What's in the Contract?: *Rockefeller*, the Hague Service Convention, and Serving Process Abroad

Today's global economy relies on transnational commerce. The Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Service Convention"), implemented in 1965, encouraged transnational commerce by establishing a streamlined mechanism for serving foreign parties with process. More reliable international service methods helped ensure parties that they could resolve disputes with foreign parties through the courts. The Hague Service Convention thus created a bridge between civil and common law procedures on service while reducing some of the risks of engaging in business with foreign parties.

At the same time, the Hague Service Convention frequently runs into tension with contractual provisions that address service of process. Even though much international dispute resolution occurs through arbitration today, these arbitral awards are often enforced through national court systems. Many parties choose specific service methods by contract for potential disputes or enforcing arbitral awards, and these service provisions may not comply with one party's home country's interpretation of the Hague Service Convention. In particular, Article 10 of the Hague Service Convention permits mail service on a foreign defendant only if the state of destination does not object. But what happens when a defendant in an objecting state agrees to mail service by contract? Should courts adhere to a nation-state's objection to mail service within its borders, and ignore the contract? Or should the court give meaning to the parties' contract and permit such service into the objecting state?

These two approaches—which this Note refers to as the supremacy and autonomy approaches, respectively—offer distinct solutions to the "contracting around" issue that arose in the California Supreme Court's Rockefeller *opinion. Both the supremacy and autonomy approaches emphasize different values, with the supremacy approach underscoring the Hague Service Convention and sovereignty over contracts between parties. The autonomy approach, alternatively, supports the parties' interests in adhering to their bargained-for contract and avoiding the use of the Hague Service Convention as a defensive mechanism by wily defendants. Given the prevalence of both transnational commerce and contractual service provisions, courts will continue to face this "contracting around" issue going forward. Indeed, these uncertainties harm the global economy by inserting uncertainty into transnational relationships: Will a party be able to effectively hold another party accountable through dispute resolution if it cannot use an agreed-upon method of service?*

This Note proposes a solution that draws on both of the above approaches. The Hague Service Convention and the Federal Rules of Civil Procedure already support waiver of service that avoids countries' Article 10(a) objections. Under these textual readings of the treaty and rules, parties must focus on "what's in the contract" and determine (1) whether waiver is permissible under the forum's law, (2) if the parties have waived service, and (3) if the Hague Service Convention even applies. Through these textual interpretations, alongside potential clarifications from the Hague Conference and the Advisory Committee on Civil Rules, this Note offers a way to reassure parties engaged in transnational commerce of the availability of service of process that quickly and effectively triggers dispute resolution. A clear waiver regime will support the enforcement of arbitration awards and thus strengthen the primary transnational dispute resolution mechanism in use today, without overriding the sovereignty of nation-states who object to specific service methods under the Hague Service Convention.

INTRODUCTION

Two companies have invested significant time in drafting and negotiating an international business agreement. The contract likely contains a provision on how either party can commence a lawsuit, with specific instructions on how to serve the required documents upon the other party. Perhaps a few months later, the U.S. company believes a breach has occurred and brings a lawsuit against the foreign company. In order to serve the foreign party with notice of the lawsuit and trigger a court's jurisdiction, the U.S. company's lawyers will likely look at the contract itself and adhere to any relevant provisions on service of process. The U.S. company asks, "what's in the contract?" and then adheres to its provisions. But what if the foreign company arrives in a U.S. court and argues the contract's service provision is actually invalid under international law? Suddenly, "what's in the contract" might not matter as much.

This common "contracting around" issue in transnational litigation, especially in the arbitration-enforcement context, exhibits the tensions of applying the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention)[1] to commercial parties who often insert their own service provisions in contracts. In its recent decision in *Rockefeller v. Changzhou SinoType*, the California Supreme Court found that under certain circumstances, the parties' contractual service provisions could avoid the Hague Service Convention requirements.[2] In effect, this allows parties to contract around the service requirements of international law.

The court's decision was met with both scorn and praise from various sectors, encapsulating distinct theoretical conceptions of how commercial parties and freedom of contract should interact with state actors who have created an applicable international treaty on service.[3] Because the U.S. Supreme Court denied certiorari,[4] many important questions lack sufficient answers: Does *Rockefeller*'s logic replace potential gamesmanship concerns with a subversion of sovereign power

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

2. *See* Rockefeller Tech. Invs. (Asia) VII v. Changzhou SinoType Tech. Co., 460 P.3d 764, 767 (Cal. 2020) (finding that "the Convention applies only when the law of the forum state requires formal service of process to be sent abroad" and "because the parties' agreement constituted a waiver of formal service of process under California law in favor of an alternative form of notification, the Convention does not apply").

3. *See infra* Part II.

4. Rockefeller Tech. Invs. (Asia) VII v. Changzhou SinoType Tech. Co., 460 P.3d 764, *cert. denied*, 141 S. Ct. 374 (2020).

over service within a nation-state's borders?[5] How will foreign states react to a decision that weakens their ability to control service rules in their own country, especially in civil law countries that view service as a sovereign act? Can commercial parties simply bypass the Hague Service Convention according to *Rockefeller*? And how will the common hypothetical situation laid out above be resolved going forward?

Uncertainty surrounding international service of process poses a serious threat to the ease, efficiency, and practicability of international contracting in our global economy. Parties will more likely engage in business with foreign parties if they can ensure accountability and properly assign liability through litigation. International service of process enables parties to bring such lawsuits and grants potential plaintiffs a more practical method for assigning liability in courts of their home nation, compared to litigating in foreign courts. To that point, a clear international service regime offers greater efficiency in dispute resolution. As many international commercial disputes are resolved by arbitration,[6] clear service of process rules encourage the efficient recognition of arbitral awards. Following *Rockefeller*, though, litigants lack clarity.

Scholars and courts have articulated two distinct approaches to the "contracting around" issue. While the supremacy approach emphasizes the Hague Service Convention's broad application and the narrowness waiving service, the autonomy approach instead pushes for a formalistic definition of "service of process" and conceives of a broad right of waiver, even ex ante.

This Note offers a solution to the current impasse by drawing on both of the above approaches. Litigants can contractually waive service of process under the existing text of the Hague Service Convention and the Federal Rules of Civil Procedure. By doing so, litigants will avoid triggering the application of the Hague Service Convention, and therefore courts will hold parties to their contractually agreed-upon method of service. Both the Hague Conference on Private International Law and the Advisory Committee on Civil Rules can additionally offer clarifications on key provisions that solidify this right to wavier. This solution resolves the existing tensions between a contract's service terms and the Hague Service Convention's support of the waiver of service requirements, even ex ante.

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5. Unless specified otherwise, the use of "state" in this Note refers to nation-states.

6. *See* Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 440–41 (2003) (discussing the number of commercial disputes resolved through international arbitration).

This Note proceeds as follows: Part I provides an overview of service of process, the applicable Federal Rules of Civil Procedure, the relevant provisions of the Hague Service Convention, and how the Convention and U.S. domestic laws on service interact. This Part also explores case law addressing the "contracting around" issue before *Rockefeller* and provides a detailed explication of the seminal *Rockefeller* case itself. Part II analyzes the supremacy and autonomy approaches. Part III highlights how waiver of service not only resolves the "contracting around" issue but is supported by both the Hague Service Convention and Federal Rules of Civil Procedure. Finally, this Note applies the proposed waiver regime to the facts of the *Rockefeller* case, emphasizing the importance of "what's in the contract."

I. INTERNATIONAL SERVICE AND *ROCKEFELLER*

Service of process fulfills several fundamental roles when commencing a lawsuit. In order to notify a defendant of a lawsuit commenced against her, the U.S. Constitution's due process clause requires that a plaintiff provide the defendant with the court summons and the plaintiff's complaint.[7] These documents are collectively referred to as process, and the plaintiff's act of providing them is called service.[8] In addition, a court cannot exercise personal jurisdiction over the defendant without proper service that is "reasonably calculated . . . to apprise interested parties of the pendency of the action."[9] Service thus fulfills two functions: enabling the court to exercise personal jurisdiction while also informing the defendant of a lawsuit commenced against her. If a plaintiff does not properly serve process, then the court itself cannot exercise jurisdiction over the defendant, even if the defendant has some notice of the lawsuit.

Serving process in the United States requires litigants to comply with jurisdiction-specific rules. A litigant in federal court must adhere to Federal Rule of Civil Procedure ("FRCP") Rule 4,[10] while litigants in domestic state courts will adhere to the rules of the relevant jurisdiction. Compliance with these jurisdiction-specific rules also requires litigants to adhere to certain forms of service abroad, as restricted by domestic rules and treaties. An understanding of these statutory and treaty requirements, in addition to illuminating case law,

7. *Service of Process*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/service_of_process (last visited Nov. 5, 2022) [https://perma.cc/H6CH-HBJT].

8. *See id.*

9. Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950).

10. FED. R. CIV. P. 4.

sheds light on the complex, overlapping requirements at issue in *Rockefeller*.

A. Serving Abroad Under the Federal Rules of Civil Procedure

FRCP 4 establishes the method by which litigants in federal court can serve process and accomplish the purposes noted above.[11] According to FRCP 4(c)(1), service must include both a summons and a copy of the complaint.[12] In order to serve an "[i]ndividual in a [f]oreign [c]ountry" under FRCP 4(f)(1),[13] a litigant may effect service "by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents."[14] Practically, a plaintiff seeking to serve a foreign defendant would send a summons and copy of the complaint by one of the methods dictated by the Hague Service Convention. Serving a foreign corporation also requires adherence to FRCP 4(f).[15] In addition to "internationally agreed means of service" in FRCP 4(f)(1),[16] parties may also rely on alternative means of service not prohibited by international agreement if a court so orders, according to FRCP 4(f)(3).[17] For example, if initial attempts at service fail, a plaintiff can ask a court to order service by email if doing so is not explicitly restricted under an applicable international agreement.[18] At the same time, service must be "reasonably calculated, under all the

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11. *See* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1063 (4th ed. 2022) (discussing the function of Rule 4); FED. R. CIV. P. 4(k)(1); *see also* Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 444–45 (1946) ("[S]ervice of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served."); Eric Porterfield, *Too Much Process, Not Enough Service: International Service of Process Under the Hague Service Convention*, 86 TEMP. L. REV. 331, 333 (2014) (noting that service of process historically involved literally compelling an answer because a defendant was physically seized); Kent Sinclair, *Service of Process: Rethinking the Theory and Procedure of Serving Process Under Federal Rule 4(c)*, 73 VA. L. REV. 1183, 1187–89 (1987) (examining the long history of service of process, including elements of service in the ancient Code of Eshnunna and the medieval English practice of preliminary arrest for civil actions).

12. FED. R. CIV. P. 4(c)(1).

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

14. *Id.*; *see* Hague Service Convention, *supra* note 1.

15. See FED. R. CIV. P. 4(h)(2), although an exception exists for personal delivery under FED. R. CIV. P. 4(f)(2)(C)(i).

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

17. FED. R. CIV. P. 4(f)(3); *see also* Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1014–15 (9th Cir. 2002) (rejecting a reading of FRCP 4(f) implying a hierarchy between the subdivisions). Although dicta, the court in *Rio* did note that a federal court cannot order an alternative form of service under FRCP 4(f)(3) that directly contradicts an applicable international agreement such as the Hague Service Convention. *Rio Props.*, 284 F.3d at 1015 n.4.

18. *See Rio Props.*, 284 F.3d at 1017 (holding that service by email was acceptable in this case).

circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" in order to satisfy constitutional notions of due process.[19] Finally, the typical timing requirements for service do not apply to service in a foreign country.[20]

The 1983 and 1993 Amendments to FRCP 4 establish an alternative mechanism that enables plaintiffs serving a defendant in a foreign country to avoid some of the service rules' formalities.[21] Under FRCP 4(d), a plaintiff can simply notify the defendant by delivering the complaint and requesting that she *waive* formal service of a summons.[22] The notice must be sent by "first-class mail or other reliable means."[23] If the defendant returns the waiver, the plaintiff can file the waiver and the FRCP apply as if formal service had been effected at the time the waiver was filed.[24]

B. The Hague Service Convention and Harmonization

Although the FRCP established a consistent standard for service of process in federal courts throughout the United States,[25] service between litigants in the United States and abroad remained a "judicial nightmare" before the establishment of the Hague Service Convention.[26] A boom in international commerce in the late twentieth century sparked an increase in civil litigation involving interstate and international litigants.[27] Significant tension arose due to the different service requirements in various countries, particularly between civil

19. Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950).

20. FED. R. CIV. P. 4(m). Except for service in a foreign country or a showing of good cause for failing to meet the timing requirement, a plaintiff must serve a defendant within ninety days of the complaint being filed, otherwise the court must dismiss the action or compel service. *Id.*

21. *See* FED. R. CIV. P. 4(d) advisory committee's note to 1993 amendment (noting that it would not be useful to require plaintiffs to comply with "all the formalities of service in a foreign country" and highlighting the high costs of translating service documents, for example).

22. FED. R. CIV. P. 4(d).

23. FED. R. CIV. P. 4(d)(1)(G).

24. FED. R. CIV. P. 4(d)(4).

25. Domestic states within the United States, however, "continued to have disparate service of process procedures." Gary A. Magnarini, *Service of Process Abroad Under the Hague Convention*, Comment, 71 MARQ. L. REV. 649, 656 (1988). Foreign litigants had to deal with these diverse procedural requirements, while U.S. plaintiffs could not always apply the accessible service methods offered under FRCP 4 because states lacked any uniformity on out-of-state service requirements. *Id.*

26. *Id.* at 650; *see also* Porterfield, *supra* note 11, at 336 (describing how Americans needed to serve a foreign defendant according to the foreign jurisdiction's laws, while concurrently satisfying domestic procedural and due process requirements).

27. Porterfield, *supra* note 11, at 336 (citing WRIGHT & MILLER, *supra* note 11, § 1133).

and common law service.[28] While private individuals often deliver service in the United States, civil law countries generally consider service a sovereign act performed only by judicial officers or other government agents.[29] Consequently, nations subscribing to such a conception of service may perceive other private parties serving process within their borders as a violation of their sovereignty.[30] In order to bridge the massive gaps between civil and common law on service of process while developing a standard international process, nation-states convened in 1965 to draft the Hague Service Convention.[31]

The Hague Service Convention created a system of judicial service of process that enables effective service and affords due process protections for litigants in the courts of all signatory nation-states.[32] Building off prior conventions, the Hague Service Convention sought to "establish a system which . . . brings actual notice of the document to be served to the recipient in sufficient time" while simplifying the methods of transmission and facilitating proof of service abroad.[33] Under Article 1, the Convention applies in a (1) civil or commercial matter,[34] (2) when a judicial or extrajudicial document (3) must be transmitted for service abroad and (4) the address of the recipient is known.[35] Application of the convention thus depends on whether a judicial or extrajudicial document must be transmitted abroad, and this determination turns on the law of the court's jurisdiction instead of the defendant's residence.[36] If the above conditions are met and the Hague Service Convention

28. *See id.* at 336–37 (discussing issues that arose due to difference between civil and common law service).

29. *Id.*

30. Martinez, *supra* note 6, at 513.

31. *See* Hague Service Convention, *supra* note 1 (stating that the signatories aimed to create "means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time," and "to improve the organisation of mutual judicial assistance for that purpose").

32. Robert B. von Mehren, *International Control of Civil Procedure: Who Benefits*, 57 LAW & CONTEMP. PROBS. 13, 16 (1994). As of 2021, seventy-nine countries have ratified the Hague Service Convention. *See Status Table*, HAGUE CONF. ON PRIV. INT'L L., https://www.hcch.net/en/instruments/conventions/status-table/?cid=17 (last visited Nov. 9, 2022) [https://perma.cc/4RV4-63UJ] [hereinafter *Status Table*].

33. HAGUE CONF. ON PRIV. INT'L L., PRACTICAL HANDBOOK ON THE OPERATION OF THE SERVICE CONVENTION 3 (4th ed. 2016); *see also* Porterfield, *supra* note 11, at 338 ("This Convention was intended to simplify, standardize, and expedite service of process in member nations, while incorporating features consistent with due process.").

34. *See* Emily Fishbein Johnson, Note, *Privatizing the Duties of the Central Authority: Should International Service of Process Be Up for Bid*, 37 GEO. WASH. INT'L L. REV. 769, 777 (2005) (explaining that common-law countries tend to interpret "civil or commercial matters" to include all noncriminal matters, and that judges and Central Authorities in general are likely to make a liberal interpretation of the phrase).

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

36. Porterfield, *supra* note 11, at 339.

applies, then the treaty's procedures are mandatory.[37] By violating these procedures and not validly serving process, a plaintiff's suit will fail because the court lacks jurisdiction and thus cannot validly hear the case.

The Hague Conference on Private International Law's Practical Handbook, a key interpretive document, offers definitions of the "judicial and extrajudicial documents" to which the Hague Service Convention applies.[38] The handbook identifies writs of summons, decisions and judgments delivered by a member of judicial authority, and the defendant's reply as examples of "judicial documents."[39] Extrajudicial documents are distinguished from judicial documents because they do not directly relate to trial, and they require the involvement of an "authority or judicial officer," distinguishing them from purely private documents.[40]

The Hague Service Convention established one uniform method for service of these documents, as well as several alternative methods.[41] The Convention requires each signatory state to establish a Central Authority that receives service requests from other contracting states and then executes service upon parties while also certifying receipt of service.[42] This principal and uniform method of service is always available to foreign litigants, and is the "heart and soul of this multilateral treaty."[43] Postal, consular, and diplomatic service methods may be used as alternatives, provided that the receiving state has not explicitly objected to the their use.[44] Finally, litigants may use any other method of service expressly permitted in the receiving state by prior international agreement or its domestic law.[45] Articles 15 and 16 of the Hague Service Convention allow for the entry of default judgments under certain circumstances, and for relief from a default judgment in the interest of fairness and due process.[46] Indeed, this inclusion of due

37. *Id.*; *see* Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 705 (1988) (explaining that the Convention aims to ensure adequate notice, so "compliance with the Convention is mandatory in all cases to which it applies").

38. *See* HAGUE CONF. ON PRIV. INT'L L., *supra* note 33, at 29–30.

39. *Id.* at 29.

40. *Id.* at 30.

41. Porterfield, *supra* note 11, at 339–41.

42. Hague Service Convention, *supra* note 1, arts. 2–6.

43. Magnarini, *supra* note 25, at 658.

44. Hague Service Convention, *supra* note 1, arts. 8–11.

45. *Id.* arts. 11, 19, 24–25.

46. *Id.* arts. 15–16.

process protection evinced a significant step towards bridging the gap between common and civil law systems on service of process.[47]

C. Service by Mail Under the Hague Service Convention

Significant controversy has arisen regarding Article 10(a) of the Hague Service Convention, the mail service provision.[48] Article 10(a) states that "[p]rovided the State of destination does not object, the present Convention shall not interfere with . . . the freedom to send judicial documents, by postal channels, directly to persons abroad."[49] Contradicting interpretations of Article 10(a) long resulted in divergent applications by U.S. courts.[50] Some courts interpreted the Hague Service Convention to have banned service by mail.[51] These courts interpreted the phrase "send judicial documents" in Article 10(a) as distinct from all other provisions in the Convention, which used "effect service of judicial documents."[52] As such, "send" indicated permission to transmit only non-service documents, and service by mail would illogically circumvent the complex Central Authority system.[53] Other courts interpreted the Hague Service Convention as permitting service by mail, because Article 10(a)'s inclusion in the Hague Service Convention would be superfluous if not applicable to service.[54] While litigants mostly relied on the Central Authority system for years due to the uncertainties of mail service,[55] the U.S. Supreme Court recently resolved this issue in *Water Splash, Inc. v. Menon*.[56] Analyzing the treaty's text, its overall structure, and the "equally authentic" French

47. Magnarini, *supra* note 25, at 659 (citing Phillip W. Amram, *The Proposed International Convention on the Service of Documents Abroad*, 51 A.B.A. J. 650, 653 (1965) (discussing the significant change Articles 15 and 16 trigger for civil law countries that previously used *notification au parquet*, which did not require notice)).

48. von Mehren, *supra* note 32, at 17.

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

50. von Mehren, *supra* note 32, at 17.

51. *See, e.g.*, Bankston v. Toyota Motor Corp., 889 F.2d 172, 173 (8th Cir. 1989); cases cited *infra* note 53.

52. *See* cases cited *infra* note 53.

53. *See, e.g.*, *Bankston*, 889 F.2d at 173 (focusing on plain meaning of "send"); McClenon v. Nissan Motor Corp., 726 F. Supp. 822, 826 (N.D. Fla. 1989) (finding that mail service illogically circumvented the Central Authority system); Pochop v. Toyota Motor Co., 111 F.R.D. 464, 466 (S.D. Miss. 1986) (plain meaning of "send"); Mommsen v. Toro Co., 108 F.R.D. 444, 446 (S.D. Iowa 1985) (stating that allowing mail service would circumvent the Central Authority).

54. *See, e.g.*, Ackermann v. Levine, 788 F.2d 830, 839 (2d Cir. 1986); Shoei Kako Co. v. Superior Ct., 109 Cal. Rptr. 402, 411–12 (Ct. App. 1973); Brockmeyer v. May, 383 F.3d 798, 802 (9th Cir. 2004).

55. Porterfield, *supra* note 11, at 344.

56. 137 S. Ct. 1504 (2017).

translation,[57] the Court held that Article 10(a) permits nation-states to receive mail service.[58] In addition, the Convention's drafting history,[59] the longstanding position of the President, and the views of other signatory states supported the Court's holding.[60]

While the text of the Hague Service Convention allows service by mail, the Article 10 methods of service only apply "[p]rovided the State of destination does not object."[61] Indeed, nation-states may declare opposition to postal and diplomatic service, except against nationals of the originating state,[62] and nation-states can issue declarations to specify the application of Articles 15 and 16 as well.[63] Many nation-states have decided to declare the inapplicability of Article 10.[64] For example, China has "oppose[d] the service of documents in the territory of the People's Republic of China by the methods provided by Article 10 of the Convention," while also issuing declarations for several other articles.[65] Because China has objected to all of the alternative forms of service available under the Hague Service Convention, a plaintiff seeking to transmit service documents upon a Chinese

57. *See* Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 699 (1988) (acknowledging the equal authenticity of both the French and English translations of the Convention); *see also* Vienna Convention on the Law of Treaties art. 33, May 23, 1969, 1155 U.N.T.S. 331 (explaining that treaty text is equally authoritative in each authenticated language).

58. Water Splash, Inc. v. Menon, 137 S. Ct. 1504, 1509–11 (2017).

59. *See* Phillip W. Amram, *The Proposed International Convention on the Service of Documents Abroad*, 51 A.B.A. J. 650, 653 (1965) ("Article 10 permits direct service by mail . . . unless [the receiving] state objects to such service.")

60. *Water Splash*, 137 S. Ct. at 1511–12; *see also* HAGUE CONF. ON PRIV. INT'L L., *supra* note 33, at 89 n.379 ("Space does not allow us to refer to the numerous decisions of other States expressly supporting the view that Art. 10(a) allows for service of process."); HAGUE CONF. ON PRIV. INT'L L., REPORT ON THE WORK OF THE SPECIAL COMMISSION OF APRIL 1989 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 AND OF 18 MARCH 1970 ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS 5 (1989), https://assets.hcch.net/docs/e8456534-1ba4-4bc9-ade8-bcf3a7b85c5d.pdf [https://perma.cc/8BK7-JA2P] (stating that "theoretical doubts about the legal nature of the procedure were unjustified" and that the Convention permits service by mail).

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

62. *Id.* art. 8.

63. *Id.* arts. 15–16.

64. *See Applicability of Articles 8(2), 10(a), (b) and (c), 15(2), 16(3)*, HAGUE CONF. ON PRIV. INT'L L., https://assets.hcch.net/docs/6365f76b-22b3-4bac-82ea-395bf75b2254.pdf (last visited Oct. 9, 2021) [https://perma.cc/K2FY-F745] (displaying the oppositions and declarations of all member states for each relevant Article).

65. *Status Table: People's Republic of China*, HAGUE CONF. ON PRIV. INT'L L., https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=393&disp=resdn (last visited Jan. 29, 2023) [https://perma.cc/V9HT-BHFA]. This analysis focuses on China because the plaintiff in *Rockefeller* sued a Chinese defendant. Rockefeller Tech. Invs. (Asia) VII v. Changzhou SinoType Tech. Co., 460 P.3d 764 (Cal. 2020). Many other countries, however, object to all forms of Article 10 service, and several more have objected to only Article 10(a). *See Status Table*, *supra* note 32

defendant must proceed through the Central Authority method. As the Practical Handbook notes, the validity of service pursuant to Article 10(a) does not depend on the domestic law of the destination state because "it is the declaration that matters."[66]

Stepping back, it is important to consider the relationship between the Hague Service Convention and domestic state and federal law on serving process. Under the U.S. Constitution's Supremacy Clause, treaties are the supreme law of the land and are binding upon U.S. states.[67] While a non-self-executing treaty only becomes enforceable through legislative implementation by Congress,[68] a self-executing treaty takes effect as domestic law immediately upon ratification.[69] Courts have repeatedly found the Hague Service Convention to be self-executory.[70] Because of the treaty's status as the supreme law of the land, it generally preempts conflicting state and federal procedural law on serving process.[71] According to the Supreme Court's critical *Volkswagenwerk* opinion, the Hague Service Convention mandatorily applies under the Supremacy Clause so long as the law of plaintiff's jurisdiction requires transmittal of a service document.[72] If U.S. law requires transmittal of a service document on a defendant, then a U.S. plaintiff serving a foreign defendant in a member state to the Convention must adhere to the treaty, including an Article 10(a) declaration by the foreign defendant's nation.

Before analyzing the contracting issue at the root of *Rockefeller*, an overview of the above-related legal framework is in order. If a U.S. litigant in federal court seeks to effect service upon a foreign defendant in a member state to the Convention, she must first adhere to FRCP 4(f), assuming that the defendant has not agreed to waive service under FRCP 4(d).[73] FRCP 4(f)(1) specifically directs the plaintiff to comply with any internationally agreed means of service,[74] and the Hague Service Convention applies mandatorily based on the Constitution's Supremacy Clause[75] so long as the law of plaintiff's jurisdiction requires

66. HAGUE CONF. ON PRIV. INT'L L., *supra* note 33, at 82–83.

67. U.S. Const. art. VI ("[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.").

68. *Self Executing Treaty*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/self_executing_treaty (last visited Aug. 28, 2022) [https://perma.cc/T9KX-S4MN].

69. *See* Magnarini, *supra* note 25, at 659–60.

70. *See id.*; *e.g.*, Vorhees v. Fischer & Krecke, 697 F.2d 574, 575 (4th Cir. 1983).

71. *See* Magnarini, *supra* note 25, at 659–62.

72. Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 700 (1988).

73. FED. R. CIV. P. 4(d), (f).

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

75. *Volkswagenwerk Aktiengesellschaft*, 486 U.S. at 699.

transmittal of a service document.[76] Because the defendant has refused to waive service under FRCP 4(d), the FRCP require transmittal of a service document. If the defendant is present in a member state that has declared opposition to the Hague Service Convention's alternative forms of service, such as Article 10(a), then the plaintiff will need to serve through the Central Authority. Of course, the plaintiff may seek to serve by alternative means under FRCP 4(f)(3), but only if a judge grants permission.[77]

D. The "Contracting Around" Issue

A U.S. plaintiff has a more complicated path to serving a foreign defendant than a domestic one according to the roadmap laid out above, but the litigant can effect valid service by strictly adhering to the roadmap. Yet, what happens when the parties stipulate a service of process provision in their contract?[78] For example, Company A (residing in the United States) and Company B (residing in Belgium) agree to a business contract and stipulate to "service of process by express mail." If Company A needs to serve Company B in Belgium, which has not issued an Article 10(a) objection,[79] a court will presumably hold the parties to their agreement and require service by express mail. Now change the facts: Company B resides in an objecting nation-state such as China, Germany, or Switzerland.[80] The court faces tension between

76. Porterfield, *supra* note 11, at 339.

77. FED. R. CIV. P. 4(f)(3). For an extreme example of FRCP 4(f)(3)'s application, see Spencer Willig, Note, *Out of Service: The Causes and Consequences of Russia's Suspension of Judicial Assistance to the United States Under the Hague Service Convention*, 31 U. PA. J. INT'L L. 593 (2009). Due to a dispute ostensibly arising from the United States' charging of a fee for use of its Central Authority, Russia effectively "severed Hague Service Convention ties with U.S. courts in July 2003." *Id.* at 594, 599–60. Federal courts have resorted to alternative service under FRCP 4(f)(3) when the Hague Service Convention is not functioning, and almost uniformly do so when a plaintiff is serving a Russian defendant because of Russia's failure to process any U.S. service requests. *Id.* at 617 & n.130; *see also* Arista Recs. LLC v. Media Servs. LLC, No. 06 Civ. 15319, 2008 WL 563470 (S.D.N.Y. Feb. 25, 2008) (explaining that while a district court would usually require exhaustion of service methods under the Hague Service Convention before granting FRCP 4(f)(3) service, exhaustion is not needed under the "particular circumstances of this case").

78. *See* WRIGHT & MILLER, *supra* note 11, § 1062 ("Indeed it is common practice in many commercial contexts for the parties to incorporate service provisions into their contracts."); *see also* John F. Coyle & Christopher R. Drahozal, *An Empirical Study of Dispute Resolution Clauses in International Supply Contracts*, 52 VAND. J. TRANSNAT'L L. 323, 381 (2019) (finding that almost twenty percent of recent international supply agreements contain language specifically addressing service of process).

79. *Status Table: Belgium*, HAGUE CONF. ON PRIV. INT'L L., https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=391&disp=resdn (last visited Oct. 9, 2021) [https://perma.cc/T4BL-UMT6].

80. *See Status Table*, *supra* note 32 (listing member countries and their declarations to various articles of the Hague Service Convention).

the right of private parties to establish and stipulate to terms of service in their own contracts,[81] and the requirements of the statutory and treaty scheme profiled above. This issue sits at the root of *Rockefeller*, but several prior cases began developing an approach that supported contracting around the Hague Service Convention.

1. Pre-*Rockefeller* Case Law

Faced with this "contracting around" issue, several courts have allowed parties to avoid the requirements of the Hague Service Convention through stipulations in their contracts and instead conduct service by mail into an objecting state.[82] Although academics and some judges have criticized these cases, the *Rockefeller* court's reliance on this line of reasoning indicates its importance.

In 2010 the New York Supreme Court, Appellate Division, considered this "contracting around" issue in *Alfred E. Mann Living Trust v. ETIRC Aviation S.a.r.l* and allowed mail service as stipulated in the contract.[83] Plaintiff Alfred E. Mann Living Trust and defendant ETIRC entered a funding agreement alongside a separate unconditional guaranty, which included a waiver of jurisdiction and venue defenses, and "hereby waive[d] personal service of the summons, complaint and other process issued in any such action or suit."[84] Plaintiff served the guarantor of ETIRC, Roland Pieper, by email to his location in the Netherlands.[85] Pieper argued that the Hague Service

81. U.S. courts have long allowed parties to derogate from FRCP 4's service of process requirements, or even from service altogether. *See, e.g.*, WRIGHT & MILLER, *supra* note 11, § 1062; Dr.'s Assocs., Inc. v. Distajo, 107 F.3d 126, 136 (2d Cir. 1997) (affirming that parties could dispense with FRCP 4 compliance because the franchise agreements governed service of process and allowed service by mail upon a party's representative); Beautytuft, Inc. v. Factory Ins. Ass'n, 48 F.R.D. 15, 27 (E.D. Tenn. 1968) ("It appears well settled that a party may waive or be estopped from asserting an objection to service of process by reason of a stipulation in a contract."); Comprehensive Merch. Catalogs, Inc. v. Madison Sales Corp., 521 F.2d 1210, 1212 (7th Cir. 1975) ("It is well-settled that parties to a contract may agree to submit to the jurisdiction of a particular court and may also agree as to the manner and method of notice."); Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 316 (1964) (noting that parties may agree in advance to submit to the jurisdiction of a given court, permit notice to be served, or waive notice altogether).

82. Alfred E. Mann Living Tr. v. ETIRC Aviation S.a.r.l., 910 N.Y.S.2d 418 (App. Div. 2010); Masimo Corp. v. Mindray DS USA Inc., No. 12-02206, 2013 WL 12131723 (C.D. Cal. Mar. 18, 2013).

83. *Alfred E. Mann Living Tr.*, 910 N.Y.S.2d at 422.

84. *Id.* at 420–21.

85. *Id.* at 420. It is worth noting that the Netherlands has not actually objected to the Hague Service Convention's alternative forms of service such as those permitted in Article 10, potentially distinguishing this case from litigation involving defendants in objecting states that only accept Central Authority service. *See Status Table: Netherlands*, HAGUE CONF. ON PRIV. INT'L L., https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=413&disp=resdn (last visited Feb. 21, 2022) [https://perma.cc/LAL5-YLU9] (indicating that the Netherlands has issued no Article 10 declaration).

Convention's requirements for service abroad cannot be waived in the same manner that a domestic defendant waives the formalities of FRCP 4 service (or its state law equivalents).[86] The Appellate Division noted that, despite the Hague Service Convention's status as the "law of the land," it saw "no reason why the requirements of the Convention may not be waived by contract."[87] Indeed, the court evinced concern with potential gamesmanship by defendants. Precluding contractual waiver of the Hague Service Convention "would allow people to unilaterally negate their clear and unambiguous written waivers of service by the simple expedient of leaving the country," and defendants could then hide behind the Hague Service Convention rules and invalidate any service attempts.[88] The New York Appellate Division essentially held that parties could waive the Hague Service Convention because litigants could waive similar domestic service procedures, and because of the risk of party-perpetrated gamesmanship.

The Central District of California addressed these same concerns in *Masimo Corp. v. Mindray*.[89] In a purchasing and licensing agreement, the U.S. plaintiff and Chinese defendant consented "to service of process . . . by hand or by postage prepaid, first class, registered or certified mail, return receipt requested."[90] Plaintiff then served defendant Shenzhen Mindray in China "pursuant to the service of process provisions."[91] Defendant Mindray argued on a motion to quash service that plaintiff failed to comply with FRCP 4(f), which requires service pursuant to the Hague Service Convention and bars service by mail upon a Chinese defendant as a result.[92] The *Masimo* court, similar to the court in *Alfred E. Mann*, emphasized the ability of parties to deviate from FRCP 4 service requirements or to waive service altogether.[93] As a result, the court then found "no reason why parties may not waive by contract the service requirements of the Hague Convention," and noted that the *Alfred E. Mann* court came to the same conclusion.[94] Although defendant Mindray cited *Volkswagenwerk* to argue for the Hague Service Convention's mandatory application, the court reasoned that the Supreme Court did not consider this

86. *Alfred E. Mann Living Tr.*, 910 N.Y.S.2d at 421.

87. *Id.*

88. *Id.* at 422.

89. Masimo Corp. v. Mindray DS USA Inc., No. 12-02206, 2013 WL 12131723 (C.D. Cal. Mar. 18, 2013).

90. *Id.* at *1.

91. *Id.*

92. *Id.* at *1–2.

93. *Id.* at *2–3.

94. *Id.* at *3.

"contracting around" situation in V*olkswagenwerk*.[95] The *Masimo* court also cited two other cases[96] that reached similar outcomes regarding one's ability to waive the Hague Convention on the Taking of Evidence Abroad.[97]

Both *Alfred E. Mann* and *Masimo* emphasized the right of freedom of contract, holding that parties could waive the provisions of the Hague Service Convention. Both courts raised concerns that if parties were not held to their stipulated form of service, then foreign defendants could play games by hiding behind the Hague Service Convention's requirements and dispute any contractual method of service as ineffective.[98] The *Rockefeller* case directly called such analysis into question, and courts have clearly diverged on how to resolve this "contracting around" issue. Before identifying and analyzing two underlying approaches to this issue, this Note provides a careful analysis of the *Rockefeller* case itself.

2. The *Rockefeller* Case

In 2007 and 2008 Changzhou SinoType Technology Co. ("SinoType"), a Chinese company, met several times with Rockefeller Technology Investments (Asia) VII ("Rockefeller"), a U.S. investment partnership, for discussions regarding the creation of a new company.[99] The parties signed a memorandum of understanding in February 2008, which specified their intent to form a new company, the shares of interest each party would hold in the company, and provisions relating to jurisdiction and waiver.[100] The parties agreed to "provide notice in the English language" by courier, to submit "to the jurisdiction of the Federal and State courts in California and *consent to service of process* in accord with the notice provisions," and to send any disputes to arbitration.[101] When relationships soured in 2012, Rockefeller filed a demand for arbitration, but SinoType never appeared.[102] The arbitrator then issued a final award in 2013, and Rockefeller petitioned the

95. *Id.*; Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 705 (1988).

96. *Masimo Corp.*, 2013 WL 12131723, at *3; Image Linen Servs., Inc. v. Ecolab, Inc., No. 5:09-cv-149-Oc, 2011 WL 862226 (M.D. Fla. Mar. 10, 2011); Boss Mfg. Co. v. Hugo Boss AG, No. 97-8495, 1999 WL 20828 (S.D.N.Y. Jan. 13, 1999).

97. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555.

98. *See* Alfred E. Mann Living Tr. v. ETIRC Aviation S.a.r.l., 910 N.Y.S.2d 418, 422 (App. Div. 2010); *Masimo Corp.*, 2013 WL 12131723, at *3.

99. Rockefeller Tech. Invs. (Asia) VII v. Changzhou SinoType Tech. Co., 233 Cal. Rptr. 3d 814, 817 (Ct. App. 2018).

100. *Id.*

101. *Id.* at 818 (emphasis added).

102. *Id.*

California courts to confirm the arbitral award.[103] Upon Rockefeller's demonstration that it delivered a summons on SinoType by Federal Express,[104] the trial court confirmed the arbitration award of around $414 million and entered a default judgment against SinoType.[105]

Subsequent briefing revolved around SinoType's motion to quash the summons and set aside the judgment, but the trial court found that the parties "were permitted to contract around the Convention's service requirements."[106] The court also reflected a similar gamesmanship concern to the *Albert E. Mann* and *Masimo* courts.[107]

On appeal in 2018, the parties primarily disputed whether they may set their own terms of service by contract, and thus override the Hague Service Convention.[108] The appellate court first explained that China's objection to Article 10(a) rendered service by mail inapplicable.[109] The court next addressed Rockefeller's "contracting around" argument and determined that "parties may not agree by contract to accept service of process in a manner not permitted by the receiving country."[110] Emphasizing the text and context of the treaty, the court found that each *contracting state*, not a citizen therein, determines how service shall be effected under the Hague Service Convention.[111] Article 11 states that the Hague Service Convention "shall not prevent two or more contracting States from agreeing to permit . . . channels of transmission other than those provided for in the preceding Articles."[112] Chinese civil procedure law, however, requires that service by foreign parties receives the consent of the People's Republic of China—so, even Chinese domestic law does not allow foreign service of process by mail.[113] Finally, the Hague Service Convention permits nation-states, but not private parties, to decide

103. *Id.*

104. *Id.* at 819.

105. *Id.*; *see* Rockefeller Tech. Invs. (Asia) VII v. Changzhou SinoType Tech. Co., No. BS149995, 2014 WL 12669294 (Cal. Super. Ct. Oct. 23, 2014) (confirming Rockefeller's arbitration award).

106. *Rockefeller Tech.*, 233 Cal. Rptr. at 819, 822.

107. *See id.* at 822 (explaining that allowing "parties to enter into a contract with one another and then proceed to unilaterally disregard provisions out of convenience . . . would allow parties to simply return to their respective countries in order to avoid any contractual obligations").

108. *Id.* at 823.

109. *Id.* at 824. The court cited several cases to demonstrate the inapplicability of mail service when a country formally objects to Article 10(a). *See, e.g.*, Prince v. Gov't of China, No. 13-CV-2106, 2017 WL 4861988 (S.D.N.Y. Oct. 25, 2017) (China); Pats Aircraft, LLC v. Vedder Munich GmbH, 197 F. Supp. 3d 663, 673 (D. Del. 2016) (Germany); Shenouda v. Mehanna, 203 F.R.D. 166, 171 (D.N.J. 2001) (Egypt).

110. *Rockefeller Tech.*, 233 Cal. Rptr. at 825, 827.

111. *Id.* at 826.

112. Hague Service Convention, *supra* note 1, art. 11.

113. *Rockefeller Tech.*, 233 Cal. Rptr. at 826.

whether to allow mail service.[114] In response to *Alfred E. Mann* and *Masimo*, the appellate court dismissed these opinions for their cursory analysis and failure to confront the treaty's text.[115] The appellate court's holding emphasized the importance of the Hague Service Convention's supremacy, the right of a nation-state to define international service provisions effecting private parties within its borders, and comity in respecting the perspectives of foreign states on matters of international law.

The California Supreme Court, though, ultimately reached a novel and controversial outcome in 2020.[116] Reviewing existing precedent, such as *Volkswagenwerk*, the court explained that the Hague Service Convention applies only to *technical* service of process, involving a "formal delivery of documents."[117] Formal service of process performs two functions according to the court: asserting jurisdiction over the person and giving a defendant proper notice.[118] Critically, the court noted that *both* aspects may be waived.[119] As such, "if the law of the forum states that [ ] notice is to be somehow directed to one or several addressee(s), without requiring *service*, the Convention does not have to be applied."[120] Whether there is an occasion to transmit a judicial document for service is determined by reference to the law of the sending forum—California law in this case.[121]

Next, the court analyzed California law to determine if transmission of a judicial document was even required. According to California law, when parties have established a method of service in their arbitration agreement, a "copy of the petition and a written notice of the time and place of the hearing thereof . . . shall be served in the manner provided."[122] Section 1293 of California's Civil Procedure Code additionally states that an agreement to have arbitration within California "shall be deemed a consent of the parties thereto to the jurisdiction of the courts of this State to enforce such agreement . . . and by entering of judgment on an award under the agreement."[123]

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114. *Id.*

115. *Id.*

116. Rockefeller Tech. Invs. (Asia) VII v. Changzhou SinoType Tech. Co., 460 P.3d 764 (Cal. 2020).

117. *Id.* at 770 (quoting Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 700 (1988)).

118. *Id.* at 772.

119. *Id.* (citing Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 315–16 (1964)).

120. HAGUE CONF. ON PRIV. INT'L L., *supra* note 33, at 23.

121. *Rockefeller Tech.*, 460 P.3d at 771 (quoting *Volkswagenwerk*, 486 U.S. at 700–01).

122. CAL. CIV. PROC. CODE § 1290.4(a) (West 2022).

123. CAL. CIV. PROC. CODE § 1293 (West 2022).

Applying these above principles and statutes to the facts, the court found that the parties actually waived both the personal jurisdiction and notice aspects of service through their memorandum.[124] The memorandum stipulated that the parties agreed "to the jurisdiction of the Federal and State Courts in California" and to submit all disputes "to the Judicial Arbitration & Mediation Service in Los Angeles."[125] Section 1293 of the Civil Procedure Code confirms that the language of the memorandum constituted a consent to *jurisdiction* in California courts.[126] The memorandum also specified that *notice* would be provided "via Federal Express or similar courier," and that the parties "consent to service of process in accord with the notice provisions above."[127] The court read these provisions as waiving the otherwise applicable statutory requirements for service and agreeing upon an alternative form of notification for confirming an arbitration award, permitted under section 1290.4(a).[128] Noting the narrow nature of its holding, the court explained that the parties' waiver of formal service in the memorandum indicated that the case "does not present an occasion to transmit a judicial document for service abroad" and therefore the Hague Service Convention did not apply.[129] Additionally, the court noted the party-perpetrated gamesmanship concerns raised by the *Alfred E. Mann* and *Masimo* opinions.[130] Through this complicated analysis of California's arbitration statutes, the court determined that "what's in the contract" enabled the parties to contract around the Hague Service Convention, albeit through a narrow route.

II. SUPREMACY VERSUS AUTONOMY

While scholars and jurists have advanced various positions on the "contracting around" issue laid out above, this Note synthesizes these positions and identifies two underlying approaches: the supremacy approach and the autonomy approach. The supremacy approach argues for a broader and more uniform application of the

124. *Rockefeller Tech.*, 460 P.3d at 774.

125. *Id.*

126. *Id.*; CIV. PROC. § 1293.

127. *Rockefeller Tech.*, 460 P.3d at 774.

128. *Id.* at 775; CIV. PROC. § 1290.4(a). The Court explained that the use of "service" in subsection (a) did not reference formal service of process. *Rockefeller Tech.*, 460 P.3d at 775; *see also In re* Jennifer O., 108 Cal. Rptr. 3d 846, 853–54 (Ct. App. 2010) (finding analogous "service of the notice" language in the Welfare and Institutions Code did not require formal service which would have triggered the Hague Service Convention).

129. *Rockefeller Tech.*, 460 P.3d at 776 (quoting Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 707–08 (1988)).

130. *Id.*

Hague Service Convention, preempting domestic law and private contracts by the terms of the treaty. The autonomy approach instead argues that private parties should have a right to agree upon a waiver of service and suggests a narrow application of the Hague Service Convention. Any potential statutory or interpretive solution must engage with the values and policy determinations supporting both approaches.

A. The Supremacy Approach

The supremacy approach rests on a strong foundation: the Supremacy Clause of the U.S. Constitution.[131] As a treaty, the Hague Service Convention is the supreme law of the land,[132] and its requirements should apply broadly as a result. The approach evinces several key principles, including a functional definition of "formal service of process," broad applicability of the Hague Service Convention, and a narrow conception of one's ability to waive service of process. Various broad values underpin this approach, such as respect for a nation-state's treaty obligations, concern over offending foreign states and the resulting prejudice against U.S. litigants, and the promotion of international harmonization of service of process.

Under the supremacy approach, a functional definition of "formal service of process" determines the applicability of the Hague Service Convention instead of a formalistic one. Private international law practitioner Ted Folkman proposed that "formal service of process" should be defined as delivering documents that bring the defendant before the court by virtue of having been delivered on him, therefore exerting a *compulsory* legal effect on the defendant.[133] The functional effect of formal service is to compel the defendant into appearing before the court, whereas documents waiving service under FRCP 4(d) do not.[134] Documents sent abroad to provide official notice of legal proceedings must then be subject to the Hague Service Convention, which can even extend to extrajudicial documents such as petitions and grievances arising in agency actions.[135] Folkman explains that such a

131. U.S. CONST. art. VI.

132. *Id.*

133. Ted Folkman, *Case of the Day:* Rockefeller v. Changzhou SinoType, FOLKMAN LLC: LETTERS BLOGATORY (Apr. 13, 2020), https://folkman.law/2020/04/13/case-of-the-day-rockefeller-v-changzhou-sinotype/ [https://perma.cc/XYN8-ZUYY]; *see also Volkswagenwerk*, 486 U.S. at 695, 700 (" 'Service' means a formal delivery of documents that is *legally sufficient to charge the defendant* with notice of a pending action." (emphasis added)).

134. Folkman, *supra* note 133.

135. Brief of Amicus Curiae Law Professors in Support of Petitioner Changzhou Sinotype Technology Co., Ltd. at 10–11, Changzhou SinoType Tech. Co. v. Rockefeller Tech. Inv. (Asia) VII,

broad conception of formal service prevents a member state to the Hague Service Convention from providing an unusual method of service and, then, asserting the Hague Service Convention does not apply because of the method's status as nonformal service.[136] In this sense, a broad reading of formal service prevents nation-states from intentionally dodging the obligations of the Hague Service Convention.

At its outer bounds, the supremacy approach even suggests that the Hague Service Convention has wider applicability than *Rockefeller* and the U.S. Supreme Court have suggested. The California Supreme Court in *Rockefeller* noted that the Hague Service Convention only applies to a "formal delivery of documents," drawing on dicta from *Volkswagenwerk*.[137] The Hague Service Convention, though, explicitly states its desire to ensure an efficient means of delivering "judicial and extrajudicial documents,"[138] and the Practical Handbook provides an expansive definition of judicial documents: writs of summons, the defendant's reply, decisions and judgments delivered by a member of a judicial authority, as well as witness summons (subpoenas) and requests for discovery of evidence sent to the parties even if these are orders delivered as part of evidentiary proceedings.[139] If these documents are considered process, then the Hague Service Convention must apply beyond just what U.S. law considers "formal service of process," at least in order to comply with the Practical Handbook's interpretation of the treaty.[140]

Considering the broad applicability of the Hague Service Convention under the supremacy approach, waiver of service applies only under narrow circumstances. Because the approach defines formal service of process functionally (and broadly), any transmission of documents necessary to institute a legal proceeding is still serving process, not just providing notice.[141] Under this interpretation, the *Rockefeller* memorandum of understanding did not actually waive service of process because the memorandum "consent[ed] to service of

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141 S. Ct. 374 (2020) (No. 20-238), 2020 WL 5821360 [hereinafter Brief of Amicus Curiae Law Professors].

136. Folkman, *supra* note 133.

137. Rockefeller Tech. Invs. (Asia) VII v. Changzhou SinoType Tech. Co., 460 P.3d 764, 770 (Cal. 2020) (quoting *Volkswagenwerk*, 486 U.S. at 700).

138. Hague Service Convention, *supra* note 1.

139. HAGUE CONF. ON PRIV. INT'L L., *supra* note 33, at 29–30; *see also supra* notes 38–40 and accompanying text.

140. *See* Folkman, *supra* note 133 (explaining how restricting the Hague Service Convention's application to formal service "has to be wrong" because writs of summons, the defendant's reply, decisions and judgments delivered by a member of a judicial authority, and witness summons extend beyond what U.S. law considers to be "process").

141. Brief of Amicus Curiae Law Professors, *supra* note 135, at 14.

process"; the agreement only specified *how* service could be accomplished.[142] While parties could potentially waive service ex ante in a contract, due process would still require some form of notice to defendants.[143] The Supreme Court has upheld cognovit clauses that waive service outright in the context of debt collection,[144] but they appear to be generally disfavored by U.S. states and courts.[145] If a contract waived service of process but still required notice, then ex ante contractual waiver might also stand in tension with the complex procedural requirements of waiver ex post under FRCP 4(d), obviating the need for that process.[146]

As seen in the discussion above, several key values underlie the supremacy approach to the "contracting around" issue. First, this approach rests on a strong respect for nation-states and their international agreements. The contracting problem exposes a tension between nation-states determining how service may be provided and individual litigants who actually serve process. The supremacy approach emphatically supports the power of nation-states to determine how service is effected within their borders. While the Hague Service Convention applies to private international law, in a sense it functions as public international law: allowing nation-states to control how foreign service of process will occur inside their borders.[147] The California Court of Appeal noted "the Convention expressly allows each 'State of destination' to decide whether to permit mail service on its citizens by foreign defendants," but the Hague Service Convention "does not include an analogous provision" for private parties to agree to accept service by mail.[148] Because China has objected to mail service within its borders by adding a declaration to the Hague Service Convention,

142. *Id.*

143. John F. Coyle, Robin J. Effron & Maggie Cardner, *Contracting Around the Hague Service Convention*, 53 U.C. DAVIS L. REV. ONLINE 53, 59 (2019).

144. *See* D.H. Overmyer Co., of Ohio v. Frick Co., 405 U.S. 174 (1972). Cognovit clauses waive a debtor's right to notice and a hearing, enabling a creditor to quickly obtain a default judgment against a debtor when a loan default occurs. Coyle et al., *supra* note 143, at 58–59.

145. Coyle et al., *supra* note 143, at 58–59. *But see* sources cited *supra* note 81 (exemplifying case law that supports wavier of service outside of the debt-collection context).

146. Coyle et al., *supra* note 143, 59–60. *But see* Masimo Corp. v. Mindray DS USA Inc., No. 12-02206, 2013 WL 12131723 (C.D. Cal. Mar. 18, 2013) (stating that a majority of courts have allowed parties to contract around FRCP 4's requirements).

147. This is similar to Articles 1–5 of the United Nations Convention on Contracts for the International Sale of Goods, which cover that convention's scope and primarily speak to courts themselves instead of litigants. United Nations Convention on Contracts for the International Sale of Goods arts. 1–5, Apr. 11, 1980, 1489 U.N.T.S. 59.

148. Rockefeller Tech. Invs. (Asia) VII v. Changzhou SinoType Tech. Co., 233 Cal. Rptr. 3d 814, 826 (Ct. App. 2018).

Rockefeller's service through Federal Express *cannot* be correct under the supremacy approach.[149]

As a result, China and other states with an Article 10(a) objection might view the *Rockefeller* decision as infringing upon their sovereignty.[150] This could lead to downstream prejudice toward U.S. litigants, similar to Russia's outright refusal to process U.S. service requests through its Central Authority.[151] Civil law countries in particular—which consider service of process a "sovereign act, not properly performed by a private citizen"—may be concerned that the *Rockefeller* holding allows litigants to serve privately in their countries, regardless of any declarations the countries have made to the Hague Service Convention.[152]

International harmonization, particularly of service of process, also influences the supremacy approach. In addition to the approach's concern with offending foreign states, the supremacy approach focuses on the Hague Service Convention's goal of "ensur[ing] greater predictability and uniformity of procedure."[153] The Practical Handbook specifically notes that the Hague Service Convention "greatly facilitates and streamlines the transmission of documents for service abroad,"[154] while addressing the treaty's major goal of "[d]esiring to improve the organisation of mutual judicial assistance for that purpose."[155] For the Hague Service Convention to satisfy these harmonization goals, the member states must respect the service regime laid out by the treaty. Indeed, the Hague Service Convention contains no optional opt-out provision, such as the Convention on Contracts for the International Sale of Goods' Article 6.[156] These values of international harmonization

149. Folkman, *supra* note 133.

150. Brief of Amicus Curiae Law Professors, *supra* note 135, at 19; *see also* Jeanne Huang, *Changzhou Sinotype Technology Co., Ltd, Hague Service Convention and Judgment Enforcement in China*, CONFLICT OF LAWS (Nov. 10, 2020), https://conflictoflaws.net/2020/changzhou-sinotype-technology-co-ltd-hague-service-convention-and-judgment-enforcement-in-china/ [https://perma.cc/CAM2-KZEE] (arguing the judgment in *Rockefeller* "probably cannot be recognized and enforced in China" because China's Article 10(a) reservation clearly bars service by mail).

151. Brief of Amicus Curiae Law Professors, *supra* note 135, at 20 (noting that "[p]rivate litigants continue to be caught in the crossfire, with those litigants facing significant difficulty in serving process on Russian defendants"); *see supra* note 77 and accompanying text.

152. Brief of Amicus Curiae Law Professors, *supra* note 135, at 18 (quoting Porterfield, *supra* note 11, at 337).

153. Martinez, *supra* note 6, at 513.

154. HAGUE CONF. ON PRIV. INT'L L., *supra* note 33, at ix.

155. Hague Service Convention, *supra* note 1.

156. Brief of Amicus Curiae Law Professors, *supra* note 135, at 18 ("If the parties to the Convention wanted to allow private parties to opt out, they could have expressly provided for it, as has been done in other treaties."); *see also* United Nations Convention on Contracts for the

and respecting nation-states' treaty obligations underpin the supremacy approach to the contracting issue.

B. The Autonomy Approach

The autonomy approach instead emphasizes the rights of private litigants, and particularly plaintiffs' ability to avoid the requirements of the Hague Service Convention through waiver. This approach applies a formalistic definition of "formal service of process," supports the narrow application of the Hague Service Convention, and advocates for a broad right to waive service. Values such as respecting party autonomy, conforming to contractual agreements, avoiding gamesmanship, and promoting the speedy international commercial arbitration process all support this approach.

In contrast with the supremacy approach's functional definition of "formal service of process," the autonomy approach applies a formalistic definition. Quoting *Volkswagenwerk*, the California Supreme Court noted that the Hague Service Convention applies only to "service of process in the technical sense," meaning a "formal delivery of documents."[157] As such, formal service is distinct from merely providing notice.[158] According to the Practical Handbook, "if the law of the forum states that [ ] notice is to be somehow directed to one or several addresses(s), without requiring *service*, the Convention does not have to be applied," again distinguishing between formal service and simply providing notice.[159] Noting that formal service performs two functions—asserting the court's jurisdiction and providing due notice to a defendant—the *Rockefeller* court then found that the parties' memorandum waived both and thus took "the place of formal service of process."[160] The supremacy approach, on the other hand, would still perceive Rockefeller's Federal Express mailing upon SinoType as *functionally* compelling the defendant to appear, consequently comprising formal service.

The autonomy approach understands the Hague Service Convention's application as narrow. "[I]nternational transmission of service documents must comply with the Convention" only when formal

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International Sale of Goods, *supra* note 147, art. 6 (allowing parties to "exclude the application of this Convention or . . . derogate from or vary the effect of any of its provisions").

157. Rockefeller Tech. Invs. (Asia) VII v. Changzhou SinoType Tech. Co., 460 P.3d 764, 770 (Cal. 2020) (quoting Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 700 (1988)).

158. *Id.*

159. HAGUE CONF. ON PRIV. INT'L L., *supra* note 33, at 23.

160. *Rockefeller Tech.*, 460 P.3d at 774–75.

service of process is required by the domestic law of the forum.[161] The autonomy approach adheres to the Supreme Court's interpretation of the Hague Service Convention's applicability as demonstrated by *Volkswagenwerk*.[162] Demands for arbitration do not fall under the Hague Service Convention, as they are not judicial or extrajudicial.[163] While *Rockefeller* involved judicial enforcement of an arbitration award, the California Supreme Court demonstrated the influence of the autonomy approach when it found that the parties' memorandum satisfied both personal jurisdiction and notice requirements, obviating the need to apply the Hague Service Convention because no formal service needed to occur under California law.[164] Indeed, the Senate's analysis of the Hague Service Convention also adheres to the autonomy approach, finding the convention "is not a restricting convention which would, in any manner, limit the existing or future procedures in any signatory state if they are more liberal than the convention."[165] Instead, the Hague Service Convention mandatorily applies only in the narrow (albeit common) circumstance that formal service of process is required under the forum's domestic laws.

The autonomy approach relatedly supports a broad ability to waive service requirements, even under the Hague Service Convention. The *Masimo* court acknowledged the long-standing consensus that parties can waive FRCP 4 service requirements.[166] The Supreme Court has explained that "parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether."[167] Based on this reasoning, both the *Masimo* and *Alfred E. Mann* courts found that

161. *Id.* at 771.

162. *See Volkswagenwerk*, 486 U.S. at 700 ("If the internal law of the forum state defines the applicable method of serving process as requiring the transmittal of documents abroad, then the Hague Service Convention applies.").

163. *See* Application for Permission to File Amicus Curiae Brief, and Proposed Brief of Amicus Curiae California International Arbitration Council, in Support of Plaintiff and Respondent Rockefeller Technology Investments (Asia) VII at 16, *Rockefeller Tech.*, 460 P.3d 764 (No. S249923), 2019 WL 4752965 [hereinafter Proposed Brief of Amicus Curiae California International Arbitration Council]. Arbitration procedures are not instituted by courts, so they are not "judicial," and the Hague Service Convention defines extrajudicial documents as those emanating from officers of the contracting state. *Id.* at 16–17. Therefore, demands for arbitration are neither judicial nor extrajudicial documents. S*ee generally* PRACTITIONER'S HANDBOOK ON INTERNATIONAL ARBITRATION AND MEDIATION 63–81 (Daniel M. Kolkey, Richard Chernick & Barbara Reeves Neal eds., 3d ed. 2012).

164. *Rockefeller Tech.*, 460 P.3d at 775.

165. Proposed Brief of Amicus Curiae California International Arbitration Council, *supra* note 163, at 32 (emphasis omitted) (quoting S. Exec. Rep. No. 90-6, at 14 (1967)).

166. Masimo Corp. v. Mindray DS USA Inc., No. 12-02206, 2013 WL 12131723, at *2 (C.D. Cal. Mar. 18, 2013); *see also* sources cited *supra* note 81.

167. Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 316 (1964).

parties could also waive Hague Service Convention requirements by contract.[168] While the supremacy approach points out that waiver by contract may be in tension with the waiver mechanism under FRCP 4(d), the wealth of case law appears to support litigants' right to deviate from FRCP 4's requirements, as is common in commercial contexts.[169] The autonomy approach points out that FRCP 4(d)'s waiver mechanism actually suffices to avoid the Hague Service Convention altogether, as the Advisory Committee clarifies that a waiver under FRCP 4(d) is a "private nonjudicial act" that "does not purport to effect service."[170] Under this broad conception of waiver, private litigants can choose to waive the service regimes established through FRCP 4 and the Hague Service Convention. Parties can either waive out of formal service through FRCP 4(d)—as the supremacy approach also acknowledges—or through contract, as argued for by the autonomy approach. Either way, a waiver of service would avoid triggering the Hague Service Convention.

Compared to the supremacy approach, the autonomy approach highlights a vastly different set of values. First off, the approach emphasizes holding parties to their word, boosting certainty and predictability for parties engaged in international commerce. The international arbitration system largely defers to arbitration agreements because they operate as choice-of-forum and choice-of-law provisions, offering predictability despite the diversity of local laws.[171] Overriding these agreements through the complicated mechanisms of the Hague Service Convention would instead "undermine the certainty and predictability" that arbitration agreements offer when they require parties to serve by an unagreed-upon method.[172] Instead of sophisticated parties having a clear understanding of their mutual service obligations based on these agreements, the parties would additionally need to verse themselves in how the Hague Service Convention may hinder any attempt at judicial enforcement of an arbitration award.

The autonomy approach also avoids the legal gamesmanship pitfall of the supremacy approach. By contracting to a form of service,

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168. *Masimo Corp.*, 2013 WL 12131723, at *3 (finding "no reason why parties may not waive by contract the service requirements of the Hague Convention"); Alfred E. Mann Living Tr. v. ETIRC Aviation S.a.r.l., 910 N.Y.S.2d 418, 421 (App. Div. 2010) (holding there is "no reason why the requirements of the Convention may not be waived by contract").

169. *See* WRIGHT & MILLER, *supra* note 11, § 1062; cases cited *supra* note 81.

170. Proposed Brief of Amicus Curiae California International Arbitration Council, *supra* note 163, at 24 (quoting FED. R. CIV. P. 4(d) advisory committee's note to 1993 amendment).

171. Republic of Nicar. v. Standard Fruit Co., 937 F.2d 469, 478 (9th Cir. 1991).

172. Proposed Brief of Amicus Curiae California International Arbitration Council, *supra* note 163, at 13.

parties are assumed to have expressed their true intentions. Overriding that contractual form of service and mandating compliance with the Hague Service Convention would allow "people to unilaterally negate their clear and unambiguous written waivers."[173] After negotiating a form of service, and being served in compliance with the contract, a foreign defendant could simply point to the lack of compliance with the Hague Service Convention and argue that a court never had jurisdiction. As the *Rockefeller* court pointed out, the Hague Service Convention does not suggest that parties can abuse the treaty in this way.[174] Under the autonomy approach, by upholding the expressed intent of the parties as embodied in their contractual service provision, a foreign defendant cannot use the Hague Service Convention as a shield in bad faith.

Party autonomy and the efficiency of the international arbitration system also underly the approach. The international arbitration rests entirely on consent, and arbitration processes "depend for their very existence upon the agreement of the parties."[175] As discussed above, the autonomy approach seeks to hold parties to the service provisions provided for in their arbitral agreements. In addition to simply upholding clarity and certainty, respecting party autonomy advances the goals of the consent-based international commercial arbitration system.[176] Because parties seek international arbitration as a "speedy and inexpensive means of settling disputes," requiring service under the Hague Service Convention will only obfuscate what the parties expect.[177] Such uncertainty regarding service would "require court intervention," severely increase the cost and time needed to resolve disputes, and "potentially call into question long-final arbitration awards."[178] On facts similar to *Rockefeller*, a quickly resolved arbitral dispute might take months or even years to enforce if the creditor needs to wait for the Central Authority system to serve the defendant with notice of an enforcement proceeding. The autonomy approach buffers against this risk by emphasizing the right of parties to waive service in their contracts by holding the parties to their

173. *Alfred E. Mann Living Tr.*, 910 N.Y.S.2d at 422.

174. Rockefeller Tech. Invs. (Asia) VII v. Changzhou SinoType Tech. Co., 460 P.3d 764, 776 (Cal. 2020).

175. NIGEL BLACKABY, CONSTANTINE PARTASIDES, ALAN REDFERN & MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 1 (6th ed. 2015); *see also Rockefeller Tech.*, 460 P.3d at 776.

176. Proposed Brief of Amicus Curiae California International Arbitration Council, *supra* note 163, at 13.

177. *Rockefeller Tech.*, 460 P.3d at 776.

178. *Id.*

agreement, preventing gamesmanship, and protecting the consent-based international commercial arbitration system.

III. WAIVING SERVICE

Where does the law stand today? *Rockefeller* pried open the previously existing but quiet "contracting around" issue, thrusting it into the spotlight and creating major tension for international service of process. Adhering to the supremacy approach results in potentially invalidating contractually agreed-upon language on service of process and greatly extending the timeline for enforcement of an arbitration award. On the other hand, the autonomy approach disturbs predictability of the existing international service regime and challenges the sovereignty of nation-states that have expressed how service shall be effected within their borders by treaty. This uncertainty ultimately harms international commerce by reducing the efficiency, speed, and accountability of dispute resolution. The parties in *Rockefeller* sought to resolve the confusion spurred by the California Supreme Court decision, at least for themselves, by petitioning the U.S. Supreme Court for certiorari.[179] The Court nonetheless declined to hear the case.[180] Fortunately, other solutions can still offer much needed clarity while considering the key principles and values of the supremacy and autonomy approaches and accounting for modern commercial practices.

The interests and values of both the supremacy and autonomy approaches must be balanced, and no solution can guarantee that all their principles will be fulfilled. Because this transnational service of process issue revolves around a combination of international and domestic law, a thorough solution must seek clarity across both bodies of law.[181] In addition to clarifying the *substantive* law, such changes must utilize the most appropriate *mechanisms*. A mix of "soft" interpretive clarifications from the Hague Conference and the Advisory Committee on Civil Rules can pair with textual interpretations of the Hague Service Convention and the FRCP to significantly clear the murky waters of contracting around the Hague Service Convention.

This Note calls for the Hague Conference on Private International Law to offer several interpretative clarifications, exhibiting the full meaning of an Article 10(a) reservation and

179. Petition for a Writ of Certiorari, Changzhou SinoType Tech. Co. v. Rockefeller Tech. Invs. (Asia) VII, 141 S. Ct. 374 (2020) (No. 20-238), 2020 WL 5092675.

180. Rockefeller Tech. Invs. (Asia) VII v. Changzhou SinoType Tech. Co., 460 P.3d 764, *cert. denied*, 141 S. Ct. 374 (2020).

181. *See supra* Part I.A and B.

specifying how the applicability of the Hague Service Convention should be determined. Next, this Note addresses how the text of Article 10(a) supports a broad conception of waiver of service. The Note then suggests that the Advisory Committee for Federal Rules clarify the possibility of contractual waiver of service. Finally, the Note examines how the FRCP and case law already support such waiver. By offering these clarifications and interpretations, this Note points towards a clearer service regime that supports international commerce by enabling efficient commencement of suit against foreign defendants while respecting the sovereignty of nation-states to control service of process under the Hague Service Convention.

A. Clarifications from the Hague Conference on Private International Law

As the intergovernmental organization overseeing the application of the Hague Service Convention, the Hague Conference on Private International Law can provide interpretations of the Convention that have a broad impact while reflecting the interests of the member states directly.[182] Unlike a solution relying entirely on U.S. domestic law, the Hague Conference speaks on behalf of all member states and resultingly increases the legitimacy of any interpretations.[183]

The Conference has a long history of providing useful interpretations of the Hague Service Convention to a broad audience through Conclusions and Recommendations of the Special Commissions[184] as well as through the Practical Handbook.[185] Indeed, because no supranational body has jurisdiction over the operation of the Convention, these interpretive pronouncements are "invaluable tool[s]" for ensuring a "common understanding of the Convention."[186] Even in the United States, where courts tend to apply a strong textualist

182. *See* Statute of the Hague Conference on Private International Law, Oct. 15, 1964, 15 U.S.T. 2228.

183. *Id.*; *see also* HAGUE CONF. ON PRIV. INT'L L., *supra* note 33, at iii (noting that the Practical Handbook had been "approved by the Council on General Affairs and Policy," comprised of representatives from all member states).

184. *About HCCH*, HAGUE CONF. PRIV. INT'L L., https://www.hcch.net/en/about (last visited Oct. 12, 2022) [https://perma.cc/HXM8-SDM8]; *see, e.g.*, HAGUE CONF. ON PRIV. INT'L L., CONCLUSIONS AND RECOMMENDATIONS OF THE SPECIAL COMMISSION ON THE PRACTICAL OPERATION OF THE HAGUE SERVICE, EVIDENCE AND ACCESS TO JUSTICE CONVENTIONS (2014), https://assets.hcch.net/docs/eb709b9a-5692-4cc8-a660-e406bc6075c2.pdf [https://perma.cc/LQP9-D2YX].

185. *See* HAGUE CONF. ON PRIV. INT'L L., *supra* note 33, at ix (explaining that the Practical Handbook is addressed to "users" such as courts, clerks, judicial officers, process servers, counsel, government officials, and diplomatic and consular agents).

186. *Id.*

approach,[187] judges often grant strong persuasive weight to Hague Conference interpretations.[188]

Applying its unique ability to meaningfully interpret the Hague Service Convention, the Conference should reinforce its understanding that a member state's reservation to Article 10(a) indeed prohibits service of process by mail upon defendants in that nation-state. The Conference can do so through a meeting of a Special Commission, and/or by amending the Practical Handbook.[189] As explained by a Special Commission in 1989, Article 10(a) "in effect offered a reservation to Contracting States to consider that service by mail was an infringement of their sovereignty."[190] Paragraph 259 of the current Practical Handbook identifies some of the major objecting states and explains that parties cannot serve by mail upon defendants in these states,[191] but a further explanation that such a reservation protects *sovereignty* interests will strengthen the interpretation's effect and clarify its reasoning.

At the same time, the Hague Conference should pair this supremacy-focused interpretation of Article 10(a) with another clarification that leans more towards the autonomy approach: because domestic law determines the application of the Hague Service Convention, parties may *waive* service and avoid triggering the Convention if permitted under the forum's law. The Conference acknowledges the nonmandatory nature of the Hague Service Convention by recognizing that two Supreme Courts, of the United States and the Netherlands, have found that the law of the forum determines whether a document must be "served."[192] The 1989 Special Commission even indicated that "[t]he principle that the forum is to

187. *See, e.g.*, Anton Metlitsky, *The Roberts Court and the New Textualism*, 38 CARDOZO L. REV. 671, 673 (2016) (arguing that the Roberts Court has shown a deep commitment to new textualism); Caroline Savini, Note, *Plain-Meaning: A-Broad Investigation*, 46 GA. J. INT'L & COMPAR. L. 281 (2017) (examining the textual interpretation of the New York Convention provided by U.S. courts, in contrast to less textual interpretations by foreign courts).

188. *See, e.g.*, Water Splash, Inc. v. Menon, 137 S. Ct. 1504, 1512–13 (2017) (emphasizing the perspective of several Special Commissions that Hague Service Convention permits service by mail); Rockefeller Tech. Invs. (Asia) VII v. Changzhou SinoType Tech. Co., 460 P.3d 764, 770 (Cal. 2020) (citing the Practical Handbook to emphasize that application of the treaty turns on the law of the forum state).

189. *See* Statute of the Hague Conference on Private International Law, *supra* note 182, art. 8.

190. HAGUE CONF. ON PRIV. INT'L L., *supra* note 33, at 5.

191. *Id.* at 82.

192. *Id.* at 13; *see also* Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 700 (1988) (stating the Hague Service Convention applies if the "internal law of the forum state . . . [requires] the transmittal of documents abroad"); HR 27 juni 1986, NJ 1987, 743 m.nt. WHH (Segers and Rufa BV/Mabanaft GmbH) (Neth.) (finding that whether a document needed to be transmitted abroad for service must be determined according to the law of the forum).

decide this question under its own law was broadly accepted," exhibiting the longstanding nature of the treaty's nonmandatory application.[193]

Why would the Conference itself acknowledge that such a loophole to the Hague Service Convention's application exists? Because the Practical Handbook has *already* acknowledged situations in which Article 10 reservations do not apply.[194] For example, when a postal channel is "complementary to another means of effecting service," then postal transmission would not be an infringement of the sovereignty of the receiving state.[195] As a result, the supplementary transmission should be accepted, "notwithstanding an objection to Article 10(a)."[196] This same reasoning should apply to a notice sent after waiver of service. Under FRCP 4(d), a privately sent notice informing a defendant of an action's commencement and requesting a waiver of service is distinct from the judicial act of serving a summons.[197] If parties agreed ex ante to waive service, a notice of an action would still be *supplemental* to the agreement that service need not formally occur.

While an Article 10(a) objection does apply to a mailing under *substituted service* (where a party serves a Secretary of State according to a state statute and then sends a copy of the documents to a defendant abroad), *waiver* is again distinct.[198] It does not involve sending the actual summons and, as a result, is supplemental to actual service. By providing these updated interpretations, the Hague Conference will reaffirm the sovereignty of member states to dictate how service can occur within their borders, while also clarifying the nonmandatory application of the treaty. Parties will resultingly have a stronger understanding of the effects of waiving service—the Hague Service Convention will not apply because the treaty does not apply to private documents.

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193. HAGUE CONF. ON PRIV. INT'L L., *supra* note 33, at 4; *see also* HAGUE CONF. ON PRIV. INT'L L., CONCLUSIONS AND RECOMMENDATIONS OF THE SPECIAL COMMISSION ON THE PRACTICAL OPERATION OF THE HAGUE APOSTILLE, SERVICE, TAKING OF EVIDENCE AND ACCESS TO JUSTICE CONVENTIONS 4 (2009), https://assets.hcch.net/upload/wop/jac_concl_e.pdf [https://perma.cc/E4Y5-JB97] (confirming that the Service Convention "is of a non-mandatory but exclusive character").

194. *See* HAGUE CONF. ON PRIV. INT'L L., *supra* note 33, at 83.

195. HAGUE CONF. ON PRIV. INT'L L., REPORT ON THE WORK OF THE SPECIAL COMMISSION ON THE OPERATION OF THE CONVENTION OF 15 NOVEMBER 1965 ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS 7 (1977), https://assets.hcch.net/docs/62546dae-4491-41f3-99aa-9ee09586bee4.pdf [https://perma.cc/FS79-ERMH].

196. *See* HAGUE CONF. ON PRIV. INT'L L., *supra* note 33, at 83.

197. *See* FED. R. CIV. P. 4(d)(1); *see also infra* note 204 and accompanying text.

198. *See* HAGUE CONF. ON PRIV. INT'L L., *supra* note 33, at 83; *see* William S. Dodge, *Substituted Service and the Hague Service Convention*, 63 WM. & MARY L. REV. (forthcoming 2022).

B. The Text of Article 10(a) Allows for Waiver

The text of Article 10(a) supports the broader conception of waiver and the formalistic definition of formal service advocated by the autonomy approach. Under the Vienna Convention, treaty text should receive its ordinary meaning in context of its object and purpose.[199] Applying this rule of interpretation, Article 10 appears to only concern judicial documents, as the Article does not contain the additional "extrajudicial document" language present in Article 1.[200] Given this textual distinction, Article 10(a) applies to a narrow subset of documents, and thus an Article 10(a) reservation only nullifies the validity of mailing the same narrow subset of documents. In addition, the French text of the treaty, which is equally authoritative,[201] makes the exact same distinction between "*judiciaires*" in Article 10, and "*judiciaire ou extrajudiciaire*" in Article 1.[202]

How does a notification following waiver of service fit into the judicial/extrajudicial distinction? Considering the definitions provided by the Practical Handbook,[203] a notice following waiver under FRCP 4(d) would likely be considered a private document because the plaintiff sends it directly and it is not a judicial act of summoning the defendant. The Advisory Committee for Civil Rules agrees, explaining that because "transmission of the notice and waiver forms is a private nonjudicial act, does not purport to effect service, and is not accompanied by any summons or directive from a court," the waiver should not offend foreign sovereigns that object to formal service by mail.[204]

Applying this reasoning, a notice of an action sent to a defendant who has *contractually* waived service should also constitute a private, nonjudicial act. The text of the Hague Service Convention therefore supports the transmission of notice following a waiver of service by mail, because an Article 10(a) reservation only bars the transmission of judicial documents by mail. This textual interpretation rests smoothly upon the autonomy approach's formalistic perspective on "formal service," as well as the approach's belief in a broad right to waive service.

199. Vienna Convention on the Law of Treaties, *supra* note 57, art. 31.
200. Hague Service Convention, *supra* note 1, arts. 1, 10.
201. Vienna Convention on the Law of Treaties, *supra* note 57, art. 33.
202. Hague Service Convention, *supra* note 1, arts. 1, 10.
203. *See supra* notes 38–40 and accompanying text.
204. FED. R. CIV. P. 4(d) advisory committee's note to 1993 amendment.

C. Waiver Under U.S. Domestic Law

While the clarifications from the Hague Conference on Private International Law and the textual interpretation of Article 10 confirm how the Hague Service Convention handles waiver of service issues, application of the treaty still turns on the law of the forum state.[205] Consequently, parties can only waive service of process when the domestic law of the forum allows them to do so. To ensure the enforceability of these increasingly common waiver of service provisions in contracts, this Note advocates that the Advisory Committee for Civil Rules add interpretive text to their notes acknowledging the long-recognized validity of waiving formal service requirements by contract. Indeed, a wealth of case law already supports parties in waiving formal service ex ante through contractual provisions.

As indicated earlier, many courts have supported the validity of an ex ante contractual waiver of service.[206] Commentators have noted that U.S. states have shown skepticism towards the total lack of notice under cognovit clauses, and some U.S. states have banned them.[207] Outside the specific context of cognovit clauses, though, an abundance of case law supports a general contractual waiver of formal service.[208]

Waiver of service in the international commercial context, though, should still provide some form of notice to comply with the *Mullane* due process standard: "[N]otice 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."[209] Sending actual notice will not only satisfy the due process standard, but it will also enhance the plaintiff's ability to seek international enforcement of a U.S. judgment.[210]

Some scholars have suggested that ex ante waiver of service will conflict with the ex post waiver provisions of FRCP 4(d).[211] Indeed, one court found that "the language of Rule 4 is mandatory," and that "Rule 4 does not authorize the parties to contract around the waiver of service requirements."[212] As explained above, though, the "majority of courts to

205. *See* Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 700 (1988).

206. *See supra* notes 81, 166–167 and accompanying text.

207. *See* Coyle et al., *supra* note 143

208. *See supra* notes 81, 166–168 and accompanying text.

209. Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950); *see also* Coyle et al., *supra* note 143, at 59 (explaining that waiver of service in the foreign context should still provide notice to comport with due process).

210. *See* Coyle et al., *supra* note 143, at 60.

211. *See supra* note 146 and accompanying text.

212. Bozell Grp. v. Carpet Co-Op of Am. Ass'n., Inc., No. 00 CIV. 1248, 2000 WL 1523282, at *4 (S.D.N.Y. Oct. 11, 2000).

have considered the issue have determined that parties may contract around Rule 4's requirements."[213]

Additionally, the text of FRCP 4(d) does not require adherence to its ex post waiver mechanism. The rule states that litigants have a "duty to avoid unnecessary expenses of serving," and then suggests that a plaintiff *may* notify a defendant and seek a waiver of service.[214] The permissive language and lack of penalties for foreign defendants who refuse waiver suggest that the FRCP 4(d) request for waiver is only one possible method of avoiding the expenses of serving.[215] Waiver by contract would also accomplish the rule's ultimate purpose of avoiding these expenses, especially when a plaintiff might otherwise be required to "comply with all the formalities of service in a foreign country, including costs of translation, when suing a defendant manufacturer, fluent in English . . . ."[216] While Professors John Coyle, Robin Effron, and Maggie Gardner suggest that such contractual waiver might be "constitutionally suspect" because FRCP 4(d) contains procedural safeguards,[217] litigants need not be so concerned. Valid contractual waiver of service would of course still need to comply with *Mullane*'s constitutional due process standard. If a plaintiff provides constitutionally adequate notice following contractual waiver of service, a court is likely to uphold the validity of the waived service under existing case law.

Because application of the Hague Service Convention turns on the law of the forum, domestic state law would also need to permit a waiver of service. While federal case law interpreting FRCP 4 in this context is not particularly relevant to states, the due process analysis directly binds state courts considering international service of process issues. The *Rockefeller* court's examination of both federal and state waiver of service cases indicates the persuasive effect of interpretations of the FRCP, as well as the binding due process component of service.[218] As such, a clarification by the Advisory Committee of Civil Rules on the validity of contractual waiver of service will have persuasive effect on state courts. The proposed clarifications and interpretations of the

213. Masimo Corp. v. Mindray DS USA Inc., No. 12-02206, 2013 WL 12131723, at *3 (C.D. Cal. Mar. 18, 2013).

214. FED. R. CIV. P. 4(d).

215. While a defendant "located within the United States" who fails to waive service under FRCP 4(d) may incur the expenses of service and other fees, no similar provision penalizes foreign defendants who fail to waive. *See* FED. R. CIV. P. 4(d)(2).

216. FED. R. CIV. P. 4(d) advisory committee's note to 1993 amendment.

217. *See* Coyle et al., *supra* note 143, at 60.

218. Rockefeller Tech. Invs. (Asia) VII v. Changzhou SinoType Tech. Co., 460 P.3d 764, 772–73 (Cal. 2020).

FRCP will likely permit plaintiffs to waive service by contract in state courts as well, absent a countervailing statute.

D. Application to the Facts of Rockefeller

The application of these interpretations can be laid out in several systematic steps that indicate how litigants and courts should analyze service of process upon a foreign defendant that raises a "contracting around" issue.

Step 1: In order to determine if the Hague Service Convention even applies, does the law of the forum permit waiver of service? In federal court, the FRCP constitute the law of the forum. Under the proposed solution, the FRCP and case law support a plaintiff's reliance on a contractual waiver provision.[219]

Step 2: Have the parties validly waived service under the forum's law? The parties must actually agree to *waive* service in order to avoid the Hague Service Convention's application, and not just agree to a specific form of service.

Step 3: Because waiver by contract is valid under the forum's law, does the Hague Service Convention apply to the specific facts at issue? The treaty only applies when transmission of judicial or extrajudicial documents abroad is required by the forum's laws. As such, if the forum permits waiver of service and the parties have waived, the Hague Service Convention will not apply.

To examine how this solution applies to the typical facts of the "contracting around" issue, this Note concludes by applying the proposed steps to the facts of *Rockefeller* itself and asks, "what's in the contract?"

Step 1: Does the law of the forum permit waiver of service? As the California Supreme Court carefully explained, California's statutes and state and federal case law support the right of parties to waive both the personal jurisdiction and notice aspects of service of process;[220] however, a textual reading of California Civil Procedure Code Section 1290.4(a) raises an issue for Rockefeller.[221] Under section 1290.4(a), a petition and written notice of the hearing's time and place "shall be *served* in the manner provided in the arbitration agreement for the service of such petition and notice."[222] The Court found that "served" here did not imply formal service of process, and then analogized to a

219. As indicated above, state courts will also likely permit waiver of service if federal courts and the Advisory Committee interpret waiver by contract to comport with due process.

220. *Rockefeller Tech.*, 460 P.3d at 772–73.

221. *Id.* at 774–75.

222. CAL. CIV. PROC. CODE § 1290.4(a) (West 2022) (emphasis added).

case in which this same statute authorized simple notice upon a Mexican defendant *after* he already appeared in the case.[223] Rockefeller's transmission here, on the other hand, was *before* SinoType appeared in the case. On this shaky evidence, section 1290.4(a) does not support *waiver*, but instead just allows an alternative *method* of service. If the statute only allows alternative service, and not waiver, the analysis will stop here.

Step 2 (assuming the statute authorizes outright *waiver* of service): Have the parties validly waived service of process? Rockefeller again runs into trouble here. The agreement of memorandum states that the parties "shall provide notice in the English language . . . via Federal Express or similar courier," and that they "consent to service of process in accord with the notice provisions."[224] The California Supreme Court read this language as confirming an intent to replace "service of process" with an "alternate notification method."[225] The memorandum, though, only agrees that *service* should be conducted in accordance with the notice provision, i.e., "via Federal Express or similar courier."[226] Supporting this reading that Rockefeller still intended to *serve* the defendant, and not just send a notice, Rockefeller actually transmitted both the "petition and *summons* to SinoType through Federal Express."[227] Sending the actual summons strongly suggests that Rockefeller intended to serve SinoType at the time, and it did so by mail.[228]

Step 3: Does the Hague Service Convention apply? Under the proposed solution, the treaty does not apply when a plaintiff only sends a private notice of the action following a waiver of service. Here, though, Rockefeller transmitted the actual summons, which the Practical Handbook explicitly considers a judicial document.[229] As such, the Hague Service Convention does apply, and Rockefeller cannot serve SinoType by mail due to China's Article 10(a) reservation.

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223. *Rockefeller Tech.*, 460 P.3d at 775; *In re* Jennifer O., 108 Cal. Rptr. 3d 846, 853 (Ct. App. 2010).

224. *Rockefeller Tech.*, 460 P.3d at 774.

225. *Id.* at 775.

226. *Id.* at 774.

227. *Id.* at 768 (emphasis added).

228. *See* Brief of Amicus Curiae Law Professors, *supra* note 135, at 14 ("Instead, [Rockefeller and SinoType] specified a particular type of service of process by 'consent[ing] to service of process' by Federal Express.").

229. *See* HAGUE CONF. ON PRIV. INT'L L., *supra* note 33, at 29–30.

CONCLUSION

Combining interpretive comments from the Hague Conference on Private International Law and the Advisory Committee for Civil Rules with the textual interpretations provided above, the international service regime will better reflect the goals of the Hague Service Convention. Signatories of the Hague Service Convention intended to ensure that service abroad would occur in "sufficient time," while "simplifying and expediting" the procedure.[230] Transnational litigation has radically changed since the Hague Service Convention's ratification in 1965, especially with regard to the boom in international commercial arbitration over the past few decades.[231] The need for simple and expedited service has only increased, and commercial practice in today's globalized age may have outpaced the speed offered by the Hague Service Convention. Of course, commercial parties are still bound by a nation-state's acceptance of and reservations to the Hague Service Convention. Taking this Note's solution into account, parties will more readily understand the intricacies of serving under the Hague Service Convention and the opportunity to waive service of process by contract, thus accomplishing quick, effective, and valid service while respecting the sovereignty concerns of nation-states.

The proposed alterations to the service regime also balance numerous values and concerns of the supremacy and autonomy approaches. The interpretive clarifications from the Hague Conference express the supremacy approach's respect for state sovereignty, while they also embrace the autonomy approach's conception of broad waiver. This solution even acknowledges the broad application of the Hague Service Convention as understood by the supremacy approach, but *only if* domestic law triggers the application of the treaty. The Practical Handbook's own definitions of judicial and extrajudicial documents suggest the appropriateness of a more formalistic definition of service, as advocated for by the autonomy approach. Ultimately, although these proposals lean closer to the autonomy approach, the solution supports some key values of both. Increasing clarity from the Hague Conference and the Advisory Committee for Civil Rules will decrease the possibility of gamesmanship by savvy parties (an autonomy approach goal), while

230. Hague Service Convention, *supra* note 1.

231. *See* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 92–96 (3d ed. 2021). Born provides both anecdotal and empirical evidence of arbitration's boom. For example, the International Chamber of Commerce's International Court of Arbitration received 32 arbitration requests in 1956 and 869 in 2019. *Id.* at 92. Born also examines arbitration's application to a wide variety of dispute categories and the growing international arbitration bar as evidence of international arbitration's increasing popularity. *Id.* at 94–95.

also harmonizing international service requirements and respecting state sovereignty over service requirements within their borders (supremacy approach goals). These proposals offer a balance of the two approaches while leaning towards autonomy given the importance of speedy dispute resolution in today's globalized world.

As the analysis of *Rockefeller* under this solution shows,[232] the proposals in this Note will not obfuscate the Hague Service Convention's application. Instead, the solution offers an efficient method for sophisticated parties to commence an action quickly through ex ante waiver of service, followed by the transmission of notice documents to satisfy constitutional notions of due process. These gains in speed and efficiency will greatly benefit the globalized pace of transnational litigation today, particularly in the context of enforcing international arbitration awards. At the same time, the Hague Service Convention will still apply to many cases, as will countries' Article 10(a) reservations. Most importantly, litigants and courts will find clarity by focusing on "what's in the contract" to determine if the parties have avoided the Hague Service Convention's application through waiver or triggered its application through service of process.

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232. *See supra* Part III.D.

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