970 ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS 27–28 (2014), https://assets.hcch.net/docs/661b8dec-a0c8-45a1-9b71-0144798e2597.pdf [https://web.archive.org/web/20210404155049/https://assets.hcch.net/docs/661b8dec-a0c8-45a1-9b71-0144798e2597.pdf] (listing survey data indicating that most contracting states consider the Service Convention's operation "good").

60. *See* Hague Service Convention, *supra* note 1, art. 6.

61. *See* Weis, *supra* note 58, at 165 (quoting GARY B. BORN & DAVID WESTIN, CIVIL LITIGATION IN UNITED STATES COURTS 138 (1989)) ("The Europeans obtained a more formal method for serving process in the United States and the Americans gained assurances that service on U.S. defendants would be reasonably calculated to give them actual notice.").

62. *See generally* Porterfield, *supra* note 24, at 344–47.

63. *Id.* at 344–45.

64. Hague Service Conventions, *supra* note 1, art. 12.

65. *Id.* art. 5.

66. Document translators generally charge per word and prices vary widely depending on the language. *See* Esther Bond, *America's Translation Rate Holds Firm at USD 0.22*, TECHNINPUT (Jan. 15, 2019), http://techinput.com/americas-translation-rate-holds-firm-at-usd-0-22/ [https://web.archive.org/web/20210404233552/http://techinput.com/americas-translation-rate-holds-firm-at-usd-0-22/] (analyzing translation costs charged by Government Services Administration vendors). The price of translating a document would therefore depend on the length of the complaint, the language of the receiving country, and the rates charged by the individual translator.

67. *See, e.g.*, L. Off. G.A. Lambert & Assocs. v. Davidoff, 72 F. Supp. 3d 110, 119–20 (D.D.C. 2014) (awarding prevailing plaintiff costs of $875 for translating complaint into German); Int'l Petroleum Prod. & Additives Co., Inc. v. Black Gold S.A.R.L., No. 19-cv-

Second, service through a central authority may also be slow or unreliable.[68] Although two thirds of requests for service through the central authority are completed with proof of service in less than two months,[69] data compiled from survey responses suggests that nearly twenty percent of requests take over a year to process, and nearly ten percent are never delivered at all.[70]

A third problem is that some central authorities refuse to serve documents in lawsuits barred by their country's internal substantive law.[71] Although Article 13 of the Convention forbids this practice,[72] some countries do it anyway.[73] German central authorities, for example, refuse to serve complaints in cases subject to "split recovery statutes," in which some portion of the damages is allocated to the plaintiff's home government.[74]

03004-YGR, 2020 WL 789567, at *5 (N.D. Cal. Feb. 18, 2020) (awarding $4,622.96 for translation costs incurred in serving process in Monaco); Magic Carpet Ski Lifts, Inc. v. S&A Co., Ltd., No. 14-cv-02133-REB-KLM, 2015 WL 4237950, at *9 (D. Colo. June 8, 2015) (awarding $1,610 for translation services); *see also* Bankston v. Toyota Motor Corp., 889 F.2d 172, 174 (8th Cir. 1989) (Gibson, J., Concurring) (describing costs of serving Japanese defendant as "$800 to $900"), *abrogated by* Water Splash, Inc. v. Menon, 137 S. Ct. 1504 (2017).

In truly exceptional cases, in which the complaint is complex or describes complex subject matter, cost estimates may exceed $30,000. *See, e.g.*, Gamboa v. Ford Motor Co., 414 F. Supp. 3d 1035, 1041 (E.D. Mich. 2019) ("Plaintiffs asserted, and [Defendant] did not deny, that it would cost up to $30,000 to seek service under the Hague Convention, mostly because of the cost of translating the long complaint into German."); Rice v. Electrolux Home Products, Inc., 4:15-CV-00371, 2018 WL 4964076, at *4 (M.D. Pa. Oct. 15, 2018) (describing plaintiff's contention that transition costs associated with serving Chinese Defendant may exceed $30,000).

68. Porterfield, *supra* note 24, at 345–46.

69. Permanent Bureau Questionnaire, *supra* note 11, ¶ 57.

70. Porterfield, *supra* note 24, at 332 (citing *id.* ¶¶ 58–59).

71. *See, e.g.*, Gurung v. Malhotra, 279 F.R.D. 215, 217 (S.D.N.Y. 2011) (describing facts in which Indian central authority refused service based on claim of diplomatic immunity).

72. Hague Service Convention, *supra* note 1, art. 13 ("[a contracting state] may not refuse to comply solely on the ground that . . . its internal law would not permit the action upon which the application is based.").

73. *E.g.*, *Gurung*, 279 F.R.D. at 217 (describing Indian diplomatic immunity objection); Gamboa v. Ford Motor Co., 414 F. Supp. 3d 1035, 1038–39 (E.D. Mich. 2019) (collecting cases observing that Germany refuses to effect service in split-recovery cases); *see also In re* S. Afr. Apartheid Litig., 643 F. Supp. 2d 423, 437–38 (S.D.N.Y. 2009) (noting that German constitutional court enjoined German central authority from serving documents in American class action suits).

74. *Gamboa*, 414 F. Supp. 3d at 1038–39.

D. The Alternative Channels

Beyond the central authority mechanism, the Convention preserves the right to use other alternative channels for service.[75] In addition to the receiving nation's central authority, a party may also serve documents through "consular channels,"[76] "postal channels,"[77] letters rogatory,[78] or any other means considered valid under the laws of the receiving nation.[79] However, American consular officers are generally prohibited from serving process, so consular channels are not available to American plaintiffs.[80] The U.S. State Department also advises against using letters rogatory, describing the procedure as a "time consuming, cumbersome process" that "need not be utilized unless there are no other options available."[81]

Perhaps the most litigated alternative—at least in American courts—is the "postal channels" described in Article 10(a).[82] Postal channels were unavailable as a means of service to many American plaintiffs until as recently as 2017, based on some federal circuits' conclusion that the use of "send" rather than "serve" in that Article indicated that postal channels were only available *after* process was initially served.[83] This interpretation ran contrary to decisions of foreign courts and governments permitting international service by mail or other postal channels.[84] The U.S. Supreme Court recently resolved this split in *Water Splash, Inc. v. Menon*,[85] in

75. Practical Handbook FAQ, *supra* note 2, at xlvi.

76. *See* Burda Media, Inc. v. Viertel, 417 F.3d 292, 300 (2d Cir. 2005); Hague Service Convention, *supra* note 1, arts. 8–9. This may include service via the serving party's nation's consular officers, consular officers of the receiving state, or if "exceptional circumstances so require, . . . diplomatic channels." *Id.*

77. *Id.* art. 10(a).

78. *Id.* arts. 10(b)–(c).

79. *Id.* art. 19; Water Splash, Inc. v. Menon, 137 S. Ct. 1504, 1508 (2017).

80. 22 C.F.R. § 92.85 (2020).

81. *Service of Process*, U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFS. (NOV. 7, 2018), https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-asst/Service-of-Process.html [https://web.archive.org/web/20210327113609/https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-asst/Service-of-Process.html].

82. Hague Service Convention, *supra* note 1, art. 10(a); *see Water Splash*, 137 S. Ct. at 1508 (acknowledging circuit split over interpretation of Article 10(a)).

83. *E.g.*, Bankston v. Toyota Motor Corp., 889 F.2d 172, 173–74 (8th Cir. 1989), *abrogated by Water Splash*, 137 S. Ct. 1504.

84. *See* Michael O. Eshleman & Judge Stephen A. Wolaver, *Using the Mail to Avoid the Hague Service Convention's Central Authorities*, 12 OR. REV. INT'L L. 283, 329–31 (2010) (collecting decisions and interpretations from other contracting states indicating that the Hague Service Convention contemplated *service* via "postal channels").

85. *Water Splash*, 137 S. Ct. 1504.

which it determined that the send-versus-serve distinction was immaterial, thus holding that an American plaintiff could serve a Canadian defendant by mail without violating the Convention.[86]

The freedom to use postal channels does not give American plaintiffs an absolute license to ignore the central authority mechanism.[87] As the Supreme Court held in *Water Splash*, the serving party must ensure that (1) the receiving state does not object to service via mail; and (2) service "is authorized under otherwise-applicable law."[88] The second requirement presents relatively few difficulties, as the applicable state or federal rules of civil procedure will usually provide a means for the plaintiff to move for alternative service.[89] However, the first requirement often proves fatal if a plaintiff attempts to use mail or other "postal channels," since many contracting states object to service under the methods described in Article 10.[90] These objectors include countries where service through the central authority mechanism may be especially slow, such as China,[91] India,[92] and Mexico.[93] Suing a defendant in these countries may prove especially

86. *Id.* at 1512–13.

87. *See id.* at 1513 ("Article 10(a) encompasses service by mail. To be clear, this does not mean that the Convention affirmatively *authorizes* service by mail." (emphasis in original)).

88. *Id.*

89. *E.g.*, FED. R. CIV. P. 4(f)(3) (permitting service "by other means not prohibited by international agreement, as the court orders"); ALASKA R. CIV. P. 4(13)(C) (similar); TEX. R. CIV. P. 108a(a)(6) (similar).

90. *See Table Reflecting Applicability of Articles 8(2), 10(a)(b) and (c), 15(2), at 16(3) of the Hague Service Convention*, HAGUE CONF. ON PRIV. INT'L L., https://assets.hcch.net/docs/6365f76b-22b3-4bac-82ea-395bf75b2254.pdf [https://web.archive.org/web/20210404171404/https://assets.hcch.net/docs/6365f76b-22b3-4bac-82ea-395bf75b2254.pdf] (last visited April 1, 2020) (listing contracting states' objections to provisions of the Hague Service Convention) [hereinafter Objection Table].

91. The Chinese central authority has taken over a year to effect service in some recent cases. *See, e.g.*, Anova Applied Elecs., Inc. v. Hong King Grp., 334 F.R.D. 465, 468 (D. Mass. 2020) (describing repeated and unsuccessful attempts to serve a defendant in China over the course of two years); Facebook, Inc. v. 9 Xiu Network (Shenzhen) Tech. Co., 480 F. Supp. 3d 977 (N.D. Cal. 2020) (same); *see also* FKA Distrib. Co., LLC v. Yisi Tech. Co., Ltd., 17-cv-10226, 2017 WL 4129538, at *2 (E.D. Mich. Sept. 19, 2017) ("[T]he vendor who served the documents for Plaintiff stated that China has been taking up to one year or more to process documents served under the Hague Convention.").

92. *See* Aaron Lukken, *Appendix*, *in* Victoria A. Valentine et. al., *The Foreign Sovereign Immunities Act's Crippling Effect on United States Businesses*, 24 MICH. ST. INT'L. L. REV. 625 app. at 659 (2016) ("Of India's more than one billion people, only a single staff member works in the Hague central authority. As such, the time needed to effect service is extraordinarily long.").

93. *See, e.g.*, Canal Indem. Co. v. Castillo, No. DR-09-CV-43-AM-CW, 2011 WL 13234740, at *2 (W.D. Tex. Mar. 30, 2011) (noting that plaintiff's unsuccessful attempt at service on Mexican defendant took over six months); LCE Lux HoldCo S.a.r.l. v.

challenging, as plaintiffs find themselves unable to rely on a country's central authority on one hand, but unable to take advantage of alternative forms of service on the other.[94]

E. Waiving Service

A simple way to circumvent a foreign country's central authority, and thus avoid the expense and delay associated with it and other previously discussed methods,[95] is to seek a waiver of service from the opposing party.[96] When parties waive service, there is no longer an "occasion to transmit a . . . document for service abroad,"[97] and thus no requirement to comply with Hague procedures.[98]

To reduce the time and expense associated with litigation, the Federal Rules of Civil Procedure encourages parties to waive service where possible.[99] The Advisory Committee Notes to Rule 4 specifically note the desirability of waving service:

> [Waiver] is useful in dealing with defendants who are furtive, who reside in places not easily reached by process servers, or who are outside the United States and can be served only at substantial and unnecessary expense. . . . [T]here is no useful purpose achieved by requiring a plaintiff to comply with all the formalities of service in a foreign country, including costs of translation, when suing a defendant manufacturer, fluent in English, whose products are widely distributed in the United States.[100]

Entretenimiento GM de Mexico S.A. de C.V., 287 F.R.D. 230, 238 (S.D.N.Y. 2012) (describing plaintiff's contention that "it took two years to effectuate service on [defendant] because of the requirements of the Mexican Central Authority"); *see also* Willhite v. Rodriguez-Cera, 274 P.3d 1233, 1235 (Colo. 2012) (explaining that plaintiff had taken over six months to effect service on Mexican defendant because he was "hindered by numerous obstacles and bureaucratic challenges").

94. *Cf. Facebook, Inc.*, 480 F. Supp. 3d at 984 (N.D. Cal. 2020) (collecting cases holding that central authority is the only available method of service in countries that object to article 10(a)).

95. *See supra* notes 62–74, 90–94 and accompanying text.

96. *See infra* quoted text accompanying note 100.

97. Hague Service Convention, *supra* note 1, art. 1.

98. *Cf.* Volkswagenwerk Anktiengesellschaft v. Schlunk, 486 U.S. 694, 707–08 (1988) (holding that the Hague Service Convention is not applicable where there is no "occasion to transmit a judicial document for service abroad").

99. *See* FED. R. CIV. P. 4(d), advisory committee's note to 1993 amendments ("The aims of the provision are to eliminate the costs of service of a summons on many parties and to foster cooperation among adversaries and counsel.").

100. *Id.*

In the early 1990s, the Judicial Conference amended the Federal Rules to incentivize parties to waive service of process.[101] Rule 4 imposes a "duty" on parties to mitigate unnecessary expenses of serving documents.[102] Rule 4(d) offers two key inducements to ensure compliance with this duty. First, the defendant gets sixty days to respond to the complaint, rather than the standard twenty-one.[103] Second, a defendant who refuses to waive service without good cause is required to compensate the plaintiff for costs associated with formal service.[104]

The Federal Rules nominally impose the same duty to mitigate costs on foreign parties, but the incentives are less robust.[105] Rule 4(d)(3) provides foreign defendants who waive formal service ninety days to respond to the complaint.[106] Practically speaking, this provision offers little incentive.[107] Because central authority service in many countries may typically take longer than ninety days,[108] a defendant who receives and subsequently declines a request to waive service may enjoy several months to prepare a response before formal service arrives. Further, unlike domestic defendants, foreign parties who refuse to waive service are subject to no penalty at all.[109] The committee notes to Rule 4(d)(2) urge that foreign parties should still waive service to avoid having service costs taxed against them at a later point in the litigation.[110] However, this alone is unlikely to motivate parties to waive, given that service costs, high as they may be in some cases, are small compared to the expected value of an adverse judgement—especially considering the likelihood of settlement (in which case costs would not be taxed at all).[111]

The 1993 Amendments originally contained a much stronger inducement to waive service in international cases.[112] Apparently

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101. *Id.*

102. FED. R. CIV. P. 4(d)(1).

103. *Compare* FED. R. CIV. P. 4(d)(3) *with* FED. R. CIV. P. 12(a)(1)(C) (providing twenty-one days to respond to complaint).

104. FED. R. CIV. P. 4(d)(2).

105. Born & Vollmer, *supra* note 16, at 234–35.

106. FED. R. CIV. P. 4(d)(3).

107. Born & Vollmer, *supra* note 16, at 234–35.

108. *See supra* notes 68–70 and accompanying text.

109. *See* FED. R. CIV. P. 4(d), advisory committee's note to 1993 Amendments ("Nor are there any adverse consequences to a foreign defendant [for failure to waive service], since the provisions for shifting the expense of service to a defendant that declines to waive service apply only if the plaintiff and defendant are both located in the United States.").

110. *Id.*

111. Born & Vollmer, *supra* note 16, at 234–35.

112. *See id.* at 231–32.

concerned with the costs associated with service on a foreign defendant,[113] the Advisory Committee's initial draft authorized taxation of costs against both domestic *and* foreign defendants.[114] While the proposed Rules were pending review,[115] the British Government sent a letter to the State Department objecting to the waiver of service provision, expressing fears that it would be "oppressive" as it "would coerce a waiver of service of the summons."[116] The letter also asserted that the amendment would offend "the public policy of the United Kingdom, which is that litigation affecting persons resident in the United Kingdom and commenced in foreign jurisdictions should be properly documented in public form."[117] These objections evidently caused the Department of Justice (which had originally taken no position on the matter) to oppose the new provision.[118] In light of these objections, the Supreme Court returned the draft Rules to the Committee for further revisions.[119] The Advisory Committee attempted to assuage these concerns in a new draft, which explained that cost-shifting would be inappropriate if it violated the public policy of a defendant's country of residence.[120] Despite these changes, the Judicial Conference ultimately adopted the modern Rule 4(d)(2), retaining only the hortatory committee notes extoling the virtues of waiving service.[121]

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113. *Minutes of Meeting, April 13–15, 1992*, ADVISORY COMM. ON CIV. RULES, JUD. CONF. OF THE U.S. (1992), at 5, https://www.uscourts.gov/sites/default/files/fr_import/CV04-1992-min.pdf [https://web.archive.org/web/20170705161910/http://www.uscourts.gov/sites/default/files/fr_import/CV04-1992-min.pdf] ("[One member of the Advisory Committee] noted that the translation cost in a case he had managed had [cost] thousands of dollars.").

114. *See* FED. R. CIV. P. 4(d)(2) (Proposed Amendments 1989) (imposing costs on defendants who refuse to waive service, not exempting foreign parties), *reprinted in* 127 F.R.D. 270–71.

115. The Advisory Committee generally drafts rules, which are then subject to review by the Standing Committee, the Judicial Conference, and finally, the Supreme Court. *See How the Rulemaking Process Works*, U.S. CTS., https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works [https://web.archive.org/web/20210205054637/https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works] (last visited Feb. 5, 2021).

116. U.K. Embassy Note No. 63, *enclosed in* Letter from Edwin D. Williamson, Legal Adviser of the U.S. Department of State, to Honorable William H. Rehnquist, Chief Justice of the United States (April 19, 1991), *reprinted in* Brockmeyer v. May, 383 F.3d 798, 807 (9th Cir. 2004).

117. *Id.*

118. Letter from Sam C. Pointer, Chairman, Advisory Committee on Civil Rules, to Honorable Robert E. Keeton, Chairman, Standing Committee on Rules of Practice and Procedure (May 1, 1992), *reprinted in* 146 F.R.D. 519, 521.

119. *Id.*

120. *Id.*

121. Born & Vollmer, *supra* note 16, at 233; *see* FED. R. CIV. P. 4(d), advisory committee's note to 1993 Amendments.

F. Service via E-mail

In the absence of the waiver solution described above, courts and litigants have sought other means of circumventing the central authority in the three ensuing decades.[122] This Note considers one of the more controversial alternatives: e-mail service.[123]

Plaintiffs have increasingly sought authorization to serve defendants in contracting states via e-mail, since e-mail is faster and cheaper than methods the Hague Service Convention explicitly approves.[124] Where the United States and a foreign defendant's home country are both parties to an international agreement providing for service of process—e.g., the Hague Service Convention—the Federal Rules of Civil Procedure permit service through (1) means "authorized" by the international agreement[125] or (2) means "not prohibited" by the international agreement and approved by the court.[126] Courts have held that these Rules establish no order of preference, meaning than a plaintiff need not attempt service through the channels established by international agreement before seeking a court's approval for alternative service.[127]

The first federal appellate case authorizing international e-mail service was *Rio Properties, Inc. v. Rio International Interlink*.[128] In that case, a plaintiff brought a trademark infringement suit against a defendant located in Costa Rica.[129] The plaintiff first attempted to serve the defendant at its registered address in Miami, Florida.[130] However, the plaintiff discovered

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122. *See, e.g.*, *In re* Potash Antitrust Litig., 667 F. Supp. 2d 907, 928–32 (N.D. Ill. 2009), *vacated and remanded on other grounds sub nom.* Minn-Chem, Inc. v. Agrium Inc., 657 F.3d 650 (7th Cir. 2011), *reh'g en banc granted, opinion vacated* (Dec. 2, 2011), and *aff'd*, 683 F.3d 845 (7th Cir. 2012) (approving service on Russian defendant via e-mail, fax, and substituted service on United States subsidiaries); Arista Records LLC v. Media Servs. LLC, No. 06 Civ. 15319(NRB), 2008 WL 563470, at *2 (S.D.N.Y. Feb. 25, 2008) (permitting service on foreign defendant's counsel in New York).

123. E-mail service in this context is "controversial" in the sense that courts do not agree whether it is consistent with the Hague Service Convention. *Compare* Rosenhaus, *supra* note 12, § 6 *with id.* §§ 7–8.

124. *See generally id.* §§ 4–8 (collecting cases).

125. Fed. R. Civ. P. 4(f)(1).

126. *Id.* 4(f)(3). Rule 4(f)(2) governs situations where the United States and the destination state are *not* parties to the Hague Convention or other agreement. *See id.* 4(f)(2).

127. *See, e.g.*, Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1014–16 (9th Cir. 2002); AngioDynamics, Inc. v. Biolitec AG, 780 F.3d 420, 429 (1st Cir. 2015); Enovative Techs., LLC v. Leor, 622 F. App'x 212, 214 (4th Cir. 2015).

128. *Rio Props., Inc.*, 284 F.3d 1007; Yvonne A. Tamayo, *Catch Me If You Can: Serving United States Process on an Elusive Defendant Abroad*, 17 HARV. J.L. & TECH. 211, 223 (2003).

129. *Rio Props., Inc.*, 284 F.3d at 1012–13.

130. *Id.* at 1013.

that the address was the location of the defendant's international courier, who was not authorized to accept service on the defendant's behalf.[131] Unable to find the defendant's address in Costa Rica, the plaintiff moved for alternative service via e-mail and service on defendant's counsel.[132] After a judgment against it, the defendant appealed, challenging the sufficiency of service.[133] The Ninth Circuit affirmed the judgment, reasoning that service via e-mail was not only appropriate under Rule 4(f)(3), but was the means most likely to ensure that the defendant received actual notice of the suit against it.[134] "Indeed," the court wrote, "when faced with an international e-business scofflaw, playing hide-and-seek with the federal court, e-mail may be the only means of effecting service of process."[135]

Rio Properties offers little help in the Hague Service Context.[136] As the Ninth Circuit noted, Costa Rica is not a member of the Hague Service Convention, so the issue of whether the Convention prohibits e-mail service was not addressed.[137] Moreover, the plaintiff in *Rio Properties* was unable to ascertain the location of the defendant, meaning that the Convention would not apply in any case.[138]

Federal courts are split over whether e-mail service on a defendant is permissible under the Hague Service Convention.[139] One line of cases permits e-mail service, reasoning that e-mail is not mentioned in the Convention and therefore is "not prohibited" within the meaning of Rule 4(f)(3).[140] These courts further hold that a contracting state's objection to Article 10(a) does not prohibit e-mail service because e-mail is not a "postal channel" within the meaning of the Convention.[141] A second line of cases hold that e-mail *is* a "postal channel," meaning that an Article 10(a) objection by the receiving nation renders e-mail service

131. *Id.*
132. *Id.*
133. *Id.* at 1014.
134. *Id.* at 1016–18.
135. *Id.* at 1018.
136. *See id.* at 1015 n.4.
137. *Id.*
138. *See* Hague Service Convention, *supra* note 1, art. 1 ("This Convention shall not apply where the address of the person to be served with the document is not known.").
139. *Compare, e.g.*, Anova Applied Elecs., Inc. v. Hong King Grp., 334 F.R.D. 465 (D. Mass. 2020) (holding that "service by e-mail is inconsistent with the Convention's terms, and is not permitted.") *with* Lexmark Intern., Inc. v. Ink Techs. Printer Supplies, LLC, 291 F.R.D. 172, 174 (S.D. Ohio 2013) ("Various courts have agreed that service by e-mail is not prohibited by the Hague Convention").
140. *See* Facebook, Inc. v. 9 Xiu Network (Shenzhen) Tech. Co., 480 F. Supp. 3d 977, 982 n.3 (collecting cases); Rosenhaus, *supra* note 12, §§ 7–8 (same).
141. *See* Sulzer Mixpac AG v. Medenstar Indus. Co., 312 F.R.D. 329, 331–32 (S.D.N.Y. 2015) (collecting cases); *Lexmark*, 291 F.R.D. at 175 (same).

impermissible.[142] Yet a third line of cases holds that e-mail is not permissible as a means of service under any circumstance, reasoning that e-mail service is inconsistent with the terms of the Convention.[143]

III. ANALYSIS

E-mail service is an attractive alternative to the methods enumerated in the Hague Service Convention, especially when serving a defendant in a country where central authority service is slow or unreliable and alternative channels are not available.[144] But, as discussed below, most contracting states do not consent to international service via e-mail, and the Convention does not affirmatively authorize the practice.[145]

This Note proposes a different solution: taxing the costs of service against foreign defendants who fail to waive service without good cause.[146] Parties can execute a waiver of service electronically, so this solution retains the speed and efficiency benefits of e-mail—in fact, a plaintiff can send a request for waiver *via* e-mail.[147] And because a waiver is not *itself* service, [148] it is less likely to infringe on foreign sovereignty. Accordingly, encouraging foreign defendants to waive service would mitigate the cost and delay associated with the Convention's procedures while avoiding the risks that e-mail service creates.

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142. *See, e.g.*, Compass Bank v. Katz, 287 F.R.D. 392, 396–97 (S.D. Tex. 2012) (holding that Mexico's objection to service via postal channels precludes e-mail service); Agha v. Jacobs, No. C 07-1800 RS, 2008 WL 2051061, at *2 (N.D. Cal. May 13, 2008) (reaching the same result with a German defendant); *see also Facebook, Inc.*, 480 F. Supp. 3d at 983 ("[A]lthough it has been suggested that service by e-mail could conceivably come within an expansive reading of service 'by postal channels,'. . . China has affirmatively objected to service 'by postal channels,' so that reading, even if accepted, wouldn't support service by e-mail on defendants in China.").

143. *See, e.g.*, *Anova Applied Elecs.*, 334 F.R.D. at 472 (holding that e-mail service is inconsistent with the Hague Convention because "[i]f the Convention left parties free to serve each other by e-mail, it is hard to see why they would ever choose slower, more costly methods"); Elobied v. Baylock, 299 F.R.D. 105, 108 (E.D. Pa. 2014) (denying service via e-mail because Swiss e-mail is not an enumerated means of service under the Convention).

144. *See supra* notes 91–93 and accompanying text.

145. *See* discussion *infra* Part III.A.

146. *See* discussion *infra* Part III.B.

147. Rule 4(d) permits a plaintiff to request waiver through "first-class mail or other reliable means." FED. R. CIV. P. 4(d)(1). Courts have generally read "reliable means" to include e-mail. *See* 4A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1092.1, Westlaw (database updated October 2020).

148. *See supra* notes 95–98 and accompanying text.

A. E-mail Service: An Inelegant Solution

The Hague Service Convention provides the exclusive means of service whenever there is an occasion to transmit documents for service abroad, including documents transmitted between countries via e-mail.[149] Rule 4(f)(3) does not create a freestanding exception to this principle, since the Convention supersedes a federal Rule to the extent that the two conflict.[150] Thus, while some courts have seized on the language of Rule 4(f)(3) to say that e-mail service is "not prohibited" by the Hague Service Convention,[151] the pertinent question is whether any article of the Convention allows or permits it.[152]

The closest any article of the Convention comes to affirmatively allowing e-mail service is Article 10(a), which permits service via "postal channels."[153] Some commentators offer convincing arguments that "postal channels" include e-mail and other digital communications.[154] Others argue that 10(a) cannot encompass e-mail because "postal channels" refer to entities operating under the authority of the state.[155]

This Note does not take a position on whether e-mail is properly considered a "postal channel," since it would rarely make a difference in the situations where circumventing the central authority is necessary. Countries where central authority service tends to be slow (e.g., Mexico, China, or India) also tend to object to service via the means enumerated in Article 10(a), including postal channels.[156] When courts permit e-mail

149. *Cf.* Hague Service Convention, *supra* note 1, art. 1; Volkswagenwerk Anktiengesellschaft v. Schlunk, 486 U.S. 694, 707 (1988).

150. Although treaties and federal statutes (including the Federal Rules) are theoretically "on the same footing," courts "have generally held that where a conflict exists, the treaty preempts Federal Rule 4." Magnarini, *supra* note 2, at 662. *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 114 (AM. L. INST. 1987) ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.").

151. *See* cases cited *supra* note 139.

152. *See* Gardner, *supra* note 12, at 1000 ("As everyone agrees, the Convention is mandatory when it applies. Thus, unless the Convention does not apply by its own terms, any method of service not approved by the Convention is effectively prohibited under Rule 4(f)(3).").

153. Hague Service Convention, *supra* note 1, art. 10(a).

154. *See, e.g.*, Jeremy A. Colby, *You've Got Mail: The Modern Trend Towards Universal Electronic Service of Process*, 51 BUFF. L. REV. 337, 352 n.60 (2003); Eshleman & Wolaver, *supra* note 84, at 311–12.

155. *See* Richard J. Hawkins, *Dysfunctional Equivalence: The New Approach to Defining "Postal Channels" Under the Hague Service Convention*, 55 UCLA L. Rev. 205, 228 (2007) ("In many countries, the postal service is an agency of the state. . . . [This means that] the term 'postal' would convey a meaning opposite of 'private.'").

156. *See supra* notes 90–94 and accompanying text.

service, they usually reason that e-mail *is not* a postal channel, and that an objection to Article 10(a) therefore does not render e-mail service inconsistent with the Hague Service Convention.[157] Meanwhile, courts that decline to allow service via e-mail often reason that e-mail *is* a postal channel and is thus prohibited whenever a country objects to Article 10(a).[158] By implication, the latter view should allow for e-mail service where the receiving country permits international service by postal channels, but it is exceedingly difficult to find a case authorizing service under this line of reasoning.[159] Since most documented attempts at e-mail service involve a defendant in a country that objects to Article 10(a), it would make little practical difference if courts read e-mail service into that provision.[160]

Even if Article 10(a) encompassed e-mail, it would not create an independent basis for service where foreign law prohibits it.[161] As the Supreme Court held in *Water Splash, Inc. v. Menon*,[162] Article 10(a) does not "affirmatively *authorize*[]" service via postal channels.[163] It merely reserves the right to use them if foreign law otherwise allows it.[164] Analogously, Article 19 reserves the right to use any method the Convention does not enumerate, provided that the receiving country's internal laws permit it.[165] This essentially forecloses the possibility of using e-mail to serve a defendant, since the vast majority of Hague

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157. *See* Rosenhaus, *supra* note 12, § 8.

158. *Id.* § 6. *See also* James Avery Craftsman, Inc. v. Sam Moon Trading Enter., Ltd., No. SA-16-cv-00463-OLG, 2018 WL 4688778, at *6 (W.D. Tex. July 5, 2018) (noting that "[m]any courts have found that service by e-mail is also prohibited with respect to foreign defendants in countries that have objected to Article 10," including Germany and Mexico).

159. See Rosenhaus, *supra* note 12, which contains a fairly comprehensive selection of cases on both sides of the split. It does not appear to contain any cases allowing e-mail service *because* e-mail is a postal channel. The author of this Note has not found any authority to this effect, either.

160. China, Germany, Switzerland, Mexico, and India all object to Article 10(a), and these countries appear most often in when a plaintiff seeks alternate service via e-mail. *See* Objection Table, *supra* note 90; Rosenhaus, *supra* note 12.

161. The Article provides that the Convention "shall not interfere with . . . the freedom" to serve process via "postal channels." Hague Convention, *supra* note 1, art. 10(a). On its face, this does not purport to independently create a right to use postal channels.

162. 137 S. Ct. 1504 (2017).

163. *Id.* at 1513.

164. *Id.*

165. Hague Service Convention, *supra* note 1, art. 19 ("To the extent that the internal law of a contracting State permits methods of transmission, other than those provided for in the preceding articles . . . the present Convention shall not affect such provisions."). While some have suggested that Article 19 permits any means of service "not prohibited" by foreign law, the more appropriate reading is that the Article should only be construed to "allow the use of alternative service methods which foreign law *specifically authorizes*." Magnarini, *supra* note 2, at 682 (emphasis in original).

contracting states do not allow cross-border service on their domestic parties via e-mail.[166]

Because the Convention and the laws of most contracting states do not expressly authorize e-mail service,[167] e-service creates some serious risks.[168] Foreign courts will refuse to recognize service that does not comply with their internal law, meaning that a successful judgment creditor who served a defendant through e-mail could not reach assets in the defendant's home country.[169] Further, an American court's unilateral decision to order service under Rule 4(f)(3) is "essentially reaching into the realm of the foreign government's sovereign domain."[170] Especially in civil law countries, where service is seen as a sovereign act,[171] service that contravenes the receiving nation's law may be downright offensive.[172]

Despite these concerns, e-mail service is faster and cheaper than the Convention's enumerated methods of service,[173] and it avoids the involvement of the central authority mechanism. Most important, though, e-mail service may be the only available option when a central authority is dilatory or refuses to effect service.[174]

Anova Applied Electronics, Inc. v. Hong King Group, Ltd.[175] offers a useful example of the circumstances in which e-mail service—or some other alternative—is necessary. *Anova* was a trademark dispute in which the American plaintiff alleged that the Chinese defendant had sold infringing counterfeit goods online.[176] The plaintiff hired a professional process server to attempt service through the Ministry of Justice, China's central authority.[177] After eight months, the Ministry of Justice denied the

166. *See* Permanent Bureau Questionnaire, *supra* note 11, ¶ 237. Only the United States, Canada, Montenegro, and South Africa allow incoming service from abroad via e-mail. *Id.* ¶ 237, n.329.

167. (except the four countries mentioned in the above footnote).

168. *See* Tamayo, *supra* note 128, at 245.

169. *See id.* at 236 n.172; David P. Stewart & Anna Conley, *E-Mail Service on Foreign Defendants: Time for an International Approach?*, 38 GEO. J. INT'L L. 755, 790 (2007). However, where the lawsuit merely seeks injunctive relief, or when the defendant has assets in the United States, this is concededly less of an issue. *Id.* at 791.

170. Steward & Conley, *supra* note 169, at 776.

171. Tamayo, *supra* note 128, at 238. In some countries, usurpation of the sovereign authority to effect service may constitute a "criminal offense." *Id.* at 245.

172. *Cf. id.* at 238–39 (discussing French government's offense at FTC's attempt to subpoena French corporation without French government approval).

173. *See* Facebook, Inc. v. 9 Xiu Network (Shenzhen) Tech. Co., 480 F. Supp. 3d 977, 988 (N.D. Cal. 2020).

174. Countries' objection to alternative forms of service makes e-mail the only practical option if central authority service fails. *See, e.g.*, cases cited *supra* notes 91–94.

175. 334 F.R.D. 465 (D. Mass. 2020).

176. *Id.* at 467.

177. *Id.* at 468.

service because the authority "no longer accepted cashier's checks to pay related fees and instead required payment by a bank wire transfer"—a minor clerical mishap.[178] The plaintiff attempted service again, this time with the correct form of payment, but was still unable to effect service after over a year.[179] Thus, nearly two years after the first attempt at service, the Ministry of Justice still had not served the defendant and could not offer an estimate of when it would.[180]

Despite these sympathetic facts, the court denied the plaintiff's motion for alternative service via e-mail.[181] The court reasoned that e-mail service was fundamentally inconsistent with the structure of the Convention because "[i]f the Convention left parties free to serve each other by e-mail, it is hard to see why they would ever choose slower, more costly methods."[182] Without permission for alternate service, the *Anova* plaintiff was just going to have to wait—no matter how long that took.

The Convention's drafters probably did not contemplate such a result. As explained in the preamble, the Hague Service Convention was intended to both expedite and simplify the procedures for serving documents abroad.[183] Indeed, the Convention was created in part as a response to the prior regime of international service, in which plaintiffs suffered considerable confusion and expense, and defendants were often served without notice.[184] The delay and difficulty associated with service in some contracting states thus substantially undermines the goals underlying the Convention's adoption.

The cause of this flaw is inherent to the design of the central authority system. While no county's central authority could be characterized as fast per se, countries vary widely in the amount of time required for service.[185] The explanation for these disparities is simple: because the Hague Service

178. *Id.*
179. *Id.*
180. *Id.* at 469.
181. *Id.* at 472.
182. *Id.*
183. Hague Service Convention, *supra* note 1, pmbl.
184. *See* 1964 Hague Conference Proceedings, *supra* note 35, at 127; Magnarini, *supra* note 2, at 664–65 ("The Convention . . . not only aims to solve the problem of lack of uniformity in international judicial assistance by creating an effective and expeditious system, but also addresses the due process considerations which American litigants must always bear in mind."); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 471 (AM. L. INST. 1987), Reporters' Note 1 ("The delay resulting from the use of diplomatic channels, and the confusion often caused by uncertainty as to the court to which a letter rogatory should be addressed, were among the principal motivations for the establishment of Central Authorities under both the Service and the Evidence Conventions.").
185. *See generally* Lukken, *supra* note 92, app. at 654–65.

Convention relies on the receiving nation's government to effect service,[186] the speed of service in any given country will roughly correspond with that country's investment in its central authority. In the United States, for example, where the contractor that serves process is contractually obligated to effect service within six weeks, central authority service is roughly as fast as a private process server.[187] In India, meanwhile, where a single person staffs the central authority, service often takes over nine months.[188] Because each respective country's government establishes each central authority, service through Convention procedures is only as fast and efficient as that contracting state wants it to be.

The delay and cost associated with Hague procedures is increasingly unjustified in a world where a defendant is reachable with the click of a button. This is especially true in cases like *Anova*, where the conduct that gave rise to the lawsuit was itself conducted online.[189] As long as the volume of internet commerce continues to rapidly expand[190]—along with the volume of counterfeit or infringing goods[191]—cases like these will become increasingly common. In fact, online transactions are already a common theme in the cases that discuss international e-mail service.[192] If plaintiffs cannot rely on central authorities to effect service, and courts do not reliably grant leave to serve a defendant via alternative means, a new solution is necessary to ensure that American plaintiffs have adequate remedies for these international harms.

B. Waiver: A Better, Simpler Solution

The Federal Rules of Civil Procedure already have such a solution in place for purely domestic litigation.[193] Under Rule 4(d)(2), defendants who needlessly increase the costs of litigation by refusing to waive service

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186. *See* Hawkins, *supra* note 155, at 237 ("The actual service of process, as opposed to the transmission of documents, is, for the most part, fully within the control of domestic state actors and subject to domestic state laws.").

187. Johnson, *supra* note 53, at 789.

188. Lukken, *supra* note 92, app. at 659.

189. The Anova defendants sold the infringing goods on e-commerce websites. *See* Anova Applied Elecs., Inc. v. Hong King Grp., Ltd., 334 F.R.D. 465, 467 (D. Mass. 2020).

190. Smith & Anderson, *supra* note 8.

191. *See generally* U.S. DEP'T OF HOMELAND SEC., *supra* note 8.

192. *See, e.g.*, Facebook, Inc. v. 9 Xiu Network (Shenzhen) Tech. Co., 480 F. Supp. 3d 977, 981; Luxottica Grp. S.p.A. v. P'ships & Unincorporated Ass'ns Identified on Schedule "A", 391 F. Supp. 3d 816, 819–20; (N.D. Ill. 2019); NOCO Co. v. Liu Chang, No. 1:18-cv-2561, 2019 WL 2135665, at *1 (N.D. Ohio May 16, 2019); Keck v. Alibaba.com, Inc., No. 17-cv-05672-BLF, 2017 WL 10820533, at *1 (N.D. Cal. Dec. 20, 2017).

193. *See* FED. R. CIV. P. 4(d)(2).

are required to bear those costs.[194] But as discussed above, the scope of this Rule was not originally limited to American defendants.[195] To offer a reliable means of bringing a foreign defendant to court, the Judicial Conference should amend Rule 4(d)(2) so that it once again extends to foreign and domestic defendants alike.

An amendment that extended this cost-shifting rule to foreign defendants would provide a far greater incentive to waive service than currently exists.[196] A defendant that forced a plaintiff to undergo central authority service could become liable for thousands of dollars in translation and service fees.[197] And unlike judgment costs,[198] a court must impose costs under Rule 4(d)(2) regardless who wins or loses the case.[199] A plaintiff need not wait until a final judgment to seek relief under the cost-shifting provision, either.[200] Foreign defendants would therefore face the prospect of immediate, potentially substantial liability at the start of the litigation, regardless of the outcome—a strong incentive to waive service.

Effectuating this policy would only require a minor revision. The Rule currently reads as follows:

> (2) *Failure to Waive*. If a defendant *located within the United States* fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the court must impose on the defendant:
>
> (A) the expenses later incurred in making service; and
>
> (B) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.[201]

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194. *See* FED. R. CIV. P 4(d)(2) advisory committee's note to 1993 Amendment.

195. *See supra* notes 112–21 and accompanying text.

196. The only current incentive for a foreign defendant to waive service is found in FED. R. CIV. P. 4(d)(3), which extends the defendant's time for response to ninety days. As discussed earlier, this incentive has little practical value if international service in the defendant's home country regularly takes longer than that. *See supra* notes 105–11 and accompanying text.

197. *See supra* notes 63–67 and accompanying text.

198. *See* FED R. CIV. P. 54(d)(1).

199. Estate of Darulis v. Garate, 401 F.3d 1060, 1063–64 (9th Cir. 2005).

200. *See* Costello v. Feaman, No. 4:10CV425RWS, 2010 WL 2985660 (E.D. Mo. July 26, 2010) (collecting cases holding that plaintiff can collect costs assessed under Rule 4(d)(2) before final judgment).

201. FED. R. CIV. P. 4(d)(2) (second emphasis added).

To apply Rule 4(d)(2) to foreign defendants, the drafters would only need to remove the first occurrence of the phrase "located within the United States" (italicized above).

The standard for "good cause" for failure to waive would also only require minor changes. Sending a waiver request to a foreign defendant, and subsequently imposing costs for failure to respond, would raise understandable concerns with procedural fairness if the complaint is not translated and the defendant is not fluent in English.[202] Fortunately, the notes to the 1993 Amendments define "good cause" to include situations in which the defendant does not receive actual notice of the lawsuit, such as when the defendant does not receive the request or is "insufficiently literate in English to understand it."[203] The new Rule could simply import this statement. However, the notes to the new amendment should also make clear that a genuine objection to waiver of service as a matter of policy by the defendant's home government would also constitute good cause; the drafters of the original 1993 Amendments included such a note to minimize offense to the British government, which claimed that it categorically opposed its citizens waiving international service.[204] This language would help to ensure that foreign defendants are not required to waive service in violation of their country's law.

The change to Rule 4(d)(2) as described above would provide many of the benefits that American plaintiffs currently seek through e-mail service while minimizing the potential drawbacks. A request to waive service retains essentially the same efficiency benefits as service via e-mail, not least because a plaintiff can send a request for waiver over e-mail.[205] Just as important, a plaintiff's request for waiver is a private communication, obviating the need to use the central authority of the defendant's home country.[206] Plaintiffs often attempt e-mail service expressly *because* they want to avoid serving a defendant through a central

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202. *Cf.* Borschow Hosp. & Med. Supplies, Inc. v. Burdick-Siemens Corp., 143 F.R.D. 472, 480 (D.P.R. 1992) (holding that service by mail of documents not written in defendant's native language was insufficient to properly apprise defendant of suit against it and give it sufficient time to respond).

203. FED. R. CIV. P 4(d)(2) advisory committee's note to 1993 Amendment.

204. Letter from Sam C. Pointer, Chairman, Advisory Committee on Civil Rules, to Honorable Robert E. Keeton, Chairman, Standing Committee on Rules of Practice and Procedure (May 1, 1992), *reprinted in* 146 F.R.D. 519, 521 ("The criticism that a declination, pursuant to foreign law, to waive service when requested by mail could result in unfair cost-shifting is dealt with in the Notes, which explain that cost-shifting would be inappropriate if a refusal is based upon a policy of the foreign government prohibiting all waivers of service.").

205. WRIGHT & MILLER, *supra* note 147, § 1092.1.

206. *See* Weis, *supra* note 58, at 165 (noting that an informal waiver procedure would have "bypassed the Convention in a significant number of cases").

authority,[207] and a provision that incentivized defendants to waive service would provide that same benefit.

The provision would also alleviate the procedural difficulties plaintiffs currently face in effecting e-mail service. To serve a defendant in a Hague contracting state via e-mail, a plaintiff must move for alternate service under Rule 4(f)(3).[208] Given the current split in district court authority over whether the Service Convention permits service via e-mail, plaintiffs cannot reliably predict whether they will be granted a 4(f)(3) motion in any given case.[209] Moreover, courts that permit e-mail service often require plaintiffs to show that they already tried and failed to effect service though methods enumerated in the Hague Service Convention,[210] severely reducing the efficiency benefits of e-mail. In contrast, a plaintiff can send a request for waiver immediately and without a court's prior approval.[211]

Furthermore, a request to waive service does not contravene the terms of the Hague Service Convention. Sending an e-mail to a defendant in a foreign county directly implicates the Service Convention, since an e-mailed complaint is necessarily a document that is transmitted for service abroad.[212] A request to *waive* service, meanwhile, is distinct from actual service in the U.S. legal system.[213] This distinction is critical. As discussed above, the law of the plaintiff's home jurisdiction determines when service abroad is necessary, and accordingly, the extent to which the Convention applies.[214] Because service is no longer necessary when parties waive it,

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207. *See, e.g.*, Facebook, Inc. v. 9 Xiu Network (Shenzhen) Tech. Co., 480 F. Supp. 3d 977, 982 (N.D. Cal. 2020); *In re* S. Afr. Apartheid Litig., 643 F. Supp. 2d 423, 437–38 (S.D.N.Y. 2009).

208. *See* FED. R. CIV. P. 4(f); Rosenhaus, *supra* note 12, § 2.

209. *See generally* Rosenhaus, *supra* note 12, §§ 4–8 (collecting cases on both sides of the split).

210. *See* Gamboa v. Ford Motor Co., 414 F. Supp. 3d 1035, 1040 (E.D. Mich. 2019) (quoting Phoenix Process Equip. Co. v. Capital Equip. & Trading Corp., 250 F. Supp. 3d 296, 306–07 (W.D. Ky. 2017)) ("[E]ven if Rule 4(f) does not establish a preferred method of service among its options, many courts do require, as a factor in weighing whether to exercise its discretion and allow substituted service, a showing that reasonable efforts to serve the defendant have already been made, and that the Court's intervention will avoid further burdensome or futile attempts at service.") (alteration in original).

211. *Compare* FED. R. CIV. P. 4(f)(3) (requiring court approval for alterative service) *with* FED. R. CIV. P. 4(d)(1) (permitting plaintiff to send a request for waiver to defendant).

212. *See* Hague Service Convention, *supra* note 1, art. 1.

213. *See* WRIGHT & MILLER, *supra* note 147, § 1092.1 (noting that drafters of Rule 4(d)(2) intended to clarify that a "request for waiver of formal service" was distinct from "service itself.").

214. Volkwagen Anktiengesellschaft v. Schlunk, 486 U.S. 694, 700 ("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."); *see also* international cases cited *supra* note 48.

the Convention, along with other requirements for service of process in foreign countries, are not applicable.

Of course, the waiver solution would not obviate the need for Convention service in every case. Defendants with substantial resources that face high-dollar claims could still reason that the benefit of delayed litigation would outweigh the costs of effecting formal service. But even in these cases, the cost-shifting provision would at least ensure that plaintiffs, or their contingent fee attorneys, would be compensated for the costs of service that their opponents imposed on them.

The amendment might also attract similar criticisms as it did in the 1990s, such as the British government's assertions that the provision violated the "letter and spirit" of the Convention.[215] To a certain extent, the "good cause" standard discussed above might assuage these concerns.[216] But in evaluating these foreign objections, one should still consider that American courts, by ordering e-mail service, already authorize service that violates the law of many defendants' home countries.[217] By reducing the need for e-mail service, and thus reducing the need to invade a foreign sovereign's domain, a cost-shifting provision that incentivized defendants to waive service would reduce the offense to many countries' foreign law, rather than add to it.

In the years since the 1993 Amendments, the necessity and practicality of waiver has only become clearer. With the rise of internet commerce, courts have seen (and will likely continue to see) more suits involving international defendants whose contacts with the United States consist largely of online sales and digital communications.[218] Where a defendant transacts largely online, it is highly probable that a digital message notifying them of a lawsuit against them will reach them.[219] Requiring a

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215. U.K. Embassy Note No. 63, *enclosed in* Letter from Edwin D. Williamson, Legal Adviser of the U.S. Department of State, to Honorable William H. Rehnquist, Chief Justice of the United States (April 19, 1991), *reprinted in* Brockmeyer v. May, 383 F.3d 798, 807 (9th Cir. 2004).

216. *See supra* note 204 and accompanying text.

217. *See* discussion *supra* Part A.

218. *See, e.g.*, Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1018 (9th Cir. 2002) (noting that defendant gambling service "RII had neither an office nor a door; it had only a computer terminal."); Luxottica Grp. S.p.A. v. Partnerships & Unincorporated Associations Identified on Schedule "A", 391 F. Supp. 3d 816, 819–20 (identifying online defendants who sold infringing goods on online marketplaces such as eBay and Alibaba) (N.D. Ill. 2019); NOCO Co. v. Liu Chang, No. 1:18-cv-2561, 2019 WL 2135665, at *1 (N.D. Ohio May 16, 2019) (explaining that defendant in trademark infringement case largely did business and communicated through Amazon.com shop); *see also* Jacques deLisle & Elizabeth Trujillo, *Consumer Protection in Transnational Contexts*, 58 AM. J. COMP. L. 135, 156 (2010) (identifying online transactions as an "increasingly important medium for international harms to consumers.").

219. *See Rio Props., Inc.*, 284 F.3d at 1018.

plaintiff to wait for months or more to achieve central authority service in these situations is, as one court put it, is "shockingly out-of-step with today's fast-paced e-commerce."[220] But this delay is the logical result of a system that offers little incentive for a foreign defendant to clear a roadblock created by a dilatory central authority. Absent a greater incentive to waive service, an international defendant has little reason to carry out its duty[221] to mitigate the costs of service.

IV. CONCLUSION

The purpose of the Hague Service Convention was to simplify and standardize procedures for service of documents abroad. This simplification, the drafters hoped, would expedite and simplify the procedures for service and ensure that defendants received notice of suits against them.

As this Note has discussed, the results have been mixed. The central authority mechanism has made international service a more straightforward process, but the speed of service largely depends on a foreign government's diligence. Where service through a central authority is slow or unreliable, plaintiffs have understandably sought alternative means of notifying opposing parties of pending lawsuits. But these alternative methods, e-mail included, are not affirmatively authorized by the Convention, and often offend foreign law.

Waiver of service has similar advantages to e-mail service without the drawbacks. Because waiver is a private act, it does not constitute "service" and thus does not conflict with foreign jurisdictions' service requirements. More importantly, a party who convinces the other to waive service does not need to involve the government of the receiving state. Waiver thus circumvents a foreign government's procedures for service without usurping its authority. Accordingly, to effectuate the Service Convention's goals of simplifying and streamlining international litigation, the Judicial Conference should amend Rule 4(d)(2) to apply to all defendants—foreign and domestic alike.

220. *NOCO Co.*, 2019 WL 2135665, at *5.
221. *See* FED. R. CIV. P. 4(d)(1).