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Commentary

TRENDING METHODS OF INTERNATIONAL SERVICE OF PROCESS:  
@ELUSIVEDEFENDANT #YOU CAN RUN BUT YOU CAN'T HIDE #HAGUE CONVENTION

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Lockridge Grindal Nauen attorney Heidi M. Silton and law clerk Amanda Sicoli discuss the trends in international service of process, noting how courts and legislatures in the United States are beginning to accept new methods such as email and Facebook.

A video call with Amsterdam is a finger swipe away; a message to Beijing takes one vocal command. Email is part of everyday life, and it continues to replace once-common methods of communication. <sup>1</sup>

Just as our reliance on technology is changing, legal processes are continually evolving. <sup>2</sup> In 2000, only nine federal courts allowed e-filing, yet e-filing is accepted in about 99 percent of federal courts today. <sup>3</sup>

Similarly, the means by which plaintiffs can give fair notice of legal proceedings to defendants is changing. <sup>4</sup> The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents prescribes the traditional methods for international service. <sup>5</sup> Now, through [Federal Rule of Civil Procedure 4\(f\)\(3\)](#), new trends are taking root. These new methods for international service are cheaper, quicker and, at times, more reasonably calculated to provide notice to the defendant. In light of these trends, the Hague Convention should continue to be interpreted broadly so as to remain relevant and encompass technological advancements in an ever-changing society.

***#ThePast: International service historically***

[Federal Rule of Civil Procedure 4\(f\)\(1\)](#) permits service of process via an established international agreement that is reasonably calculated to put the defendant on notice, and it specifically names the Hague Convention as one such agreement. <sup>6</sup> For decades, the Hague Convention has thus been the primary means of international service of process.

International service under the Hague Convention is accomplished through a designated central authority. Each signatory country is required to designate a central authority that receives and sends requests for service from other countries. The central authority in the United States is the Justice Department, which contracts with Process Forwarding International, a private company, to handle requests for service within the United States.

A party wishing to serve process outside the United States works directly with the central authority for the jurisdiction in which the party wishes to serve, rather than going to his or her home nation's central authority. The central authority may require translation of the documents and either serves the documents or notifies the litigant of deficiencies. <sup>7</sup>

\*2 [Federal Rule of Civil Procedure 4\(f\)\(3\)](#), however, permits service of process by means other than the Hague Convention so long as such other means are not prohibited by international agreement. [Rule 4\(f\)\(3\)](#) opens the door to modern and efficient means of international service via email, social media sites and other methods that meet the constitutional requirements for service of process.

### *#ThePresent: Trending away from @HagueConvention*

#### *Service via email*

Courts are beginning to recognize the validity of service of process on international defendants through email. This trend will continue to expand as defendants become more mobile. It is estimated that 88 percent of adults have personal email accounts and that 147 million people use email to communicate.<sup>8</sup>

Service via email eliminates the risks associated with sending notice to someone other than the defendant. In addition, service via email reaches the recipient's inbox seconds after it is sent from the plaintiff, rather than a few days or weeks later as is the case with regular mail, or the few weeks or months it traditionally takes pursuant to the Hague Convention.<sup>9</sup>

Email service of a summons and complaint on a foreign defendant was first allowed in this country in 2000 by a federal bankruptcy court in Atlanta.<sup>10</sup> In a written order, Chief U.S. Bankruptcy Judge Stacey W. Cotton of the Northern District of Georgia noted that [Rule 4\(f\)\(3\)](#) permitted the "utilization of modern communication technologies to effectuate service when warranted by the facts." Thus, Judge Cotton allowed service of the summons and the complaint by direct service to the defendant's last known address, his fax number *and his email address*.

In 2002 the 9th U.S. Circuit Court of Appeals concluded that there is no hierarchy of methods of service under [Rule 4\(f\)](#). Therefore, it ruled that a plaintiff could serve a copy of the summons and complaint via email, finding email to be the method most likely to reach the defendant.<sup>11</sup>

While the 9th Circuit allowed service of process via email, the panel did express concern over the inability of confirming receipt of the email, the limited use of electronic signatures and verification requirements, and the lack of ease in terms of attaching and viewing exhibits. Thus, the panel encouraged other courts to perform their own analysis regarding the balancing of the benefits and limitations of using email for service via process in any particular case.

In this case, however, the panel concluded that service by email was constitutional because it gave the defendant notice about the pending action and an opportunity to be heard, meeting the due process standards set forth in [Mullane v. Central Hanover Bank & Trust Co.](#), 339 U.S. 306 (1950).

Since the 9th Circuit's 2002 decision, several courts have affirmed the practice of email service of process.<sup>12</sup> A majority of cases permitting service via email have found that the defendant expressed that email was either a permitted or the preferred method of contact.<sup>13</sup> Similarly, service via email has been allowed in cases where the plaintiff demonstrated that the defendant used the email address and that previous emails to the defendant's purported email address did not bounce.<sup>14</sup>

\*3 Several states have also enacted statutes that permit email service of process in their courts.<sup>15</sup>

Some courts have not been as eager to adopt the trend accepting service via email.<sup>16</sup> In 2005 a plaintiff initiated a declaratory judgment action in the U.S. District Court for the Southern District of New York and tried to serve the complaint and summons via an email address provided on the defendant's website. U.S. District Judge Richard C. Casey, however, held that there was no evidence that the defendant maintained the website, monitored the email address or would be likely to receive information

transmitted to the email address. Therefore, he found that service via email did not meet the constitutional standards articulated in *Mullane*.<sup>17</sup>

In *Pfizer Inc. et al. v. Domains by Proxy et al.*, U.S. District Judge Stefan R. Underhill of the District of Connecticut also rejected service via email, stating the emails were not reasonably likely to reach the defendants. Judge Underhill further noted that the plaintiff had not attempted to determine if the defendants had agents in the United States to receive service.<sup>18</sup>

Despite the rejection of service of process via email in these particular cases, courts still use the same analysis when evaluating the acceptability of service of process in any individual case. Therefore, when an alternative means of international service is requested under [Rule 4\(f\)\(3\)](#), the serving party must demonstrate that the service is reasonably calculated to provide notice to the foreign defendant.

### ***Service via Facebook***

Courts are also beginning to embrace service via Facebook. In 2012 the social networking site reported 1.06 billion monthly active users -- 618 million of whom are daily users. Facebook also currently supports over 70 languages. More people spend time on Facebook than on Google, Wikipedia, YouTube, Bing and Amazon combined. Notice via Facebook may therefore be more reasonably calculated to provide actual notice than other methods of service and may be immediately received by the defendant.<sup>19</sup>

Benefits of service via Facebook include speed, ease and cost. Plaintiffs may be able to discern the last time the defendant logged into his or her account, post images or PDF documents through an HTML link, or subpoena the site operator for records of account activity to ensure that service was delivered. These features all address concerns raised in regard to service of process via methods like email. Facebook also ensures that the summons and complaint don't go to a family member or somebody else living in the defendant's home, as may happen with process via postal service.

Courts in Australia were the first to authorize service via Facebook in 2008. Courts in Canada have also allowed service via Facebook.<sup>20</sup> Recently, courts in the United States have allowed service of process via Facebook. All of these courts emphasized the position of Facebook as a cheaper and more effective way of reaching the defendant.<sup>21</sup>

### ***#TheFuture: What about @Hague Convention?***

\*4 A broader interpretation of acceptable methods of service is taking root as judicial branches across the world accept the prevalence of electronic methods of communication. In the face of criticism and newer, faster methods of international service, courts will continue to grapple with permissible methods of process in an electronic world.<sup>22</sup>

It is possible that the Hague Convention will not be entirely replaced by "other means" of service under [Rule 4\(f\)\(3\)](#). It may continue to be used as a means to provide modern service through a wide interpretation of the "postal channel" under Article 10. The 1999 Special Commission of the Hague Convention, in fact, recommended that service via electronic transmission be allowed under Article 10, provided that the electronic transmissions meet certain security requirements. The commission said "there is no doubt that transmission of documents by electronic means would significantly enhance the usefulness and effectiveness of the Convention."<sup>23</sup>

Interpreting the Hague Convention to allow service of process through newer technological methods is consistent with the policy behind the agreement. The purpose of the Hague Convention is to "improve the organization of mutual judicial assistance [for service of process by] simplifying and expediting the procedure." Thus, two key goals of the Hague Convention are to facilitate service abroad through reliable means of effecting and proving service and to ensure that foreign defendants have an

opportunity to be heard. There is no doubt that courts have started to support more modern methods of international service of process to simplify and expedite the notice procedure.<sup>24</sup>

### Conclusion

To comport with constitutional standards of due process, service of process must be “reasonably calculated to provide parties notice and an opportunity to respond.”<sup>25</sup> This standard does not require actual notice. As technology continues to develop, the reasonableness of the calculation to provide notice will change and courts should continue to support modern methods of service under both [Rule 4\(f\)\(3\)](#) and the Hague Convention.

While some courts are allowing service via email and Facebook, one thing is certain: With an ever-changing global technology scene, new methods of service will continue to arise. Perhaps the courts will begin to expand the application of previous holdings to allow service via publication on the Internet -- be it on a website, message board or some new public posting mechanism we have yet to discover. Maybe notions of acceptable methods of service will expand to include service via Skype or Twitter.<sup>26</sup> #onlytimewilltell.

### Footnotes

- 1 See Andrianna L. Shultz, *Superspoked and Served: Service of Process via Social Networking Sites*, 43 U. Rich. L. Rev. 1497, 1507 (2009) (noting that email is displacing traditional mail, fax and telephone).
- 2 See John M. Murphy III, *From Snail Mail to E-mail: The Steady Evolution of Service of Process*, 19 St. John's J. Legal Comment 76 (2004); Shultz, *supra* note 1, at 1504 (stating that personal service of process is not always available and that the law continues to expand to incorporate service via other means).
- 3 Claire M. Specht, *Text Message Service of Process -- No LOL Matter: Does Text Message Service of Process Comport with Due Process?*, 53 B.C. L. Rev. 1929, 1930 (2012).
- 4 Shultz, *supra* note 1, at 1499. “Fair notice” requires “[s]ufficient notice apprising a litigant of the opposing party's claim.” Black's Law Dictionary 1090 (8th ed. 2004).
- 5 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial matters, Art. 21 (Nov. 15, 1965), 20 U.S.T. 361, 658 U.N.T.S. 163 (hereinafter Hague Convention). The Hague Convention was ratified Feb. 10, 1969, and covers about 80 jurisdictions; see also Michael O. Eshleman & Stephen A. Wolaver, *Using the Mail to Avoid the Hague Service Convention's Central Authorities*, 12 Or. Rev. Int'l L. 283, 295 (2010).
- 6 See Eshleman & Wolaver, *supra* note 5, at 292 (stating that the Hague Convention is a ratified treaty and is therefore the supreme law of the land).
- 7 See Hague Convention, *supra* note 5, at Art. 2-6; Eshleman & Wolaver, *supra* note 5, at 296-98; Hague Conference on Private Int'l Law, United States of America - Central Authority & Practical Information, Authorities (Oct. 3, 2013), available at [http://www.hcch.net/index\\_en.php?act=authorities.details&aid=279](http://www.hcch.net/index_en.php?act=authorities.details&aid=279).
- 8 Kevin W. Lewis, *E-Service: Ensuring the Integrity of International E-mail Service of Process*, 13 Roger Williams U. L. Rev. 285, 300-01 (2008); see also *In re Heckmann Corp.*, C.A. No. 10-378-LPS-MPT, 2011 WL 5855333, at \*4 (D. Del. Nov. 22, 2011) (“The courts have not definitively spoken as to whether email is allowed as an alternative method of service; however, no court has stated such service is impermissible under the Fed R. Civ. P.”); Ved P. Nanda & David K. Pansius, *Litigation of International Disputes in U.S. Courts* § 2:6 (2d ed. 2005); see also *In re Int'l Telemedia Assocs.*, 245 B.R. 713 (Bankr. N.D. Ga. 2000) (“It would be akin to hiding one's head in the sand to ignore such realities and the positives of such advancements [such as email].”).
- 9 Shultz, *supra* note 1, at 1524-25; Yvonne A. Tamayo, *Are You Being Served?: E-Mail and (Due) Service of Process*, 51 S.C. L. Rev. 227, 256 (2000).

- 10 Lewis, *supra* note 8, at 289; *In re Int'l Telemedia*, *supra* note 8. Use of email for service of process was first discussed and allowed by Mr. Justice Newman of the Queens Bench Division of the Royal Courts of Justice in London in 1996. Shultz, *supra* note 1, at 1508. By decision of the parties of the case, names of the people involved and the details of the case were not released. *See also* Frank Conley, *Service with a Smile: The Effect of E-Mail and Other Electronic Communications on Service of Process*, 11 *Temp. Int'l & Comp. L.J.* 407, 408 n. 7 (1997).
- 11 *Rio Prop. Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1017 (9th Cir. 2002). (The court noted, "In proper circumstances, this broad constitutional principle [of service of process] unshackles the federal courts from anachronistic methods of service and permits them entry in to the technological renaissance.").
- 12 *See, e.g., Microsoft Corp. v. Does*, No. 12-CV-1335, 2012 WL 5497946, at \*2-3 (E.D.N.Y. Nov. 13, 2012) (allowing service via email and Internet publication and stating that the Hague Convention doesn't apply when the address of the person to be served is not known); *Philip Morris USA Inc. v. Veles Ltd.*, No. 06 CV 2988(GBD), 2007 WL 725412, at \*3 (S.D.N.Y. Mar. 12, 2007) (finding that service of process via email and fax was valid); *D'Acquisto v. Triffo*, No. 05-C-0810, 2006 WL 44057, at \*2-3 (E.D. Wis. Jan. 6, 2006) (granting plaintiff's motion to serve foreign defendant when it "appear[ed] that defendant ... is attempting to evade service"); *Williams v. Adver. Sex LLC et al.*, 231 F.R.D. 483 (N.D. W. Va. 2005) (concluding that service of process on an Australian defendant via email was appropriate); *Viz Commc'ns Inc. v. Redsun et al.*, No. C-01-04235 JF, 2003 WL 23901766, at \*6 (N.D. Cal. Mar. 28, 2003) ("The district court has direction to allow service by e-mail.") (denying motion to dismiss on the basis of insufficient service of process); *Ryan v. Brunswick Corp. et al.*, No. 02-CV-133(E) F, 2002 WL 1628933, \*3 (W.D.N.Y. May 31, 2002) (holding that plaintiff may "serve process by regular mail, fax and/or e-mail"); *Elec. Boutiques Holdings Corp. v. Zuccarini*, No. CIV. A. 00-4055, 2001 WL 83388, at \*1 (E.D. Pa. Jan. 25, 2001) (upholding service of process via mail to an elusive defendant). State courts have also allowed service via email. *See, e.g., Hollow v. Hollow*, 747 N.Y.S.2d 704 (N.Y. Sup. Ct., Oswego County 2002).
- 13 *Nanda & Pansius*, *supra* note 8. The defendant usually expresses this preference either through the structure of the defendant's business or by the explicit instruction of the defendant.
- 14 *See, e.g., ADT Sec. Servs. v. Sec. One Int'l Inc. et al.*, No. 11-CV-05149, 2012 WL 3580670, at \*2 (N.D. Cal. Aug. 17, 2012) (finding service by email was reasonably calculated to provide actual notice to the defendant); *Power Corp. of Can. v. Power Fin. et al.*, No. 4:09-CV-0510, 2009 WL 982750, at \*1 (M.D. Pa. Apr. 13, 2009) (holding that service via an email address that the defendant had previously used was reasonably calculated to provide notice); *Williams-Sonoma Inc. v. Friendfinder Inc. et al.*, No. C 06-06572, 2007 WL 1140639, at \*2 (N.D. Cal. Apr. 17, 2007) (same).
- 15 South Carolina enacted the Uniform Electronic Transactions Act in 2004, permitting email service of process on corporations, partnerships and unincorporated associations. *S.C. Code Ann. § 26-6-190* (2007). New York allows for service of process via email through Rule 308 of the New York Civil Practice Law, which states that when service of process through traditional methods is "impracticable," a court may order any manner of service that it finds will likely notify the defendant. *See also* Specht, *supra* note 3, at 1948-49 (stating that a government agency may also allow service of process via email "on any vendor, entity or individual that a governmental agency regulates or with which the government does business").
- 16 These courts rejected service of process via email before the trend took root. The court in *Columbia Insurance Co. v. Seescandy.com et al.*, 185 F.R.D. 573 (N.D. Cal. 1999), held that service via electronic means was not sufficient under the standards of the Federal Rules of Civil Procedure. Similarly, in *Wawa Inc. v. Christansen*, No. 99-1454 (E.D. Pa. 1999), the court held that emailing service of process to a Danish citizen was not an approved method of service under Rule 4 "at th[e] time."
- 17 *Ehrenfeld v. Salim a Bin Mahfouz* No. 04 Civ. 9641, 2005 WL 696769, at \*3 (S.D.N.Y. Mar. 23, 2005).
- 18 No. Civ. A. 3:04 CV 741, 2004 WL 1576703, at \*1-2 (D. Conn. July 13, 2004).
- 19 Donna Tam, *Facebook by the Numbers: 1.06 Billion Monthly Active Users*, CNET News, Jan. 30, 2013, available at [http://news.cnet.com/8301-1023\\_3-57566550-93/facebook-by-the-numbers-1.06-billion-monthly-active-users/](http://news.cnet.com/8301-1023_3-57566550-93/facebook-by-the-numbers-1.06-billion-monthly-active-users/); *see also*, Facebook Localization Tools, [https:// developers.facebook.com/docs/internationalization/](https://developers.facebook.com/docs/internationalization/). Facebook started translating its website in 2008; *see also* Ellen Lee, *Facebook Beat MySpace in May*, S.F. Chron., June 21, 2008, at C1; *see also*, Nidhi Subbaraman, *Smartphone Users Check Facebook 14 Times a Day, Study Says*, NBC News, Mar. 28, 2013, available at <http://www.nbcnews.com/technology/smartphone-users-check-facebook-14-times-day-study-says-1C9125315/>; *see also* William Wagner & Joshua R. Castillo, *Friendship Due Process: Facebook as a Fair Method of Alternative Service*, *Widener L. Rev.* 259, 269-74 (2013).

- 20 Shultz, *supra* note 1, at 1497; Melodie M. Dan, *Social Networking Sites: A Reasonably Calculated Method to Effect Service of Process*, 1 Case W. Reserve J.L. Tech. & Internet 183, 185 (2010).
- 21 *Mpafe v. Mpafe*, No. 27-FA-11-2453, *Order for Service by Publication on the Internet* (Minn. Dist. Ct., Hennepin County May 10, 2011), available at <http://www.scribd.com/doc/70014426/Mpafe-v-Mpafe-order/>; *FTC v. PCCare 247 Inc.*, No. 12 Civ. 7189, 2013 WL 841037, at \*4 (S.D.N.Y. Mar. 7, 2013); see also Wagner & Castillo, *supra* note 19, at 265.
- 22 See Jeremy A. Colby, *You've Got Mail: The Modern Trend Towards Universal Electronic Service of Process*, 51 Buff. L. Rev. 337, 381-82 (2003) (stating that technological advances have resulted in the evolution of litigation services) (citing Tamayo, *supra* note 9, at 227-28); Conley, *supra* note 10, at 414; see also Eshleman & Wolaver, *supra* note 6, at 286 (arguing that attorneys in the United States are losing enthusiasm for the Hague Convention altogether, calling it “time-consuming” and requiring “unnecessarily complex steps”).
- 23 Catherine Kessedjian, Preliminary Document No. 7 on Electronic Data Interchange, Internet and Electronic Commerce 27 (2000), available at [http://www.hcch.net/upload/wop/gen\\_pd7e.pdf](http://www.hcch.net/upload/wop/gen_pd7e.pdf).
- 24 Hague Convention, *supra* note 5, at preamble; Eshleman & Wolaver, *supra* note 6, at 294.
- 25 *Rio Props.*, 284 F.3d at 1017 (citing *Mullane*, 339 U.S. at 314); see also Fed. R. Civ. P. 4(f)(1).
- 26 Lewis, *supra* note 8, at 302; the U.K. High Court allowed a plaintiff to serve an order to a defendant over Twitter in 2009. Dan, *supra* note 20, at 185 (citations omitted).
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