DYSFUNCTIONAL EQUIVALENCE: THE NEW APPROACH TO DEFINING "POSTAL CHANNELS" UNDER THE HAGUE SERVICE CONVENTION

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In recent years, article 10(a) of the Hague Service Convention, which allows for the sending of judicial and extrajudicial documents abroad by postal channels, has proven difficult to apply in the face of commercial and technological change. The difficulties stem from the fact that the Convention neglects to define the term "postal channels." In 2006, the Permanent Bureau of the Hague Conference on Private International Law promulgated the newest edition of the Practical Handbook on the Operation of the Hague Service Convention, in which it recommends the adoption of a functional equivalent approach for evaluating whether service via modern alternatives to post, such as private courier, facsimile, or email, constitutes service via postal channels. This Comment critiques the Permanent Bureau's functional equivalent approach, finding that such an approach likely will not result in a workable definition or a practical set of guidelines. This is because incentives against testing and litigating service by modern alternatives to post are strong. Moreover, judges will likely avoid deciding the issue in the interest of judicial economy. Those cases that are considered by judges will be difficult to decide under the new approach if a foreign country views service as a sovereign act. The Comment concludes by suggesting a revision that eliminates the current ambiguity and instead roots the Convention in practical language that eliminates the need for impractical functional equivalent analyses.

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INTRODUCTION

Massachusetts assistant attorney general Timothy Moran wanted to serve process on an elusive foreign cigarette manufacturer in a remote area of the Philippines. To accomplish the task, Moran hired an international process server not only to locate the company and devise a plan, but also to hack through the jungle using a machete, stake out an armed compound, wait for the defendant's vehicle to pass, and throw the papers through the car's open window.[1] As Moran discovered, international service of process is generally a "difficult and uncertain undertaking" for litigants[2] and "one of the most challenging [issues] that a district court can be called upon to face."[3]

Serving process likely would have been simpler for Moran had the Philippines been a signatory to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Convention), a multilateral treaty designed to simplify and expedite the transmission of legal documents abroad. Even under the Convention, however, many challenges, pitfalls, and uncertainties remain, especially with regard to article 10(a), the Convention's provision allowing signatories the "freedom to send judicial documents, by postal channels,

1. Arin Greenwood, *Serving Them Right: When Taking on International Defendants, Expect Challenges, Even Complications*, A.B.A. J., June 2005, at 24.

2. *See* GARY BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS 757 (3d ed. 1996).

3. Mayoral-Amy v. BHI Corp., 180 F.R.D. 456, 458 (S.D. Fla. 1998).

directly to persons abroad."[4] Indeed, article 10(a) has resulted in more litigation than any other provision of the Convention.[5] Most of the controversy has concerned whether article 10(a) allows plaintiffs to serve or merely to send documents via postal channels.[6] Less frequently litigated or studied, however, is the meaning of the term "postal channels" itself, which has remained undefined since the Convention's inception in 1965. Commercial change and technological innovations in the years following the Convention's creation have imbued the term with additional vagueness, with the result that it "has been quietly moving to the forefront in discussions among member nations," despite the otherwise limited attention devoted to the issue in formal legal and academic spheres.[7]

In 2006, the Permanent Bureau of the Hague Conference on Private International Law (Permanent Bureau), the intergovernmental organization that acts as the Convention's secretariat,[8] took a position that transmission of documents via postal channels can include transmission by modern commercial and technological means, provided that transmission

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4. Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, art. 10, Nov. 15, 1965, 20 U.S.T. 361, 58 U.N.T.S. 163 [hereinafter Convention].

5. *See* PERMANENT BUREAU OF THE HAGUE CONFERENCE ON PRIVATE INT'L LAW, 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 75 (3d ed. 2006) [hereinafter PERMANENT BUREAU].

6. *See* Alan J. Lazarus, *Jurisdiction, Venue, and Service of Process Issues in Litigation Involving a Foreign Party*, 31 TORT & INS. L.J. 29, 57 (1995).

7. *See* Yvonne A. Tamayo, *Catch Me if You Can: Serving United States Process on an Elusive Defendant Abroad*, 17 HARV. J.L. & TECH. 211, 240 (2003).

8. According to the official website of the Hague Conference on Private International Law:

> The Permanent Bureau is the secretariat of the Hague Conference. Its main task consists in the preparation and organisation of the Plenary Sessions and the Special Commissions. The officials of the Permanent Bureau must be of different nationalities. The Secretary General is assisted currently by four lawyers (one Deputy Secretary General, and three First Secretaries), as well as by a permanent supportive staff of nine people. The Permanent Bureau carries out the basic research required for any subject that the Conference takes up. It also maintains and develops contacts with the National Organs, experts and delegates of Member States and the Central Authorities designated by the States Parties to the Hague Conventions on judicial and administrative co-operation, as well as with international organisations and, increasingly, responds to requests for information from users of the Conventions (lawyers, notaries, officials, companies, journalists, private persons, etc.).

Hague Conference on Private International Law, Frequently Asked Questions, http://www.hcch.net/index_en.php?act=faq.details&fid=30 (last visited Nov. 19, 2006). The Hague Conference on Private International Law, which first met in 1893, is an international forum intended to assist in "unifying and harmonizing private law." Franklin B. Mann, Jr., Comment, *Foreign Service of Process by Direct Mail Under the Hague Convention and the Article 10(a) Controversy: Send v. Serve*, 21 COLUM. L. REV. 647, 649 (1991).

through these alternative means constitutes the "functional equivalent" of a postal channel.[9] This Comment critiques the Permanent Bureau's "functional equivalent" approach and finds that the approach likely will not resolve the uncertainty created by article 10(a)'s undefined use of the term "postal channels." Instead, this Comment argues that a formal revision of article 10(a) would produce a less costly and more useful instrument for resolving international disputes.

Part I documents the development, purposes, and provisions of the Convention and the various federal and state rules of civil procedure governing service. This Part also notes that the interplay between the Convention and the rules creates the potential for interpretive conflict and practical difficulties if the Convention contains ambiguous terms. Part I concludes by examining the benefits associated with service via postal channels under article 10(a).

Part II focuses on the particular problem of interpreting the term "postal channels," finding that commercial and technological developments since the Convention's inception have made the definition of "postal channels" ambiguous. This ambiguity renders both the Convention and U.S. service rules difficult to interpret and follow in the face of modern alternatives to post, such as private courier services, facsimile, and email.

Part III examines the Permanent Bureau's recent attempt to reconcile the Convention with modern commercial and technological developments. This Comment finds that the Permanent Bureau's preferred functional equivalent approach to modern alternatives to post likely will not be applied in courts. Litigants face significant incentives against either utilizing postal channels or bringing suits concerning the meaning of postal channels. Courts, ever concerned with issues of judicial economy, are also not likely to decide on the complicated meaning of postal channels when not necessary. Moreover, this Comment argues that even if a court had occasion to apply a functional equivalent analysis, the approach would be ineffective for evaluating the equivalence of service in countries that view the act of service as having symbolic or policy purposes. Lastly, Part III examines the case of *Creative Products Group, LLC v. Decolee Co.*[10] as an example of how litigants and courts avoid litigating, analyzing, and expounding on the meaning of postal channels when possible.

9. PERMANENT BUREAU, *supra* note 5, at 86.
10. No. 06-CV-02305 (C.D. Cal. June 30, 2006) (minute order).

This Comment concludes in Part IV by proposing a revision to the Convention that would eliminate the term "postal channels" and bring the Convention's text into the twenty-first century.

I. OVERVIEW OF INTERNATIONAL SERVICE OF PROCESS

A. Service of Process

Traditionally, service of process describes the procedure by which a plaintiff delivers to a defendant a complaint, which states his or her grievance, and a summons, which directs the defendant to answer the complaint.[11] In the United States, this formal delivery of documents, which is governed by Rule 4 of the Federal Rules of Civil Procedure (FRCP)[12] in federal courts and by individual state statutes in state courts, constitutes the process by which a defendant in a lawsuit is brought within the jurisdiction of a state.[13]

Service of process performs two functions in contemporary civil procedure.[14] First, it provides formal notice to the defendant of a pending legal action.[15] This notice, the U.S. Supreme Court has found, must be "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."[16]

A second function of service is to mark the formal assertion of a forum state's power over the defendant. Modern jurisdictional doctrine in the United States minimizes this function;[17] other nations' jurisdictional doctrines maintain this function.[18] From this divergence flows one of the difficulties with the interpretation of postal channels: From the standpoint of a U.S. litigant, service by any means that gives adequate notice should be valid. However, from the standpoint of some foreign countries, direct service upon their citizens through postal channels represents an affront to their sovereignty—as if a U.S. citizen tried to arrest a foreign citizen

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11. GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS 153 (2d ed. 1992).
12. FED. R. CIV. P. 4.
13. *See* Pennoyer v. Neff, 95 U.S. 714, 733 (1877).
14. Henry H. Perritt, Jr., *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1, 31 (1996).
15. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314–17 (1950).
16. *Id.* at 314.
17. *See, e.g.*, FED. R. CIV. P. 4(d)(1) (stating that a defendant who waives service of process does not thereby waive any objection to jurisdiction).
18. BORN, *supra* note 2, at 774.

on foreign soil.[19] Thus, in these countries, private actors may not complete direct service of process through postal channels because of the official state nature of the act.[20] Those who do may find themselves subject to criminal penalties.[21] Given the extensive international political and jurisdictional change over the last quarter of the twentieth century, some argue that claims of sovereignty have never been more vigorously asserted than they are today.[22]

While federal rules, commentaries, and case law adequately define the requirements for sufficient service upon domestic defendants, the requirements for service of process on foreign defendants are murky, even under the supposedly clearer mechanisms of the Convention. As international commerce and litigation increase, judges, practitioners, and scholars must understand, analyze, and harmonize the domestic rules for service of process with other countries' corresponding rules.[23] The history, purposes, and provisions of the Convention and the domestic rules that govern international service of process reflect these parties' attempts at harmonization.

B. The Hague Service Convention

1. History and Purposes

After World War II, countries around the world gradually began shedding their policies of global and judicial isolationism.[24] As participation in

19. *See id.* ("Civil law states generally regard service of judicial process as a sovereign act that may be performed in their territory only by the state's own officials and in accordance with its own law." (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 471 cmt. b (1987))); Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 513 (2003) ("Some nations consider serving process and collecting evidence to be 'official' acts, and thus deem it a violation of their sovereignty for such acts to be conducted within their borders without their permission . . . .").

20. BORN, *supra* note 2, at 774.

21. Swiss Penal Code Article 271 states:

> Whoever, without authorization, executes acts on Swiss territory which are attributed to an administrative or government authority, on behalf of a foreign state, and whoever executes such acts on behalf of a foreign state, and whoever executes such acts on behalf of a foreign person or another foreign organization, and whoever encourages or otherwise participates in such acts, will be punished with prison, and in severe cases with penitentiary.

Strafgesetzbuch [StGB] [Criminal Code] Dec. 21, 1937, AS 54, art. 271 (Switz.), *translated in* BORN, *supra* note 2, at 776.

22. Doug Rendleman, *Comment on Judge Joseph F. Weis, Jr.*, Service by Mail—Is the Stamp of Approval From the Hague Convention Always Enough?, LAW & CONT. PROBS., Summer 1994, at 179, 181.

23. Perritt, *supra* note 14, at 9.

24. *See* BORN, *supra* note 2, at 796–97.

international commerce, transportation, and communication increased dramatically, so too did participation in international litigation.[25] The rules of civil procedure in the United States and other countries, however, were ill equipped to handle the increase in cross-border litigation, because internationally acceptable means of serving process had not yet been established.[26] Two problems were inherent: First, fundamental differences existed between civil and common law legal systems, which exposed litigants to varying and unpredictable laws and liabilities.[27] These laws and liabilities could vary even within a country's internal system, as is the case in the United States with its individual state and federal jurisdictions.[28] Practically speaking, U.S. litigants serving a foreign defendant faced a no-win situation.[29] Not only did they have to meet domestic standards for sufficiency of process, they also were required to heed the foreign country's local service laws.[30] Compounding these legal problems, litigants faced considerable logistical hurdles. Litigants seeking to serve process abroad found consular offices unhelpful, unreliable, and unaccountable; foreign counsel prohibitively expensive; and the use of letters rogatory burdensome.[31] In the United States, "courts neither receive[d] adequate assistance from, nor dispense[d] adequate aid to other nations, and this reciprocal inadequacy [was] particularly severe with respect to countries where civil law prevails."[32]

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25. *See* 4B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1133 (3d ed. 2002) ("The phenomenal expansion of international trade, communication, and travel in recent decades has made it increasingly common for a potential defendant to be physically in a foreign country at the time suit is commenced or to be a citizen of or an entity created by another nation and located outside the United States.").

26. *See* Harry Leroy Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 515–16 (1953); *see also* Gary A. Magnarini, Comment, *Service of Process Abroad Under the Hague Convention*, 71 MARQ. L. REV. 649, 653 n.22 (1988) ("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.").

27. *See* S. REP. NO. 85-2392 (1958), *reprinted in* 1958 U.S.C.C.A.N. 5201.

28. *See id.*

29. *See* Magnarini, *supra* note 26, at 653.

30. *See id.*

31. *See id.*; Stephen F. Downs, Note, *The Effect of the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 2 CORNELL INT'L L.J., 125, 127 (1969). A letter rogatory (also known as a letter of request) is a document issued by a domestic court to a foreign court asking the foreign court to serve process on an individual or a corporation within the foreign jurisdiction and return proof of service to the domestic court. *See* BLACK'S LAW DICTIONARY 916 (7th ed. 1999).

32. Jones, *supra* note 26, at 516.

The United States, like many other nations, acknowledged the need for international mechanisms to simplify service of process abroad. Thus, in the 1950s and 1960s, the United States evaluated several methods of increasing international assistance and cooperation.[33] In contemplating how to implement such mechanisms, the U.S. Senate articulated two specific objectives. First, the Senate expressed a need to protect the due process of its citizens:

> Given the continually increasing volume of American travel abroad, especially in Europe, of international business transactions, of U.S. investment abroad, the subject of insuring that U.S. citizens who were sued in foreign courts received notice . . . is a matter of substantial importance to this country.[34]

Second, the Senate sought to encourage international judicial cooperation by streamlining service of process within its own borders:

> With 49 separate procedural jurisdictions in the United States . . . a unitary approach is the only solution. We can hardly expect [a foreign government] to look favorably on a program of separate negotiation with the representatives of each of the 48 states and with the representatives of the Federal government. The problems must be solved through a single, unified set of discussions, the results of which will be effective for all of the 49 jurisdictions.[35]

In October 1964, delegates from the United States and twenty-two other nations converged at the Hague Conference on Private International Law to formulate a convention regulating the international transmission of judicial and extrajudicial documents between member nations.[36] The delegates shared a common goal of "[providing] 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."[37] Finding that the Convention adequately espoused the

33. BORN, *supra* note 2, at 797.

34. S. EXEC. REP. NO. 90-6, app. at 6 (1967) (statement of Richard D. Kearney, Deputy Legal Advisor, Dep't of State).

35. S. REP. NO. 85-2392, at 6 (1958), *reprinted in* 1958 U.S.C.C.A.N. 5201, 5206.

36. Leonard A. Leo, *The Interplay Between Domestic Rules Permitting Service Abroad by Mail and the Hague Convention on Service: Proposing an Amendment to the Federal Rules of Civil Procedure*, 22 CORNELL INT'L L.J. 335, 340 (1989). The resultant Convention was intended to modernize the Hague Convention on Civil Procedure of 1954 and the 1904 Hague Convention on Civil Procedure. BORN, *supra* note 2, at 796.

37. Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 698 (1988). The text of the Convention highlights the signatory countries' two principal objectives. First, the Convention ensures that the recipients of documents served abroad have adequate notice to avoid default judgments in foreign lands. Second, the Convention simplifies and expedites international service of process by improving the institutions and mechanics of international judicial cooperation. *See* Convention, *supra* note 4, at pmbl.

United States' primary objectives of protecting its citizens and encouraging international judicial cooperation, the Senate unanimously voted in favor of the Convention's ratification on April 14, 1967, making the United States the first signatory nation. Over forty years later, twenty-one nations are now parties to the Convention through ratification,[38] thirty-one have joined through accession,[39] and four are successors to previous signatories.[40] The Convention currently remains open for accession.[41] With 191 countries presently members of the United Nations,[42] there is significant potential for the Convention to continue to broaden its reach across borders.

2. Operation

The Convention applies in all "civil or commercial matters" between member nations that occasion the transmittal abroad of judicial or extrajudicial documents for service upon a person with a known address.[43] The Convention provides for numerous methods of serving foreign defendants in a uniform manner.[44]

The centerpiece and principal innovation of the Convention is the Central Authority,[45] an agency created within each country's governmental administration designated to "receive requests for service coming from other

38. Ratifying countries include: Belgium, Denmark, Egypt, Finland, France, Germany, Greece, Ireland, Israel, Italy, Japan, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. Hague Conference on Private International Law, Status Table, http://www.hcch.net/index_en.php?act=conventions.status&cid=17 (last visited Nov. 19, 2006) [hereinafter Status Table].

39. Acceding countries include: Albania, Argentina, Bahamas, Barbados, Belarus, Botswana, Bulgaria, Canada, China, Croatia, Cyprus, Estonia, Hungary, India, Korea, Kuwait, Latvia, Lithuania, Malawi, Mexico, Monaco, Pakistan, Poland, Romania, Russian Federation, San Marino, Seychelles, Slovenia, Sri Lanka, Ukraine, and Venezuela. *Id.*

40. Successor countries include: Antigua and Barbados, Czech Republic, Saint Vincent and the Grenadines, and Slovakia. *Id.*

41. Convention, *supra* note 4, at art. 28 (stating that a country may accede provided that no country that has ratified the Convention makes an objection; this objection must be made within six months of the acceding country's notification of its accession).

42. Alberto R. Gonzales, *Remarks at the University of Chicago Law School*, 7 CHI. J. INT'L L. 289, 294 (2006).

43. *See* Convention, *supra* note 4, at art. 1; Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 699 (1988). This Comment does not discuss the substituted service described in *Schlunk* but instead concentrates on service under the Convention via article 10(a).

44. Alexandra Amiel, Note, *Recent Developments in the Interpretation of Article 10(a) of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 24 SUFFOLK TRANSNAT'L L. REV. 387, 392 (2001).

45. BORN, *supra* note 2, at 798.

Contracting States."[46] The Convention charges each Central Authority with ensuring that service requests comport with the Convention's provisions,[47] serving process,[48] and providing proof of service.[49] The Convention requires applicants seeking service via a Central Authority to use model letters of request and requires the Central Authority to issue model certificates of proof of service, thus ensuring uniformity in request and authentication of service.[50]

In addition to the mandatory creation of a Central Authority, articles 8 through 10 of the Convention provide for several alternative methods that a plaintiff may use to effect service, unless the receiving country formally objects to service by such means.[51] The alternative methods, including service by diplomatic and postal channels, were considered innovative at the time of ratification, and were expected to be "widely used in practice."[52]

Under the Convention, a litigant may effect service directly through diplomatic or consular agents per article 8,[53] provided that the receiving

46. Convention, *supra* note 4, at art. 2 ("Each contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other contracting States and to proceed in conformity with the provisions of articles 3 to 6. Each State shall organise the Central Authority in conformity with its own law.").

47. *Id.* at art. 4 ("If the Central Authority considers that the request does not comply with the provisions of the present Convention it shall promptly inform the applicant and specify its objections to the request.").

48. *Id.* at art. 5 ("The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either (a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or (b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed. Subject to sub-paragraph (b) of the first paragraph of this article, the document may always be served by delivery to an addressee who accepts it voluntarily.").

49. *Id.* at art. 6 ("The Central Authority of the State addressed or any authority which it may have designated for that purpose, shall complete a certificate in the form of the model annexed to the present Convention. The certificate shall state that the document has been served and shall include the method, the place and the date of service and the person to whom the document was delivered. If the document has not been served, the certificate shall set out the reasons which have prevented service.").

50. BORN, *supra* note 2, at 798.

51. Though these alternative channels are sometimes referred to as "subsidiary channels," they are not subordinate to service via a Central Authority. *See* PERMANENT BUREAU, *supra* note 5, at 65 ("There is neither a hierarchy nor any order of importance among the various channels of transmission, and transmission through one of the other channels does not lead to service of lesser quality.").

52. *Id.* at 66.

53. Convention, *supra* note 4, at art. 8 ("Each Contracting State shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents. Any State may declare that it is opposed

country has not objected to such service.[54] Process may also be served per article 9 by forwarding documents through consular channels—and less frequently through diplomatic channels—to authorities of a contracting country who perform formal service.[55] Article 10 permits litigants to send judicial documents via postal channels, and also allows service via judicial officers, officials, or other competent persons of the country of destination[56] as long as the receiving country has not objected.[57] Finally, the Convention provides that signatory countries may privately agree to alternative methods of service not specifically authorized by the Convention.[58]

3. Federal and State Rules of Civil Procedure

As part of the movement to promote international judicial cooperation, the Supreme Court promulgated Rule 4(i) of the FRCP in 1963. Because Rule 4(i) and the advisory committee notes were promulgated before the drafting of the Convention, the Convention's subsequent ratification produced a "trap for the unwary" litigant subject to compliance.[59] In 1993, the Supreme Court amended Rule 4 to "make its provisions

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to such service within its territory, unless the document is to be served upon a national of the State in which the documents originate.").

54. The following countries have formally objected to article 8: Belgium, Bulgaria, China, Croatia, Czech Republic, Egypt, France, Germany, Greece, Hungary, Kuwait, Lithuania, Luxembourg, Mexico, Norway, Pakistan, Poland, Portugal, Romania, Russia, San Marino, Seychelles, Slovakia, South Korea, Sri Lanka, Switzerland, Turkey, Ukraine, and Venezuela. Status Table, *supra* note 38.

55. Convention, *supra* note 4, at art. 9 ("Each contracting State shall be free, in addition, to use consular channels to forward documents, for the purpose of service, to those authorities of another contracting State wich [sic] are designated by the latter for this purpose. Each contracting State may, if exceptional circumstances so require, use diplomatic channels for the same purpose.").

56. *Id.* at art. 10 ("Provided the State of destination does not object, the present Convention shall not interfere with . . . the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials, or other competent persons of the State of destination, [or] the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.").

57. The following countries have formally objected to article 10(a): Argentina, Bulgaria, China, Croatia, Czech Republic, Egypt, Germany, Greece, Hungary, Kuwait, Lithuania, Luxembourg, Mexico, Norway, Poland, Russia, San Marino, Slovakia, South Korea, Sri Lanka, Switzerland, Turkey, Ukraine, Venezuela. Status Table, *supra* note 38.

58. Convention, *supra* note 4, at art. 11 ("The present Convention shall not prevent two or more contracting States from agreeing to permit, for the purpose of service of judicial documents, channels of transmission other than those provided for in the preceding articles and, in particular, direct communication between their respective authorities.").

59. *See* Leo, *supra* note 36, at 344.

more accessible to those not familiar with all of them."[60] The updated version specifically alerts litigants of the Convention's existence.[61]

Rule 4 provides mechanisms for service of process on individuals and corporations in all jurisdictions, whether domestic or foreign.[62] With regard to service abroad, Rule 4(f) states that process may be served in one of three manners. First, under Rule 4(f)(1), a plaintiff may serve a foreign defendant "by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents."[63] Second, under Rule 4(f)(2), if no international agreement exists, or if the agreement is silent on the matter, a defendant may be served in a manner allowed by the law of the foreign country, as directed by a response to a letter rogatory, by personal service, or by mail requiring signed receipt.[64] In addition, Rule 4(f)(3) allows for service "by other means not prohibited by international agreement as may be directed by the court."[65] No hierarchy exists under Rule 4(f), and each method is an "an equal means of effecting service of process under the Federal Rules of Civil Procedure."[66]

In state courts, state statutes govern the service of process abroad. Though most states have adopted the federal rules for use in state court, a notable minority has not.[67] In California, for example, service abroad may be effected in a variety of manners, but each method of service is always "subject to the provisions of the Convention on the 'Service Abroad of Judicial and Extrajudicial Documents' in Civil or

60. Jeanne Nowaczewski, *Service of Process, Attorneys' Fees Petitions, and Other Miscellaneous Amendments to the Federal Rules of Civil Procedure*, 29 TORT & INS. L.J. 521, 522 (1994).

61. FED. R. CIV. P. 4(f)(1).

62. Rule 4(h) of the Federal Rules of Civil Procedure (FRCP) provides that service on a foreign corporation shall be effected either (1) "in a judicial district of the United States in a manner prescribed for service on individuals . . . or by delivering a copy of the summons and of the complaint to . . . any agent authorized . . . to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant"; or (2) "in a place not within any judicial district of the United States in any manner prescribed for individuals by subdivision (f) except personal delivery as provided in paragraph (2)(C)(i) thereof." *Id.* 4(h).

63. *Id.* 4(f)(1).

64. *Id.* 4(f)(2).

65. *Id.* 4(f)(3).

66. Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1016 (9th Cir. 2002).

67. *See* Steven C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 632 n.1 (noting that thirty-five states have adopted the FRCP as their own).

Commercial Matters . . . ."[68] Texas, on the other hand, takes a slightly different approach, by treating service under the provisions of a treaty as a separate and independent means of service.[69]

Because adequate service of process under either the federal or the state rules requires a thorough understanding of the requirements of the Convention, any ambiguities in the Convention result in confusion as to whether process is sufficient under the relevant federal or state rule. However, despite the ambiguities of the several options for service under Rule 4 or equivalent state statutes, many litigants will still seek to use the Hague Convention whenever they serve a defendant who resides in a signatory country. This preference flows primarily from the increased ease of collecting abroad any judgment resulting from the lawsuit. Though collecting an American money judgment abroad is generally difficult, collection is likely impossible if the plaintiff's service has not conformed to the Convention, as foreign courts regularly reject efforts to enforce judgments where the plaintiff ignored the Convention and local laws' options for service.[70] The remainder of this Comment focuses on one such option—that set forth in article 10(a).

C. Advantages of Service Under Article 10(a)

Service via postal channels offers a potential litigant two distinct advantages: savings in time and money. First, direct service through postal channels is significantly faster than service via a Central Authority. The Convention does not establish a specific time period within which a

68. CAL. CIV. P. CODE § 413.10(c) (West 2004) ("Outside the United States, as provided in this chapter or as directed by the court in which the action is pending, or, if the court before or after service finds that the service is reasonably calculated to give actual notice, as prescribed by the law of the place where the person is served or as directed by the foreign authority in response to a letter rogatory. These rules are subject to the provisions of the Convention on the 'Service Abroad of Judicial and Extrajudicial Documents' in Civil or Commercial Matters (Hague Service Convention).").

69. TEX. R. CIV. R. § 108(a)(1) (Vernon 2005) ("Service of process may be effected upon a party in a foreign country if service of the citation and petition is made: (a) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (b) as directed by the foreign authority in response to a letter rogatory or a letter of request; or (c) in the manner provided by Rule 106; or (d) pursuant to the terms and provisions of any applicable treaty or convention; or (e) by diplomatic or consular officials when authorized by the United States Department of State; or (f) by any other means directed by the court that is not prohibited by the law of the country where service is to be made.").

70. *See* Kenneth B. Reisenfeld, *"The Usual Suspects": Six Common Defense Strategies in Cross-Border Litigation*, *in* INTERNATIONAL LITIGATION STRATEGIES AND PRACTICE 75, 76 (Barton Legum ed., 2005).

Central Authority must effect service, though service within "a reasonable time period" is assumed.[71] Yet, this assumption is not always correct. Consequently, service through a Central Authority can be an extremely slow and unpredictable process, with the speed of service varying dramatically by country.[72]

At one end of the spectrum, service can be completed rapidly through a Central Authority. The recently privatized U.S. Central Authority, for instance, typically serves defendants within the United States in as little as ten to thirty days. At the other extreme, service via a Central Authority may be totally impracticable. In many countries in Latin America and Asia, for example, service through a Central Authority may result in no service whatsoever.[73] In Europe, Central Authorities may effect service within two to four months.[74] As a general rule of thumb, practitioners recommend anticipating at least six months to effectuate service through a Central Authority.[75]

The variance in time of service can have a significant impact on a waiting plaintiff, who may be suffering additional damages, accumulating further costs, or who may be under pressure to effect service before the tolling of a relevant statute of limitations.[76] Service via postal channels, however, may be effected within a matter of days,[77] or instantaneously if relying on modern alternatives to post such as facsimile or email. The potential speed of service through postal channels, therefore, makes article 10(a) an attractive alternative to service through a Central Authority.

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71. *See* 1 BRUNO A. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE (CIVIL AND COMMERCIAL) 161–62 (1986); Glenn P. Hendrix, *Service of Process Abroad*, 34 INT'L LAW. 580, 581 (2000).

72. 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, 787 (2005).

73. *Id.* at 788–89.

74. *Id.* at 787–88.

75. E. CHARLES ROUTH & GARVEY SCHUBERT BARER, GOING INTERNATIONAL: FUNDAMENTALS OF INTERNATIONAL BUSINESS TRANSACTIONS 491 (2004) ("No time period is specified for service, and it can be a very time-consuming process. . . . Although it varies by country and generally is getting better, anticipate six months from the start of the process for statute of limitations checking.").

76. *See* Cornelis D. van Boeschoten, *Hague Conference Conventions and the United States: A European View*, LAW & CONTEMP. PROBS., Summer 1994, at 47, 54–55. However, rather than grant a motion to dismiss for insufficient service of process under the Convention, a court may enter an order quashing the service of process and grant plaintiff leave to serve plaintiff in accordance with the Convention. These decisions avoid the harshness of a tolled statute of limitations. *See* Beverly L. Jacklin, Annotation, *Service of Process by Mail in International Civil Action as Permissible Under Hague Convention*, 112 A.L.R. FED. 241 (1993).

77. BORN, *supra* note 2, at 811.

In addition to saving a plaintiff time, service via postal channels may also save an applicant significant money, as service via a Central Authority can be expensive. Not only must the Convention's model service forms be filled out in either English, French, or the official language of the delivering country, requiring translation services, but the receiving country's Central Authority may require that all of the transmitted documents be "written in, or translated into, the official language or one of the official languages of the State addressed," pursuant to article 5.[78] This translation requirement may be imposed even if the defendant understands the language in which the documents would otherwise be transmitted.[79] No translation requirement exists for plaintiffs serving process via postal channels.[80]

A Central Authority also may require an applicant to pay fees that cover the costs incurred by the Central Authority as a result of the applicant's request. 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."[81] These fees represent a third cost that plaintiffs must consider in deciding whether to utilize a Central Authority to effect service.[82]

Thus, all things being equal, a litigant has significant incentives to serve process by way of the article 10(a) postal channels. All things, however, are not equal, as the ambiguous text of article 10(a) makes it uncertain whether service by postal channels is permissible at all under the Convention, and, if so, whether service is permissible by modern alternatives to post, such as private courier, facsimile, and email.[83] These ambiguities, and the legal consequences that flow from divergent

78. *See* Convention, *supra* note 4, at art. 5 ("If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed. That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document.").

79. Pa. Orthopedic Ass'n v. Mercedes-Benz A.G., 160 F.R.D. 58, 59–60 (E.D. Pa. 1995).

80. Translation, however, may be required to satisfy due process requirements. BORN, *supra* note 2, at 811.

81. Convention, *supra* note 4, at art. 12.

82. Johnson, *supra* note 72, at 785–87.

83. *See infra* Part III.

interpretations of the term "postal channels" in domestic and foreign courts, counterbalance and likely outweigh any advantages that a litigant may gain from serving through postal channels.[84]

II. AMBIGUITIES IN ARTICLE 10(a)

The Convention is rife with ambiguities.[85] The meaning and application of article 10(a), which provides for the "freedom to send judicial documents, by postal channels, directly to persons abroad," however, has proven to be the Convention's the most controversial and most litigated ambiguity.[86] In particular, the unclear meanings of "send" and "postal channels" create problems for litigants. Problems related to these ambiguities arise in at least two ways—one merely annoying to the litigant who has chosen the wrong channel, the other fatal. During litigation, a foreign party can refuse to respond or object to process improperly served. If a court upholds the objection, it can require the adversary to re-serve, delaying and increasing the expense of the litigation.[87] A much worse outcome occurs if the foreign litigant fails to object until the point of enforcing the judgment abroad; at that point, it will be too late to re-serve, and the result, if the foreign court does not find the objection waived, is that the judgment will be unenforceable.[88] With such high stakes, a litigant must ensure that process was in fact served, and that it was done so by recognized channels. It is unclear from the Convention's text, however, whether service is allowed under article 10(a), and if so, by what channels.

A. "Send" Versus "Serve"

A considerable body of literature has addressed the meaning of the term "send" in article 10(a). On one hand, the freedom to send judicial

84. *See infra* Part IV.

85. Article 1, which provides that the Convention only applies in "civil or commercial matters," contains a significant ambiguity that has engendered much debate. Convention, *supra* note 4, at art. 1. Whether "civil or commercial matters" includes administrative, fiscal, family, or public law matters is inconclusive. Ironically, drafters intended to avoid ambiguity by employing the term "civil or commercial," because the term had been used in earlier conventions. BORN, *supra* note 2, at 800.

86. BORN, *supra* note 2, at 811 (finding that much of this litigation has arisen in Japan over service of process by mail under article 10(a)).

87. *See* Robert W. Peterson, *Jurisdiction and the Japanese Defendant*, 25 SANTA CLARA L. REV. 555, 565 (1985).

88. *See id.*; Martinez, *supra* note 19, at 513.

documents via postal channels may be interpreted to include the freedom to serve judicial documents via postal channels.[89] On the other hand, the freedom to send judicial documents may be interpreted to permit only the transmission of documents other than process.[90] This difference matters. If service is properly achieved, subsequent papers may be transmitted through postal channels without concern. But if a signatory country concludes that service has been improperly sent, and thus not served, the entire ensuing litigation and its resulting judgment may be suspect or void in the eyes of the country in which such improper attempted service occurred.[91]

A minority of U.S. courts has found that the drafters of the Convention intentionally included the term "serve" in some sections of the Convention and purposely omitted the term in article 10(a).[92] Thus, under this construction, the distinction should be interpreted as an intentional deviation. Given the sentiment that when working with treaties, courts should strictly adhere to the statutory language, these courts have interpreted article 10(a) as not permitting service of process.[93]

A majority of courts, in both the United States and internationally, however, has been more liberal in its interpretation of the term "send."[94] These courts have found that the freedom to send documents via postal channels includes the freedom to serve process via postal channels, attributing any discrepancies in the text to drafting errors. Though the Permanent Bureau concurs with this interpretation, the Supreme Court has not resolved this split in the courts.[95] As a result, "practitioners remain well advised to exercise caution and avoid reliance on service by mail under the Hague Convention."[96]

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89. *See generally* Mann, *supra* note 8; Margnarini, *supra* note 26.

90. *See* RISTAU, *supra* note 71, at 165; *see generally* Michael H. Altman, Comment, *Mailing Service to Japan: Does Article 10(a) of the Hague Convention Authorize a Separate Method?*, 69 WASH. U. L.Q. 635 (1991); Craig R. Armstrong, Comment, *Permitting Service of Process by Mail on Japanese Defendants*, 13 LOY. L.A. INT'L & COMP. L.J. 551 (1991).

91. *See* Peterson, *supra* note 87, at 565.

92. Amiel, *supra* note 44, at 397; *see, e.g.*, Sheets v. Yamaha Motors Corp., U.S.A., 891 F.2d 533 (5th Cir. 1990); Bankston v. Toyota Motor Corp., 889 F.2d 172 (8th Cir. 1989).

93. Amiel, *supra* note 44, at 394–95.

94. *Id.* at 395; *see, e.g.*, Brockmeyer v. May, 383 F.3d 798 (9th Cir. 2004); Ackermann v. Levine, 788 F.2d 830, 839–40 (2d Cir. 1986).

95. PERMANENT BUREAU, *supra* note 5, at 80.

96. N. Jansen Calamita, *International Litigation: Recent Developments in the Service of Process Abroad*, 37 INT'L LAW. 483, 485 (Katherine Birmingham Wilmore ed., 2003).

B. Postal Channels

Less frequently debated is the meaning of the term "postal channels" in article 10(a). Because the Convention was drafted in 1965, it makes no mention of the modern methods of communication prevalent today.[97] These modern alternatives to post include private international courier, facsimile, and email transmission. Some have argued in favor of permitting service under the Convention via these modern alternatives to post in certain circumstances, such as when a defendant communicates only by email address, is difficult to locate, or refuses to accept service by other methods.[98] Such arguments rely on precedent from non-Convention cases that have advocated the evolution of the law in the face of technological advancement.[99]

Because the term "postal channels" was not defined by the Convention's drafters, it has the potential to be construed either narrowly or liberally by courts, practitioners, and scholars, with dramatically different results in both cases. On the one hand, the term may be defined narrowly to include only those channels contemplated by the drafters in 1965. Given that the Convention was drafted before the widespread use of modern technologies such as facsimile and email, the meaning of postal channels would have been naturally restricted by time and circumstance. Postal channels, therefore, are found by the Permanent Bureau to "certainly" include channels such as letter post, certified mail, and registered mail.[100] In addition to these traditional postal channels, the negotiating history suggests that the drafters contemplated telegraph as falling within the meaning of the term, presumably because in many states the same state agency that operated the post office also operated the telegraph system.[101] Thus, the report on the draft convention noted

97. PERMANENT BUREAU, *supra* note 5, at 85.

98. *See, e.g.*, Jeremy A. Colby, *You've Got Mail: The Modern Trend Towards Universal Electronic Service of Process*, 51 BUFF. L. REV. 337, 371–72 (2003).

99. New Eng. Merch. Nat'l Bank v. Iran Power Generation & Transmission Co., 495 F. Supp. 73, 81 (S.D.N.Y. 1980) ("Courts, however, cannot be blind to changes and advances in technology. No longer do we live in a world where communications are conducted solely by mail carried by fast sailing clipper or steam ships. Electronic communication via satellite can and does provide instantaneous transmission of notice and information. No longer must process be mailed to a defendant's door when he can receive complete notice at an electronic terminal inside his very office, even when the door is steel and bolted shut.").

100. PERMANENT BUREAU, *supra* note 5, at 69.

101. *See, e.g.*, Michael D. Birnhack & Niva Elkin-Koren, *The Invisible Handshake: The Reemergence of the State in the Digital Environment*, 8 VA. J.L. & TECH. 6, 13 n.16 (2003) (noting that the English government nationalized the telegraph companies in 1868 and gave control of the system to the post office).

that "[t]he commission did not accept the proposal that postal channels be limited to registered mail" and found that postal channels should include "telegram if the state where service . . . is to be made does not object."[102]

Such a narrow construction of the term's meaning would produce correspondingly narrow holdings, eliminating the possibility of service by modern alternatives to post under the Convention. The decision in *Mezitis v. Mezitis*[103] exemplifies this narrow approach. In *Mezitis*, a New York court held that service via DHL and Overnight Express Service upon a defendant did not constitute service through postal channels within the Convention's meaning:

> It appears that neither Greece nor the United States has "opted out" of Article 10[a] service. Mail to Greece would therefore have complied with the Convention. None of the forms of service attempted here included mail by "postal channels" to Greece. The court is well aware of the reliability of private carrier delivery services which have developed in the decade and one-half since the Convention was drafted. However they may not be used to comply with the Convention. . . . In short, respondent has raised the issue of service and petitioner has failed to show proper service.[104]

Though the court did not explain its reasoning in the decision, it is clear that the court narrowly construed the term "postal channels" to exclude service via private international courier.[105]

Alternatively, the term "postal channels" may be construed liberally to include channels of transmission not contemplated by the drafters of the Convention. The term "postal channels" is an undefined term with a variety of possible meanings, even at the time of the Convention's drafting, suggesting that the drafters intended some flexibility in its application. This understanding is reinforced by the fact that the definitional omission is typical of other successful multilateral conventions, the drafters of which intentionally "leave important terms undefined" as a means of avoiding controversy.[106] By leaving the term undefined, the

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102. RISTAU, *supra* note 71, at 166 (emphasis omitted).

103. Court Decisions First Judicial Department New York County Supreme Court: 1A Part II: Mezitis v. Mezitis, N.Y.L.J. Nov. 21, 1995, at 25, col. 5.

104. *Id.*

105. *See* PERMANENT BUREAU, *supra* note 5, at 70 (noting that "the Court did not provide any reason for its decision on this point").

106. RUSSELL J. WEINTRAUB, INTERNATIONAL LITIGATION AND ARBITRATION: PRACTICE AND PLANNING 101 (3d ed. 2001). The proposed *European Regulation on the Service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters*

drafters gave the Convention the necessary flexibility to accommodate the needs of its many signatories and to adapt to technological change and progression.

Under a broad interpretation, an assessment of whether the Convention allows documents to be transmitted abroad via modern alternatives to post likely would result in a broad holding. Judges would thus grant requests for service by means of private courier, facsimile, and email if appropriate under the signatory country's internal law. A liberal approach to whether email constitutes a postal channel under the Convention would likely result in an affirmative analysis and holding similar to the following:

> The Hague Convention neither explicitly authorizes nor explicitly prohibits service of process by e-mail. This, however, is not surprising since the Hague Convention was promulgated in 1965. Article 10(a) of the Hague Convention permits litigants to "send judicial documents, by postal channels, directly to persons abroad" if the "State of destination does not object." Consequently, the Hague Convention may permit service by electronic means to the extent that such means constitute "postal channels" within the meaning of article 10(a).[107]

The ambiguity related to the term "postal channel" in the Convention makes domestic rules of civil procedure difficult to apply. If private courier, facsimile, and email constitute postal channels, then service upon a defendant via these modern alternatives to post in a nonobjecting country would be authorized by the Convention. If private courier service, facsimile, and email do not constitute postal channels, then the Convention would be silent as to service via these means and alternative rules for service would apply. For a court seeking to apply correctly both the Convention and the federal or state rule of civil procedure when modern alternatives to post are concerned, the meaning of the term "postal channels" becomes a critical issue.

(March 2000) also has not defined the particular channels appropriate for the transmission of documents. Under article 4(2),

> [t]he transmission of documents, requests, confirmations, receipts, certificates and any other papers between transmitting agencies and receiving agencies may be carried out by any appropriate means, provided that the content of the document received is true and faithful to that of the document forwarded and that all information in it is easily legible.

Council Regulation 1348/2000, art. 4(2), 2000 O.J. (L 160) 39 (EC).

107. Colby, *supra* note 98, at 351–52.

III. A NEW APPROACH TO DEFINING "POSTAL CHANNELS": FUNCTIONAL EQUIVALENCE

In 2006, the Permanent Bureau issued its latest guidelines on the practical interpretation of the Hague Service Convention. The newest handbook, like the two previous editions,[108] attempts to offer practical advice on the operation of the Convention. Yet, unlike the previous editions, the 2006 handbook "reflect[s] the Convention's evolution, in particular as regards the use of modern technology, and [provides] suitable answers to the issues raised by practice in recent years."[109]

As a result, the handbook delves into several controversial issues previously unexplored, such as the meaning of the term "postal channels."[110] The Permanent Bureau, like the Convention, does not attempt to define rigidly the term "postal channels."[111] It does, however, find that the term "certainly covers sending the document by *letter post*, *certified mail* and *registered deliveries* within the meaning of the Conventions of the Universal Postal Union."[112] Moreover, the Permanent Bureau also finds that "[t]elegrams and telex are treated as postal channels."[113] Whether modern alternatives to post, such as international courier, facsimile, and email, fall within the meaning of postal channels, however, was an issue upon which the Permanent Bureau has refrained from officially opining. The 2003 Special Commission did, however, issue the following recommendation, which was reprinted in the 2006 handbook:

> Although [the evolution of modern technologies] could not be foreseen at the time of the adoption of the three Conventions . . . modern technologies are an integral part of today's society and their usage a matter of fact. In this respect, the [Special Commission] noted that the spirit and letter of the Conventions do not constitute an obstacle to the usage of modern technology and

108. The Permanent Bureau had already released two earlier editions of the handbook. PERMANENT BUREAU OF THE HAGUE CONFERENCE ON PRIVATE INT'L LAW, 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 (2d ed. 1992); PERMANENT BUREAU OF THE HAGUE CONFERENCE ON PRIVATE INT'L LAW, 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 (1st ed. 1983).

109. PERMANENT BUREAU, *supra* note 5, at iii.

110. *Id.* at 69–70.

111. *Id.* at 69.

112. *Id.*

113. *Id.*

> that their application and operation can be further improved by relying on such technologies.[114]

Because modern technologies did not violate the "spirit and letter of the Conventions," the terms of the Convention itself, in combination with interpretive techniques, could be used to bring the Convention into the modern era. Thus, the Special Commission found that the "opening of the Convention to modern means of communication *does not require a formal revision of the Convention*: it was concluded that the terms of the Convention do not prevent the use of modern technologies in order to assist in further improving the operation of the Convention."[115]

A. The Contours of the Functional Equivalence Standard

To facilitate the application and operation of these modern technologies within the existing Convention, the Permanent Bureau advocates the new interpretive approach embraced by the Special Committee: the "functional equivalence approach."[116] It recommends that practitioners and courts follow this approach to determine whether the transmission of documents via alternative channels is proper. The functional equivalent approach, according to the Permanent Bureau, requires "review[ ] for each method of transmission provided for by the Convention, [of] the aim and function of the related requirements," followed by consideration of "whether these requirements could be satisfied in equivalent fashion" through an alternative channel.[117]

In certain cases, such as service of process by private courier, the Permanent Bureau anticipates that the functional equivalent approach will yield relatively straightforward results. For example, the Permanent Bureau believes that

> [p]rivate courier services offer the same security as domestic postal services, while usually being faster. In addition, pursuant to the wave of privatization in the postal sector, the distinction between public and private services has tended to blur. It is difficult to see, therefore, what would prevent a private courier service from being treated as a postal channel within the meaning of the Convention.[118]

114. *Id.* at 86.
115. *Id.* at 87.
116. *Id.* at 86.
117. *Id.*
118. *Id.* at 70.

Some courts have followed this line of reasoning by implicitly finding that service via Federal Express or other international couriers constitutes service by "mail" for purposes of Rule 4(f).[119]

Other requests for alternative service of process, such as service by means of facsimile and email, require a more in-depth analysis. Though transmission via facsimile and email promotes the Convention's purposes of simplicity and efficiency, the Permanent Bureau noted that these channels may lack confidentiality and may undermine the Convention's objective of providing defendants with actual notice.[120] An example of the functional equivalent approach cited by the Permanent Bureau is the Canadian Quebecois case of *S.A. Louis Dreyfus & Cie v. Holding Tusculum B.V.*[121] The Court of Appeal of Quebec applied a functional equivalent analysis in considering facsimile service on a defendant located in a nonsignatory country. Though the Convention did not apply to Quebec, the court stated in dicta that the Convention's interpretation must take into account technological developments. The court found that "it would not be a breach of [the Convention's] fundamental principles to recognise transmission by fax machine . . . . The use of such an instrument of communication, based on a liberal and evaluative construction of [the Convention], complies with [its] spirit and preserves [its] effectiveness."[122]

The Permanent Bureau also cited a decision of the Queen's Bench Division of the Royal Courts of Justice in London.[123] In that case, lawyers requested an immediate injunction against the defendant preventing the online dissemination of defamatory texts and images relating to their client. The plaintiff had several letters from the defendant but no return address. The plaintiff also had the defendant's fax number, but the number corresponded to a country of origin different from the letters. Because personal service was impossible, the court allowed the plaintiff to serve the defendant via email, as email was the defendant's preferred method of communication with the plaintiff.[124]

These cases, the Permanent Bureau finds, "suggest that a functional and evolutive interpretation of article 10(a) allow for the use of [electronic

119. R. Griggs Group Ltd. v. Filanto SPA, 920 F. Supp. 1100, 1108 (D. Nev. 1996); *see also* Power Integrations, Inc. v. Sys. Gen. Corp., No. C 04-02581 JSW, 2004 WL 2806168, at *2 n.3 (N.D. Cal. Dec. 7, 2004) (stating that *Griggs* found that Federal Express was a postal channel for purposes of the Convention).

120. PERMANENT BUREAU, *supra* note 5, at 87–88.

121. [1998] R.J.Q. 1722 (Can.), *discussed in* PERMANENT BUREAU, *supra* note 5, at 95.

122. *Id.* (alterations in PERMANENT BUREAU translation).

123. PERMANENT BUREAU, *supra* note 5, at 93–94.

124. *Id.*

service] under that provision."[125] Absent from these examples offered by the Permanent Bureau, however, is consideration of the official nature of the channel of communication. In many countries, the postal service is an agency of the state.[126] To such signatories, the term "postal" would convey a meaning opposite of "private." For some countries, the distinction might not matter, such as the United States, where service has performed only the function of notice since the time the United States ratified the Convention. For others, it might matter. Service by post would, in these countries, still constitute service that remains at least nominally under governmental control. In Japan, for example, postal carriers who serve process assume a special role as an officer of the court by law.[127] The mailed process is accompanied by a "special service" form, stamped by the court and signed by the postal carrier, distinguishing the delivery as a state function apart from regular mail delivery.[128] For such a nation, postal service is quite unlike a similar delivery performed by a Federal Express driver.[129]

The Permanent Bureau does not offer any insight into how litigants, practitioners, or courts might apply or adapt the functional equivalent approach in the face of conflicting international views on the sovereign function of service. Instead, the Permanent Bureau sidesteps the potential for conflict by repeatedly emphasizing that "service under Article 10(a) is allowed only if allowed under *both* law of the State of origin and the law of the State of destination."[130] In taking this position, the Permanent Bureau stresses that service via modern alternatives to post may be appropriate under the Convention so long as the sending and receiving parties' respective laws allow such service. Reliance upon signatory countries' legal systems is misguided, however, because signatory countries' laws may suffer from the same difficulties in dealing with modern technologies and commerce as the Convention does. In other words, a signatory country's law or policy concerning international service of process may be just as ambiguous, undeveloped, or informal as the

125. *Id.* at 96.

126. Even in the United States, where the postal service is a public-private hybrid, the postal service is no longer simply a branch of the executive but a federally chartered corporation operating under legislative guidelines.

127. Yasuhiro Fujita, *Service of American Process Upon Japanese Nationals by Registered Airmail and Enforceability of Resulting American Judgments in Japan*, 12 LAW JAPAN 69, 73 (1979).

128. *Id.*

129. In Japan, "[s]ervice made in violation of statutory provision is null and void." TAKAAKI HATTORI & DAN FENNO HENDERSON, CIVIL PROCEDURE IN JAPAN § 7.01[3] (1983).

130. PERMANENT BUREAU, *supra* note 5, at 96.

Convention itself. For example, it was not until 2002 that a U.S. appellate court upheld the validity of email service on a foreign corporation.[131]

B. The Problems of the Functional Equivalence Standard

Interestingly, the Permanent Bureau's examples of courts' application of the functional equivalent approach all involve cases in which the Convention did not apply, cases rendered easier to decide because there was no clear channel by which to serve. In the Quebecois case, the court determined that Quebec was not party to the Convention.[132] In the English case, the defendant had no known address.[133] Application of the functional equivalent approach in cases in which the Convention does not apply, however, is easier and more likely than in instances where the Convention does apply. As the discussion below explains, application of the functional equivalent approach in a case subject to the provisions of the Convention is unlikely at best and impossible at worst. Not only will plaintiffs avoid litigating the postal channel issue, but courts will also avoid deciding the issue. Moreover, should a case be both brought by a plaintiff and decided by a court, the functional equivalent approach will be of little use in helping courts determine whether the aims of the Convention are satisfied by alternative methods of service.

1. Plaintiffs' Avoidance

It is unlikely that plaintiffs will bring sufficient cases to adequately test and define the subtle contours of the term "postal channels." First, plaintiffs have every incentive to avoid service under the Convention altogether after the Supreme Court decision in *Volkswagenwerk Aktiengesellschaft v. Schlunk*.[134] Second, plaintiffs engaging in a cost-benefit analysis will likely choose service via a Central Authority over service via an alternative channel. As a result, it is unlikely that many cases involving modern alternatives to post will be litigated, and courts will not have sufficient opportunity to apply the functional equivalent approach and produce meaningful guidance to future litigants.

131. Tamayo, *supra* note 7, at 213.
132. *See* PERMANENT BUREAU, *supra* note 5, at 95.
133. *See* Convention, *supra* note 4, at art. 1.
134. 486 U.S. 694 (1988).

In *Schlunk*, the Supreme Court faced the question of whether service upon the domestic subsidiary of a foreign corporation was compatible with the requirements of the Convention.[135] The court found:

> Where service on a domestic agent is valid and complete under both state law and the Due Process Clause, our inquiry ends and the Convention has no further implications. . . . The only transmittal to which the Convention applies is a transmittal abroad that is required as a necessary part of service.[136]

As a result, the court held that service upon the domestic subsidiary of a foreign corporation did not occasion the transmittal of service abroad.[137] Thus, the Convention was inapplicable because proper service under state law was effected within the United States, and the party desiring to effect service was not bound by the Convention's requirements.[138]

The permissiveness of the *Schlunk* decision gives plaintiffs great incentive to effect service upon a foreign defendant's domestic presence, be it a subsidiary, office, or agent, and thus to avoid service under the Convention altogether.[139] For example, leave to serve a Pakistani defendant's domestic attorney has been granted under Rule 4(f)(3) and was held not to implicate the Convention, even though Pakistan is a signatory, because the attorney's offices were located within the United States.[140] In this manner, the *Schlunk* holding has the potential to dramatically reduce the number of cases involving the service of process abroad via postal channels that courts will hear.

If service abroad under the Convention is inevitable, it is unlikely that a litigant would choose to serve via postal channels rather than through a Central Authority, unless a country had unambiguously agreed

135. *Id.* at 696.
136. *Id.* at 707.
137. *Id.*
138. *Id.* at 707–08.
139. *See* Bruce A. Brightwell, *The Hague Convention on Service of Process Abroad: An Overview*, 37 RES GESTAE 420, 420 (1994) ("Under the holding of *Schlunk*, it is not necessary to follow the Convention if the foreign corporation has an agent for service of process in the state. Thus, if a foreign corporation has a registered agent for service of process in Indiana or has a wholly owned subsidiary in the state, the Convention does not apply and service pursuant to the Trial Rules is sufficient."); Michael L. Silhol, *Service of Process Upon Foreign Defendants Under the Hague Convention*, TENN. B.J., Oct. 28, 1992, at 16, 17 ("Because the Convention applies only when process is served abroad, counsel should check carefully into the possibility of serving the defendant in the United States.").
140. *See* FMAC Loan Receivables v. Dagra, 228 F.R.D. 531, 534 (E.D. Va. 2005) ("Since service is being requested on [defendant's counsel in prior proceedings], whose office is located in Richmond, Virginia, the Hague Convention does not apply. Thus, the means of service requested does not conflict with the requirements of Rule 4(f)(3).").

to service as well as sending by specific means. As discussed above,[141] service via postal channels would be much faster and less expensive than service via a Central Authority. Despite these benefits, a litigant, especially one with any degree of risk aversion, has compelling incentives to effect service through a Central Authority, rather than utilize the Convention's alternative means listed in articles 8 through 10.[142] Against the savings in time and money previously discussed,[143] a plaintiff seeking to effect service abroad must weigh the potential costs of increased litigation, an unenforceable judgment, or a denied default judgment. On balance, these concerns tend to favor service via a country's Central Authority.

First, attempting to serve via postal channels adds another issue to litigate to the suit.[144] Should service via postal channels be attempted, a foreign defendant would likely challenge the sufficiency of service, as challenging sufficiency of service is one of the most common defense strategies in international litigation.[145] Not only must service via postal channels comport with the required procedures of the state in which the suit is filed, it also must comply with the service laws of the foreign jurisdiction.[146] Because "plaintiff's counsel must ensure that process is served according to applicable treaties and the enforcing country's domestic laws,"[147] ensuring sufficiency of service may require that a plaintiff consult local counsel in the foreign jurisdiction.[148] It may also require that a plaintiff provide a declaration of sufficiency of service.[149] Thus, attempting service of process by non–Central Authority methods would significantly increase the prospect of future litigation.[150]

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141. *See supra* Part II.

142. *But see* Johnson, *supra* note 72, at 789 ("Currently, the benefits of guaranteed service achieved by utilizing the Central Authorities are often outweighed by the savings in both time and costs that can be achieved by utilizing alternative methods of service such as certified mail, service by a foreign attorney or process server, and service by publication.").

143. *See supra* Part II.

144. *See* Silhol, *supra* note 139, at 19 ("[A]ttempting to serve a defendant abroad by one of the alternative methods raises the risk that service will not be effective, which also raises the prospect of future litigation over a relatively simple preliminary procedural matter.").

145. Reisenfeld, *supra* note 70, at 76.

146. RISTAU, *supra* note 71, at 166.

147. Reisenfeld, *supra* note 70, at 76.

148. *Id.* at 77.

149. *Id.*

150. *See* RISTAU, *supra* note 71, at 168 ("Rather than risk challenges to an alternative method of service under Article 10(c), the practitioner who wishes to obtain expeditious and effective service of process abroad should proceed via the normal Convention route—Article 5—and not invite potential challenges or protracted appellate proceedings on questions of validity or adequacy of service by private process-servers in Convention country.").

Adding to the cost of service via alternative methods is the prospect of an unenforceable judgment:

> [T]he attorney seeking to avoid the Convention's strictures should take heed, for achieving an interpretation not in accord with that of the foreign nation might produce a hollow victory. As stated by one court: "It is recognized that this court cannot render an interpretation of the treaty which will bind the courts of [the foreign country] in the event plaintiff, if he obtains a judgment against [the foreign defendant], seeks to enforce it through the courts in that nation."[151]

Thus, to obtain an enforceable judgment, even if a country does not object to a specified method of service under the Convention, it is still necessary to ensure that the laws of the foreign country affirmatively authorize the particular method of service employed.[152]

Finally, service via alternative channels may produce additional losses in the event that the domestic court does not grant a default judgment. Default judgments are more readily obtained if process is served through a Central Authority.[153] According to article 15, a default judgment may be entered even if no certificate of service or delivery has been received if the following three conditions are met: (1) The document was transmitted via one of the methods proscribed by the Convention; (2) a period of at least six months has elapsed since the transmission of the document; and (3) "no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed."[154] Under this standard, the first element is easily satisfied if service is effected through a Central Authority as opposed to an alternative channel.[155] Moreover, when service is made

151. The Comm. on Fed. Courts of the N.Y. State Bar Ass'n, *Service of Process Abroad: A Nuts and Bolts Guide*, 122 F.R.D. 63, 69 (1989) (quoting Shoei Kako Co. v. Superior Court, 33 Cal. App. 3d 808, 822 (Ct. App. 1973)).

152. *See* RISTAU, *supra* note 71, at 132; *see also* Yvonne A. Tamayo, *Sometimes the Postman Doesn't Ring at All: Serving Process by Mail to a Post Office Box Abroad*, 13 WILLAMETTE J. INT'L L. & DISP. RESOL. 269, 286 (2005) ("[I]n instances where a foreign court finds service of process noncompliant with its country's internal laws, that court will refuse to enforce the judgment. As a result, in order to increase the likelihood of successfully enforcing a subsequent judgment in the serving country, a plaintiff must ensure at the onset of litigation that his chosen method of serving process complies with the receiving country's internal laws. To this end, the accurate interpretation by United States courts of the laws of foreign countries regarding service of process in their jurisdiction is of paramount importance in promoting efficiency within the procedural infrastructure of international litigation.").

153. Silhol, *supra* note 139, at 20.

154. Convention, *supra* note 4, at art. 15.

155. Silhol, *supra* note 139, at 22.

through a Central Authority, it may be easier to prove that six months indeed has elapsed since delivering the documents to a Central Authority; that no certificate was received from a Central Authority; that a Central Authority constitutes a "competent authority"; and that "every reasonable effort" was made by utilizing a Central Authority.[156]

On balance, the costs of service via postal channels usually outweigh the benefits, especially when testing the validity of modern alternatives to post.[157] One practitioner writing for a local bar association concisely summarized the triumph of long-term certainty and enforceability of service through a Central Authority over short-term convenience through alternative methods:

> While problems can easily arise for those who attempt to serve process abroad by one of the alternative methods under the Convention, [service through a Central Authority] is certain to achieve effective service with little chance of an effective challenge by the foreign defendant. Moreover, parties that comply with this method may ultimately find it easier to obtain judgments and enforce them abroad.[158]

According to another practitioner, "[u]nless an attorney is very familiar with the alternative methods of service to a particular country, it is strongly advisable to effect service of process via the Central Authority and avoid the litigation minefield that might otherwise ensue."[159] Given that it is impossible for an attorney to be "very familiar" with the permissibility of modern alternatives to post under the Convention, a "careful practitioner will not take chances and will resort to the more formal and cumbersome, but certain, Central Authority procedures supplied by the Convention."[160] With considerable disincentives in place to dissuade a plaintiff from serving via modern alternatives to post, it is unlikely that

156. *Id.*

157. B. Gino Koenig, *The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents*, *in* INTERNATIONAL JUDICIAL ASSISTANCE IN CIVIL MATTERS 227, 243 (Denise Campbell et al. eds., 1999) ("Even though it might take some time to figure out which methods of service are valid and efficient in the defendant's state, it is a worthwhile procedure. The general view that service of process may take between three and six months, in particular if the defendant is from a state, such as Switzerland, which has opposed article 10 of the Convention, is correct. However, a client's interest is likely to be better served if the lengthy procedure through the [Central Authority] is followed and he, therefore, has an enforceable judgment in hand.").

158. Silhol, *supra* note 139, at 19.

159. Brightwell, *supra* note 139, at 420–21.

160. *See* Alan J. Lazarus, *Jurisdiction, Venue, and Service of Process Issues in Litigation Involving a Foreign Party*, 31 TORT & INS. L.J. 29, 64 (1995).

courts will have sufficient occasions to apply a functional equivalent analysis and create a workable modern definition of "postal channels."

2. Judicial Avoidance

Courts, too, have little incentive to conduct a functional equivalent analysis and interpret the meaning of postal channels. Given the lack of textual or historical insight into the meaning of the term "postal channels," courts necessarily will have a difficult time defining the meaning of the term on their own. As a result, courts, in the interest of judicial economy, are likely to abstain from deciding this difficult issue.

In *Schlunk*, the Supreme Court instructed lower courts as to the steps they should take when interpreting passages from the Convention. First, courts should "begin 'with the text of the treaty and the context in which the written words are used.'"[161] In addition, the Court noted:

> Other general rules of construction may be brought to bear on difficult or ambiguous passages. "'Treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.'"[162]

Also relevant, however, is the canon that courts

> have no dispensation to alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial . . . . Indeed, any such effort on our part would be . . . an usurpation of power, and not an exercise of judicial function. Neither may [courts] supply a *casus omissus*, for we have no authority to rewrite a treaty.[163]

Despite the guidance provided in *Schlunk*, courts have little information with which to interpret the Convention. Other than the undefined nature of the term "postal channels," there is no clear indication that the plain meaning of the text encompasses technological innovation. The context of the Convention suggests that its drafters were trying to make service of process easier for litigants, but that they also sought to preserve the sovereignty of the receiving nations. Given the limited

161. Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 699 (1988) (quoting Air France v. Saks, 470 U.S. 392, 397 (1985)).

162. *Id.* at 700 (quoting *Air France*, 470 U.S. at 396).

163. Kreimerman v. Casa Veerkamp, S.A. de C.V., 22 F.3d 634, 638 (5th Cir. 1994) (internal quotation marks omitted).

technology at the time of the Convention's drafting, the history and the negotiations of the Convention also shed little light on the term's meaning.

Because of the difficulties in interpreting the term "postal channels," courts will likely avoid reaching the issue in the interest of judicial economy, which encompasses "the notions that courts should avoid making duplicate efforts or unnecessarily deciding difficult questions."[164] In other words, when a court has the option of deciding a case on the basis of either a simple or a complex issue, "[t]he simplest way to decide a case is often the best,"[165] whether that decision is based on procedural grounds or on the merits.[166] Given that the "question of service of process abroad is one of the most challenging that a district court can be called upon to face,"[167] the interests of judicial economy are best served when courts avoid deciding a case on the basis of the Convention's ambiguous text.

Judicial abstinence is evident in federal courts' treatment of international courier services under the Convention. As previously indicated, the Permanent Bureau believes that courier services provide an easy test for defining postal channels, finding that "[i]t is difficult to see . . . what would prevent a private courier service from being treated as a postal channel within the meaning of the Convention."[168] In practice, however, it is likely a more difficult analysis than the Permanent Bureau asserts. As a result, courts seem to have avoided the issue when presented. When the validity of service via a private international courier has been challenged as not constituting a postal channel, courts have avoided deciding the issue by instead deciding the cases, when possible, on the merits[169]

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164. Bath Mem'l Hosp. v. Me. Health Care Fin. Comm'n, 853 F.2d 1007, 1012 (1st Cir. 1988).

165. Chambers v. Bowersox, 157 F.3d 560, 564 n.4 (8th Cir. 1998).

166. *See, e.g.*, Barrett v. Acevedo, 169 F.3d 1155, 1162 (8th Cir. 1999) ("Although the procedural bar issue should ordinarily be resolved first, judicial economy sometimes dictates reaching the merits if the merits are easily resolvable against a petitioner while the procedural bar issues are complicated."); *Chambers*, 157 F.3d at 564 n.4 ("The State argues that the point is procedurally barred for a number of reasons, and it may be right. In this instance, as in the case of some of the other arguments advanced by petitioner, the law of procedural bar is a great deal more complicated than the law governing the merits of petitioner's point. Since petitioner cannot prevail on the merits in any event, we see no reason to ring the changes of the various formulas used in determining the issue of procedural bar.").

167. Mayoral-Amy v. BHI Corp., 180 F.R.D. 456, 458 (S.D. Fla. 1998).

168. PERMANENT BUREAU, *supra* note 5, at 70.

169. Technetronics, Inc. v. Leybold-Geaeus GmbH, No. CIV. A. 93-1254, 1993 WL 197028, at *6 (E.D. Pa. June 9, 1993) ("Because this Court dismisses this action based on the international arbitration clause, the Court does not reach the issue of whether Technetronics effectuated service in violation of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or [C]ommercial Matters.").

or on jurisdictional grounds.[170] Moreover, courts have refrained from raising the international courier issue sua sponte[171] and have even flagged the potential pitfall and allowed plaintiffs time to cure any potential procedural errors.[172]

3. Substantially Equivalent Sovereignty

Even in the unlikely event that a litigant should choose to effect process via modern alternatives to post under the Convention and a court did not abstain from deciding the issue, a court would have difficulty applying the functional equivalent analysis test that the Permanent Bureau recommends. Courts are capable of making the potentially difficult determination that one form of service constitutes the functional equivalent of another in terms of its physical or logistical function. In this regard, the Permanent Bureau's recommendations and examples of functional equivalence provide significant insight into making a determination. The Convention, however, does not exclusively address the physical means of transmitting documents abroad. The Convention, as evidenced by the permission for signatories to object to service via alternative channels, is also concerned with harmonizing the differing international philosophical and political underpinnings of process service.[173]

170. Mones v. Commercial Bank of Kuwait, S.A.K., 399 F. Supp. 2d 310, 312 n.8 (S.D.N.Y. 2005) ("CBK contests the validity of the service [via DHL] in Kuwait under the Hague Convention; however I need not reach this issue because, even assuming service was proper, the Turnover Order was invalid as this Court lacks the power to order CBK to transfer assets from outside the jurisdiction.").

171. *In re* CINAR Corp. Sec. Litig., 186 F. Supp. 2d 279, 304 (E.D.N.Y. 2002) ("Canada has not objected to service of process by 'postal channels.' Whether service by Purolator Courier counts as service by 'postal channels' is a question this Court need not decide. The Kelley Plaintiffs have provided ample proof that in addition to serving defendants by Purolator Courier, they also served the defendants by International Express Mail, Return Receipt Requested, sent by the Clerk of the Court of the Western District of North Carolina. This constitutes proper service. Accordingly, plaintiffs' chosen method of service of process did not violate the Hague Convention." (internal citations omitted)).

172. Rosenfield v. Steele, No. 84 C 9604, 1984 WL 14283, at *3 n.1 (N.D. Ill. Nov. 30, 1984) ("The defendants also maintain that service of process, effected by DHL courier service, did not comply with the requirements of the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters. However, Fed. R. Civ. P. 4(j) does not mandate dismissal for want of proper service until 120 days after filing of a complaint, here until March 5, 1985. Consequently, dismissal on this ground would be premature at this time.").

173. *But see* van Boeschoten, *supra* note 76, at 50 (noting that because of the inherent differences in legal systems, "one cannot reasonably expect [the differences] to disappear as a result of efforts at harmonization").

As stated previously,[174] service of process serves two functions in modern society. First, it provides a defendant with formal notice of a pending action. Second, it represents the commencement of a formal state action against the defendant. The text of article 1 explicitly posits the goal of providing defendants with adequate notice. Yet, the Convention's advancement of sovereignty and public policy is more nuanced. In general, the Convention centers on service via the actions of state actors, such as the Central Authorities, diplomatic or consular agents, judicial officers, and officials of the state. The actual service of process, as opposed to the transmission of documents, is, for the most part, fully within the control of domestic state actors and subject to domestic state laws.

In channeling the service of process through state agents, the Convention implicitly recognizes that many countries, predominantly those with civil law systems, consider the service of process to be an act of sovereignty,[175] symbolic of "independent and supreme authority."[176] State control of service, in addition to having symbolic value, can also support important public policies, ranging from ensuring fair notice to preserving judicial isolationism.[177] Some provisions of the Convention, such as article 10, allow individuals to circumvent the receiving state and serve process more directly. Because this more direct service may undermine a variety of state functions and objectives, the Convention acknowledges the civil law tradition and allows countries to object to alternative forms of service.[178] As a result, some signatory countries have objected to the more direct forms of service in article 8, article 10, or both.[179]

When faced with either a challenge to or a request for service of process via modern alternatives to post, the Permanent Bureau recommends that a court review the "aim and function of the related [Convention] requirements," and consider "whether these requirements could be satisfied in equivalent fashion" through an alternative channel.[180] Thus, a court's functional equivalent analysis would likely consist of two components: (1) an evaluation of equivalent function; and (2) an evaluation of equivalent aim.

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174. *See supra* text accompanying notes 15–22.

175. *See supra* text accompanying notes 18–22.

176. BLACK'S LAW DICTIONARY 1430 (8th ed. 2004).

177. BORN, *supra* note 2, at 775.

178. Convention, *supra* note 4, at arts. 8, 10.

179. ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION 222 (2d ed. 2002) ("Other Convention states have filed objections to personal service in their territory except by their officials, but do not object to service by mail.").

180. PERMANENT BUREAU, *supra* note 5, at 86.

Though a difficult task, evaluating equivalence of physical function is a determination that courts are capable of performing, even though courts may be disinclined to perform such an analysis for the reasons discussed above. Though courts have not conducted this type of physical functional analysis with regard to postal channels under the Convention, they have on a few occasions determined the equivalence of electronic service to other types of service under Rule 4. Generally, service via electronic means has been permitted in international disputes under Rule 4(f)(3) on three types of defendants[181]: (1) defendants in nonsignatory countries;[182] (2) defendants with unknown addresses in signatory countries;[183] and (3) defendants in unknown international locations.[184] These cases suggest that under certain circumstances, often when the defendant is otherwise incommunicado, electronic service is functionally equivalent to service by traditional methods.[185] The Convention did not apply in these cases, and the courts were not required to heed foreign law in making a determination under Rule 4(f)(3). The cases do, however, illustrate the fact that courts could perform an evaluation of the equivalence of a service method's physical function.

In addition to evaluating the equivalence of a service channel's physical function, a court would also be required to determine the equivalence of a service channel's aim or purpose. If the purpose of service is to provide notice to a defendant of a pending action, a court would evaluate whether defendants are likely to receive equivalent notice via

181. Creative Prods. Group, LLC v. Decolee Co., No. 06-CV-02305 (C.D. Cal. June 30, 2006) (minute order).

182. *See* Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1018 (9th Cir. 2002) (allowing service via email on a foreign corporation located in a nonsignatory country); Ryan v. Brunswick Corp., No. 02-CV-0133E(F), 2002 WL 1628933, at *3 (W.D.N.Y. May 31, 2002) (authorizing service by regular mail, facsimile, and email on a defendant in a nonsignatory country).

183. *See* D'Acquisto v. Triffo, No. 05-C-0810, 2006 WL 44057, at *2 (E.D. Wis. Jan. 6, 2006) (allowing email service on a Canadian defendant with no Canadian address); Viz Commc'ns, Inc. v. Redsun, No. C-01-04235 JF, 2003 WL 23901766, at *6 (N.D. Cal. Mar. 28, 2003) (allowing service via email because Canadian defendants should not be allowed to "avoid service simply by changing their mailing address and making it difficult or even impossible for courts in the United States to reach them").

184. *See* Broadfoot v. Diaz (*In re* Int'l Telemedia Assoc.), 245 B.R. 713, 719–20 (Bankr. N.D. Ga. 2000) (authorizing mail, facsimile, and email service on a defendant in an unknown international location).

185. *See Rio Props.*, 284 F.3d at 1018 (finding that the defendant "structured its business such that it could be contacted *only* via its email address"); *Viz Commc'ns*, 2003 WL 2390176, at *6 (finding that an email address was the defendant's only provided contact information); *Broadfoot*, 245 B.R. at 718 (noting that the defendant, who had no address, specifically requested communication via facsimile or email).

the modern alternative to post. An evaluation of sufficiency of notice, however, will likely be reduced to an evaluation of the physical function of each modern alternative to post, such as the "evidentiary and security concerns inherent to emerging technologies."[186] Thus, with regard to service via modern alternatives to post in common law countries that view service of process as providing notice without constituting an act of sovereignty, the analysis of function and aim simply collapses into the equivalent physical function analysis described above.

Service of process in other countries, however, may represent a sovereign state action that promotes important public policies. After determining physical equivalence, a court would also need to analyze the equivalence of sovereignty between the traditional and modern alternatives to post. Unlike an equivalent notice inquiry, this type of inquiry involves both policy and philosophical dimensions and does not collapse into a strictly physical analysis. Thus, a court would be required to ask many difficult questions. For example, if a receiving country has not objected to article 10(a), would service via a modern alternative to post be equivalently sovereign as service via a traditional postal channel? If so, must the underlying public policies be equivalent? Should a court interested in being true to the Convention sort the several channels of communication according to the degree of state involvement and control and the extent to which the nation involved intended to reserve such functions for state officials?[187] For some nations, that would encompass fax transmissions via the state-owned telephone service, but might not include service by email if that occurred over a wireless broadband network controlled by a private corporation. To date, no court has embarked on such an analysis.

If a receiving country has in fact objected to article 10(a), would service via a modern alternative to post impinge more or less than the traditional postal channel on the receiving country's sovereignty? Would service via a modern alternative to post in an objecting country promote the receiving country's public policies more or less than the traditional channel? If more, does it support the policy sufficiently to override the objection on policy grounds?

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186. Charles T. Kotuby, Jr., *International Anonymity: The Hague Conventions on Service and Evidence and Their Applicability to Internet-Related Litigation*, 20 J.L. & COM. 103, 113 (2000).

187. *See, e.g.*, Hans Smit, *International Aspects of Federal Civil Procedure*, 61 COLUM. L. REV. 1031, 1042 (1961) (suggesting that service via post requires minimal imposition on the part of the foreign country and, therefore, infringes minimally on the foreign country's sovereignty).

These questions are unlikely to generate concrete answers from courts. If courts have been unwilling to reach questions concerning service through modern alternatives to post with no framework for analysis, they are perhaps even less likely to reach the difficult question if the formalized framework requires them to ask esoteric questions that border on being unanswerable.

C. An Illustrative Case: *Creative Products Group, LLC v. Decolee Co.*

A recent order from a court in the Central District of California illustrates what may become a typical analysis under the functional equivalent approach. In *Creative Products Group, LLC v. Decolee Co.*,[188] the plaintiffs attempted to skirt the restrictive, costly, and time-consuming requirements of the Convention. After wrestling with the meaning of postal channels and the notion of functional equivalence, the court eventually granted alternative service of process in a manner that did not implicate the Convention.

In *Creative Products*, the plaintiffs, two Nevada limited liability companies, were involved in arbitration with Decolee Co., a corporation with its principal place of business in South Korea. The plaintiffs sought an injunction against Decolee enjoining its alleged violation of a product licensing agreement pending the outcome of the arbitration proceedings. Though Decolee had no offices or agents in the United States, it was represented in the arbitration matter by local counsel in Los Angeles, California.

The plaintiffs did not attempt service via the South Korean Central Authority, probably because the violation of the licensing agreement was costly and the plaintiffs could not afford to wait up to six months for service to occur. Moreover, the Convention did not permit service via postal channels because South Korea objected to article 10(a). Instead, the plaintiffs attempted service on Decolee's counsel in California, who refused to accept service. Rather than comply with the Convention, the plaintiffs requested an order directing alternative service of process pursuant to Rule 4(f)(3). Specifically, the plaintiffs requested permission to serve Decolee by means of private courier, facsimile, and email. Alternatively, the plaintiffs requested permission to serve Decolee's counsel in California a second time.

188. No. 06-CV-02305 (C.D. Cal. June 30, 2006) (minute order).

After outlining the federal rules of service and the applicable provisions of the Convention, the court turned to the difficult issue of whether private courier, facsimile, and email constituted service via postal channels. In its analysis, the court relied on a provisional version of the *Practical Handbook on the Operation of the Hague Service Convention*. Consistent with the handbook, the court found that precedent required a finding that a private courier service constituted service via a postal channel. With regard to facsimile and email, the court held:

> Based on these authorities, and application of the functional equivalent approach . . . permitting plaintiffs to serve Decolee by facsimile or e-mail would be the functional equivalent of transmission via postal channels. All methods share the aim of simplify[ing] the method of transmission of these documents, and the function of sending judicial documents directly to persons abroad. In objecting to Article 10(a), South Korea objected to more than just the direct transmission of judicial documents via defined postal channels. Effectively, it rejected the aim and function of the service methods set forth in Article 10(a). Given that service via facsimile and e-mail are the functional equivalents of service under Article 10(a), the court concludes that South Korea's objection to the provision implies an objection to service via facsimile transmission and e-mail as well. Consequently, the court cannot authorize these alternative means of service. To allow such service would violate South Korea's rights as a signatory to the Convention, and thus violate Rule 4(f)(3), which allows service only by means not prohibited by international agreement.[189]

According to the court, South Korea's specific objection to article 10(a) meant that both the form and function of service via postal channels was objectionable. By finding that facsimile and email were physically functional equivalents of postal channels, the court did not analyze the more difficult question of whether facsimile and email were the functional equivalents of postal channels under the aim prong of the analysis. The denial of service by facsimile and email in the case of a country objecting to article 10(a), the Court felt, was a straightforward ruling that did not necessitate delving into the more abstract questions of policy and sovereignty. Such an inquiry, however, would not have been unwarranted despite South Korea's objection to article 10(a) in light of the discussion above.[190]

189. *Id.* at 7 (internal quotation marks omitted).
190. *See supra* Part III.B.3.

The court, however, did not deny alternative service altogether, especially when the decision relied on the unsure footing of a special commission's recommendation in a provisional handbook interpreting an ambiguous international convention. Instead, the court granted alternative service on Decolee's domestic counsel pursuant to Rule 4(f)(3), because service on Decolee's counsel did not implicate the provisions of the Convention:

> Service on a foreign corporation's domestic counsel does not involve the international transmission of a judicial or extrajudicial document. As a result, the Convention does not apply. . . . When the Convention is inapplicable, service of process on a foreign corporation's domestic counsel does not conflict with the requirements of Rule 4(f)(3), i.e., it does not constitute a method of service that is prohibited by international agreement. *See* FMAC Loan Receivables v. Dagra, 228 F.R.D. 531, 534 (E.D. Va. 2005) ("Since service is being requested on [defendant's counsel in prior proceedings,] whose office is located in Richmond, Virginia, the Hague Convention does not apply. Thus, the means of service requested does not conflict with the requirements of Rule 4(f)(3)"). The Convention thus poses no impediment . . . to permitting service on Decolee through [its counsel], which is located in Los Angeles, California.[191]

Had the plaintiffs petitioned the court with a more difficult fact pattern in which the defendant's signatory country had not objected to article 10(a), it seems likely that the court would have foregone the functional equivalent analysis entirely and simply circumvented the Convention by allowing the plaintiffs to serve the defendant's domestic counsel.

IV. AN OVERLOOKED SOLUTION: REVISING THE HAGUE SERVICE CONVENTION

In deciding that the functional equivalent approach should be used to develop the meaning of postal channels, the Special Commission advised the Permanent Bureau that a formal revision of the Convention was unnecessary.[192] The Special Commission was incorrect in this conclusion. Because of the logistical and interpretive problems of applying a functional equivalent approach across borders, formal revision of the Convention is the best means of adapting the current Convention to modern commercial and technological changes.

191. *Creative Prods.*, No. 06-CV-02305, at 7.
192. PERMANENT BUREAU, *supra* note 5, at 87.

The Convention should be revised in a targeted manner that eliminates the ambiguous term "postal channels." A useful and appropriate revision would break the term "postal channels" into its various components, such as regular mail, registered mail, certified mail, telegram, telex, private courier, facsimile, and email. For each method of transmission, signatory countries could be required to lodge specific objections that take into account each individual country's sovereignty concerns, public policies, and local laws on a line-item basis. A revision in this manner would be a strong indication to future litigants, practitioners, and judges of which service methods are acceptable in that jurisdiction. Expanding article 10(a) in this manner would result in a clearer and more certain law and legal practice in international disputes. Most importantly, such a revision would put the burden of knowing domestic laws and policies on the party in the best position to efficiently obtain that information—the signatory government and not each individual litigant.

Alternatively, the term "postal channels" could be broken into its various components as described above, each of which would be impermissible unless a signatory country expressly consented to service via each alternative means. This idea was first proposed at the time of the Conference's origination by civil law countries, notably Germany, who objected to the fact that these channels were permissible under the Convention's default rule.[193] The German delegate to the Convention proposed that the rule should be reversed; unless the signatory expressly consented, service through the alternative means listed in articles 8 through 10 should be impermissible.[194] The majority of the Convention's signatories, however, rejected this proposal and adopted the generally more permissive use of the alternative methods as default devices for service.[195] In light of the confusion caused by nonobjecting signatories whose domestic laws nonetheless prohibit service by postal channels, such a revision may be desirable.[196]

A change to the Convention would not be without costs.[197] Changes in laws relating to highly instable fields, such as technology, can result in

193. Fujita, *supra* note 127, at 76.

194. *Id.* at 76–77.

195. The proposal was rejected by a vote of seventeen to two, with Germany and Egypt dissenting. Italy and Japan abstained from voting. *Id.* at 77 n.32.

196. PERMANENT BUREAU, *supra* note 5, at 74–75 (explaining the position of Japan).

197. *See generally* Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789 (2002) (discussing costs associated with adjusting to the existence of new legal norms).

substantial "legal learning costs—as lawmakers repeatedly reassess transient legal solutions—as well as related uncertainty and private adjustment costs."[198] However, the benefits of legal change in this case would likely outweigh these transition costs. A revision of article 10(a) would be the very type of legal change advocated by proponents of legal change cost-benefit analyses:

> Legal change of course can be beneficial. Many existing bodies of law, for instance, are themselves highly uncertain or otherwise substantively defective. Moreover, the existing legal costs of a socially desirable activity may be the problem a new body of law is designed to redress. The adoption of new legal norms thus may serve, among other things, to clarify contentious legal problems, simplify excessive complexity, facilitate new and valuable forms of human interaction, and otherwise advance the interests of legal certainty. Among the best examples here is the beneficial role of uniform law in facilitating transjurisdictional interchange. The very purpose of uniform legal rules is to address the learning costs of gathering reliable information about foreign legal systems, uncertainties about the content and choice of applicable law, and the absence of an effective framework for the development of private contractual networks.[199]

Thus, though a revision of article 10(a) would incur the cost of periodic revisitations that adjust for technological innovation, this cost would likely be offset by the potential savings of time and resources that could result from more efficient and timely service. Most importantly, such a revision would root the Convention in practical language and operation, avoiding the impractical analyses that result from interpreting the current Convention's postal channels through the functional equivalent approach.

CONCLUSION

Given the logistical and analytical problems with determining the meaning of postal channels under the functional equivalent approach, it is difficult to see a meaningful interpretation of the term "postal channels" emerge from courts. Economic realities under the present Convention discourage plaintiffs from serving process via article 10(a) postal channels. Further, considerations of judicial economy weigh against

198. *Id.* at 856.
199. *Id.* at 857–58.

courts determining the meaning of postal channels. And finally, nations have differing symbolic and policy views on service. Taken together, these factors all serve to make the functional equivalent approach improbable and impractical. The best solution, one prematurely deemed unnecessary by the Special Commission, is a formal revision to the Convention that eliminates the ambiguous term "postal channels" and provides a clearer picture of domestic law for foreign litigants.