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**TOO MUCH PROCESS, NOT ENOUGH SERVICE:  
INTERNATIONAL SERVICE OF PROCESS UNDER THE  
HAGUE SERVICE CONVENTION**

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ABSTRACT

*Service of process under the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention or Convention)<sup>1</sup> is too costly, time consuming, and unreliable. The Hague Service Convention's defining feature—the Central Authority system—adds unwarranted expense and delay to the already expensive and protracted process of civil litigation. Worse, however, is the fact that the Central Authority completely fails to effect service on a foreign party in a significant percentage of cases. For decades, courts and commentators have argued over whether the Hague Service Convention actually permits litigants to sidestep the Central Authority and serve process simply, reliably, and directly—by mail. Regrettably, the divide among the circuit courts as to whether the Convention actually permits service by mail seems irreconcilable. This Article does not attempt to resolve the service-by-mail controversy. Rather, this Article proposes a different resolution: federal legislation establishing a domestic agent for service of process on foreign defendants that are subject to personal jurisdiction in the United States. While imperfect and most useful against foreign defendants likely to have domestically available resources subject to enforcement of any resulting judgment, this legislation reduces the expense, burden, and uncertainty of service under the Convention, while remaining consistent with federalism, comity, due process of law, and the Hague Service Convention itself.*

I. INTRODUCTION

Your client was rear-ended at low speed while stopped at a traffic light. Her seat collapsed backward, causing her head to strike the rear windshield, resulting in traumatic brain injuries. Your presuit investigation reveals that the seat components that failed were designed, tested, and manufactured by companies located in three countries: Canada, Japan, and the United States.

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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.

How do you serve all three companies in your lawsuit filed in the United States? You are apparently in luck. Both Canada and Japan are parties to the Hague Service Convention. The Hague Service Convention is a multilateral treaty that provides permissible methods for accomplishing service of process on a defendant within a party nation's borders.<sup>2</sup> In fact, sixty-eight countries have become parties to the Hague Service Convention to date.<sup>3</sup> So how do you actually accomplish service under the Hague Service Convention? This question is not as simple as it may seem.<sup>4</sup>

The Hague Service Convention provides one, universal mechanism to accomplish service of process within a party's territory. Each nation must establish a "Central Authority,"<sup>5</sup> which both receives and executes requests for service of process.<sup>6</sup> Although deceptively easy to describe in the abstract, in practice the Central Authority system does not accomplish the stated goals of the Hague Service Convention: to simplify and expedite the service of documents abroad.<sup>7</sup> Indeed, service of process under the Hague Service Convention often adds six months or more to an already delay-ridden judicial process.<sup>8</sup> Even worse, however, is that nearly one in five service requests takes longer than a year to complete, and one in ten requests is never honored at all. Further, these problems disproportionately affect service requests originating in the United States.<sup>9</sup>

Service of process should be neither unduly time consuming nor unreliable. Short of amending the Hague Service Convention to address these concerns, the Supreme Court's interpretation of the language of the Convention permits domestic legislation that can improve the timeliness and certainty of serving process on foreign parties, all without running afoul of treaty obligations under the Convention.<sup>10</sup> Though not without

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2. The Hague Service Convention is considered a self-executing treaty. *See e.g.*, *Vorhees v. Fischer & Krecke*, 697 F.2d 574, 575 (4th Cir. 1983) (finding the Hague Service Convention to be self-executing because it imposes judicially enforceable obligations without requiring legislation); *Ex parte Volkswagenwerk Aktiengesellschaft*, 443 So. 2d 880, 882 (Ala. 1983) (recognizing that the Hague Service Convention is "the supreme law of the land" (quoting *Am. Trust Co. v. Smyth*, 247 F.2d 149, 153 (9th Cir. 1957)); *Dr. Ing. H.C.F. Porsche A.G. v. Superior Court*, 177 Cal. Rptr. 3d 155, 156 n.1 (Cal. Ct. App. 1981) (noting that a convention has the status of a treaty).

3. *Status Table*, HAGUE CONFERENCE ON PRIVATE INT'L LAW, [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=17#nonmem](http://www.hcch.net/index_en.php?act=conventions.status&cid=17#nonmem) (last visited Mar. 13, 2014).

4. Instructions for Serving Foreign Judicial Documents in the U.S. and for Processing Requests by Litigants in this Country for Service of American Judicial Documents Abroad, D.J. Memo No. 386, Rev. 3, at 13 (July 1979) (referring to the "short and clear" text of the Hague Service Convention).

5. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *supra* note 1, art. 2.

6. *Id.* arts. 3, 5.

7. *Id.* pmb.; *see also Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 698 (1988) (noting that the Hague Service Convention "was intended to provide a simpler way to serve process abroad, to assure that defendants sued in foreign jurisdictions would receive actual and timely notice of suit, and to facilitate proof of service abroad").

8. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *supra* note 1, art. 15.

9. *See infra* notes 126–30 and accompanying text for a discussion of the problems with service under the Hague Service Convention and how those problems impact the United States more severely than other countries.

10. *Schlunk*, 486 U.S. at 700.

limitations, federal legislation establishing a domestic agent for service of process on entities that are subject to personal jurisdiction in any state of the United States provides a quicker and easier method to accomplish service of process on foreign defendants. It also provides an interim solution that will benefit many litigants while the lengthy process of amending (and hopefully modernizing) the Hague Service Convention is concluded.

This Article addresses the problems of service under the Hague Service Convention in five sections. Section I provides a brief overview of the concept of service of process and discusses the problems that led to the Hague Service Convention. Section II describes the mechanics of the Hague Service Convention, and Section III explains some of the practical problems with those mechanics. Section IV describes federal legislation designed to allow domestic litigants to serve foreign defendants through an agent for service of process, resulting in quicker, less expensive, and more certain service, while not running afoul of due process, federalism, comity, or the Hague Service Convention itself. Section IV acknowledges the limitations of such legislation—particularly enforcement of domestic judgments in foreign courts—and weighs them against the benefits to be gained, concluding that the potential limitations on enforcement abroad do not counsel against such legislation; thus, legislation as outlined here should be implemented.

## II. A BRIEF HISTORY OF SERVICE AND THE NEED FOR THE HAGUE SERVICE CONVENTION

Service of process, simply put, is the method by which a defendant is formally and officially notified that an action is pending against him and that he must respond.<sup>11</sup> While filing the initial pleading typically commences a lawsuit,<sup>12</sup> from a defendant's perspective, service of process marks the beginning of his compulsory involvement.<sup>13</sup> Historically, service of process meant literal compulsion to answer because the defendant was physically seized pursuant to a writ of *capias ad respondendum*.<sup>14</sup>

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11. See *Miss. Publ'g Corp. v. Murphree*, 326 U.S. 438, 444–45 (1946) (“[S]ervice of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served.”).

12. *E.g.*, FED. R. CIV. P. 3; TEX. R. CIV. P. 22.

13. See FED. R. CIV. P. 4(a)(1)(E) (requiring a summons of service to notify a defendant that a failure to appear will result in default judgment); TEX. R. CIV. P. 99(c) (requiring a citation to provide notice that if a defendant fails to file a written answer with the clerk, default judgment may result); see also Robert B. von Mehren, *International Control of Civil Procedure: Who Benefits?*, 57 LAW & CONTEMP. PROBS. 13, 14 (1994) (“As a general proposition, service is important in two respects. First, it may confer jurisdiction in some cases, and, second, it functions to give notice of the nature and venue of the case to the defendant.”).

14. See ROBERT C. CASAD, JURISDICTION IN CIVIL ACTIONS § 2.02[2][a] (2d ed. 1991) (describing *capias ad respondendum* as requiring a defendant to post bond sufficient to guarantee payment of potential judgment against him in order to be released from seizure). The concept of service of process is as old as legal codes themselves and certainly predates the medieval procedures of England. See Kent Sinclair, *Service of Process: Rethinking the Theory and Procedure of Serving Process Under Federal Rule 4(c)*, 73 VA. L. REV. 1183, 1187–88 (1987) (describing service of process under perhaps one of the oldest legal codes, the Code of Eshnunna, where the plaintiff had to shout the defendant's name until he responded and submitted to the court); see also Frank Conley, Comment, *Service with a Smiley: The Effect of E-mail and Other Electronic Communications on Service of Process*, 11 TEMP. INT'L & COMP. L.J. 407, 417–18 (1997) (citing the Code of

Arresting the defendant accomplished not only notification but also established a court's personal jurisdiction over a defendant.<sup>15</sup> At least through the nineteenth century, in personam jurisdiction generally required personal service within the territorial boundaries of the forum.<sup>16</sup> Under this view of personal jurisdiction as physical power over a defendant, jurisdiction and service were both subject to similar geographic limits, namely the territorial limits of the forum state.<sup>17</sup> Although the concepts of service of process and personal jurisdiction are now distinct, even today, personal service on a defendant within the forum state exists as a reminder of the territorial view of personal jurisdiction.<sup>18</sup> Such service is still a valid, independent basis for exercising personal jurisdiction in the United States.<sup>19</sup>

By the middle of the twentieth century, service of process and personal jurisdiction evolved from their more parochial origins to accommodate the rise of interstate commerce.<sup>20</sup> As increased mobility and technological advances in communication gave rise to increased business transactions across state lines, the focus of personal jurisdiction shifted from physical presence in the territorial boundaries of the forum state to the concept of "contacts" with the state.<sup>21</sup> With personal jurisdiction predicated on a nonresident's contacts rather than personal service within the territory, service of process was no longer constrained to personal service, which was certain to give constitutionally adequate notice.<sup>22</sup> Instead, service methods evolved to permit more indirect methods, including "substituted" or "constructive" service on nonresidents.<sup>23</sup> Unlike personal service, these new service methods did not necessarily guarantee adequate notice. To satisfy due process, these alternatives to personal service were subject to a distinct test: any procedure must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford

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Eshnunna in explaining that the service of process has been a fundamental feature of the law for at least 4,000 years).

15. Sinclair, *supra* note 14, at 1189–90.

16. See *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877) (stating in dicta that when a suit "involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance"); see also *Sturgis v. Fay*, 16 Ind. 429, 431 (1861) (noting that the state exercises personal jurisdiction by notifying people to appear in court or through the action of officers of the court); *Weil v. Lowenthal*, 10 Iowa 575, 578 (1860) (referencing the doctrine that a court does not have personal jurisdiction over a citizen of another state); *Reber v. Wright*, 68 Pa. 471, 476–77 (1871) (explaining that no sovereignty may assert personal jurisdiction beyond its jurisdiction).

17. See *Pennoyer*, 95 U.S. at 722 (declaring that states may not exercise direct jurisdiction over people or property outside their territory and state courts may not extend process beyond their territory); see also *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (discussing how historically a person's presence within the jurisdictional limits of the court was necessary for the court to exercise personal jurisdiction).

18. *Burnham v. Superior Court*, 495 U.S. 604, 619 (1990).

19. *Id.*

20. *Hanson v. Denckla*, 357 U.S. 235, 260 (1958) (Black, J., dissenting).

21. *Int'l Shoe*, 326 U.S. at 320.

22. See *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) ("Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding."); *Milliken v. Meyer*, 311 U.S. 457, 463 (1940) (describing personal service even outside the jurisdiction as valid).

23. *Burnham*, 495 U.S. at 617–18; *Mullane*, 339 U.S. at 312–13.

them an opportunity to present their objections.”<sup>24</sup> While still marking or evidencing a court’s exercise of jurisdiction, service of process now functions primarily to provide timely notice to a defendant.<sup>25</sup>

Personal service, however, is not the only constitutionally permissible method of service. Rather, the due process standard for service is a flexible one.<sup>26</sup> Courts have held that many alternative methods of serving process are reasonably calculated to provide adequate and timely notice.<sup>27</sup> One method of service available in nearly every state—service by certified or registered mail—provides reliable and timely notification and typically passes constitutional muster.<sup>28</sup> Although not explicitly permitted by any rule of procedure, service of process by telex or fax has also been found reasonably calculated timely to inform the defendant of the pending action under certain, specific factual scenarios.<sup>29</sup> And at the extreme, service of process by publication in a newspaper or by posting a notice in public may comport with due process where it is the only available way to notify the defendant of the action.<sup>30</sup>

Between service by mail and service by publication is an alternative method of service, known as substituted service.<sup>31</sup> One common example of substituted-service provisions arose to fill the need to serve nonresident motorists who were accused of committing a tort in the forum state.<sup>32</sup> The typical scenario involved an out-of-state motorist passing through a state and being involved in a traffic collision.<sup>33</sup> A state

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24. *Mullane*, 339 U.S. at 314.

25. See Henry H. Perritt, Jr., *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1, 31 (1996) (stating that service of process represents both assertion of jurisdiction by a forum state over a defendant and the formal method of providing notice of suit to a defendant).

26. See *Greene v. Lindsey*, 456 U.S. 444, 449 (1982) (stating that while personal service is ideal, other procedures for service may meet the due process requirement).

27. See, e.g., *Tulsa Prof'l Collection Servs. v. Pope*, 485 U.S. 478, 490 (1988) (finding mail service to be an appropriate method of providing actual notice); *New England Merchs. Nat'l Bank v. Iran Power Generation & Transmission Co.*, 495 F. Supp. 73, 81 (S.D.N.Y. 1980) (allowing service through telex together with regular mail); *Calabrese v. Springer Pers. of N.Y., Inc.*, 534 N.Y.S.2d 83, 84 (N.Y. Civ. Ct. 1988) (permitting service by fax).

28. See *Pope*, 485 U.S. at 490 (emphasizing that service by mail is an inexpensive and efficient means of providing actual notice); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983) (stating notice by mail to a party whose name and address is reasonably ascertainable and that ensures actual notice is “a minimum constitutional precondition” in a legal proceeding); *Hess v. Pawloski*, 274 U.S. 352, 354, 356–57 (1927) (stating service on a nonresident motorist is sufficient when a copy of the complaint is mailed to the defendant by registered mail and is also left with registrar); cf. *Jones v. Flowers*, 547 U.S. 220, 230–31 (2006) (asserting that certified mail returned unclaimed should have been followed by attempts to serve via regular mail).

29. See *New England Merchs. Nat'l Bank*, 495 F. Supp. at 81 (permitting service through telex coupled with regular mail); *Calabrese*, 534 N.Y.S.2d at 84 (validating service of process by fax).

30. See *Greene*, 456 U.S. at 452–53 (stating that posting may be allowed in some instances when personal service is not possible); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950) (stating that service by publication is sufficient when it is the only method of notice available to plaintiff).

31. *Wuchter v. Pizzutti*, 276 U.S. 13, 17–18 (1928).

32. See, e.g., *id.* at 15 (seeking to resolve the issue of service of process with regard to a Pennsylvania motorist accused of crashing into a horse-drawn wagon on a public highway in New Jersey).

33. See, e.g., *id.* (involving an accident between residents of New Jersey and Pennsylvania, respectively); *Hess*, 274 U.S. at 353 (concerning a collision between residents of Massachusetts and Pennsylvania).

statute would decree that some act by the motorist, such as his use of the roadways, equated to his consent to designate the secretary of state or some other local governmental official as his agent for receiving service of process.<sup>34</sup> As a result, the plaintiff need not track down the passing motorist and physically serve him; instead, he could serve the secretary of state, who was then required to forward the process by mail to the motorist defendant.<sup>35</sup> Provided that the statute made it “reasonably probable that notice of the service on the Secretary will be communicated to the non-resident defendant who is sued,” substituted-service provisions would satisfy constitutional due process limitations.<sup>36</sup>

While the methods of serving process across state lines evolved in the United States, service of process on defendants in foreign States<sup>37</sup> remained a “nightmare.”<sup>38</sup> The postwar rise of international commerce in the latter half of the twentieth century<sup>39</sup> called for reforms in international procedure that mirrored the evolution of personal jurisdiction and service of process in the United States.<sup>40</sup> Americans attempting to serve defendants abroad had the unenviable task of serving a defendant according to the law of the foreign country in which the defendant was located, while still assuring the procedure satisfied domestic procedural requirements and constitutional due process limitations.<sup>41</sup> American litigants had no desirable options. Service through U.S. consular officers was practically impossible and retaining local counsel to ensure compliance with local laws was prohibitively expensive.<sup>42</sup> The United States and other civil law countries vary in how they define who is a proper person to effect service.<sup>43</sup> In

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34. See, e.g., *Wuchter*, 276 U.S. at 17–18 (describing New Jersey statute designating the secretary of state as the agent for service of process on a nonresident motorist); *Hess*, 274 U.S. at 354 (describing Massachusetts statute designating the registrar as the agent for service of process on a nonresident motorist).

35. *Wuchter*, 276 U.S. at 17–18.

36. See *id.* at 18–19 (invalidating New Jersey substituted-service statute that did not require the secretary of state to attempt to actually notify the defendant about the pendency of the suit).

37. When discussing a foreign sovereign, this Article will refer to the sovereign as a “State.” By contrast, where the concept of a state of the United States is discussed, the term “state” will appear.

38. Gary A. Magnarini, Comment, *Service of Process Abroad Under the Hague Convention*, 71 MARQ. L. REV. 649, 650 (1988).

39. See 4B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1133 (3d ed. 2002) (asserting that, after World War II, there was a marked increase in civil litigation with interstate or international aspects).

40. See Magnarini, *supra* note 38, at 653 n.22 (“The need to reform international judicial procedures was recognized even before World War II. In the late 1930’s the Harvard Research Committee in International Law drafted a proposed multilateral agreement which would offer litigants a variety of service methods. The Harvard Draft was farsighted indeed; its provisions were the basis for Federal Rule 4(i) and ultimately for the Hague Service Convention itself.”).

41. *Id.* at 653; see also Harry Leroy Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 536–37 (1953) (describing procedural deficiencies with foreign service procedures, such as the possibility that process servers in civil law countries may refuse to verify or provide sworn proof of service as may be required in domestic courts); Hans Smit, *International Aspects of Federal Civil Procedure*, 61 COLUM. L. REV. 1031, 1043 (1961) (stating that people serving process abroad have been unwilling to execute affidavits of service).

42. See Jones, *supra* note 41, at 536 (explaining that foreign counsel fees often greatly exceeded the amounts charged by American counterparts); Magnarini, *supra* note 38, at 653 (illustrating the degree of difficulty that American plaintiffs faced while attempting to serve foreign defendants).

43. See Ronan E. Degnan & Mary Kay Kane, *The Exercise of Jurisdiction over and Enforcement of*

the United States, service is typically accomplished through private individuals, either by attorneys or private process servers, rather than court officials.<sup>44</sup> Many civil law countries, however, consider service of process a sovereign act, not properly performed by a private citizen; and they therefore require service through judicial officials or other governmental agents.<sup>45</sup>

Foreign litigants attempting to serve defendants in the United States fared no better. Without a codified procedure, a foreign plaintiff would likely resort to a letter rogatory (also known as a letter of request) in order to effect service in the United States.<sup>46</sup> A letter rogatory would take the form of a letter from a governmental official of the foreign State, requesting assistance from a governmental official of the United States to serve process.<sup>47</sup> The U.S. federal system, however, does not provide a federal governmental office to act on such requests, as courts are generally administered at the state level.<sup>48</sup> Moreover, a foreign plaintiff would likely be stymied by the lack of any uniform state office to act on such requests, as well as the different service rules for each state and federal court.<sup>49</sup>

In an attempt to overcome the myriad problems of serving process in the United States, some European countries permitted service on foreign defendants via an involuntary agent procedure known as *notification au parquet*.<sup>50</sup> Service could be accomplished by leaving the process with a local official, who, unlike the secretaries of state described above, need only nominally attempt to forward the process to the

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*Judgments Against Alien Defendants*, 39 HASTINGS L.J. 799, 836–37 (1988) (noting that, given the various methods of serving process in foreign countries, careful assessment of each country’s requirements is crucial).

44. See, e.g., FED. R. CIV. P. 4(c)(2) (stating that any person over eighteen—and not a party to the dispute—may serve a complaint); TEX. R. CIV. P. 103 (allowing service by any person over eighteen who is authorized by law or written order of the court). *But see* FED. R. CIV. P. 4(c)(3) (authorizing service by a federal marshal on request); TEX. R. CIV. P. 103 (permitting service by a sheriff or constable).

45. See Degnan & Kane, *supra* note 43, at 836 (stating that in countries where service of process is considered a sovereign act, attempt at service may be subject to sanction); Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 513 (2003) (discussing how some countries consider service of process and collection of evidence conducted without permission within their borders as a violation of their sovereignty); Smit, *supra* note 41, at 1040 (recognizing that a country’s opposition to service within its borders typically stems from the notion that such service should not be made in the absence of a treaty); see also *Prewitt Enters., Inc. v. Org. of Petroleum Exporting Countries*, 353 F.3d 916, 925 (11th Cir. 2003) (explaining Austria’s laws involving service); *Beightler v. Produkte Fur Die Medizin AG*, No. 3:07CV1604, 2008 WL 4160589, at \*3 (N.D. Ohio Aug. 28, 2008) (explaining that service must be carried out by the court under German law); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 471 cmt. b (1987) (noting that civil law states usually regard service of process as a sovereign act that may be performed only by officials of the state in accordance with the state’s law); Yvonne A. Tamayo, *Catch Me if You Can: Serving United States Process on an Elusive Defendant Abroad*, 17 HARV. J. L. & TECH. 211, 238–40 (2003) (describing France and Switzerland’s objections to attempts at service that did not involve their respective governments).

46. See Tamayo, *supra* note 45, at 244 (explaining that in most foreign countries, a letter rogatory is the favored method of serving process in the United States).

47. *Id.*

48. See Magnarini, *supra* note 38, at 654 (noting the difficulty faced by foreign plaintiffs in navigating the various state mechanisms in place for service in the American court system).

49. *Id.*

50. See *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 703 (1988) (explaining that countries such as France, Belgium, and Italy used *notification au parquet* to serve process by depositing documents with a designated local official).

defendant.<sup>51</sup> Naturally, this method of service did not provide reasonable assurance, consistent with due process, that the defendant would receive timely notice of the suit.<sup>52</sup> This led to default judgments against American defendants who never had any realistic opportunity to defend the suit, let alone know that it was pending.<sup>53</sup> Against this background of international service difficulties, the Hague Conference on Private International Law (Hague Conference) adopted the Hague Service Convention.<sup>54</sup>

The Hague Conference is an organization comprised of sovereign States, which first convened in 1893.<sup>55</sup> The Hague Conference has held sessions regularly over the last century and has drafted more than forty conventions, many of which have been ratified around the world.<sup>56</sup> These conventions address issues of private international law, ranging from procedural issues such as service of process and the taking of evidence abroad, to family law matters such as divorce recognition, intercountry adoption, and international child abduction. During its tenth session in 1965, the Hague Conference adopted the Hague Service Convention.<sup>57</sup> This Convention was intended to simplify, standardize, and expedite service of process in member nations, while incorporating features consistent with due process.<sup>58</sup>

### III. THE MECHANICS OF THE HAGUE SERVICE CONVENTION

The Hague Service Convention applies only in certain specific circumstances. Litigants serving process on a party in a Hague Service Convention State must adhere to the procedures in the Convention when (1) a document must be transmitted for service abroad, (2) the document is a judicial or extrajudicial document, (3) the case is a civil or commercial matter, and (4) the address of the recipient is known.<sup>59</sup> For all practical purposes, the first factor—whether a document must be transmitted for service

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51. See von Mehren, *supra* note 13, at 16 (“In particular, Justice Brennan noted the discussions concerning the civil law procedure of ‘notification au parquet,’ which permits service of process upon a local official, who is then supposed, but not required, to transmit the document abroad through diplomatic or other channels.” (citing *Schlunk*, 486 U.S. at 709–10 (Brennan, J., concurring))).

52. See *id.* (explaining that *notification au parquet* is generally considered inconsistent with due process because it does not guarantee timely notice of a pending lawsuit).

53. See *Schlunk*, 486 U.S. at 709 (Brennan, J., concurring) (noting that practices for service such as *notification au parquet* did not ensure notice and often led to default judgments).

54. See von Mehren, *supra* note 13, at 16 (“The concurring justices concluded that the desire of the Tenth Hague Conference to eliminate ‘notification au parquet’ required that the Convention be interpreted to limit the ‘forum’s ability to deem service ‘domestic,’ thereby avoiding the Convention terms.’”).

55. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 529 (1987); see also *More about HCCH*, HAGUE CONFERENCE ON PRIVATE INT’L LAW, [http://www.hcch.net/index\\_en.php?act=text.display&tid=4](http://www.hcch.net/index_en.php?act=text.display&tid=4) (last visited Feb. 17, 2014) (highlighting that the first session of the Hague Conference was convened by the Netherlands Government in 1893).

56. *What Is the Difference Between the “Hague Conference” and the “Hague Conventions”?*, HAGUE CONFERENCE ON PRIVATE INT’L LAW, [http://www.hcch.net/index\\_en.php?act=faq.details&fid=32](http://www.hcch.net/index_en.php?act=faq.details&fid=32) (last visited Feb. 17, 2014).

57. *Aérospatiale*, 482 U.S. at 530.

58. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *supra* note 1, pmbl.

59. *Id.* art. 1.



abroad—essentially determines whether the Hague Service Convention applies.<sup>60</sup> Somewhat surprisingly, the local law of the jurisdiction where the case is pending, rather than the law of the country where the defendant resides or some other law created or specified in the Hague Service Convention itself, determines whether a document must be transmitted abroad for service.<sup>61</sup>

When a document must be transmitted for service abroad in a Hague Service Convention State, the Convention's procedures are mandatory.<sup>62</sup> The litigant serving process abroad must utilize one of the methods of service provided for in the Convention. The Convention provides one universal method,<sup>63</sup> and other potential methods, for serving process abroad.<sup>64</sup> The method available in all Hague Service Convention States is also the defining feature of the Hague Service Convention: the Central Authority.<sup>65</sup>

Each State is required to establish an office known as the Central Authority, which is responsible for receiving and processing requests from other contracting States for service of process.<sup>66</sup> In some States, the Central Authority is administered through the court system.<sup>67</sup> In others, there is a freestanding bureaucracy that performs

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60. What constitutes a "civil or commercial matter[]" has occasionally been subject to dispute. For example, Germany has refused to cooperate with requests for service of pleadings seeking punitive damages on the basis that such damages are penal rather than civil in nature; thus, they are outside the scope of the Hague Service Convention. See Kenneth B. Reisenfeld, *Service of United States Process Abroad: A Practical Guide to Service Under the Hague Service Convention and the Federal Rules of Civil Procedure*, 24 INT'L LAW. 55, 66 (1990) (stating that West German Central Authorities have refused to serve complaints requesting punitive damages "on the ground that such complaints involve criminal matters"). Generally, however, signatories to the Hague Service Convention agree that the phrase includes most matters other than criminal matters. See Emily Fishbein Johnson, Note, *Privatizing the Duties of the Central Authority: Should International Service of Process Be up for Bid?*, 37 GEO. WASH. INT'L L. REV. 769, 777 (2005) (asserting that common law countries expansively interpret the phrase to include most matters that are not criminal); see also PERMANENT BUREAU, HAGUE CONFERENCE ON PRIVATE INT'L LAW, SUMMARY OF RESPONSES TO THE QUESTIONNAIRE OF JULY 2008 RELATING TO THE SERVICE CONVENTION, WITH ANALYTICAL COMMENTS 10 (2009), <http://www.hcch.net/upload/wop/2008pd14e.pdf> ("The majority of States have not experienced any major difficulty with the interpretation of the phrase 'civil or commercial'."). As for what constitutes a "judicial or extrajudicial document," the concept of extrajudicial documents is beyond the scope of this Article. There is no dispute, however, that the signatories to the Hague Service Convention agree that the phrase encompasses at least initial service of process. See, e.g., Johnson, *supra*, at 770 (noting that signatories to the Hague convention were motivated by a shared desire to facilitate international service of process).

61. Von Mehren, *supra* note 13, at 16; see also Georges A.L. Droz, *A Comment on the Role of the Hague Conference on Private International Law*, 57 LAW & CONTEMP. PROBS. 3, 10 (1994) (discussing *Schlunk* and noting the "Supreme Court of . . . the Netherlands, had already endorsed the same principle," namely, that "the local law . . . determine[s] whether a document has to be transmitted abroad for service").

62. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 705 (1988).

63. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *supra* note 1, arts. 2–6.

64. *Id.* arts. 8–11.

65. *Id.* art. 2; see also Magnarini, *supra* note 38, at 658 (describing the Central Authority as "an innovation constituting the heart and soul of this multilateral treaty").

66. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *supra* note 1, art. 2–6.

67. Johnson, *supra* note 60, at 773.

its functions.<sup>68</sup> Regardless of the structure of the Central Authority in different States, it performs the same basic functions. The Central Authority both receives and executes requests for service from requesting parties.<sup>69</sup> Requests for service must be made by a person authorized to forward service requests under the laws of the State of origin.<sup>70</sup> Although private attorneys in the United States are often authorized to serve process under state law, and thus are proper requesting parties under the Hague Service Convention,<sup>71</sup> some Central Authorities refuse to accept service requests forwarded by American attorneys.<sup>72</sup> As a result, private attorneys are specifically advised to note in their request for service that they are authorized under domestic law to send such requests.<sup>73</sup>

The Hague Service Convention also prescribes the form of the request to the Central Authority. The requesting party must provide the Central Authority with a summary of the document to be served, the actual documents to be served, and a standardized service request form.<sup>74</sup> The summary and request form must be provided in duplicate.<sup>75</sup> Central Authorities may require that the service documents be “written in, or translated into, the official language or one of the official languages of the State addressed.”<sup>76</sup> The Central Authority can refuse a service request that is defective in any way.<sup>77</sup> For requests that do comply with the Hague Service Convention, the Central Authority is required to comply,<sup>78</sup> although litigants have no recourse when a Central Authority fails or improperly refuses to effect service.<sup>79</sup> Requesting parties may either ask the Central Authority to serve the documents using a specific method (provided that method is consistent with the internal law of the State where service is made), or via a method the Central Authority chooses.<sup>80</sup>

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68. *Id.*

69. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *supra* note 1, arts. 2–6.

70. *Id.* art. 3.

71. See *Marschhauser v. Travelers Indem. Co.*, 145 F.R.D. 605, 608–09 (S.D. Fla. 1992) (finding that a private attorney qualifies as a “competent authority” to serve process under the Hague Convention).

72. See *Johnson*, *supra* note 60, at 792 (explaining that some states, including the United Kingdom and Israel, feel that private attorneys are not authorized to transmit service requests under the Convention and have thus refused to accept requests forwarded by private U.S. attorneys).

73. REPORT OF THE U.S. DELEGATION TO THE SPECIAL COMMISSION ON THE OPERATION OF THE CONVENTION OF 15 NOVEMBER 1965 ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS 316 (1977).

74. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *supra* note 1, art. 3. The standardized service request form is available online in multiple languages. *Hague Service Convention Model Form*, HAGUE CONFERENCE ON PRIVATE INT’L LAW, [http://www.hcch.net/index\\_en.php?act=text.display&tid=47](http://www.hcch.net/index_en.php?act=text.display&tid=47) (last visited Mar. 13, 2014).

75. *Id.*

76. *Id.* art. 5.

77. *Id.* art. 4.

78. See *id.* art. 13 (indicating that where a request complies with the terms of the Convention, the State may only refuse to comply if doing so would infringe on its sovereignty or security).

79. See *Magnarini*, *supra* note 38, at 674 (noting that the Convention does not offer recourse if the procedure for service fails).

80. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *supra* note 1, art. 5.

In addition to the Central Authority system, the Hague Service Convention also permits service of process through other alternatives, provided the receiving State has not objected.<sup>81</sup> In the absence of a specific objection, the Hague Service Convention allows service through diplomatic or consular agents, judicial officers, or any method permissible under the internal law of the country where process is to be served.<sup>82</sup> These methods are rarely used; indeed, they basically recite the permissible practices that existed before the Hague Service Convention was adopted. Additionally, the Hague Service Convention arguably provides one more method for serving process, via “postal channels” directly to the party to be served.<sup>83</sup> As discussed in the next Section, service directly via mail or through the Central Authority carries unacceptable risks, either in terms of protracted litigation over the method chosen or the risk that the attempt at service will fail.

#### IV. THE PROBLEMS WITH THE HAGUE SERVICE CONVENTION

##### A. *Service via Mail Is Risky*

For more than twenty years, there has been no clear answer to whether the Hague Service Convention actually permits service via mail.<sup>84</sup> Ambiguous language in Article 10(a) of the Convention, permitting parties to “send judicial documents, by postal channels, directly to persons abroad,”<sup>85</sup> has led many to believe that service of process is permissible via mail.<sup>86</sup> Others have credibly argued that, although admittedly cumbersome, the Central Authority is both a novel and defining feature of the Hague Service Convention; thus, permitting litigants to sidestep the Central Authority by serving process by mail cannot be the drafters’ intention.<sup>87</sup> The purpose of this Article is not to resolve the Article 10(a) controversy. However, a brief examination of the circuit split regarding Article 10(a) reveals why parties prudently limit their service efforts to the Central Authority system, even though that system fails to provide efficient and reliable service.

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81. *See id.* (indicating that an applicant may request a specific method of service as long as the method chosen has not been outlawed by the State addressed).

82. *Id.* arts. 8–11.

83. *Id.* art. 10.

84. *See* Magnarini, *supra* note 38, at 676 (pointing out that the question of whether service of process is permissible via mail has been a center of controversy).

85. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *supra* note 1, art. 10(a).

86. Magnarini, *supra* note 38, at 676–77.

87. *See* McClenon v. Nissan Motor Corp. in U.S.A., 726 F. Supp. 822, 826 (N.D. Fla. 1989) (explaining that permitting service simply via the mail would be illogical because it would circumvent the complex procedure established as the very purpose of the Convention); *see also* Bankston v. Toyota Motor Corp., 889 F.2d 172, 173–74 (8th Cir. 1989) (noting that the Convention’s use of the word “send” in Article 10(a) cannot mean service of process because the word “service” is deliberately used throughout the Convention when referencing service of process).

The genesis of the Article 10(a) controversy is the ambiguous term “send.”<sup>88</sup> Other portions of the Hague Service Convention use the more specific terms “served”<sup>89</sup> or “service”<sup>90</sup> rather than “send.”<sup>91</sup> Relying on the canon of construction *expressio unius est exclusio alterius*—which dictates that the express inclusion of one thing excludes all others—both the Eighth Circuit Court of Appeals in *Bankston v. Toyota Motor Corp.*,<sup>92</sup> and the Fifth Circuit Court of Appeals in *Nuovo Pignone SpA v. Storman Asia M/V*,<sup>93</sup> were persuaded by this textual difference and concluded that “send” in Article 10(a) does not mean “serve.”<sup>94</sup> Moreover, the Fifth Circuit Court of Appeals expressed serious reservations that the drafters of the Hague Service Convention would have provided for more “reliable” methods of service, such as the Central Authority system and service through diplomatic channels, “while simultaneously permitting the uncertainties of service by mail.”<sup>95</sup>

Article 1 of the Hague Service Convention, however, confirms that the Convention applies only to formal service of documents.<sup>96</sup> Indeed, the drafters originally considered and rejected language in Article 1 that would have broadened the Convention to apply in situations other than formal service.<sup>97</sup> Thus, as the Second Circuit Court of Appeals concluded in *Ackermann v. Levine*,<sup>98</sup> if Article 10(a) does not address service, its very inclusion in the Hague Service Convention—along with nearby Articles 10(b) and 10(c) and thirty other Articles admittedly concerning formal service—would be anomalous.<sup>99</sup> And while the drafters did use the terms “serve” or

88. Reisenfeld, *supra* note 60, at 71.

89. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *supra* note 1, arts. 1, 3, 5, 6, 8, 15.

90. *Id.* arts. 1–2, 5, 6, 8–17, 19.

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

92. 889 F.2d 172 (8th Cir. 1989).

93. 310 F.3d 374 (5th Cir. 2002).

94. *Nuovo Pignone*, 310 F.3d at 384; *Bankston*, 889 F.2d at 173–74.

95. *Nuovo Pignone*, 310 F.3d at 384–85.

96. See Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *supra* note 1, art. 1 (indicating that the Convention applies only to civil or commercial matters that require service of judicial or extrajudicial documents); see also *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 698 (1988) (indicating that the Convention was intended to provide a method of service to ensure that a defendant sued in a foreign jurisdiction would receive actual, timely notice of the suit).

97. The Supreme Court explained the scope of applicability of the Hague Service Convention in *Schlunk*: “The preliminary draft of Article 1 said that the present Convention shall apply in all cases in which there are grounds to transmit or to give formal notice of a judicial or extrajudicial document in a civil or commercial matter to a person staying abroad.” 486 U.S. at 700–01. But the delegates “criticized the language of the preliminary draft because it suggested that the Convention could apply to transmissions abroad that do not culminate in service. The final text of Article 1 . . . eliminates this possibility and applies only to documents transmitted for service abroad.” *Id.* at 701 (citation omitted).

98. 788 F.2d 830 (2d Cir. 1986).

99. See *Ackermann*, 788 F.2d at 839 (“The reference to ‘the freedom to send judicial documents by postal channels, directly to persons abroad’ would be superfluous unless it was related to the sending of such documents for the purposes of service.” (quoting *Shoei Kako Co. v. Superior Court*, 109 Cal. Rptr. 402, 411–12 (Cal. Ct. App. 1973))); see also *Brockmeyer v. May*, 383 F.3d 798, 802 (9th Cir. 2004) (holding that the Convention does not prohibit service of process by international mail); *Research Sys. Corp. v. IPSOS Publicite*, 276 F.3d 914, 926 (7th Cir. 2002) (holding that service by mail is permissible under the Convention,

“service” more consistently throughout the Hague Service Convention, they are not the only terms in the Convention that necessarily concern service of process.<sup>100</sup> Many signatories to the Hague Service Convention necessarily interpreted Article 10(a) as permitting service of process by mail because they objected to service by mail under Article 10(a)<sup>101</sup> or made statements evincing their interpretation that mail service was permissible under the Convention.<sup>102</sup> Experts charged with interpreting the Hague Service Convention have come to the same conclusion.<sup>103</sup> They attribute the textual

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provided that the foreign country does not object).

100. Article 21 refers to Articles 8 and 10 as involving “methods of transmission,” even though Article 8 expressly uses the phrase “effect service,” while Article 10(a) uses the term “send.” Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *supra* note 1, arts. 8, 10, 21. “Methods of transmission” necessarily refers to both “service” in Article 8 and “send” in Article 10; thus, all three terms must be interchangeable.

101. The following countries objected to service via mail under Article 10(a): China, Czech Republic, Egypt, Germany, Greece, Republic of South Korea, Latvia, Luxembourg, Norway, Poland, Slovak Republic, Switzerland, Turkey, and Venezuela. Memorandum from the Admin. Office of the U.S. Courts to All Clerks of the U.S. Dist. Courts 2 (Nov. 7, 2000); *see also* EOI Corp. v. Med. Mktg. Ltd., 172 F.R.D. 133, 138 n.13 (D.N.J. 1997) (indicating that Egypt, Germany, Norway, Turkey, and the Czech Republic have objected to the application of Article 10(a) of the Convention).

102. Canada, Japan, Pakistan, and the United States similarly made statements indicating that they understood Article 10(a) permitted service by mail and that they did not object to such service. Paradigm Entm’t, Inc. v. Video Sys. Co., No. 3:99-CV-2004P, 2000 WL 251731, at \*6–7 (N.D. Tex. Mar. 3, 2000). Canada stated that it “does not object to service by postal channels,” and Pakistan stated that it “has no objection to such service by postal channels directly to the persons concerned.” *Id.* “At a Special Commission of the Hague Convention held in April, 1989, the Japanese delegation announced that Japan does not consider the sending of foreign judicial documents by postal channels to be an ‘infringement of its sovereign power.’” Knapp v. Yamaha Motor Corp., U.S.A., 60 F. Supp. 2d 566, 569 n.3 (S.D. W.Va. 1999) (quoting PRACTICAL HANDBOOK ON THE OPERATION OF THE HAGUE CONVENTION OF 15 NOVEMBER 1965 ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS 134 (2d ed. 1992)). And in 1967, “the United States delegate to the Hague Convention reported to Congress that Article 10(a) permitted service by mail.” Brockmeyer v. May, 383 F.3d 798, 803 (9th Cir. 2004).

103. *See United States Department of State Opinion Regarding the Bankston Case and Service by Mail to Japan under the Hague Service Convention*, 30 I.L.M. 260, 261 (1991) (quoting Letter from Alan J. Kreczko, Legal Advisor, U.S. Dep’t of State, to the Admin. Office of U.S. Courts & the Nat’l Ctr. for State Courts (Mar. 14, 1991)) (“We . . . believe that the decision of the Court of Appeals in Bankston is incorrect to the extent that it suggests that the Hague Convention does not permit as a method of service of process the sending of a copy of a summons and complaint by registered mail to a defendant in a foreign country.”). The impact of an interpretation by a government agency such as this one has been articulated by the Supreme Court: “[T]he meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.” *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982). In a guidebook to practicing law under the Hague Service Convention, the authors, an international commission of experts from signatory countries to the Convention, criticized the *Bankston* line of cases and reasoned that “signatory States would not have been given the opportunity to object to Article 10(a) on the grounds that such use of postal channels would infringe upon their sovereignty unless such use constituted service of process.” PRACTICAL HANDBOOK ON THE OPERATION OF THE HAGUE CONVENTION OF 15 NOVEMBER 1965 ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS, *supra* note 102, at 42–45. A special international commission formed after the *Bankston* opinion has stated, “the postal channel for service constitutes a method which is quite separate from service via the Central Authorities or between judicial officers. Article 10(a), in effect, offered a reservation to Contracting States to consider that service by mail was an infringement of their sovereignty. Thus, theoretical doubts about the legal nature of the procedure were unjustified. Nonetheless, certain courts in the United States of America . . . had concluded that service of process abroad by mail was not permitted under the Convention.”

difference, somewhat unsatisfyingly, to “careless drafting.”<sup>104</sup> This debate has proceeded for more than twenty years, and no resolution to the Article 10(a) dispute appears on the horizon. As a result, litigants have no prudent choice but to rely on the problematic Central Authority system to serve process abroad, even though it is time consuming and unreliable.

*B. Service via the Central Authority Is Cumbersome and Unreliable*

Service via the Central Authority is unappealing for many reasons. First, service is relatively expensive; it often costs in excess of \$1,000.<sup>105</sup> Although under Article 12 “[t]he service of judicial documents coming from a contracting State shall not give rise to any payment or reimbursement of taxes or costs for the services rendered by the State addressed,” an applicant may be required to reimburse the Central Authority for costs incurred by “the employment of a judicial officer or of a person competent under the law of the State of destination” or “the use of a particular method of service.”<sup>106</sup> This only adds further expense to the \$1,000 cost estimate. Second, some countries not only require translation of documents to be served, they micromanage document translations, refusing to serve documents they consider mistranslated.<sup>107</sup> This can lead to multiple attempts to translate documents to the Central Authority’s satisfaction. Third, Central Authorities often refuse to fulfill service requests from American attorneys because they incorrectly conclude that such persons are not permitted to make service requests through the Central Authority.<sup>108</sup> Finally, Central Authorities often refuse to complete requests originating in the United States where the service documents were created electronically, like the e-filing services in federal courts, because the documents lack an original signature or seal.<sup>109</sup> These difficulties in translation, who is a proper requesting party, and concerns about authenticating

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PERMANENT BUREAU, REPORT ON THE WORK OF THE SPECIAL COMMISSION OF APRIL 1989 ON THE OPERATION OF THE HAGUE CONVENTIONS OF 15 NOVEMBER 1965 ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS AND OF 18 MARCH 1970 ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS, *reprinted in* 28 I.L.M. 1558, 1561 (1989). Such authorities reveal “the practical construction adopted by the parties” and are important aids to interpretation of treaties like the Hague Service Convention. *Air France v. Saks*, 470 U.S. 392, 396 (1985) (quoting *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431–32 (1943)).

104. *Ackermann*, 788 F.2d at 839.

105. *Cf. Bankston v. Toyota Motor Corp.*, 889 F.2d 172, 174 (8th Cir. 1989) (Gibson, J., concurring) (describing service under the Central Authority system twenty years ago as costing “\$800 to \$900”). The author’s personal experience reveals that this estimate is no longer accurate; indeed, complying with Article 5 is much more costly today than it was in 1989.

106. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *supra* note 1, art. 12.

107. *See Johnson*, *supra* note 60, at 785 (explaining that “both Japan and Germany read the documents received before serving them domestically and have been known to send documents back because of inaccurate translations”).

108. Some States, including the United Kingdom and Israel, “have refused to accept service requests forwarded by private attorneys in the United States.” *Id.* at 792.

109. *See PERMANENT BUREAU*, *supra* note 60, at 21 (“They also noted a number of problems that have arisen: rejection of service request e-filed in US so no original signature or seal, demanding legalization of the document or the translation, demanding that requests originate from clerks of court.”).

documents often make it advisable to hire a process-serving company specializing in service under the Convention, such as APS.<sup>110</sup>

Commentators often characterize the difficulties associated with complying with the Hague Service Convention as minimal.<sup>111</sup> If the only impediments to service were the expense and administrative headaches just described, those commentators would be justified. Although these difficulties are not insignificant, the more serious obstacles to international service of process are the serious delays in and the lack of reliability of the Central Authority.<sup>112</sup> This problem arises, at least in part, because there is neither stick nor carrot available to litigants to enforce a State's treaty obligations.<sup>113</sup> There is no deadline imposed on the Central Authority to act on service requests.<sup>114</sup> Indeed, a signatory country can categorically ignore the Hague Service Convention.<sup>115</sup> Even where the Central Authority acknowledges its responsibilities, requests for service are often not acted upon for months.<sup>116</sup> Worse still, proof of service from the Central Authority may take years or never come at all.<sup>117</sup>

As a default rule, litigants can expect service through the Central Authority—even when it is successful—to take at least six months.<sup>118</sup> This delay can have outcome-determinative consequences. For example, in *Paracelsus Healthcare Corp. v. Philips Medical Systems, Nederland, B.V.*,<sup>119</sup> the plaintiff served the request for service on the Central Authority for the Netherlands one month before limitations expired.<sup>120</sup> Not surprisingly, the Central Authority did not complete service within the month. As a result, the court held the suit was properly dismissed, and admonished the plaintiff: “Paracelsus should have recognized the difficulties involved in serving a foreign

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110. See *International Service of Process*, APS INTERNATIONAL (last visited February 17, 2014), <http://www.civilactiongroup.com/index.php?pr=International> (stating that APS is “recognized by member nations as an authority to transmit requests for service abroad” under the Hague Service Convention).

111. See Joseph F. Weis, Jr., *The Federal Rules and the Hague Conventions: Concerns of Conformity and Comity*, 50 U. PITT. L. REV. 903, 912 (1989) (describing compliance as a “slight inconvenience”).

112. See CATHERINE KESSEDIAN, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, ELECTRONIC DATA INTERCHANGE, INTERNET AND ELECTRONIC COMMERCE 28 (2000), [http://www.hcch.net/upload/wop/gen\\_pd7e.pdf](http://www.hcch.net/upload/wop/gen_pd7e.pdf) (pointing out that a Central Authority may not act upon a request for service for several months, and in some cases, may not send a certificate proving execution of service for several years).

113. See Magnarini, *supra* note 38, at 674 (noting that the Convention does not offer recourse if the procedure for service fails).

114. See *id.* at 687 (stating that the Convention does not specify any time limits for execution of service of process); see also WRIGHT & MILLER, *supra* note 39, § 1133 (asserting that the Convention does not stipulate a time in which a foreign country's Central Authority must perform service of process).

115. See *Nuance Commc'ns, Inc. v. Abby Software House*, 626 F.3d 1222, 1237–40 (Fed. Cir. 2010) (highlighting that even though Russia is a signatory to the Hague Convention, the Russian Federation no longer recognizes the applicability of the Hague Service Convention between Russia and United States); Johnson, *supra* note 60, at 789 (describing the inability to effect service through Russia and Korea's designated Central Authorities).

116. See KESSEDIAN, *supra* note 112, at 28 (describing the Central Authority's issue with delays in service of process).

117. *Id.*

118. Charles Routh, *Dispute Resolution—Representing the Foreign Client in Arbitration and Litigation*, in *GOING INTERNATIONAL: FUNDAMENTALS OF INTERNATIONAL BUSINESS TRANSACTIONS* 483, 491 (2004).

119. 384 F.3d 492 (8th Cir. 2004).

120. *Paracelsus*, 384 F.3d at 497–98.

corporation and immediately used every method available to accomplish service within the limitations period.”<sup>121</sup> Curiously, the court criticized the plaintiff for failing to use alternative service methods, including mail service, because the Netherlands had not objected to them,<sup>122</sup> apparently failing to recognize that the alternative methods are either at least as time consuming as the Central Authority or, in the case of mail service under Article 10(a), a method found impermissible by the very same court of appeals fifteen years earlier.<sup>123</sup> Unfortunately, this result is not an isolated event<sup>124</sup> and can also occur where a plaintiff fails diligently to complete service after filing—even where the statute of limitations is not at issue.<sup>125</sup>

More troubling is the apparently systemic problem of significant delays in, or complete failure of, the Central Authority system. In a significant percentage of cases, proof of service is delayed by a year or more.<sup>126</sup> Even more disturbing is the fact that, especially considering requests for service originating in the United States, ten percent of requests are never fulfilled at all.<sup>127</sup> In July 2008, the Permanent Bureau, the secretariat of the Hague Conference, distributed a questionnaire to Hague Service Convention States to evaluate how the Convention was functioning and to identify concerns.<sup>128</sup> In January 2009, the Permanent Bureau published the results of the questionnaire and compiled statistics regarding the timeliness of responses to requests for service through the Central Authority.<sup>129</sup> Although two-thirds of service requests were completed within two months, the Permanent Bureau uncovered an alarming trend:

Of greater concern are the 18.3% of requests which took 12 months or more to be issued with a certificate, which justifies the comments of States as regards delays. Significant delays undermine the effectiveness of the Convention, and the Permanent Bureau considers that solutions to prevent delays of this length should be considered as part of the discussion at the Special Commission.

. . . Finally, 10.3% were of requests were returned unexecuted, the vast

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121. *Id.* at 497.

122. *Id.*

123. *Bankston v. Toyota Motor Corp.*, 889 F.2d 172, 173–74 (8th Cir. 1989).

124. *See, e.g., Thach v. Tiger Corp.*, 609 F.3d 955, 960 (8th Cir. 2010) (dismissing pursuant to limitations despite plaintiff’s attempt to serve via Japan’s Central Authority a little more than a month before limitations expired); *Damron v. Sadler*, No. 01-A-01-9511-CV-0050, 1996 WL 355070, at \*6 (Tenn. Ct. App. June 28, 1996) (stating in dicta that due to failure to effect service within the limitations period, on remand “the suit is subject to dismissal upon proper presentation of the affirmative defense of statute of limitations”).

125. *See Conservatorship of Prom v. Sumitomo Rubber Indus.*, 592 N.W.2d 657, 666 (Wis. Ct. App. 1999) (dismissing suit for failure to comply with Wisconsin’s sixty-day diligent service requirement). While the 120-day limit for diligently securing service in Federal Rule of Civil Procedure 4(m) does not apply in the context of foreign service of process, plaintiffs must still diligently effect service or risk dismissal. *See, e.g., Nylok Corp. v. Fastener World Inc.*, 396 F.3d 805, 807 (7th Cir. 2005) (“[T]he amount of time allowed for foreign service is not unlimited.”).

126. PERMANENT BUREAU, *supra* note 60, at 17 & fig. 2.

127. *Id.* at 17.

128. *Id.* at 7.

129. *Id.* at 17 & fig. 2.



majority of these coming from the United States of America.<sup>130</sup>

Viewed in the aggregate, nearly thirty percent of requests were either never acted upon or took more than a year to complete.<sup>131</sup> Any private process server with this batting average would be out of business. Delays and uncertainty of this magnitude are simply unacceptable, especially when added to a civil litigation system that is already too time consuming and unpredictable. On average, slightly more than two years elapses from the time a plaintiff files a complaint to the eventual verdict or judgment,<sup>132</sup> and another year or more elapses before an appeal is resolved.<sup>133</sup> Often, these delays are further compounded by long, expensive preliminary battles over procedure, including the method of service of process.<sup>134</sup> Federal legislation establishing a domestic agent for service of process for foreign entities subject to personal jurisdiction here can reduce delay and make service more reliable.

#### V. FEDERAL SUBSTITUTED-SERVICE LEGISLATION

Federal legislation inspired by the United States Supreme Court's decision in *Volkswagenwerk Aktiengesellschaft v. Schlunk*<sup>135</sup> would alleviate the burden, expense, and uncertainty of serving process through the Central Authority, while remaining consistent with the Constitution and the Hague Service Convention itself.<sup>136</sup> In *Schlunk*, the Supreme Court held that the Hague Service Convention did not apply because the foreign defendant was validly served through an involuntary domestic

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130. *Id.*

131. *Id.*

132. See Thomas H. Cohen & Steven K. Smith, *Civil Trial Cases and Verdicts in Large Counties, 2001*, BUREAU OF JUSTICE STATISTICS BULLETIN, Apr. 2004, at 8 (“[T]he average case processing time from filing of the complaint to verdict or judgment was 24.2 months[.]”).

133. DONALD J. FAROLE, JR., & THOMAS H. COHEN, U.S. DEP'T OF JUSTICE, APPEALS OF CIVIL TRIALS CONCLUDED IN 2005, at 4 (2011), <http://bjs.ojp.usdoj.gov/content/pub/pdf/act05.pdf> (stating that, of appeals decided on the merits, 38% were resolved within twelve months and 82% took eighteen months to be resolved).

134. See Jessica Shelton, Comment, *Defective Products in a Defective System: Legislation Designed to Level the Playing Field in International Trade*, 16 ROGER WILLIAMS U. L. REV. 171, 172 (2011) (describing the burden caused by lengthy battles over procedure in international products liability cases).

135. 486 U.S. 694 (1988).

136. A bill sponsored by Senator Sheldon Whitehouse (D-RI) in the 111th Congress and again in the 112th Congress would have performed a somewhat similar function to the legislation proposed here. See Foreign Manufacturers Legal Accountability Act of 2011, S. 1946, 112th Cong. (2011) (stating its purpose as “[t]o require foreign manufacturers of products imported into the United States to establish registered agents in the United States who are authorized to accept service of process against such manufacturers”); Foreign Manufacturers Legal Accountability Act of 2009, S. 1606, 111th Cong. (2009) (establishing service of process rules in response to *Schlunk*). The Foreign Manufacturers Legal Accountability Act (FMLAA) would require a foreign manufacturer to designate an agent for service of process in a single state and deem such designation consent to personal jurisdiction in that state. S. 1946, §§ 5(a)(1)–(2), (c). The FMLAA has a number of shortcomings, the most relevant of which is that a covered manufacturer need only designate an agent in one state. *Id.* § 5(a). The wide latitude afforded manufacturers as to where to designate an agent promotes a race to the bottom avoided by my proposed legislation. Additionally, the FMLAA is concerned primarily with personal jurisdiction. *Id.* § 5(c)(1). For reasons explained more fully in my forthcoming work on the Hague Judgment Enforcement Convention, the FMLAA is a noble but flawed effort to resolve the thorny issue of establishing personal jurisdiction over foreign nationals.

agent under state law.<sup>137</sup> Because state law did not require that a document be sent abroad as a necessary part of service, the Convention did not apply of its own terms.<sup>138</sup>

The details of *Schlunk* reveal the key features of the proposed legislation and why the legislation will not run afoul of either the Hague Service Convention or the Constitution. When Herwig Schlunk's parents were killed in an automobile crash, he brought a wrongful death suit claiming the Volkswagen that they were driving when they died was defective.<sup>139</sup> He initially sued Volkswagen of America (VWoA), the domestic entity that sold the car.<sup>140</sup> VWoA, however, denied it designed or manufactured the car.<sup>141</sup> Mr. Schlunk then amended his complaint to add Volkswagenwerk Aktiengesellschaft (VWAG), the German parent company that designed and manufactured the Volkswagen and that wholly owned the domestic sales entity, VWoA.<sup>142</sup> Rather than serve VWAG via the Hague Service Convention,<sup>143</sup> Mr. Schlunk served VWoA as VWAG's agent for service of process.<sup>144</sup> Under Illinois state law, VWoA was VWAG's involuntary agent for receiving process.<sup>145</sup> And under Illinois law, service was complete upon VWAG when Mr. Schlunk served VWoA.<sup>146</sup>

The key to the Supreme Court's holding was that the local law of the jurisdiction where the case was pending determines whether the Hague Service Convention was implicated.<sup>147</sup> Article 1 of the Convention provides: "The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad."<sup>148</sup> The Court interpreted this language to mean that the Convention applies only when "a transmittal abroad . . . is required as a necessary part of service."<sup>149</sup> The Convention, however, does not specify when a document must be transmitted "for service abroad."<sup>150</sup> Without any guidance from the Convention itself, the Court essentially saw no other alternative but to consult local law to determine whether a document must be transmitted abroad as a necessary part of service.<sup>151</sup> Because under Illinois law service was complete when the domestic subsidiary was served, the Court explained that "[w]here service on a domestic agent is valid and complete under both state law and the Due Process Clause, our inquiry ends

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137. *Schlunk*, 486 U.S. at 707–08.

138. *Id.* at 706–07.

139. *Id.* at 696.

140. *Id.*

141. *Id.*

142. *Id.* at 696–97.

143. Germany is a party to the Hague Service Convention. Reisenfeld, *supra* note 60, at 56–57.

144. *Schlunk*, 486 U.S. at 697.

145. *Id.* at 706.

146. *Id.* at 706–07.

147. *Id.* at 707.

148. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *supra* note 1, art. 1.

149. *Schlunk*, 486 U.S. at 707.

150. *See id.* at 702 (asserting that the requesting State must determine "when" a document must be served abroad).

151. *Id.* at 706.

and the [Hague Service] Convention has no further implications.”<sup>152</sup> Thus, the Hague Service Convention was not even implicated, let alone violated.<sup>153</sup>

Although they agreed that substituted service that was complete under state law did not violate the Hague Service Convention, the concurring Justices acknowledged the difficulties the Court’s holding might produce.<sup>154</sup> Such a restricted view of when the Convention applies might resurrect *notification au parquet*, one of the service methods the Hague Service Convention was designed to eliminate. As briefly described above, *notification au parquet* resembles, at least in passing, substituted-service provisions available under state law. *Notification au parquet* allows a litigant to deposit service documents with a designated local governmental official who is only arguably required to forward the documents to the defendant. The defendant’s duty to answer the lawsuit is triggered when the official receives the documents—not when the defendant is actually notified.<sup>155</sup> Yet, there is no remedy available if the official fails to notify the defendant.<sup>156</sup> Several countries that are now parties to the Hague Service Convention, including France, Italy, Belgium, Greece, and the Netherlands, permitted service via *notification au parquet* at the time the Convention was drafted.<sup>157</sup>

The concurring Justices were concerned not only with *notification au parquet*; they were concerned that states would adopt other service methods even less likely timely to notify the foreign defendant.<sup>158</sup> They saw the Court’s holding as giving a state virtually unfettered discretion to designate any service—no matter how suspect—as “domestic,” thereby avoiding application of the Convention altogether.<sup>159</sup> A state could, for example, create a mailbox rule for service of process, such that when the process is deposited in the mail, service is deemed complete on the foreign national irrespective of whether it was ever delivered.<sup>160</sup> Worse still, a state could deem anyone a domestic agent for service of process on a foreign defendant and deem service complete upon receipt by the deemed agent, “even though there is little likelihood that service would ever reach the defendant.”<sup>161</sup> The negotiating history and contemporaneous statements made during ratification of the Hague Service Convention confirmed that the Convention was intended to make international service of process more likely to actually notify the defendant of the pendency of the lawsuit—in other words, to make it more consistent with due process.<sup>162</sup>

The Justices, however, were not concerned by these implications and interpreted the language as they found it. They agreed that “the [Hague] Conference wanted to eliminate *notification au parquet*,”<sup>163</sup> particularly because its procedures failed to

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152. *Id.* at 707.

153. *Id.* at 708.

154. *Id.* at 710–11 (Brennan, J., concurring).

155. *Id.* at 709.

156. *Id.* at 703 (majority opinion).

157. *Id.*

158. *Id.* at 710–11 (Brennan, J., concurring).

159. *Id.* at 710.

160. *Id.*

161. *Id.* at 711.

162. *Id.* at 710.

163. *Id.* at 703 (majority opinion).

comport with due process.<sup>164</sup> The Court simply held that the language of Article 1, making the Hague Service Convention applicable only to transmissions of documents abroad as a necessary part of service, prevailed—especially where there was “no comparable evidence in the negotiating history that the Convention was meant to apply to substituted service on a subsidiary like VWoA, which clearly does not require service abroad under the forum’s internal law.”<sup>165</sup> Indeed, if the drafters of the Hague Service Convention had intended the Convention to govern any service on a foreign national, they could have drafted the Convention to that effect. And as the concurrence grudgingly acknowledged, due process remains an important limitation on service both for domestic or foreign entities.<sup>166</sup> In cases brought in domestic courts, service of process on any party, regardless of citizenship, is limited by due process.<sup>167</sup> Similarly, if a foreign or domestic defendant is served abroad, suffers an adverse judgment, and the plaintiff attempts to enforce the judgment in this country, the defendant can resist enforcement on due process grounds.<sup>168</sup> Any method of service, such as those posited by the concurrence, that attempts to deem service complete without a meaningful attempt to notify the defendant would be invalid under the Due Process Clause, irrespective of whether it comports with the Hague Service Convention.<sup>169</sup>

In light of the holding in *Schlunck*, substituted-service legislation can be drafted to increase the efficiency and reliability of international service, all without running afoul of the Constitution or the Hague Service Convention itself. The essential elements of the legislation include the following:<sup>170</sup>

1. a duty for foreign persons or entities that are subject to personal jurisdiction in any state of the United States to register an agent for service of process with the Secretary of State of the United States;<sup>171</sup>

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164. *Id.* at 703–04.

165. *Id.* at 704.

166. *Id.* at 715 (Brennan, J., concurring).

167. *Id.* at 707 (majority opinion).

168. *See id.* at 705 (“[T]here has been no question in this country of excepting foreign nationals from the protection of our Due Process Clause.”).

169. *Id.* at 707.

170. In addition to the features of the Illinois statute described in *Schlunk*, this legislation is inspired by the Texas long-arm and substituted-service statutes. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 17.044, 17.045 (West 2013) (outlining the methods for substituted service and notice for nonresidents under Texas state law).

171. The purpose of this section is to create an obligation to register an agent for service of process, such that the obligation is coextensive with the due process limitations on personal jurisdiction. *See, e.g.*, *CSR Ltd. v. Link*, 925 S.W.2d 591, 594–95 (Tex. 1996) (interpreting broad statutory language in Texas’s long-arm statute involving “doing business” in the state as reaching to the limits of federal due process). Similar concepts already exist in other states and territories. *See, e.g.*, *Melia v. Les Grands Chais de France*, 135 F.R.D. 28, 32 (D.R.I. 1991) (quoting Rhode Island’s substituted-service provision allowing substituted service on the secretary of state as agent for any corporation that does business in Rhode Island); *Kawasaki Heavy Indus. v. Superior Court of Guam*, No. 90-00024, 1990 WL 320758, at \*3 (D. Guam Oct. 24, 1990) (quoting Guam’s substituted-service provision allowing substituted service on any unregistered corporation that is subject to personal jurisdiction); *Hammond v. Honda Motor Co.*, 128 F.R.D. 638, 642 (D.S.C. 1989) (“An unauthorized foreign corporation which is doing business in South Carolina is deemed to have designated the Secretary of State as its agent ‘upon whom process against it may be served . . .’”). Of course, the question of whether the particular court in which the claim is brought can actually exercise personal jurisdiction over the

2. as a consequence of failing to register an agent for service when required, or despite having registered an agent, where the agent cannot be served after at least two attempts on two different business days, the United States Secretary of State is deemed the involuntary agent for service of process;
3. when the Secretary of State is served with process in accordance with this legislation and via a method permitted by the rules of the court in which the case is pending, service is complete upon receipt by the Secretary of State;<sup>172</sup>
4. the Secretary of State must forward all process received to the current home or home office address of the person or entity served, addressed to the individual person or a corporate officer, director, or managing agent of the business entity, all as provided by the serving party, by registered or certified mail, return receipt requested;
5. the deadline of the served party to answer, object, or otherwise respond to the suit is the latter of sixty days after the date of receipt of the process by Secretary of State or the deadline imposed by the law of the court where the case is pending;
6. the plaintiff must file documents evincing proof of service—including documents proving the Secretary of State was served and that the Secretary of State forwarded service—and the return receipt showing the defendant received service;
7. no default judgment shall be entered unless the plaintiff proves strict compliance with the foregoing provisions; and
8. the time for appealing or otherwise attacking a default judgment on the grounds that this legislation was not complied with or that the defendant did not receive actual notice of the lawsuit before the deadline to respond to the suit is extended to the longer of one year or the deadline provided under the law of the court where the judgment was rendered.

These features result in either a designated agent or an involuntary agent upon whom process may be served. In either event, this process neither implicates nor violates the Hague Service Convention because service is complete when the agent is served—the

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defendant remains a separate question, subject to a separate due process analysis. It is certainly conceivable that a defendant would have an obligation to register an agent for service of process with the Secretary of State (because he has sufficient contacts with at least one state to be subject to personal jurisdiction there), yet that same defendant would not have sufficient contacts with the particular state in which the claim is brought to justify the exercise of personal jurisdiction. While this feature of the legislation may result in litigation of the predicate facts establishing a duty to register, such challenges seem most likely from defendants who would also challenge personal jurisdiction. Thus, by definition, the plaintiff could prove the defendant had sufficient contacts with the forum state to rebut the challenges to both service of process and personal jurisdiction. As a result, the breadth of issues to litigate pre-answer would not necessarily increase.

172. Many substituted-service statutes have this feature; it is a matter of drafting the language appropriately. *See, e.g.,* *Barrie-Peter Pan Sch., Inc. v. Cudmore*, 276 A.2d 74, 77 (Md. 1971) (“The secretary of state acts for and on behalf of the corporation, as effectually as if he were designated in the charter as the officer on whom process was to be served; or, as if he had received from the president and directors a power of attorney to that effect.” (quoting *Silva v. Crombie & Co.*, 44 P.2d 719, 720 (N.M. 1935))).

subsequent forwarding of the served documents is thus not a necessary part of service. Moreover, this procedure meets the federal due process test of notice because the use of certified or registered mail is reasonably calculated to notify the defendant of the pendency of the action and duty to respond.<sup>173</sup> This legislation is also a valid exercise of federal power, premised upon the Interstate Commerce Clause of the United States Constitution or the federal government's power over foreign relations. It also does not violate the doctrine of international comity. Finally, its benefits in streamlining litigation outweigh any difficulty that may arise in enforcing the resulting judgment in a foreign court.

A. *The Proposed Legislation Neither Implicates nor Violates the Hague Service Convention*

Service of process under this proposal occurs domestically; thus, the Hague Service Convention is not implicated of its own terms. As with the Illinois substituted-service statute in *Schlunk*, the agent, whether designated or involuntary, is the agent for receiving service of process.<sup>174</sup> The agent is not the plaintiff's process server. As a result, service is complete when the designated agent or the Secretary of State receives the process from the serving party. Unlike the Illinois statute, however, the proposed legislation explicitly requires the agent to forward the process to the defendant. This difference is without significance though, because the Hague Service Convention applies only when a document must be transmitted abroad "as a necessary part of service."<sup>175</sup> Conversely, "[w]here service on a domestic agent is valid and complete under both state law and the Due Process Clause, our inquiry ends and the [Hague Service] Convention has no further implications."<sup>176</sup> Because the Hague Service Convention is not even implicated when a domestic agent is served as proposed, there is no conflict between the treaty and the proposed legislation; thus, the treaty would have no preemptive effect, either by its own terms or via the Supremacy Clause.

This proposal also differs in important ways from *notification au parquet*. The proposal requires that the defendant have sufficient connection to both the litigation and the United States such that the court could validly exercise personal jurisdiction over the defendant. It also explicitly requires the agent to forward the process to him. Perhaps more importantly, there are consequences if the agent fails to forward the process to the defendant, or if the defendant can prove that he never received notice of the suit. If the plaintiff cannot prove strict compliance with all provisions—including specifically that the agent forwarded the process, and that the completed return receipt was filed as required—the court may not enter a default judgment. The proposal also provides a fairly generous deadline to respond to the suit and generous timelines for overturning a default judgment in the event the defendant does not receive actual notice or the plaintiff fails to show strict compliance with these procedures.<sup>177</sup> These features

173. *Tulsa Prof'l Collection Servs. v. Pope*, 485 U.S. 478, 490 (1988); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

174. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 696–97, 707 (1988).

175. *Id.* at 707 (emphasis added).

176. *Id.*

177. *See* S. Rep. No. 90-6 (1967) (discussing the difference between *notification au parquet* and

also provide the defendant with due process; consequently, it would meet even the standard advanced by the concurrence in *Schlunk*—that the Hague Service Convention forbids service of process that does not comport with due process.<sup>178</sup>

*B. The Proposed Legislation Meets Due Process Standards*

A foreign national may be required, consistent with due process, to designate a local agent upon whom process may be served, particularly when, as here, the obligation to designate an agent is coextensive with the due process limits on personal jurisdiction.<sup>179</sup> The ultimate test of due process remains whether the service method is “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.”<sup>180</sup> The proposed legislation relies primarily on mail services to ensure that the Secretary of State, once served with process, actually notifies the defendant that the suit is pending against him. For nearly a century, the postal system has been considered sufficiently reliable to meet the requirements of due process.<sup>181</sup> In fact, under the Hague Service Convention, Central Authorities often execute service requests through the postal system.<sup>182</sup> In addition, the more generous response deadlines and default judgment restrictions, as well as the appellate and collateral attack provisions, further help ensure that no person is deprived of property without due process of law. Thus, this proposal is consistent with due process.

*C. The Legislation Is a Valid Exercise of Federal Power*

Congress may validly enact legislation governing service on foreign nationals pursuant to either its Foreign Commerce Clause power or the federal government’s inherent power over foreign relations.<sup>183</sup> There is no question that Congress may regulate procedure in federal courts pursuant to the Constitution’s grant of authority under Article III, as supplemented by the Necessary and Proper Clause.<sup>184</sup> This grant of

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American substituted-service procedures).

178. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 715–16 (1988) (Brennan, J., concurring).

179. *See, e.g., Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445–46 (1952) (discussing state statutes that require a foreign corporation to secure a license and appoint a statutory agent as useful for determining whether the foreign corporation has sufficient minimum contacts for personal jurisdiction purposes).

180. *Mullane v. Cent. Hanover Trust Co.*, 339 U.S. 306, 314 (1950).

181. *See Tulsa Prof’l Collection Servs. v. Pope*, 485 U.S. 478, 490 (1988) (“We have repeatedly recognized that mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice.”); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983) (stating notice by mail to party whose name and address are reasonably ascertainable and that ensures actual notice is “a minimum constitutional precondition” in a legal proceeding); *Hess v. Pawloski*, 274 U.S. 352, 354, 356–57 (1927) (stating service on a nonresident motorist is sufficient when a copy of the complaint is mailed to the defendant by registered mail and is also left with registrar).

182. *See PERMANENT BUREAU, supra* note 60, at 11 (noting that States mainly use the postal method to forward requests for service abroad).

183. U.S. CONST. art. I, § 8, cl. 3.

184. *See, e.g., Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 5 n.3 (1987) (“Article III of the Constitution, augmented by the Necessary and Proper Clause of Article I, § 8, cl. 18, empowers Congress to

authority over procedure specifically includes rules for service of process.<sup>185</sup> It is generally understood, however, that Congress has no such plenary power over state court procedures; indeed, the U.S. federal system typically reserves to the states the ability to regulate the procedures by which state law claims are resolved.<sup>186</sup> Despite Congress's lack of plenary authority over state procedures, the federal government can regulate state procedural rules when it otherwise acts pursuant to its limited powers.<sup>187</sup> For example, in *Stewart v. Kahn*,<sup>188</sup> the central issue was Congress's power to enact a limitations-tolling statute that applied in both federal and state courts.<sup>189</sup> The plaintiff sued on a promissory note that came due during the Civil War but did not file suit until after the war had ended, which was also after the limitations period had expired.<sup>190</sup> In 1864, however, Congress passed a tolling provision that deducted from any limitations period the time during which it was not possible to serve the defendant due to the rebellion.<sup>191</sup> The defendant claimed that if the tolling provision were construed to apply in state courts, it would be unconstitutional.<sup>192</sup> The Supreme Court disagreed, holding that the war powers of Congress and the President, the power to suppress insurrection, and the power to make laws necessary and proper to these granted powers authorized Congress to "remedy the evils which have arisen from [the Civil War's] rise and progress."<sup>193</sup> Thus, Congress can validly enact laws, arguably procedural in nature,<sup>194</sup> that apply in state courts when it acts pursuant to valid federal authority.<sup>195</sup>

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establish a system of federal district and appellate courts and, impliedly, to establish procedural Rules governing litigation in these courts."); *Hanna v. Plumer*, 380 U.S. 460, 472 (1965) (noting that under the Constitution, Congress has the power to make rules governing the practices and pleading in federal courts, allowing it to regulate matters that may reasonably be qualified as both substantive or procedural).

185. *Hanna*, 380 U.S. at 464.

186. See Anthony J. Bellia Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947, 972 (2001) (arguing that Congress lacks the authority to regulate state court procedures). When federal substantive claims are enforced in state courts, however, federal procedural rules that are an integral part of the federal claim laws may displace a state procedural rule that would impermissibly interfere with resolution of the federal claim. See, e.g., *Bailey v. Cent. Vt. Ry., Inc.*, 319 U.S. 350, 354 (1943) (requiring the state court to submit all factual issues to a jury in a Federal Employers Liability Act case in lieu of the state procedure permitting the judge to find certain facts related to fraud); *Cent. Vt. Ry. Co. v. White*, 238 U.S. 507, 512 (1915) (requiring the state court to use the federal procedure placing the burden of proving contributory negligence on the defendant in Federal Employers Liability Act cases in lieu of the state procedure requiring the plaintiff to disprove contributory negligence).

187. See, e.g., *Pierce Cnty., Wash. v. Guillen*, 537 U.S. 129, 147–48 (2003) (holding that an evidentiary privilege from disclosure, applicable in both state and federal courts, was a valid exercise of congressional power under the Commerce Clause as part of a larger regulatory scheme for the interstate highway system).

188. 78 U.S. 493 (1870).

189. *Stewart*, 78 U.S. at 498–99.

190. *Id.* at 500–01.

191. *Id.* at 503–04.

192. *Id.* at 505–06.

193. *Id.* at 507.

194. Compare *Sun Oil Co. v. Wortman*, 486 U.S. 717, 725 (1988) (finding statute of limitations was procedural for purposes of the Full Faith and Credit Clause), with *Guaranty Trust Co. v. York*, 326 U.S. 99, 110–11 (1945) (finding statute of limitations was substantive for *Erie* choice of law purposes).

195. *Pierce County, Wash. v. Guillen*, 537 U.S. 129, 147 (2003).



Congress could validly enact legislation providing for service of process on foreign persons or entities under the Foreign Commerce Clause of the Constitution. Under Article I, Section 8, clause 3 of the Constitution, Congress has the power “[t]o regulate Commerce with foreign Nations.”<sup>196</sup> Although this Clause has received far less scrutiny than the adjacent Interstate Commerce Clause,<sup>197</sup> the definition of commerce is likely at least as expansive in the foreign commerce realm. The question is thus whether the proposed legislation is a regulation of commerce as that term is understood in Supreme Court precedent. Because service of process involving foreign entities involves regulation of economic activity with foreign nations, or at least is regulation of activity that, in the aggregate, substantially affects commerce with foreign nations, the proposed legislation is a valid exercise of Foreign Commerce Clause authority.

At first blush, a rule of procedure applicable to service of process in both federal and state courts may not appear to regulate commercial or economic activity.<sup>198</sup> The Supreme Court’s Commerce Clause jurisprudence has, especially of late, analyzed whether the legislation directly regulates commercial or economic activity.<sup>199</sup> For example, in *United States v. Lopez*,<sup>200</sup> the Court invalidated the Gun-Free School Zones Act of 1990 as exceeding Congress’s power under the Commerce Clause because, as Justice Kennedy stated in his concurrence, “neither the actors nor their conduct has a commercial character.”<sup>201</sup> Similarly, the Supreme Court struck down the Violence Against Women Act of 1994 in *United States v. Morrison*<sup>202</sup> because “[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity.”<sup>203</sup> Though not necessarily outcome determinative, the character of the activity being regulated is important to the Court’s Commerce Clause analysis.<sup>204</sup>

Unlike gun possession in a school zone or violence against women, service of process more directly involves economic or commercial features. Often, state rules regarding service of process specify that only nonparties may serve process.<sup>205</sup> This virtually guarantees that someone must be hired to send or physically deliver process to the recipient, who, under the proposed legislation, is either the designated or involuntary agent of a foreign national. The proposal also requires that the foreign person or entity be served through the use of postal channels,<sup>206</sup> which necessitates a purchase of postage and return receipt services for mail sent to the foreign national.

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196. U.S. CONST. art. I, § 8, cl. 3.

197. Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 VA. L. REV. 949, 950 (2010).

198. See Bellia, *supra* note 186, at 964 (calling litigation “in the abstract, a noneconomic activity”).

199. *Id.* at 967.

200. 514 U.S. 549 (1995).

201. *Lopez*, 514 U.S. at 580.

202. 529 U.S. 598 (2000).

203. *Morrison*, 529 U.S. at 613.

204. See *id.* (explaining that the Court has upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature).

205. See, e.g., CAL. CIV. PROC. CODE § 414.10 (West 2013) (stating that any person who is eighteen years of age and not a party to the suit may serve summons); N.Y. C.P.L.R. § 2103(a) (McKinney 2013) (providing that papers may be served by any person who is not a party and over eighteen years of age); TEX. R. CIV. P. 103 (allowing any person over the age of eighteen and not a party to the action to serve summons).

206. See *supra* Part V for a detailed discussion of the proposed legislation.

The Secretary of State would naturally be permitted to charge a fee for its services. And the intent of the legislation—one of its stated goals—is to reduce the high cost of international service. Even if these economic aspects of the proposed legislation seemed insignificant, litigation—of which service of process is a necessary part—is itself a significant economic activity. The reality is that the majority of American companies are, on average, a party to at least one lawsuit every year.<sup>207</sup> More specifically, litigation between American and foreign companies is generally thought to be on the rise.<sup>208</sup> And all of this litigation is expensive: more than half of all American and U.K. companies recently surveyed spent more than \$1 million on litigation.<sup>209</sup>

Legislation aimed at streamlining litigation between American and foreign nationals and reducing the costs inherent in beginning such litigation is legislation that substantially affects commerce with foreign nations. Although the Court has limited what qualifies as regulation of commerce since the 1990s, Congress may still regulate activity even where it “may not be regarded as commerce . . . if it exerts a substantial economic effect on interstate commerce.”<sup>210</sup> And though the Court has more recently reined in the formerly expansive reach of the Commerce Clause, it has consistently reaffirmed the aggregation test of *Wickard v. Filburn*: “Congress’s power, moreover, is not limited to regulation of an activity that by itself substantially affects interstate commerce, but also extends to activities that do so only when aggregated with similar activities of others.”<sup>211</sup> It is also worth remembering that “[i]n assessing the scope of Congress’ Commerce Clause authority, the Court need not determine whether [the challenged] activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a ‘rational basis’ exists for so concluding.”<sup>212</sup> As a result, even if the proposed service rule is itself not an economic or commercial regulation, and even if the economic effects of less cumbersome and less expensive service rules are

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207. See FULBRIGHT & JAWORSKI, LITIGATION TRENDS SURVEY REPORT 15 (2011), available at <http://www.fulbright.com/images/publications/Report3.pdf> (stating that in 2011, fifty-two percent of U.S. companies surveyed were plaintiffs in at least one lawsuit).

208. Although comprehensive statistics are not available, practitioners and commentators alike have noted the rise of international commerce and a concomitant rise in international litigation, especially in the United States. See, e.g., Okezie Chukwumerije, *International Judicial Assistance: Revitalizing Section 1782*, 37 GEO. WASH. INT’L L. REV. 649, 650 (2005) (stating that there will be an increase in need for international judicial assistance as trade barriers are removed in order to solve trade disputes); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1634 (1997) (claiming that scholars have noted an increase in the percentage of civil lawsuits in the United States that involve foreign parties); Roger J. Johns & Anne Keaty, *The New and Improved Section 1782: Supercharging Federal District Court Discovery Assistance to Foreign and International Tribunals*, 29 AM. J. TRIAL ADVOC. 649, 683 (2006) (noting that as globalization increases, the quantity of international litigation will also increase); Dan Harris, *Why More U.S. Firms Are Suing Chinese Companies*, FORBES (July 28, 2010, 2:48 AM), <http://www.forbes.com/sites/china/2010/07/28/why-more-u-s-firms-are-suing-chinese-companies/> (highlighting an increase in the number of lawsuits in the United States against Chinese companies).

209. See FULBRIGHT & JAWORSKI, *supra* note 207, at 19 (“Last year marked the first drop in the percentage of companies spending \$1 million or more on litigation since 2007. This year, the increase resumes with just over half of the total sample spending at least \$1 million annually on litigation.”).

210. *Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

211. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2586 (2012) (citing *Wickard*, 317 U.S. at 127–28).

212. *Gonzales v. Raich*, 545 U.S. 1, 2 (2005).

significant only when viewed in the aggregate, Congress may regulate service of process on foreign nationals because, on the whole, it substantially affects commerce with foreign nations.<sup>213</sup>

Irrespective of whether the proposal regulates commerce, legislation governing service of process on foreign nationals implicates the federal government's power over foreign affairs, which is an independent basis for congressional legislation. "As a nation with all the attributes of sovereignty, the United States is vested with all the powers of government necessary to maintain an effective control of international relations."<sup>214</sup> And unlike Congress's enumerated powers, including the Commerce Clause, "the investment of the federal government with the powers of external sovereignty d[oes] not depend upon the affirmative grants of the Constitution."<sup>215</sup> The federal government's power, and more specifically, Congress's legislative power over matters affecting foreign nationals, though not strictly defined,<sup>216</sup> is expansive.<sup>217</sup> Although scholars may debate whether and under what circumstances states have concurrent power over matters touching foreign relations, where an activity concerns foreign relations, the federal government certainly has the power to legislate.<sup>218</sup>

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213. A determination that the proposed service rules are a regulation of, or substantially affect, commerce is not tantamount to a finding that Congress may simply foist the Federal Rules of Civil Procedure on state courts. The principles of federalism and the Tenth Amendment, none of which are applicable where foreign interests are concerned, adequately circumscribe Congress's power generally to enact rules of procedure applicable in state courts. *See, e.g., Reno v. Condon*, 528 U.S. 141, 149 (2000) ("In *New York and Printz*, we held federal statutes invalid, not because Congress lacked legislative authority over the subject matter, but because those statutes violated the principles of federalism contained in the Tenth Amendment."); *Bellia*, *supra* note 186, at 972 ("Congress has no authority to regulate state court procedures in state law cases because 'procedural law' derives exclusively from state authority.").

214. *Burnet v. Brooks*, 288 U.S. 378, 396 (1933).

215. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936).

216. *See Andrew W. Hayes, The Boland Amendments and Foreign Affairs Deference*, 88 COLUM. L. REV. 1534, 1560 n.199 (1988) ("That there is no clear line between the substantive authority of the executive and Congress in foreign affairs does not itself diminish Congress's constitutional authority over foreign affairs.").

217. *See Hines v. Davidowitz*, 312 U.S. 52, 62–63 (1941) (finding that when a national government establishes regulations governing the rights, privileges, obligations, or burdens of aliens, the treaty or statute is deemed the supreme law of the land); *see also Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003) (discussing the "concern for uniformity in this country's dealings with foreign nations" that resulted in the Framers' "allocation of the foreign relations power to the National Government" (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964))).

218. *See Goldsmith, supra* note 208, at 1634–35 ("Such suits typically implicate issues that fall in the gray zone between substance and procedure: transnational choice of law, transnational forum non conveniens, the enforcement of transnational forum selection clauses, and the recognition of foreign judgments. These issues are not governed by enacted federal law. The question thus arises whether they are governed by state law or federal common law. The Supreme Court has not resolved this question. But some lower courts have ruled that these issues implicate federal foreign relations interests and should be governed by the federal common law of foreign relations. Commentators overwhelmingly agree with this conclusion."). The question may arise as to whether congressional legislation in the area of foreign affairs violates the executive's special prerogative. While there is no clear delineation between Congress's power over foreign commerce and the President's authority to make treaties or executive agreements, without any conflict between the proposed legislation and the existing treaty that may arguably apply, namely the Hague Service Convention, a violation of the separation of powers doctrine is unlikely. *See Saikrishna B. Prakash & Michael D. Ramsey, The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 233, 235 (2001) ("[T]here is no adequate

D. *The Legislation Is Consistent with International Comity*

International comity, to the extent it is a rule of law at all,<sup>219</sup> should pose no barrier to service of process that is otherwise valid under domestic law. International comity is, at best, a complex and elusive concept.<sup>220</sup> Its contours are ill defined, both in terms of what circumstances implicate comity and when comity operates to actually limit some action in an American court.<sup>221</sup> *Hilton v. Guyot*<sup>222</sup> is often quoted as the source of the doctrine of international comity in the United States.<sup>223</sup> In deciding whether to enforce a French money judgment, the Court described comity as “[t]he extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation.”<sup>224</sup> In addition to comity’s application to recognition or enforcement of a foreign judgment or other order, comity is most consistently invoked as either a rule of statutory construction preventing a domestic law from reaching foreign conduct<sup>225</sup> or as a quasi-abstention doctrine akin to *forum non conveniens* in which a court declines to exercise jurisdiction in favor of a foreign forum.<sup>226</sup> However, the formulation is so broad that comity has been invoked in myriad circumstances where a foreign interest may be at issue, sometimes with contradictory results.<sup>227</sup> The lack of a clear explanation of the doctrine from the Supreme Court

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explanation of the foreign affairs powers of Congress. Most scholars assume that Congress has a general power to legislate in foreign affairs matters . . . . Notwithstanding the common understanding of executive power, the President cannot regulate international commerce . . . .”). See also *supra* notes 183–217 and accompanying text for a discussion of why this is a valid exercise of federal power.

219. See Joel R. Paul, *Comity in International Law*, 32 HARV. INT’L L.J. 1, 7 & n.31 (1991) (arguing that deference to foreign sovereigns for the sake of comity is not required or reciprocated in international law and stating that “comity is an extravagant and gratuitous form of deference to foreign sovereigns”).

220. See 15A C.J.S., *Conflict of Laws* § 7 (2012) (noting that comity is not a rule of the courts but rather a principle involving the relationship of nations with each other); Paul, *supra* note 219, at 4 (explaining that the doctrine of comity is very difficult to define despite its widespread use); Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53, 53 (1991) (“The misleading word ‘comity’ has been responsible for much of the trouble. It has been fertile in suggesting a discretion unregulated by general principles.” (quoting *Loucks v. Standard Oil Co.*, 120 N.E. 198, 201–02 (N.Y. 1918))).

221. Weinberg, *supra* note 220, at 53; see also *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895) (stating that comity is not a matter of obligation nor of “mere courtesy and good will”).

222. 159 U.S. 113 (1895).

223. See Paul, *supra* note 219, at 8–9 (stating that comity is “both traceable to, and well represented by, the Supreme Court’s opinion in *Hilton v. Guyot*, which is the most commonly cited statement of comity in U.S. law” (footnote omitted)).

224. *Hilton*, 159 U.S. at 162–63.

225. See *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (explaining that a statute “ought never to be construed to violate the law of nations if any other possible construction remains”); see also *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817–18 (1993) (Scalia, J., dissenting) (discussing the concept of “prescriptive comity” or “comity of nations,” which refers to “the respect sovereign nations afford each other by limiting the [territorial] reach of their laws”).

226. *Hartford Fire Ins. Co.*, 509 U.S. at 817–18 & n.9 (Scalia, J., dissenting) (distinguishing “prescriptive comity” from “comity of courts” and defining the latter to refer to the principles “whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere”).

227. Compare *Morgenthau v. Avion Res. Ltd.*, 898 N.E.2d 929, 934 (N.Y. 2008) (declining to apply comity as a limit on service of process and holding comity was “not an additional hurdle for a plaintiff to overcome in serving a party in a foreign country”), with *Kreimerman v. Casa Veerkamp, S.A. de C.V.*, 22 F.3d

despite two centuries of reference to it only perpetuates this problem.<sup>228</sup> In short, existing formulations of this incoherent doctrine are broad enough for a foreign litigant to state a colorable objection to service when service does not comply with the law local to the foreign national. The better-reasoned approach, however, would not apply comity to invalidate otherwise valid domestic service procedures.

The Supreme Court's resolution of another Hague Convention case is instructive on the limits of comity, were it invoked in an attempt to invalidate service of process that complied with domestic law. In *Société Nationale Industrielle Aérospatiale v. United States District Court for Southern District of Iowa*,<sup>229</sup> the Supreme Court was confronted with whether the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention) was the exclusive means of securing discovery from a foreign national.<sup>230</sup> Much as the Court held with respect to the Hague Service Convention discussed in *Schlunk*, the Hague Evidence Convention is not exclusive; it does not foreclose the use of discovery procedures under the Federal Rules of Civil Procedure, even where the documents and information are located in the territory of a signatory country.<sup>231</sup> Unlike the *Schlunk* Court, the *Aérospatiale* Court addressed the defendant's objections based on international comity; namely, whether comity concerns dictated that litigants use the procedures in the Hague Evidence Convention as a rule of first resort.<sup>232</sup> It is the Court's resolution of the specific comity objections that illustrates why comity should not limit domestic service of process.

The foreign defendant, a French company, argued comity requires first resort to the treaty's procedures because conducting discovery via American discovery rules

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634, 647 (5th Cir. 1994) (holding that the Hague Service Convention did not invalidate service that complied with domestic procedures but remanding for the district court to determine whether such service violated international comity), and *Lake Charles Cane LaCassine Mill, LLC v. SMAR Int'l Corp.*, No. 07-CV-667, 2007 WL 1695722, at \*2 (W.D. La. June 8, 2007) (quashing service that was not in accordance with Brazilian law). Compare also *In re Honda Am. Motor Co. Dealership Relations Litig.*, 168 F.R.D. 535, 538 (D. Md. 1996) (declining to apply comity to prevent deposition of Japanese national in the United States), with *Gebr. Eickhoff Maschinenfabrik Und Eisengieberei mbH v. Starcher*, 328 S.E.2d 492, 506 (W. Va. 1985) (recognizing that the Hague Evidence Convention was not exclusive: "the principle of international comity dictates first resort to [the Hague Evidence Convention] procedures until it appears that such attempt has proven fruitless and that further action is necessary to prevent an impasse").

228. Compare *Emory v. Grenough*, 3 U.S. 369, 370 (1797) (describing a "courtesy of nations" as permitting extraterritorial effect of laws "so far as they do not occasion a prejudice to the rights of the other governments, or their citizens"), with *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 546 (1987) ("[W]e have long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation. American courts should therefore take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state. We do not articulate specific rules to guide this delicate task of adjudication." (citation omitted)).

229. 482 U.S. 522 (1987).

230. *Aérospatiale*, 482 U.S. at 524.

231. See *id.* at 534 ("The text of the Evidence Convention itself does not modify the law of any contracting state, require any contracting state to use the Convention procedures, either in requesting evidence or in responding to such requests, or compel any contracting state to change its own evidence-gathering procedures.").

232. *Id.* at 543–44.

would be an affront to France's "judicial sovereignty."<sup>233</sup> Specifically, the French defendant argued that in civil law countries like France, government officials often conduct discovery in contrast to the American style of discovery.<sup>234</sup> Because France had agreed to the Hague Evidence Convention, so the argument went, France had agreed to limit its sovereignty only to the extent necessary to comply with its treaty obligations.<sup>235</sup> Thus, the Hague Evidence Convention should be the exclusive method of securing discovery.<sup>236</sup> The Court rejected this argument as unsupported by the text of the Hague Evidence Convention itself and declined to issue a blanket rule of first resort, instead leaving open the question of whether a litigant could make a more particularized argument in favor of comity on a case-by-case basis in the future.<sup>237</sup>

After *Aérospatiale*, some commentators have suggested that, by analogy, courts should consider comity as a limit to substituted-service procedures like those blessed in *Schlunk*.<sup>238</sup> Despite twenty-five years of case law following *Aérospatiale*, no litigant has advanced a more persuasive rationale for applying comity to limit domestic discovery procedures. While on occasion a court has invoked comity to require a litigant first to resort to the Hague Evidence Convention, in each case, the litigant made the same abstract sovereignty argument rejected in *Aérospatiale*, and the court simply entered its order without much analysis or even explanation.<sup>239</sup> More often, courts have

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233. *Id.* at 543.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* at 543–44. The Court also rejected any argument that France's blocking statute, which specifically prohibits discovery of information located in France for use abroad, required a rule of first resort to the Hague Evidence Convention. *Id.* at 544 n.29.

238. See GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 832 (3d ed. 1996) (noting that when a foreign state objects to substituted service, comity may require resorting to the Hague Service Convention); Harold Hongju Koh, *International Business Transactions in United States Courts*, 261 RECUEIL DES COURS 185–86 (1996) (pointing out that courts may alleviate harsh results by performing case-by-case balancing tests with comity in mind). While the Supreme Court did not decide *Schlunk* on comity grounds, both sides briefed the issue of comity to the Court. See Brief of Petitioner at 47, *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988) (No. 86-1052) (arguing that the international custom of comity requires resort to the Hague Service Convention); Brief of Respondent at 30, *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988) (No. 86-1052) (arguing that comity, in the instant balancing analysis, does not overwhelm the opposing interests of American judicial procedures).

239. See, e.g., *Jenco v. Martech Int'l, Inc.*, No. 86-4229, 1988 WL 54733, at \*1 (E.D. La. May 19, 1988) (holding, with almost no meaningful analysis, that certain jurisdictional discovery requests must be made under the Hague Convention because "[w]hile judicial economy may dictate that the Federal Rules of Civil Procedure should be used, the interests of protecting a foreign litigant in light of the jurisdictional problems are paramount"); *Knight v. Ford Motor Co.*, 615 A.2d 297, 301 n.11 (N.J. Super. Ct. Law Div. 1992) (noting, in dicta, that "[i]f jurisdiction does not exist over a foreign party . . . the Convention may provide the only recourse for obtaining evidence"). Contrary to the Court's discussion in *Aérospatiale*, courts occasionally give too much weight to general claims of "sovereignty." See *In re Perrier Bottled Water Litig.*, 138 F.R.D. 348, 355–56 (D. Conn. 1991) (contending that France's adoption of the Hague Evidence Convention is an expression of its sovereign interests, which should weigh heavily when examining the use of alternative procedures within its borders); *Hudson v. Hermann Pfauter GmbH & Co.*, 117 F.R.D. 33, 37 (N.D.N.Y. 1987) ("When discovery is sought from citizens within the borders of a civil law country such as West Germany, the use of the discovery devices of the Federal Rules necessarily is more offensive to the sovereign interests of that country than would be the case if the same procedures were utilized in seeking discovery from a citizen of

rejected the simplistic “sovereignty” objection, much as the *Aérospatiale* Court did.<sup>240</sup> The mere fact that a foreign country prefers its own procedural rules to those of a domestic court is an insufficient reason to apply foreign procedural laws in a domestic court in the name of “comity.” Otherwise, the Court would have laid down the blanket rule requiring first resort to the Hague Evidence Convention. As a result, there appears to be no good argument in favor of applying comity to limit otherwise valid domestic service procedures.

There are also important distinctions between discovery procedures and service of process that make a difference when issues of sovereignty are raised. The nature of the document served significantly affects the perceived sovereignty concerns. Service of a discovery subpoena or even a discovery request carries with it the threat of relatively immediate sanctions for failure to comply.<sup>241</sup> In contrast, the informational nature of service of process renders it “relatively benign in terms of infringement on the foreign nation’s sovereignty.”<sup>242</sup> Similarly, the method of service affects the perceived sovereignty concerns. The proposed legislation results in completed service in the United States and does not require in-person service on foreign soil, which is a greater potential affront to sovereignty than mail service.<sup>243</sup> With no compelling argument in favor of comity, and because the proposed legislation is tailored to reduce potential sovereignty concerns, comity should not invalidate the substituted service proposed here.<sup>244</sup>

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a common law country that is a signatory to the Convention, such as the United Kingdom.”)

240. See, e.g., *In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 304 (3d Cir. 2004) (stating that the use of discovery under the Federal Rules of Civil Procedure for the purposes of investigating a price-fixing conspiracy would not offend German sovereign interest); *Schindler Elevator Corp. v. Otis Elevator Co.*, 657 F. Supp. 2d 525, 530 (D.N.J. 2009) (asserting that a deposition taken in a convenient location outside of Switzerland in accordance with the Federal Rules of Civil Procedure does not affront Swiss sovereignty); *In re Vitamins Antitrust Litig.*, 120 F. Supp. 2d 45, 50 (D.D.C. 2000) (“[T]he Court sees no reason why the foreign nations’ sovereign interests would be offended by the investigation of this antitrust price-fixing conspiracy . . . .”); *Doster v. Schenk*, 141 F.R.D. 50, 54 (M.D.N.C. 1991) (finding that no showing was made that the use of the Federal Rules of Civil Procedure would offend German sovereign interests); *Haynes v. Kleinwefers*, 119 F.R.D. 335, 337 (E.D.N.Y. 1988) (declining to use Hague Convention procedures where the defendant provided no “cogent reasons” to do so); *Benton Graphics v. Uddeholm Corp.*, 118 F.R.D. 386, 391 (D.N.J. 1987) (“These ‘critical sovereign interests’ are merely general reasons why Sweden prefers civil law discovery procedures to the more liberal discovery permitted under the federal rules. Defendants cite no reasons how the *specific* discovery sought by Benton implicates any *specific* sovereign interest of Sweden. . . . In short, because defendant has not explained, and I do not see why Benton’s discovery requests in their entirety or any particular request, violate any special sovereign interests of Sweden, resort to the Hague Convention is not required.”); see also *Synthes (U.S.A.) v. G.M. dos Reis Jr. Ind. Com. de Equip. Medico*, No. 07-CV-309-L(AJB), 2008 WL 81111, at \*7 (S.D. Cal. Jan. 8, 2008) (rejecting Brazilian defendant’s comity objection to discovery).

241. FED. R. CIV. P. 37.

242. *Commodity Futures Trading Comm’n v. Nahas*, 738 F.2d 487, 494 n.14 (D.C. Cir. 1984).

243. See *Fed. Trade Comm’n v. Compagnie de Saint-Gobain-Pont-à-Mousson*, 636 F.2d 1300, 1304, 1313 (D.C. Cir. 1980) (asserting that service of process by registered mail can be considered as the least intrusive exercise of American power in a sovereign foreign territory); Smit, *supra* note 41, at 1042 (arguing that service by mail is less likely to be prohibited because it imposes only on the foreign postal authority).

244. The Secretariat of the Hague Conference has reported that decisions like *Schlunk* and similar conclusions that the Hague Service Convention is not mandatory have not caused an uproar among member States as some predicted. See PERMANENT BUREAU, *supra* note 60, at 26 (stating that “the Permanent Bureau is

E. *The Benefits of the Legislation Outweigh the Difficulty of Enforcement Abroad*

The principal limitation of service of process on a foreign national that does not utilize the procedures in the Hague Service Convention is the increased difficulty of enforcing the judgment where the defendant resides. It is generally true that to enforce a domestically obtained judgment in a foreign country, the defendant must have been served with process in accordance with the internal laws of the country where enforcement is sought.<sup>245</sup> As a practical matter, this difficulty may be more of a theoretical concern because foreign nationals who are subject to personal jurisdiction in the United States may be more likely to have domestically available assets against which enforcement may proceed. In any event, service procedures that foreign courts may find objectionable are perhaps the least of a litigant's concerns. Money judgments obtained in the United States already suffer from a host of obstacles that make enforcement abroad unlikely. When weighed against the significant savings, both in terms of money and time, and the increased certainty of actually completing service, the fact that the judgment has but one more hurdle to enforcement is not significant.

Domestic money judgments are generally difficult to enforce abroad for a number of reasons. In 2001, the Committee on Foreign and Comparative Law of the Association of the Bar of the City of New York surveyed practitioners in Belgium, Canada, the People's Republic of China, England, Wales, France, Hong Kong, Italy, Japan, Mexico, South Africa, Spain, and Switzerland about enforcing foreign judgments in their courts.<sup>246</sup> The results of the survey paint a bleak picture for enforcing money judgments in the subject countries.<sup>247</sup> Although the specific reasons were manifold, some of the most serious obstacles to recognition (let alone enforcement) of a domestic money judgment included: (1) differences in the concept of personal jurisdiction, (2) judgments that contravene the public policy of the foreign forum, and (3) practical obstacles, such as the delay and expense in utilizing foreign court procedures.<sup>248</sup>

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very pleased to note that the 2003 Conclusion and Recommendation No 73, stating that the Service Convention is non-mandatory but exclusive, has not caused any problems amongst responding States").

245. See Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *supra* note 1, art. 15 (conditioning entry of a default judgment on compliance with the Hague Service Convention or other applicable law); Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 706 (1988) (finding that where a foreign forum requires transmittal of documents for service abroad, the Hague Service Convention may provide the exclusive procedures for valid service); 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, 239 (1993) (noting that "a country whose laws were violated by service of U.S. process might well not enforce a resulting U.S. judgment"); Tamayo, *supra* note 45, at 235-36 (explaining that enforcement of U.S. judgments abroad requires compliance with the service laws of the enforcing country); Weis, *supra* note 111, at 906 (observing that both domestic and foreign law on service needs to be followed for a judgment to be enforced abroad).

246. The Committee on Foreign and Comparative Law, *Survey on Foreign Recognition of U.S. Money Judgments*, 56 THE RECORD OF N.Y. B. ASS'N 378, 381 (2001), <http://www2.nycbar.org/Publications/record/su mmer01.pdf>.

247. See *id.* (finding that the differences between U.S. procedural laws and foreign procedural laws "constitute significant obstacles to the efficient recognition of foreign judgments").

248. *Id.* at 384, 389, 409.



Many countries consider the U.S. concept of personal jurisdiction overly broad and will not enforce judgments unless the American court had personal jurisdiction in accordance with the law of the country where enforcement is sought.<sup>249</sup> For example, Swiss law has a much narrower view of personal jurisdiction, basically requiring that the Swiss national be domiciled in the forum or have unquestionably submitted to the court's jurisdiction.<sup>250</sup> Similarly, French law in practice grants France "exclusive" jurisdiction in almost all cases involving a French national,<sup>251</sup> and a French court will refuse to enforce a money judgment if it determines it has exclusive jurisdiction.<sup>252</sup> England, Wales, South Africa, Italy, Spain, and Mexico also have similarly restrictive concepts of personal jurisdiction that may preclude enforcement.<sup>253</sup> Commentators familiar with China have also concluded that Chinese concepts of personal jurisdiction are more restricted than the "exorbitant" reach of the American minimum contacts test.<sup>254</sup>

The enforcing court's public policy is also a likely objection to recognition and enforcement of American money judgments. Some countries give courts wide discretion in determining whether a judgment violates vague notions of justice, morality, liberty, or public order—making enforcement a shot in the dark.<sup>255</sup> More specifically, every jurisdiction surveyed would likely refuse to enforce a judgment containing punitive, exemplary, or other multiple damages as contrary to its public policy.<sup>256</sup> Finally, the time and expense involved in actually enforcing a judgment abroad is often a significant handicap. In many countries, including Canada, South Africa, Spain, Japan, Belgium, Italy, and Mexico, enforcement actions likely take two years—and sometimes as long as nine years—to complete.<sup>257</sup> These are only some of the obstacles to enforcement that the survey found.

Weighed against the marginal increase in uncertainty of enforcement abroad, the benefits of the proposed legislation to domestic litigants are numerous. The overall expense will be reduced, thanks to the use of mail and relief from the need to hire specialized-service providers to, among other things, translate the service documents. The six-month delay in securing service will be reduced due to simpler procedures. Cost and delay in litigation are also reduced as pretrial litigation over service is avoided, thanks in large part to on-point Supreme Court authority blessing substituted

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249. *See id.* at 384 (describing how many of the surveyed countries do not recognize the U.S. concept of long-arm jurisdiction and are not supportive of applying such concepts in their countries).

250. *Id.* at 385–86.

251. *Id.* at 386.

252. *Id.*

253. *Id.* at 385–88.

254. *See* Arthur Anyuan Yuan, *Enforcing and Collecting Money Judgments in China from a U.S. Judgment Creditor's Perspective*, 36 GEO. WASH. INT'L L. REV. 757, 759 (2004) (listing several factors that make judgment collection difficult for U.S. creditors in China).

255. The Committee on Foreign and Comparative Law, *supra* note 246, at 390–93.

256. *See id.* (asserting that states may refuse to enforce a U.S. money judgment when such recognition would offend local standards or public policy); Yuan, *supra* note 254, at 759 (comparing judgment collection in China to a "cat-and-mouse game" where the Chinese court might refuse to recognize the U.S. judgment for a host of reasons).

257. The Committee on Foreign and Comparative Law, *supra* note 246, at 409–10.

service like the proposed legislation.<sup>258</sup> Service also becomes more reliable because the procedure bypasses the problematic Central Authority system. And the proposed legislation accomplishes all of these objectives without the need to amend the Hague Service Convention, a process of negotiation involving the sixty-eight parties to the treaty that would necessarily be time consuming and potentially contentious.<sup>259</sup>

## VI. CONCLUSION

Service of process under the Hague Service Convention is expensive and unreliable, but it need not be so. A substituted-service provision can cut through the red tape and uncertainty, all while providing valuable time and space for the parties to the Hague Service Convention to revise and update this nearly fifty-year-old treaty to keep pace with the rise of international litigation.

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258. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 708 (1988). Many states already provide for substituted-service provisions like the one suggested in this Article. And many of them have held that *Schlunk* permits substituted service without violating the Hague Service Convention. See *infra* Table A for a list of U.S. jurisdictions that hold that substituted service does not violate the Hague Service Convention.

259. See David P. Stewart & Anna Conley, *E-Mail Service on Foreign Defendants: Time for an International Approach?*, 38 GEO. J. INT'L L. 755, 760, 800 (2007) (describing the prospect of negotiating a new treaty to amend or supplement the Hague Service Convention as "likely to be controversial" and "time-consuming").

TABLE A

State	Does Local Law Permit Substituted Service Without Violating the Hague Service Convention?
Alabama	Yes. <i>See Ex parte Volkswagenwerk Aktiengesellschaft</i> , 443 So. 2d 880, 883 (Ala. 1983) (finding substituted service upon a wholly owned subsidiary and agent was sufficient service on the foreign corporation).
Alaska	Unknown.
Arizona	Unknown.
Arkansas	Unknown.
California	Yes. <i>See Gray v. Mazda Motor of Am., Inc.</i> , 560 F. Supp. 2d 928, 931 (C.D. Cal. 2008) (citing CAL. CIV. PROC. CODE § 416.10) (determining that substituted service based on “general manager” status was good service and finding that the Hague Service Convention did not apply); <i>Daewoo Motor Am., Inc. v. Dongbu Fire Ins. Co.</i> , 289 F. Supp. 2d 1127, 1131 (C.D. Cal. 2001) (holding the California Insurance Commissioner was the involuntary agent for service under California law); <i>Yamaha Motor Co. v. Superior Court</i> , 94 Cal. Rptr. 3d 494, 501 (Cal. Ct. App. 2009) (finding substituted service based on “general manager” status was valid).
Colorado	Yes. <i>See Willhite v. Rodriguez-Cera</i> , 274 P.3d 1233, 1241–42 (Colo. 2012) (concluding that where plaintiff had already attempted service per Colorado law, substituted service was a valid alternative method of serving the defendant).
Connecticut	Unknown.
Delaware	Yes. <i>See Quinn v. Keinicke</i> , 700 A.2d 147, 156 (Del. Super. Ct. 1996) (finding that service upon agent satisfied state long-arm statute and Hague Service Convention).
District of Columbia	Unknown.
Florida	No. <i>See FLA. STAT. §§ 48.181(1)(2), 48.161</i> (requiring service not only on the secretary of state but also on the foreign entity at its overseas offices); <i>Lobo v. Celebrity Cruises, Inc.</i> , 667 F. Supp. 2d 1324, 1337 (S.D. Fla. 2009) (concluding that substituted service was improper because the plaintiff did not translate documents before sending them); <i>Vega Glen v. Club Méditerranée S.A.</i> , 359 F. Supp. 2d 1352, 1357 (S.D. Fla. 2005) (finding that service that did not comply with the Hague Service Convention was invalid).
Georgia	Yes. <i>See Curcuruto v. Cheshire</i> , 864 F. Supp. 1410, 1413 (S.D. Ga. 1994) (finding service by registered mail was valid under the Georgia Non-Resident Motorist Act and the Hague Service Convention).
Guam	Yes. <i>See Kawasaki Heavy Indus. v. Superior Court of Guam</i> , No. 90-00024, 1990 WL 320758, at *3 (D. Guam Oct. 24, 1990) (finding that service upon the Director of Revenue and Taxation was valid under local law and that the Hague Service Convention did not apply).

Hawaii	Unknown.
Idaho	Unknown.
Illinois	Yes. <i>See Volkswagenwerk Aktiengesellschaft v. Schlunk</i> , 486 U.S. 694, 707 (1988) (concluding that where there is valid service upon a domestic agent pursuant to state law and the Due Process Clause, the Hague Service Convention is not violated).
Indiana	Possibly. <i>Cf. Bays v. Mill Supplies, Inc.</i> , No. 1:10-CV-00432, 2011 WL 781464, *2 (N.D. Ind. Feb. 28, 2011) (refraining from addressing valid service under local law as a nonviolation of the Hague Service Convention because plaintiff was unable to show the level of agency required for substituted service under Indiana law).
Iowa	Unknown.
Kansas	No. <i>See Brand v. Mazda Motor of Am., Inc.</i> , 920 F. Supp. 1169, 1172–73 (D. Kan. 1996) (remanding and instructing plaintiff to establish that process has been properly served on defendant).
Kentucky	Unknown.
Louisiana	No. <i>See Sheets v. Yamaha Motors Corp., U.S.A.</i> , 891 F.2d 533, 537 (5th Cir. 1990); <i>Rhodes v. J.P. Sauer &amp; Sohn, Inc.</i> , 98 F. Supp. 2d 746, 750 (W.D. La. 2000) (finding that plaintiffs failed to serve defendant in accordance with the Hague Service Convention).
Maine	Unknown.
Maryland	No. <i>See Glass v. Volkswagen of Am., Inc.</i> , 172 F. Supp. 2d 743, 743 (D. Md. 2001) (finding that, without a showing of the requisite agency relationship, substituted service on a foreign corporation was improper under Maryland law; thus, the plaintiff would need to comply with the Hague Service Convention).
Massachusetts	Unknown.
Michigan	Unknown.
Minnesota	No. <i>See In re Baycol Prods. Litig.</i> , MDL No. 1431 (MJD/JGL), 2003 WL 22038708, at *6 (D. Minn. Feb. 25, 2003) (finding that service was invalid because plaintiff failed to send documents to the Central Authority of a foreign country, as required by state statute); <i>Froland v. Yamaha Motor Co.</i> , 296 F. Supp. 2d 1004, 1008 (D. Minn. 2003) (sending untranslated documents directly to a foreign corporation fails under the Hague Service Convention).
Mississippi	No. <i>See Pennebaker v. Kawasaki Motors Corp., U.S.A.</i> , 155 F.R.D. 153, 158 (S.D. Miss. 1994) (finding that attempt by plaintiff to directly serve a foreign corporation by registered mail was improper under the Hague Service Convention).
Missouri	No. <i>See Dunakey v. Am. Honda Motor Co.</i> , 124 F.R.D. 638, 639 (E.D. Mo. 1989) (finding that substituted service was improper where Missouri law does not provide that “a domestic subsidiary is by law the foreign corporation’s involuntary agent for service of process”).
Montana	Unknown.
Nebraska	Unknown.
Nevada	Unknown.

New Hampshire	Unknown.
New Jersey	No. <i>See</i> Cintron v. W & D Mach. Co., 440 A.2d 76, 81 (N.J. Super. Ct. Law Div. 1981) (finding that where plaintiff failed to show an agency relationship under state law, the plaintiff must effect service according to the Hague Service Convention).
New Mexico	Unknown.
New York	No. Mark Davies and David S. Weinstock, <i>Service Process Abroad: A Nuts and Bolts Guide</i> , 122 F.R.D. 63, 73 (1989) (“[W]ith few exceptions, state courts have uniformly held that service of process in violation of the Convention, which is part of the supreme law of the land, will not be upheld.”).
North Carolina	Unknown.
North Dakota	Unknown.
Ohio	Unknown.
Oklahoma	Unknown.
Oregon	Unknown.
Pennsylvania	No. <i>See</i> United States <i>ex rel.</i> Thomas v. Siemens AG, 708 F. Supp. 2d 505, 521–23 (E.D. Pa. 2010) (dismissing complaint where plaintiff failed to timely serve defendant and therefore violated the Hague Service Convention).
Rhode Island	Yes. <i>See</i> Melia v. Les Grands Chais de France, 135 F.R.D. 28, 32 (D.R.I. 1991) (holding that, because Rhode Island’s statute allows substituted service without the direct transmission of documents abroad, the Hague Service Convention does not apply).
South Carolina	Yes. <i>See</i> Hammond v. Honda Motor Co., 128 F.R.D. 638, 643 (D.S.C. 1989) (denying defendants’ motion to dismiss on grounds that “direct mail service of the defendants was in accordance with the Hague Convention”).
South Dakota	No. <i>See</i> Thach v. Tiger Corp., No. CIV 07-4165, 2009 WL 2058872, at *4–5 (D.S.D. July 13, 2009), <i>aff’d</i> 609 F.3d 955 (8th Cir. 2010) (finding that South Dakota statute governing service of process did not extend to international service).
Tennessee	No. <i>See</i> Wilson v. Honda Motor Co., 776 F. Supp. 339, 340 (E.D. Tenn. 1991) (finding that “method of service of process utilized by the plaintiff, registered mail through the Tennessee Secretary of State, does not comply with [the Hague Service Convention]”).
Texas	Yes. <i>See</i> Int’l Transactions, Ltd. v. Embotelladora Agral Regionmontana SA de CV, 277 F. Supp. 2d 654, 663 (N.D. Tex. 2002) (finding that where the Texas Secretary of State properly acted as an agent for service of process, substituted service was valid under Texas law and the Hague Service Convention).
Utah	Unknown.
Vermont	Unknown.
Virginia	No. <i>See</i> Davies v. Jobs & Adverts Online, GmbH, 94 F. Supp. 2d 719, 722 (E.D. Va. 2000) (“[I]t is insufficient to serve a foreign defendant, as plaintiff here sought to do, via the Clerk of the State Corporation Commission, without complying with the dictates of the Hague Convention.”).
Washington	Unknown.
West Virginia	No. <i>See</i> Bowers v. Wurzburg, 519 S.E.2d 148, 162 (W. Va. 1999)

	(noting that West Virginia requires that where the “principal office of a nonresident defendant corporation is located outside of the United States . . . the service of process guidelines of the Hague Service Convention are implicated and dictate the precise manner in which process is required to be served”).
Wisconsin	Possibly. <i>Cf. Sacotte v. Ideal-Werk Krug &amp; Priester Maschinen-Fabrik</i> , 359 N.W.2d 393, 396–97 (Wis. 1984) (remanding to determine whether entity qualified as a managing agent); <i>Conservatorship of Prom v. Sumitomo Rubber Indus.</i> , 592 N.W.2d 657, 665 (Wis. Ct. App. 1999) (dismissing suit for failure to comply with Wisconsin’s sixty-day diligent service requirement).
Wyoming	Unknown.
N. Mariana Islands	Unknown.
Puerto Rico	Unknown.
U.S. Virgin Islands	No. <i>See V.I. Cement &amp; Bldg. Prods., Inc. v. Capital Int’l Corp.</i> , No. CIV. 829/1994, 2000 WL 520826, at *3 (Terr. V.I. Mar. 28, 2000) (concluding that plaintiff was not permitted to substitute service on the lieutenant governor where plaintiff knew defendant’s current address but chose not to serve defendant there).