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Article

***755** E-MAIL SERVICE ON FOREIGN DEFENDANTS: TIME FOR AN INTERNATIONAL APPROACH?

David P. Stewart, Anna Conley [FN1]

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This article aims to provoke consideration of the legitimacy of e-mail service of process in the context of international litigation, and more specifically, e-mail service of process in the relatively narrow context of service on an evasive defendant located abroad. It surveys recent case law in the United States and reported decisions in the United Kingdom, Canada and Australia, as well as several relevant developments in civil law jurisdictions and at the European Community level. It concludes by making some recommendations about a possible new international approach. [FN1]

I. INTRODUCTION

As the Internet becomes the predominant vehicle for business communication, solicitation and marketing, plaintiffs' attorneys increasingly face the problem of finding and serving evasive defendants who use the Internet both to violate the law and to shield themselves from suit. These difficulties are compounded when the defendants are located outside the plaintiffs' jurisdiction, especially when they are in a foreign country. Consider this scenario: you represent the owner of a trademarked product sold on your client's website. After a surprising drop in sales, your client becomes aware of a website with a suspiciously ***756** similar domain name blatantly violating the trademark and selling a cheaper and inferior product. Your client wants to bring an action to enjoin the defendant from continuing the infringement. The infringing website reveals no contact information except for an e-mail address. You contact the domain registry and find only that an electronic mail ("e-mail") address and a physical address in Pakistan are registered. After further research you discover that the address in Pakistan does not exist. Whom do you serve and how?

The problem of the evasive defendant traceable only to an e-mail address located abroad has already given rise to a number of decisions by U.S. and foreign courts authorizing e-mail service of process on defendants residing in foreign jurisdictions when no other method of service is available. In a few instances, there have been limited statutory responses. For example, a federal statute dealing with Internet-related offenses specifically allows for e-mail service on defendants that have allegedly violated the statute. [FN2] On the whole, however, neither U.S. nor foreign law offers a comprehensive approach to the problem.

Service of process is not the only aspect of litigation affected by rapidly-changing technology and new methods of communication. Electronic case filing has become more and more common, [FN3] and a new industry has emerged to deal with electronic discovery methods and issues. [FN4] So far, however, U.S. courts have been left largely on their own ***757** in confronting issues of e-mail service. Given the growing importance of the practice,

its significant due process implications, and the unique complications that can arise from attempting service in foreign jurisdictions (including jeopardizing the ultimate enforceability of any resulting judgments), a more considered approach is necessary. [FN5]

Over the past several years, federal courts in the United States have both authorized and prohibited e-mail service on foreign defendants in varying circumstances. A review of the principal decisions demonstrates that in applying the relevant federal rule, [FN6] the courts have implicitly adopted a four-factor test when determining whether to authorize e-mail service on a foreign defendant. A remarkable consistency surrounds treatment of the first three factors. Generally, courts appear to favor service by e-mail when the defendant has successfully evaded traditional methods of service and is utilizing e-mail as its preferred or sole method of communication. By the same token, courts have rejected service by e-mail when the plaintiff has not previously attempted to serve the defendant through traditional methods of service before requesting the court to authorize e-mail service. The courts have also been reluctant to authorize e-mail service when they are not satisfied that e-mail is the mode of communication most likely to give the defendant notice of the action.

Where courts diverge is on what weight, if any, to give to the legality of e-mail service in the foreign country in which the defendant resides. In many countries, service by e-mail, as well as other forms of substituted service, is not recognized as valid service. When authorizing substituted service on a defendant residing in a foreign country, a U.S. judge has a choice of whether to consider if the form of service is recognized by the laws of the country in which the defendant resides. Inevitably, efforts by U.S. parties to effect e-mail service in those countries prohibiting such service will lead to growing confrontation and restrictive responses. The Eleventh and Ninth Circuits have taken sharply different approaches to this issue. [FN7] District courts have started *758 to take sides on this emerging split, and without clarification (either by domestic rule or statute, or perhaps guidance from the Supreme Court), the divergence will likely result in continuing confusion on an important aspect of international practice.

A handful of foreign courts in common law countries have permitted service by e-mail, or other forms of substituted service, on both domestic and foreign defendants. In the relatively few reported decisions, courts appear to have relied largely on analytical factors similar to those considered by U.S. courts. Judicial approaches differ as to whether the law of the country in which the defendant resides should or must be considered by the judge authorizing service. An international standard for e-mail service on a foreign defendant drawing on the similarities across judicial approaches might well go far towards preventing the inevitable quagmire of transnational judge-made law that will likely result in the absence of an agreed approach.

Scholars and practitioners have acknowledged the need for some measure of international response by repeatedly calling for integration of changing technologies into the established framework for international service of process. The 1965 Hague Convention on the Service of Judicial and Extra-Judicial Documents in Civil or Commercial Matters (“Hague Service Convention”) [FN8] provides for internationally agreed methods of transmitting requests for service on defendants in States Parties to the Convention. The Convention does not, by its terms, address electronic means of service of process, and in fact provides that service must be accomplished by a method prescribed by the internal law of the receiving country for the service of documents in domestic *759 actions upon persons who are within its territory. [FN9] The Hague Service Convention explicitly does not apply where the address of the person being served is not known, [FN10] which is precisely the kind of situation in which U.S. courts have authorized e-mail service. In our view, therefore, the Convention itself does not clearly resolve the issue of e-mail service. [FN11]

This article explores various possibilities for resolving the issues posed by e-mail service of process on foreign defendants. The next part analyzes Federal Rule of Civil Procedure (“Fed. R. Civ. P.”) 4(f)(3) and the accompanying advisory committee note to determine the current parameters within which U.S. courts must address the issues under the federal rules. In Part III, we discuss common threads in current U.S. case law dealing with e-mail service on foreign defendants under those rules, including (1) the plaintiff’s prior attempts to serve the defendant through traditional methods, (2) whether e-mail is the defendant’s preferred or sole method of communication, (3) the perceived evasiveness of the defendant, and (4) considerations of the law of the foreign country in which the defendant resides.

We also look at the emerging decisional law in several other common law countries and conclude that foreign judges generally consider the same set of factors that U.S. judges have utilized. Part IV discusses the extent to which Rule 4(f)(3) has been or should be interpreted to require a court to take into account the legality of e-mail service under foreign law. Part V analyzes the civil procedure rules and case law of England, Australia and Canada with respect to e-mail service, and substituted service generally, on foreign defendants. We conclude that *760 judges in those countries look at the same issues of prior attempts, evasion, and actual notice when determining whether to authorize e-mail service, and generally have heightened deference to foreign law. Part VI looks briefly at several other issues relevant to e-mail service, including due process concerns, judgment enforcement issues, and difficulties in determining the state in which an evasive defendant resides.

Part VII considers several possible solutions to the problem, including amending the federal rules, re-interpreting the Hague Service Convention to accommodate requests for e-mail service abroad, and adopting a new instrument dealing directly with e-mail service directly on defendants. We conclude that the essential factors used by courts here and abroad in determining whether to authorize e-mail service on foreign defendants could readily provide the basis for a new international legal standard governing the practice. Incorporating those factors into the federal rules would assist U.S. courts in ruling on requests, but could not overcome foreign objections. Re-interpreting the Hague Service Convention to incorporate those standards and permit use of Convention channels for e-mail service, while superficially attractive, might cause more problems than it would solve. Negotiating a new instrument, such as a protocol to the Convention, although likely to be controversial, might well be the most effective way to gain international concurrence on how to deal with the issues posed by e-mail service on foreign defendants.

Whatever approach is taken, it should promote several important goals. It should explicitly recognize and endorse the growing, even pervasive, use of electronic means of communication, in particular e-mail service. It should satisfy due process concerns by providing a reasonable assurance of giving the defendant actual notice of the pending suit. It should enhance (rather than diminish) the prospects that the resulting judgment will be recognized and enforced. Finally, it should reflect due regard for the applicable law in the forum where service is effected. These, we submit, are the essential criteria for any new approach.

II. THE FEDERAL RULE

[Fed. R. Civ. P. Rule 4\(f\)](#) governs service of process on individuals outside the United States in cases pending in federal courts. [\[FN12\]](#) The first paragraph authorizes service “by any internationally agreed means *761 reasonably calculated to give notice,” specifically including means pursuant to the Hague Service Convention and the Inter-American Convention on Letters Rogatory. [\[FN13\]](#) In the absence of an internationally agreed-upon means of service or applicable international agreement, the rule allows service in accordance with the receiving

country's law, or as directed by the receiving country, or by personal delivery or return receipt mail, if not prohibited by the receiving country. [FN14] As a final option, Rule 4(f)(3) authorizes a court to order service on a defendant located in a foreign country “by other means not prohibited by international agreement as may be directed by the court.” [FN15]

*762 Unlike Rules 4(f)(2)(A) and (C), Rule 4(f)(3) does not require that such substituted service be lawful in the foreign country where it will be effected. Indeed, the third paragraph does not address the issue of consistency with foreign law in any way. As the advisory committee note for the 1993 amendments to Rule 4(f)(3) emphasized, the new provision only authorizes methods of service not prohibited by international agreements. [FN16] That note did, however, caution that “an earnest effort should be made to devise a method of communication that is consist[ent] with due process and minimizes offense to foreign law.” [FN17] But the validity *vel non* of the chosen method of service in the concerned foreign jurisdiction is simply not addressed. Indeed, the note can be read implicitly to acknowledge that “offense to foreign law” is *not* a valid ground for refusing a request.

Clearly, service under Rule 4(f)(3) must comport with applicable principles of due process. As espoused in *Mullane v. Hanover Bank*, [FN18] the relevant principle of due process is satisfied when service is “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” [FN19] Numerous courts and commentators have expressed concern that, because of the inherent inability to confirm that the intended recipient has in fact received an e-mail message, e-mail service violates the defendant's right to due process. [FN20] In most reported cases allowing e-mail service, however, courts have resolved due process concerns by finding that where e-mail is the defendant's preferred or sole method of communication, it does provide the method most *763 reasonably calculated to give the defendant notice of the action. [FN21]

Rule 4(f)(3) was designed to give courts flexibility to order service by methods “especially tailored to achieve service upon individuals in a foreign country.” [FN22] Decisions allowing service by e-mail have interpreted the rule to give courts flexibility to utilize changing technology to adapt to unique circumstances of cases. [FN23] Accordingly, courts have authorized parties to serve defendants in a myriad of ways, including publication, [FN24] mail to a current and last known address, [FN25] service on defendant's attorney, [FN26] telex, [FN27] and even television publication. [FN28] Not surprisingly, as e-mail has become the predominant method of communication worldwide, and as more cases involving electronic commerce are litigated, federal courts have begun receiving requests by plaintiffs to serve foreign defendants by e-mail pursuant to Rule 4(f)(3). [FN29]

*764 III. COMMON THREADS IN U.S. CASE LAW

Several common threads have emerged in the reported judicial opinions dealing with e-mail service. They appear to articulate a four-factor test utilized by courts to determine whether to authorize e-mail service. The first three factors—prior attempts by plaintiffs to serve the defendant by traditional means, use of e-mail as a preferred method of communication by defendant, and the level of the defendant's attempts at evasion—are generally agreed upon by courts. [FN30] There is evident disagreement, however, regarding the fourth factor—consideration of whether e-mail service would be contrary to the receiving country's laws.

A. Prior attempts by plaintiff to serve defendant by traditional methods of service

In all of the reported federal cases in which courts have ordered e-mail service to date, the plaintiff had previously attempted to serve the defendant through traditional means. This pattern suggests that courts find in [Rule 4\(f\)\(3\)](#) an implicit requirement of previous attempts before authorizing e-mail service. [\[FN31\]](#) Advocates of such a requirement*[765](#) argue that it would help ensure that foreign jurisdictions' laws are not offended. [\[FN32\]](#)

In one of the first such cases, a federal bankruptcy court explicitly stated that the plaintiff had “diligently pursued other means of communication to no avail.” [\[FN33\]](#) Likewise, in *Rio Properties, Inc. v. Rio International Interlink*, the plaintiff had unsuccessfully attempted service on the defendant by traditional means in the United States through the international courier that defendant identified as its main channel of communication and the defendant's attorney. [\[FN34\]](#) The plaintiff in *Williams v. Advertising Sex, LLC* documented her “reasonable efforts to serve the defendants by traditional means,” including thirteen attempts at personal service by Australian process servers. [\[FN35\]](#) In *Viz Communications v. Redsun*, the plaintiff attempted service on defendants through the Japanese Central Authority pursuant to the Hague Service Convention, but was unsuccessful due to “ambiguity in the mailing address” provided on defendants' domain name registry. [\[FN36\]](#) In *D'Acquisto v. Triffo*, the court authorized e-mail service on a defendant thought to be residing in British Columbia only after the plaintiff had unsuccessfully attempted service via the Hague Service Convention and by a private Canadian process server. [\[FN37\]](#)

The court in *Ryan v. Brunswick Corporation* went so far as to articulate and provide a rationale for a previous attempts requirement under *[766](#) [Rule 4\(f\)\(3\)](#):

[A]lthough a party need not exhaust all possible methods of service this Court will require parties seeking relief under [FRCP 4\(f\)\(3\)](#) to show that they have reasonably attempted to effectuate service on the defendant[s] and that the circumstances are such that the district court's intervention is necessary to obviate the need to undertake methods of service that are unduly burdensome or that are untried but likely futile This threshold requirement, although not expressly provided by [FRCP 4\(f\)\(3\)](#), is necessary in order to prevent parties from whimsically seeking alternate means of service and thereby increasing the workload of the courts. [\[FN38\]](#)

In *Popular Enterprises v. Webcom Media Group, Inc.*, both the plaintiff and the court attempted over a series of months to serve defendant with various documents, including the complaint and summons, before the court authorized e-mail service pursuant to [FRCP 4\(f\)\(3\)](#). [\[FN39\]](#) These attempts included service to the e-mail addresses the defendant had supplied to its domain name registrar, overnight mail, certified mail, and Federal Express to the address supplied by defendant to its domain name registrar. The plaintiff also attempted service pursuant to the Hague Service Convention by serving the Portuguese Central Authority, but was unsuccessful given the lack of a valid mailing address for defendant. Ultimately, the only attempts that did not bounce back or get returned to plaintiff were e-mails sent to one of the defendant's e-mail addresses, which led the court to authorize e-mail service. [\[FN40\]](#)

A lack of prior attempts to serve defendants by more traditional means has led courts to reject plaintiffs' request for e-mail service. In *Pfizer v. Domains by Proxy*, for example, the district court refused to allow plaintiffs to serve the defendants by e-mail for exactly this reason. [\[FN41\]](#) Pfizer, along with other plaintiffs, had filed a complaint against entities and individuals associated with certain domain names. Pfizer requested an order pursuant to [FRCP 4\(f\)\(3\)](#) allowing it to serve defendants via *[767](#) the e-mail address provided in the “Registrant Contact” information for the websites at issue. The court chided Pfizer for failing to present the court with evidence of previous attempts at service or to investigate the location of foreign defendants or agents of the defendants located in the United States. [\[FN42\]](#) The court reasoned that Pfizer's request to serve the defendant by e-

mail without first attempting traditional methods of service prematurely disregarded traditional methods of service, noting:

The internet is not, by and large, anonymous; activity in cyberspace almost always leaves digital crumbs trailing back to the point of physical initiation. At the very least a person establishing a website must have an internet service provider or hosting company, must register a domain name, and must acquire domain name serving. No doubt the clever malefactor can still mask his identity, but absent a minimal investigation, I think it inappropriate to conclude that, simply because an entity's primary presence is on the internet, traditional means of service are automatically obsolete. [FN43]

B. Defendant's Use of E-mail For Communication

In nearly every case authorizing e-mail service the defendants conducted business through websites and preferred communication by e-mail. Defendants' e-commerce savvy and preference for electronic communication appear to have led courts to conclude that e-mail service was the method most reasonably calculated to provide the defendant with notice of the action against it, and was thus consistent with the requirements of due process. [FN44]

*768 The crux of the bankruptcy court's holding in *In re: International Telemedia Associates* was that the communication methods most reasonably calculated to provide the defendant with notice are “those communication channels utilized and preferred by the defendant himself.” [FN45] The defendant provided the bankruptcy trustee with a permanent facsimile number and e-mail address that he instructed the trustee to use for “any future correspondence.” [FN46] The court concluded that due process considerations were satisfied because e-mail and facsimile transmission were “the very methods of communication preferred by [defendant] in his communications with the Trustee and others ... [and] if any methods of communication can be reasonably calculated to provide a defendant with real notice, surely those communication channels utilized and preferred by the defendant himself must be included among them.” [FN47]

Similarly, in *Rio*, the court emphasized that the defendant “neither had an office nor a door, it had only a computer terminal,” and that “[i]f any method of communication is reasonably calculated to provide [defendant] RRI with notice, surely it is e-mail—the method of communication which RRI utilizes and prefers.” [FN48] In holding that e-mail was the most reliable way to reach defendants, the court in *Williams v. Advertising Sex, LLC* noted that “defendants are ‘sophisticated participants*769 in e-commerce,’” as well as the fact that their websites were “well established and maintained for the purposes of e-commerce.” [FN49] The court in *Ryan* held that service by e-mail, fax or postal mail was “constitutionally permissible” because the defendant “conducts its business through these means of communication,” and they are therefore “reasonably calculated to apprise [defendant] of the pendency of this action and afford it an opportunity to respond.” [FN50] The defendant in *Popular Enterprises* was also available only in cyberspace, prompting the court to conclude that e-mail was “the method of service most likely to reach [him].” [FN51]

Likewise, in *Viz Communications v. Redsun*, the defendants had provided an incorrect address on their domain registry, making e-mail the only way to contact them. [FN52] In *D'Acquisto*, the plaintiffs tried to contact defendant by several methods, but were only successful using e-mail and by relaying messages through the defendant's sister. [FN53] In that case, the court authorized e-mail service and service by hand delivery to the defendant's sister after determining that those methods were reasonably calculated to give the defendant notice and an opportunity to defend herself. [FN54]

Conversely, none of the decisions prohibiting service by e-mail characterized the defendants as savvy e-commerce participants that preferred e-mail service. In fact, courts seem reluctant to authorize service by e-mail without evidence that defendants rely, or even depend on, e-mail as a method of communication. In *Ehrenfeld v. Khalid Salim Bin Mahfouz*, the court concluded that service on the defendant's attorneys and post-office box were sufficiently “reasonably calculated to provide the defendant with notice” to satisfy due process, but that service by e-mail was not. [FN55] The court distinguished the defendants' use of e-mail as a method of communication from *Rio* and *Ryan* as follows:

*770 Although courts have upheld service via e-mail, those cases involved e-mail addresses undisputedly connected to the defendants and that the defendants used for business purposes Plaintiff has provided no information that would lead the Court to conclude that Defendant maintains the website, monitors the e-mail address, or would be likely to receive information transmitted to the e-mail address In *Rio Properties* and *Ryan*, the e-mail addresses were the mechanisms by which the defendants conducted business, presumably on a daily basis; here, the e-mail address is apparently only used as an informal means of accepting requests for information rather than for receiving important business communications. [FN56]

Accordingly, the court determined that e-mail service was not reasonably calculated to give the defendant adequate notice of the action against him because it was not a vehicle he used for “receiving important business communications.” [FN57]

Similarly, the *Pfizer* court was concerned that several defendants would not be reached by e-mail because they had not provided e-mail addresses to their domain registers. [FN58] The court rejected plaintiff's motion for an order authorizing e-mail service because “Pfizer is not entirely clear about where it intends to send its e-mail service,” and given the lack of information available online, it “[did] not feel confident that e-mails to any of the proposed e-mail addresses are likely to reach the defendants.” [FN59]

C. Evasion of service by defendant

One of the main (if unintended) benefits of the flexibility and court discretion allowed in Rule 4(f)(3) is to enable service on evasive defendants that have skirted traditional service methods. [FN60] In nearly all the cases that have allowed e-mail service, the defendant was obviously *771 e-commerce savvy and had evaded service by relying on electronic channels of communication and not disclosing contact information that would facilitate traditional service. In most cases where courts were frustrated with evasive defendants, they authorized e-mail service because it was the only way to get on with a case that had been stalled due to the defendant's refusal to cooperate.

In *In re International Telemedia Associates*, the bankruptcy court specifically noted that the defendant “has intentionally concealed his location and failed to respond to the Trustee's inquiries regarding his whereabouts.” [FN61] The court reasoned that “[a] defendant should not be allowed to evade service by confining himself to modern technological methods of communication not specifically mentioned in the Federal Rules. Rule 4(f)(3) appears to be designed to prevent such gamesmanship by a party.” [FN62] At the time of the suit, the defendant was acting as a “moving target” and “claimed to be traveling through Europe and the Far East and refused to identify the country in which he would be at a given time.” [FN63]

Rio elucidates the importance of the defendant's evasiveness: “when faced with an international e-business scofflaw, playing hide-and-seek with the federal court, e-mail may be the only means of effecting service of pro-

cess.” [FN64] As in *Rio*, the defendant in *Popular Enterprises* was evading service. [FN65] The court in *Williams* also defined the defendant as “evasive regarding his whereabouts.” [FN66] In *Viz Communications*, the court also took issue with the defendants' apparent efforts to evade suit, stating that defendants “cannot avoid service simply by changing their mailing address and making it difficult or even impossible for courts in the *772 United States to reach them.” [FN67] The court authorized e-mail service, noting that “e-mail is the sole means of contact on the [defendants'] website” and interpreting changes in contact information and ambiguous addresses on the domain name registry to “suggest that [defendants] well may have sought to avoid disclosure of appropriate contact information.” [FN68]

IV. CONSIDERATION OF FOREIGN LAW

While most courts agree on the first three factors courts use to determine whether e-mail service is appropriate, they disagree on whether offense to a foreign country's laws should be considered in determining whether to allow e-mail service on an individual in that country. Most countries have fairly clear rules regarding service of process within their own territories, and the vast majority of those countries regard it as an exclusive function of national law and procedure. Indeed, in many legal systems (especially those following the civil law approach) the rules simply do not allow service of process by private (non-governmental) means, let alone service on defendants directly by e-mail from another jurisdiction. [FN69] In such situations, e-mail service from the United States, even when fully authorized under Rule 4(f)(3), would be directly contrary to that country's laws, and the person effecting e-mail service might conceivably be subject to criminal penalties for violating those laws. Additionally, enforcement of any U.S. judgment in a case where service had been made by e-mail in violation of foreign law would be subject to serious challenge (if not presumptive invalidity) within that foreign jurisdiction.

Some scholars and courts conclude that a decision on substituted service abroad necessitates an inquiry into foreign law by the court, [FN70] *773 while others contend that an inquiry into foreign law is legally unnecessary. [FN71] In *Rio*, for example, the Ninth Circuit explicitly stated that “service of process ordered under Rule 4(f)(3) may be accomplished in contravention of the laws of the foreign country.” [FN72] The court reasoned that:

[S]ervice under Rule 4(f)(3) must be (1) directed by the court and (2) not prohibited by international agreement. *No other limitations are evident from the text.* In fact, as long as court-directed and not prohibited by an international agreement, service of process ordered under Rule 4(f)(3) may be accomplished in contravention of the laws of the foreign country. [FN73]

The U.S. District Court for the Eastern Division of Virginia restated *Rio*'s analysis regarding e-mail service to authorize service on a foreign defendant by serving an attorney representing him in another matter. [FN74] The court relied on *Rio* for the rule that “[t]he only limitations on Rule 4(f)(3) are that the means of service must be directed by the court and must not be prohibited by international agreement.” [FN75] Similarly, when considering whether to authorize service by facsimile (not e-mail) on defendants located in Belize, the U.S. District Court for the Southern District of Florida concluded that

[T]he advisory committee notes [to FRCP 4(f)(3)] imply that a court may order service in violation of foreign law It appears to be in the power of this Court to define a method of *774 service by which the parties in Belize may be acceptably contacted, regardless of whether such method contravenes Belize law. [FN76]

In *Prewitt v. OPEC*, the Eleventh Circuit explicitly departed from the Ninth Circuit's *Rio* conclusion, finding

that offense to Austrian law prohibiting service without the consent of Austrian authorities was of great enough concern to outweigh actual notice, and concluding that it was impossible to serve the defendant, the Organization of Petroleum Exporting Countries (“OPEC”), in that case. [FN77] Prewitt had attempted to serve OPEC by requesting that the trial court send a copy of the complaint to OPEC by international registered mail, return receipt requested. The clerk for the trial court complied and sent the complaint to OPEC's headquarters in Vienna, Austria. The pleadings were signed and stamped “received” by OPEC's Administration and Human Resources Department, and circulated to several OPEC departments, but OPEC decided not to take any action regarding the complaint. [FN78] Prewitt then filed a motion to pursue alternative means of effecting service, including e-mail, which the court denied, finding that OPEC could not be effectively served with process. Prewitt appealed the district court's holding.

Affirming the result below, the Eleventh Circuit rejected the plaintiff's reliance on *Rio* as follows:

The most important distinction ... is that in *Rio*, there was no discussion of Costa Rican law at all, much less of any prohibitions relating to service of process and thus, no need to take into account the advisory note to Fed. R. Civ. P. 4(f)(3) directing that alternative service of process should minimize offense to foreign law. [FN79]

The court would not authorize e-mail service because Austrian law provided OPEC protection from “all methods of service of process without its consent” by requiring that “any service of process from *775 abroad be affected through Austrian authorities.” [FN80] The court inserted a footnote qualifying its statement: “we do not say that a district court never has the discretion to direct service of process under Fed. R. Civ. P. 4(f)(3) that is in contravention of a foreign law.” [FN81] This note implies that the court's view is that a foreign law analysis is generally required, although it can be disregarded for particularly egregious defendants.

In *D'Acquisto*, the district court authorized e-mail service on a defendant residing in British Columbia only after analyzing the provincial rules of civil procedure regarding substituted service to ensure that e-mail service was compatible with the rules. [FN82] Although the court did not posit that foreign law must be considered, it clearly felt compelled to make sure that the method of service it was authorizing complied with British Columbia law, thereby impliedly requiring a foreign law analysis.

From a strictly textual point of view, *Rio*'s interpretation of Rule 4(f)(3) as not requiring an analysis of offense to the foreign jurisdiction's law is correct. However, as explained above, the advisory note to that Rule explicitly encourages courts to “minimize” offense to foreign law when authorizing alternative methods of service. [FN83] By comparison, Rule 4(f)(2) specifically allows service only in accordance with the receiving country's laws, as directed by the receiving country, or by personal service or return receipt mail *only if* not prohibited by the receiving country. [FN84] It would be an inexplicable deviation from the rule's clear deference to foreign law to allow judges to authorize substituted service, including e-mail service, without considering the receiving country's laws.

Aside from the clear directive of Rule 4(f)'s text and advisory committee notes, concerns of international comity and judicial interdependence suggest that foreign law considerations are a necessary requirement of judges when authorizing e-mail service on defendants in foreign jurisdictions. [FN85] Courts and judicial systems are increasingly *776 interconnected, [FN86] and judges increasingly look to foreign judges' decisions on both procedural and substantive issues. [FN87] Adopting a view of service on foreign defendants that does not consider relevant foreign law is simply parochial. [FN88]

In authorizing service of process abroad, a judge is essentially reaching into the realm of the foreign government's sovereign domain. As a consequence, he or she should take into account the legitimate interests of the foreign jurisdiction. Although service of process is generally characterized as a "procedural" matter, many countries still object to such acts when carried out by methods or persons not explicitly authorized under their domestic law. In fact, one of the motivating purposes of the Hague Service Convention was to facilitate transmission of requests to member states' Central Authorities so they could then serve the defendant pursuant to local law. [FN89] At the moment a U.S. judge is presented with a request to serve a foreign defendant, a kind of "mediation" between U.S. and foreign law begins. [FN90] In an increasingly interconnected world, a judge should not simply ignore relevant strictures of foreign law when making a determination whether to authorize e-mail service, or any other form of substituted service, on a foreign defendant.

V. FOREIGN LAW AND PRACTICE [FN91]

Like their U.S. counterparts, foreign legislatures and courts have *777 been forced to analyze their service rules and requirements in the face of rapidly changing technology, including electronic means of communication. For various reasons, the response has not been uniform and to date appears to have been less accepting of service by e-mail than in the United States. In jurisdictions where e-mail service is permissible, however, courts have generally adopted principles remarkably similar to those articulated in U.S. case law.

In civil law countries, formal service of process is generally considered to be a governmental (sometimes exclusively judicial) function to be carried out by the judicial police or other officials (variously called bailiffs, marshals, clerks, "hussiers de justice," etc.) rather than attorneys, process servers or private parties. Because service in civil law jurisdictions is not linked to personal jurisdiction, issues concerning defective or improper service are often raised at the enforcement stage as opposed to at the inception of proceedings as is typical in common law systems. [FN92] While specific rules vary from country to country, the norm is personal delivery, although service by mail is often authorized where the postal system is operated by the government. Some legal systems differentiate between service of operative or initiating judicial documents, i.e., summons and complaints, and delivery of other documents (court orders, briefs, etc.). [FN93] Although most civil law jurisdictions allow some form of substituted service, such as publication, [FN94] very few civil law countries appear to have authorized e-mail service. [FN95] In any *778 event, because the methods of service are governed by positive procedural rules and are most often carried out by government officials, there are very few reported judicial decisions on the subject.

The issue of service by e-mail in European countries has recently been addressed at the EC level, and several signs suggest that although e-mail service has not yet been endorsed, it has been tentatively embraced due to its usefulness. Such signs include the relaxed standard of service for enforcement purposes found in EC Regulation 44/2001, [FN96] which modified the Brussels Convention requirement of "duly served," [FN97] interpreted by the European Court of Justice to require formality of service despite actual notice. [FN98] Other signs are EC Regulation 1348/2000's acceptance of e-mail communications between requesting and receiving authorities where authorized by the member state. [FN99] The European Court of First Instance recently amended its rules of procedure to allow e-mail service by the Court Registry on attorneys or agents of parties "by fax or e-mail, provided that the lawyer or agent concerned has agreed to service being effected in that way." [FN100] Perhaps most noteworthy is the recent EC Regulation No. 805/2004 regarding European Enforcement Orders ("EEOs") for uncontested claims. [FN101] This Regulation explicitly includes e-mail as an accepted form of service for providing the debtor notice of EEO proceedings, with certain safeguards.

Service of process in common law countries can typically be effected through personal delivery of the documents by private parties. In addition, common law countries appear more receptive to alternative forms of service, including postal mail, publication, facsimile and *779 e-mail. For those reasons, and because service of process has jurisdictional implications, the validity of service is more frequently litigated. On the whole, the courts' analyses of the issues are strikingly similar to those of U.S. courts. This is not surprising, since substituted service by e-mail is considered a fallback measure, and thus permissible only when necessitated by circumstances such as an evasive defendant or unsuccessful previous attempts at traditional service. [FN102]

Notably, two common law jurisdictions, England and Australia, consider the possible offense to the receiving country's laws. In both countries, judges are required by relevant statutory directives to consider foreign law when authorizing e-mail service abroad. In Canada, however, courts place minimal importance on offense to foreign law.

A. England

English law [FN103] permits service outside its jurisdiction by any method, whether it is permitted by the law of the country in which it is served, by a Civil Procedure Convention such as the Hague Service Convention, through diplomatic channels, or in accordance with European Council Regulation No. 1348/2000. [FN104] An English court may also order alternative methods of service, such as facsimile or e-mail service, as long as the method does not contravene the law of the country where service is being effected and "good reason" exists for authorizing the alternative method. [FN105] Regardless of the method of service, English law clearly and explicitly forbids service on foreign defendants if contrary to laws of the *780 country in which the defendant resides. [FN106]

Like their U.S. counterparts, English judges rely upon plaintiffs' prior attempts at service, evidence of evasiveness on the part of the defendants, and actual notice to the defendant when determining whether to allow substituted service, including by e-mail, on defendants abroad. For example, in the first English case to permit e-mail service, the Queen's Bench Division of the Royal Courts of Justice authorized such service on a defendant residing at unknown locations throughout Europe. [FN107] Unable to locate a physical address or reliable fax number for defendant, the court authorized service by e-mail. In that case, e-mail was the sole method available to the plaintiff for contacting the defendant. [FN108] Any concerns for due process were assuaged when the defendant responded to the e-mail that included the served documents, thus proving actual notice. [FN109] The Queens Bench Division (Commercial Court) also looked to actual notice when affirming a previous decision to authorize service on the defendant by facsimile and on a Spanish attorney representing another defendant in the same action before the English court. [FN110] The court endorsed alternative methods of service on the grounds that "[t]he service was effective in a wholly practical way: [the defendant] got the order and he responded to it." [FN111] The court reasoned that

*781 There may be situations in which service by orthodox means can be effected but it does not serve the ends of justice to use such means: not least because their use will be materially less effective in bringing the proceedings to the notice of the defendant than the [alternative] method requested." [FN112]

In *Crystal Decisions (UK) Limited v. Vedatech Corp.*, the High Court of Justice (Chancery Division) affirmed a previous court order permitting e-mail service on a defendant located in Seattle, Washington. [FN113] The order authorized service by e-mail on the defendant and by mail on the lawyers assisting him in England and other jurisdictions. [FN114] In affirming that e-mail service was valid, the court noted that the defendant

had previously been served pursuant to the Hague Service Convention and in person in a separate court proceeding, and highlighted that “there is no doubt whatever that [defendant] ... has been well aware of these proceedings at all material times.” [FN115]

The High Court, Queen's Bench Division, recently allowed substituted service on a Sudanese bank defendant's legal department. [FN116] The court only authorized such substituted service after plaintiff's repeated attempts to serve the defendant through diplomatic channels failed. [FN117] The defendant's evasiveness informed the court's decision, as the protection from service that it received under Sudanese law made it virtually untouchable. [FN118] The court further relied on the fact that the defendant had notice of the action against it. [FN119]

Molins Plc v. G.D. SpA also illustrates the importance of the defendant's evasiveness. [FN120] Molins, an English company, filed suit in English court against G.D., an Italian company. G.D. subsequently filed suit against Molins in Italian court. In a race to have the Italian court “first seize the case” pursuant to Article 21 of the Brussels Convention, [FN121] *782 G.D. requested that the Italian court authorize service by fax on Molins. [FN122] G.D. justified its request by stating that “Molins has recently escaped any contact with the applicant,” and “during the holidays it would be extremely easy for Molins to try and prevent the execution of the service of process according to methods provided for by the international agreements[.]” [FN123] These justifications, which were false, created a story for the court of an evasive defendant not reachable by traditional means of service, presupposing that these factors would guide the court's decision to authorize substituted service. [FN124]

Relevant rules of English civil procedure deviate from the U.S. Federal Rules of Civil Procedure by explicitly forbidding service on defendants abroad when doing so contravenes that country's laws. Accordingly, while foreign law is only occasionally considered by U.S. judges, it is often given detailed analysis by English judges. [FN125] The English Rules of Civil Procedure explicitly prohibit service on a foreign defendant by any method contrary to the law of the country in which the claim form is being served. [FN126] According to the English Rules of Civil Procedure: “[n]othing in this rule or in any court order shall authorize or require any person to do anything in the country where the claim form is to be served which is against the law of that country.” [FN127] Hence, regardless of whether court permission is required, English law must conform to the law of the country in which the defendant is being served. [FN128]

*783 Although English courts have rarely addressed foreign law when determining whether to authorize e-mail service specifically, English judges have considered the potential offense to foreign law when determining whether other forms of substituted service are authorized. The High Court, Queen's Bench Division, set aside a default judgment based on service by notary public on a defendant in Turkey. [FN129] The court ruled that although a defendant in a *domestic* action in Turkey may be served by notary public, Turkey's objection to Article 10(a) of the Hague Service Convention authorizing service by postal mail directly to defendant created an inference that Turkish law did not allow direct service of any kind on a defendant in foreign proceedings. [FN130] The judge in this case took the foreign law analysis one step beyond by looking at Turkish law with regard to service on Turkish defendants in *foreign* proceedings, and implicitly acknowledged the importance of comity by inferring that service by notary was contrary to Turkish law based on Turkey's objections to Article 10(a).

Similarly, in *Arros Invest Limited v. Nishanov*, the English High Court Chancery Division made a detailed inquiry into Russian law to determine whether Russian law would be violated by service on a Russian defendant's babysitter. [FN131] In the face of diverging views from Russian law experts, the court could not conclude whether service violated Russian law, and turned to actual notice to determine the issue, holding that “where it is

common ground that [the Russian defendant] had not received actual notice, the onus is on the claimant to show that the method of service adopted was adequate and in compliance with the local rules.” [FN132] This ruling, while it did not involve e-mail service, illustrates the English concern for foreign law, the defendant's due process right to actual notice, and comity when authorizing service.

Like their U.S. counterparts, English courts have also found ways to consider the implications of foreign law as circumstances dictate. At least one English court interpreted the statutory rule forbidding service “against the law” of the receiving country to prohibit service on a foreign defendant only when the receiving country has *explicitly* forbidden*784 such service. In *Habib Bank Limited v. Central Bank of Sudan*, the court held that the defendant could be served through its legal department in Sudan even though Sudan had not “expressly permitted” that particular method of service. [FN133] This case suggests that even English judges may on occasion be tempted to downplay considerations of foreign law when an evasive defendant is obstructing court proceedings.

B. Australia

Australian civil procedure also emphasizes due process and prior attempts when determining whether to authorize substituted service, including e-mail, on foreign defendants. Australia's recently amended Federal Rules of Court include explicit requirements of compliance with foreign law and prior traditional service attempts before a court can order substituted service on foreign defendants.

Pursuant to the amended Federal Rules of Court, unless the defendant consents to service, a plaintiff must receive leave from an Australian court to serve originating process on a person in a foreign country. [FN134] The court may also confirm service conducted without leave of court. [FN135] The court may *only* give leave to a party to serve process on a foreign defendant, or confirm such service, “in accordance with a convention or the law of the foreign country.” [FN136] The Australian Federal Rules require that a plaintiff seeking leave of court certify to the court that the method of service they are requesting is permitted either by a convention or the law of the foreign country. [FN137] The rules make clear that methods of service used on domestic defendants and non-personal service may be used on foreign defendants only if permitted by a convention or the laws of the foreign country. [FN138]

*785 Australian judges may only order substituted service on a foreign defendant after receiving an official certificate or declaration from the court or government of the foreign country in which the defendant resides “stating that attempts to serve a document on a person in the foreign country, in accordance with a convention or through the diplomatic channel, have not been successful.” [FN139] This requirement essentially allows substituted service on foreign defendants only after an official pronouncement by the foreign government that traditional attempts at service have been made. We have not discovered a more explicit requirement of prior attempts.

When considering whether to grant substituted service on defendants located in New Zealand by e-mail and in addition to serving one of defendant's counsel, the Federal Court of Australia in Queensland engaged in a due-process-like analysis of whether e-mail service would provide the defendant with actual notice. [FN140] The court rejected the plaintiff's request for e-mail service based on its finding that “there is nothing to indicate that [defendant] has any connection with that e-mail address, or that delivery of service copies intended for her to that e-mail address would be likely to come to her attention.” [FN141]

C. Canada

Canadian judges also consider actual notice, previous attempts, and evasiveness of the defendant when determining whether substituted service, including e-mail service, should be authorized. With regard to foreign law, however, Canadian law is similar to U.S. law in that it does not statutorily require judges to consider foreign law when authorizing substituted service, including e-mail service.

In *LeBlanc v. Whitman*, the Alberta Court of Queen's Bench in the Judicial District of Edmonton authorized e-mail service on a resident of Abu Dhabi based on the evasiveness of defendant and inability to serve him through traditional methods. [FN142] The parties were a separated couple, and the defendant husband relocated to Abu Dhabi for work. The plaintiff wife was attempting to sell the couple's former matrimonial home and experienced "difficulty in trying to track down [defendant]*786 and properly serve him ..." [FN143] The plaintiff's first attempt at e-mail transmitting service was returned as undeliverable, but she subsequently exchanged e-mail correspondence with defendant and her second e-mail message transmitting service was not returned as undeliverable. Although the court was prepared to "accept the e-mail of service," it denied plaintiff's motion to authorize sale of the home only a week after the e-mail was successfully sent without giving the defendant more time to respond. [FN144] Like U.S. courts authorizing e-mail service, *LeBlanc* discussed plaintiff's previous attempts to serve the defendant, the defendant's attempts to evade service and due process concerns of defendant's actual notice of the pending action.

Canadian courts have also addressed the issue of e-mail service on Canadian defendants being sued by plaintiffs in Canadian court. In *Telewizja Polsat S.A. v. Radiopol Inc.*, the Federal Court in Toronto, Ontario, authorized e-mail service on an evasive defendant located elsewhere in Canada. [FN145] The defendants—a Quebec company and its administrator—were allegedly operating a website offering unauthorized Polish television programming. [FN146] The plaintiffs unsuccessfully attempted to serve the defendants personally in Montreal, Quebec, and to a post office box affiliated with the individual defendant in Alberta. The court looked at Rule 136(1) of the Canada Federal Rules, which states "[w]here service of a document that is required to be served personally cannot practicably be effected, the Court may order substitutional service or dispense with service." [FN147] Pursuant to this rule, the court authorized service based on the plaintiff's prior unsuccessful attempts to personally serve defendants.

With regard to e-mail service specifically, it appears that Canadian officials did consider the possibility of e-mail service pursuant to the Quebec Code of Civil Procedure. [FN148] Article 138 of the Code currently states that "[t]he judge or clerk may, on motion, if the circumstances so *787 require, authorize a mode of service other than those provided" in the Code. [FN149] Should a judge order e-mail service pursuant to Article 138, such service would be likely valid in Quebec. [FN150]

Under Canadian law, foreign defendants can be served in accordance with either Canadian provincial law or the law of the foreign country in which the defendant resides. [FN151] For example, the Supreme Court Rules of British Columbia allow a foreign defendant to be served in one of three ways:

- (a) in a manner provided by these rules for service in British Columbia, (b) in a manner provided by the law of the place where service is made if, by that manner of service, the document could reasonably be expected to come to the notice of the person to be served, or (c) in a state that is a contracting state under the [Hague Service] Convention, in a manner provided by or permitted under the Convention. [FN152]

The result is that a plaintiff may serve a foreign defendant *either* pursuant to the Hague Service Convention, *or* pursuant to the law of British Columbia, *or* pursuant to the law of the country in which the defendant resides. [FN153] This rule has been described by at least one Canadian judge as a “difficulty” because it does not require plaintiffs to adhere to the Hague Service Convention when defendants are located in another State Party. [FN154] Canadian judges have repeatedly dismissed defendants' comity-based arguments relating to the Rules' failure to require service pursuant to the Hague Convention or the foreign *788 country's laws by strictly interpreting the Rules' clear language. [FN155]

The province of Ontario and the Canadian Federal Court Rules take a more comity-based approach to service on foreign defendants. A defendant located in a country that is a party to the Hague Service Convention must be served pursuant to that Convention. [FN156] If the defendant is located in a non-party state (or presumably if no correct address exists for the defendant in a party state) then a plaintiff can serve the defendant pursuant to the rules of the jurisdiction in which the Canadian court is located or “in a manner provided by the law of the jurisdiction where service is made” if it is reasonably expected to come to the defendant's notice. [FN157] These rules are more analogous to the ambivalence toward foreign law reflected in the U.S. rules than the civil procedure rules of England and Australia. It might well be, therefore, that the Canadian approach could also benefit from an international convention or set of principles addressing when to allow substituted service, including e-mail, on foreign defendants.

VI. PERVASIVE ISSUES IN E-MAIL SERVICE

Despite increasing judicial comfort with authorizing e-mail service when the four factors described above are present, the reported decisions reflect continuing concern over several persistent problems: the need to document actual receipt of notice by e-mail, the probability of challenges to foreign enforcement of judgments based on e-mail service, and the difficulties of actually determining an evasive defendant's whereabouts.

A. *Reliable Confirmation of Receipt*

One issue about which both courts and scholars have voiced particular concern is the lack of a truly reliable mechanism for confirming receipt of e-mail service by the defendant. [FN158] As discussed above, U.S. *789 courts have dealt with this issue by requiring that e-mail be the defendant's preferred method of communication, which increases the probability that e-mail service is reasonably calculated to provide actual notice. [FN159] It also mirrors the rule espoused by the Eighth Circuit in the context of electronic filing of documents that a party will be presumed to have received an e-mail by the court unless the court's message is returned as undeliverable. [FN160] This approach parallels the approach taken by the Canadian judge in *LeBlanc v. Whitman* holding that e-mail service was sufficient because the second e-mail message that the plaintiff sent the defendant was not returned as undeliverable, thereby permitting the conclusion that it was received. [FN161] Similarly, in each of the English cases authorizing e-mail service, the court was convinced that the defendant had actual notice of the proceedings which had been instituted against it. [FN162]

But these cases depend on judicial assessments of the particular facts and do not pretend to articulate a uniformly applicable approach. Several countries' postal bureaus have been working to create a uniform electronic postmarking systems that allow a sender to “post” an electronic message to its domestic postal service, which in turn assigns a code verifying the message's authenticity and integrity and sends the coded message to an electronic e-mail address with return receipt *790 capability. [FN163] Implementation of reliable electronic post-

marking systems by governmental (or private) organizations that can in fact guarantee the authenticity of documents and provide return receipt information might well alleviate the due process concerns and result in increased service by e-mail. [FN164]

While the United States made progress in this area several years ago, an electronic postmarking system with receipt confirmation capabilities does not seem likely in the foreseeable future. [FN165] The U.S. Postal Service's inability to provide a mechanism for reliable return receipt confirmation of e-mail will likely stall the proliferation of e-mail service, and result in the continuation of court-created ways around the due process difficulties caused by the inability to confirm receipt like those discussed above.

B. Enforcement Of Resulting Judgments

A major concern about the use of e-mail service relates to the eventual enforceability of any resulting judgment. [FN166] Most foreign countries will not recognize or enforce a judgment in a case in which initial service of process did not comply with their own domestic law (to the extent applicable). [FN167]

***791** Some commentators view Rule 4(f)(3)'s lack of reference to foreign law as evidence that the drafters believed the difficulty of enforcing a judgment in a foreign country after using service that violates its laws would by itself prevent plaintiffs from requesting service contrary to foreign law. [FN168] Such an interpretation may read too much meaning into the silence. Where a plaintiff is seeking injunctive relief, as many are in trademark infringement cases dealing with websites, or when the defendant has assets in the United States, such enforcement problems are not likely to be an issue. [FN169] Those problems become significant where and when the successful plaintiff has to try to enforce the judgment abroad, especially in the jurisdiction in which service had first been made. In other words, the validity of initial service of process may have a determinative effect on the ultimate enforceability of the resulting judgment.

C. Location of Defendant

One seemingly obvious question that has received little attention by courts and commentators is whether (and how) to determine the physical (or actual) location of a defendant known only by an e-mail address. [FN170] A court cannot undertake a foreign law analysis without knowing the foreign jurisdiction in which a defendant resides. [FN171] This issue may not have been addressed to date because, practically speaking, a plaintiff will usually have some idea about what country a defendant is located in even while lacking a correct physical address. In *Pfizer*, the only case to discuss such a problem, the court chided defendants for not mentioning "any attempts made to determine the identities and locations of the principals in these [defendant] companies." [FN172]

Other than *Pfizer's* passing reference, in all other e-mail service cases ***792** we have reviewed arising in the United States, Canada or England, the plaintiff seems to have had a general idea of the defendant's actual whereabouts. This may be due to the implied requirement that the plaintiff attempt to serve the defendant through traditional methods before requesting an order authorizing e-mail service. Notwithstanding the significant practical difficulties in seeking such information in transnational cases, due diligence regarding defendant's location for the purposes of traditional service will generally result in a reasonable idea about that defendant's country of residence. This concern, while valid, was not a dispositive factor in the decisions we reviewed.

VII. CREATING AN INTERNATIONAL STANDARD

More and more cases will require courts to deal with the validity of e-mail service on defendants outside the serving jurisdiction. [FN173] Without some resolution at the international level, the numerous issues involved in the ultimate validity of such service will continue to be addressed by courts in different countries through the application of different national laws and policies with predictably differing results. Disparate approaches and inconsistent rules will result in confusion and uncertainty on the part of litigating parties. Even within the United States, if the current circuit split regarding consideration of foreign law persists or deepens, and other circuits begin to create unique tests, whether a foreign defendant may be served by e-mail will depend on the federal circuit where the suit was filed.

In this part, we consider several possible avenues for achieving an acceptable resolution to this situation. From a purely domestic perspective, the most readily achievable solution might be to seek changes to the relevant U.S. rules. We think, however, that it is worth considering an international approach to what is in fact an international issue of real practical importance in transnational litigation. Since a clear standard in U.S. and foreign decisions has emerged on most aspects of the practice, that standard could be readily endorsed on an international level. [FN174]

**793 A. Amend Fed. R. Civ. P. Rule 4(f)(3)*

One approach would be to amend [Rule 4\(f\)\(3\)](#) to specify which methods of service on a foreign defendant a court may order, under what circumstances, and in which order of priority. [FN175] The rule could be amended explicitly to allow e-mail service in another country and to articulate the factors a court must consider when determining whether to issue such an order. [FN176]

We submit that any such amendment should require courts to give appropriate consideration to the likelihood of offense to the receiving country's law, in addition to the efficacy of previous attempts at traditional service, evidence of an evasive defendant, and that e-mail service was reasonably calculated to notify the defendant to the pendency of the action. Such an amendment would rest on well-established principles of international comity and, we believe, would actually promote the interests of U.S. litigants by improving the likelihood of eventual enforcement of resulting judgments. It would adopt the same approach as English and Australian law by demonstrating that comity and respect for foreign public interests are legitimate considerations. At the same time, of course, it should not preclude judges from having discretion to authorize e-mail service in exceptional cases even despite the fact that it would contravene foreign law.

For example, [Rule 4\(f\)\(3\)](#), which now reads "by other means not prohibited by international agreement as may be directed by the court" could be amended as follows:

A court may order service by e-mail, fax, telex, publication and/or personal service on a foreign defendant's attorney, if ***794** known, in a pending matter if (1) not prohibited by international agreement, (2) the plaintiff has diligently pursued traditional methods of service unsuccessfully, and (3) no accurate physical address is available for the defendant.

In addition, the party requesting service pursuant to this rule must demonstrate to the court that either (1) the method of service requested is not contrary to the laws of the country in which the defendant is located or (2) the interests of justice necessitate the requested method(s) of service.

A clearer and more practical formulation for the second sentence of this proposal might be:

When such means of alternative service are demonstrably contrary to the laws of the country in which the defendant is located or resides, a court should authorize them only as a last resort and in the interests of justice.

Although such an amendment would provide useful guidance for U.S. courts, it would do little to further an agreed international standard. Amending the Rules without guidance on whether courts should look to foreign law would not be a step in the right direction. [FN177] Given the increasingly global nature of service and litigation, any consideration of service abroad must include an analysis of the law in the country in which the defendant is located.

Moreover, as the above proposal suggests, we are hesitant to recommend a revision that prohibits a U.S. court, in all circumstances, from authorizing e-mail service on a foreign defendant when such service would violate the applicable foreign law. Such an absolute rule would have the obvious virtues of respecting foreign law, minimizing conflicts, and (perhaps) enhancing the enforceability of resulting judgments. On the other hand, however attractive it might be to emulate the English and Australian rules of civil procedure in this regard by explicitly forbidding a court to authorize substituted service when contrary to the receiving country's laws, we do not believe that such an approach would necessarily be in the interests of litigants with bona fide claims against elusive foreign defendants, especially in the absence *795 of an agreed international approach to the validity of electronic service in appropriate transnational cases.

B. Re-Interpret the Hague Service Convention

1. Allowing E-Mail Requests under Article 5

The Hague Service Convention establishes channels for the transmission of requests for service between the competent authorities of States Parties. It does not specify rules for the extraterritorial service of documents, but leaves the execution of the request for service to the domestic law of the requested State. [FN178] Can the Convention therefore be read to allow States Parties to send requests by e-mail to foreign Central Authorities for service in accordance with their domestic law, and/or to authorize e-mail service under the domestic law of States Parties? Some have suggested that it does. [FN179] Such a broad interpretation would be consistent with the goal of interpreting the Convention so as to incorporate changing technologies into international service processes. [FN180]

In April 2000, for example, the Conference's Special Commission on General Affairs and Policy adopted a paper entitled "Electronic Data Interchange, Internet and Electronic Commerce." [FN181] The Commission's task was to "study the implications of the new means of electronic communication for the working of the [Hague Service Convention]." [FN182] Although the Commission came to no conclusions regarding whether the Convention authorizes e-mail service, it did suggest that *796 the Convention should be read to accommodate appropriate communications by e-mail. [FN183] Specifically, the Commission endorsed the idea of allowing plaintiffs to send documents electronically to duly established Central Authorities for service within their jurisdictions under the same rules as more traditional forms of service. [FN184]

Building on these recommendations in 2003, a Special Commission on the Practical Operation of the Hague Apostille, Evidence and Service Conventions published conclusions and recommendations further embracing technological advances. [FN185] The 2003 report reiterated that the Hague Service Convention should be considered in the context of a business environment in which use of modern technology is now pervasive, and that

“the electronic transmission of judicial documents is a growing part of that environment.” [FN186]

Based on this principle, the Commission concluded that the Hague Service Convention “does not on its terms prevent or prescribe the use of modern technologies to assist in further improving its operation.” [FN187] With regard to e-mail specifically, the Special Commission concluded that transmitting documents internationally under the Convention “can and should be undertaken by IT-business methods including e-mail.” [FN188] Like the 2000 Commission, the 2003 Commission mainly focused on e-mail as a method for communication between a requesting party and a forwarding authority, and between a forwarding authority and a Central Authority. [FN189]

The recently published Practical Handbook goes further, noting that Article 5(1)(a) of the Convention has been construed to permit the Central Authority of a requested State to execute requests for service by e-mail, if allowed by the internal law of the requested State. [FN190] The Handbook states that under Article 5(1)(b), “one could imagine the forwarding authority asking the requested State to proceed by electronic means. The Central Authority would then be bound to do so, unless this particular form was incompatible with its internal law.” [FN191]

***797** Reading Article 5 to allow Central Authorities to receive and act upon electronically transmitted requests for service would obviously permit the treaty structure to accommodate modern communications methods and would likely result in a measure of increased efficiency. However, even for States Parties willing or able to act on such requests, it would not solve the problem of an evasive defendant for whom the requesting Party cannot provide a valid physical address, or for whom only an incorrect address is known, since by its terms the Convention would not apply in such a case. [FN192] Even if a Central Authority received a document via e-mail, that Central Authority would still need a physical address to serve that individual personally. [FN193] Ultimately, it would not solve the problem in the way domestic courts have begun to do, by authorizing e-mail service directly on the defendant. At best, therefore, the broad interpretation of Article 5 would be only a small step forward.

2. Interpreting Article 10

In 2000, the Hague Conference's Special Commission suggested that key terms in the Convention could be interpreted to include their electronic “functional equivalents.” [FN194] For example, the Commission ***798** discussed Article 1(2) of the Hague Service Convention, which provides that the Convention does not apply “where the address of the person to be served with the document is not known.” [FN195] Under a functional equivalence approach, the Commission suggested, the Convention might still apply, in principle, even “if only the electronic address of the recipient is known.” [FN196]

The Commission also considered applying this principle to Article 10(a), which allows plaintiffs to “send” documents to foreign defendants by mail, [FN197] and concluded that it could be interpreted to allow plaintiffs to e-mail documents directly to foreign defendants if not contrary to the receiving country's law. [FN198] The Commission recommended a broad reading of the Convention that would allow for direct e-mail service, but only if “security requirements” were met, including the following:

The technique used to send the documents should guarantee the confidentiality of the method, ... the integrity of the message, the inalterability of the message, and making it possible to identify beyond doubt the sender of the message [and] ... an irrefutable record should be kept of the exact date of dispatch and

receipt of the message. [FN199]

Various commentators have also suggested reading the words “address,” “send” and “mail” in the Hague Service Convention to encompass sending e-mail. [FN200]

*799 The “functional equivalence” approach to Article 10 is, we submit, an entirely reasonable approach which finds some support in other emergent areas of private international law. [FN201] As a practical matter, it would go far towards assisting litigants in effecting service on elusive defendants. Still, it would fall considerably short of a comprehensive solution. First, as discussed above, it is at best uncertain that fail-safe ways to ensure confirmation of receipt of electronic service can be achieved and implemented any time soon. [FN202] Secondly, Article 10(a) applies only if service by mail is permitted under the law of the State of origin *and* the State of destination does not object. [FN203] Many States Parties to the Convention continue to object to service by mail under Article 10(a), precisely because their law prohibits service by non-official persons and methods. [FN204] Functional equivalence by itself could not overcome such objections; even if Article 10(a) were read to include e-mail, the same objections would presumably apply.

Another weakness to this application of a “functional equivalence” approach arises from the current circuit split in U.S. courts regarding whether Article 10(a) permits service of initial process by postal mail, or only allows post-service judicial documents to be sent by postal *800 mail. [FN205] If a more restrictive interpretation is adopted, then pursuant to the Hague Service Convention a U.S. plaintiff could serve a foreign defendant by e-mail directly, without using the Central Authority, in only one of the several circuits that interpret Article 10(a) to allow service by mail. [FN206] Reading Article 10(a) to include e-mail service would fundamentally alter, and perhaps needlessly complicate, the current debate surrounding that provision.

C. A New International Instrument

Given the continuing disparities in national approaches to the validity of service by e-mail, it would seem that the real task is to motivate countries to modernize and harmonize their domestic laws and practices to take account of technological advances in this important area of international legal practice, specifically by permitting litigating parties to effect initial service of process by e-mail communication. Perhaps the most promising avenue of endeavor, therefore, would be to provide a context in which countries can come together in a common effort to analyze the underlying issues and agree on the operative principles.

Negotiating a new international instrument to address the propriety of and conditions for e-mail service directly on a foreign defendant might offer the most straight-forward means of moving quickly towards a new consensus on a usable international standard. The objective should be to identify the problematic issues and concerns surrounding e-mail service and to create workable solutions to them. Since it appears that courts in the U.S. and other common law jurisdictions generally look to the same factors when determining whether to authorize e-mail service on a foreign defendant, a new instrument could articulate these factors as the minimum required conditions for such judicially authorized service. Such an instrument might even be incorporated by reference into *Fed. R. Civ. P. Rule 4(f)* and the Canadian rules of civil procedure.

Several possibilities are available, including an optional protocol to the Hague Service Convention. While negotiating such a protocol would likely be time-consuming, this option might be attractive and effective because presumptively those countries permitting or willing to permit e-mail service under the conditions stated in the protocol would *801 become parties. By the same token, State Parties to the Convention choosing not to ratify such a protocol might be the same as those drawn to a narrow interpretation of the Convention and thus likely

to become safe-havens for Internet abusers. An alternative (perhaps preliminary) approach might aim at agreement on a free-standing, non-binding statement of principles which could provide clear interpretive guidance for the Convention and might serve as a precursor to a protocol. Whatever form the instrument might take, at the outset or in the long run, it seems evident that an agreement on the validity of e-mail service would go a considerable distance towards building a consensus and endorsing an internationally acceptable solution to the growing risks of confrontation and confusion in this area of transnational practice.

We do not presume at this juncture to argue for or against any particular form of instrument, or whether it should be undertaken in any particular forum (although we incline towards the Hague Conference given its developed expertise in the area of judicial assistance in general and service issues in particular). We can, however, suggest in summary form the nature of the principles on which agreement might well be reached. These are, not surprisingly, drawn from the foregoing review of relevant decisions and practices. Our starting point is the more cautious, conservative approach reflected in the decision of the Eleventh Circuit in the *Prewitt* case. [FN207]

- States are encouraged to amend their domestic laws and rules to permit electronic service of process generally in appropriate cases.
 - Specifically, States should allow service by e-mail from abroad on persons and entities within their jurisdictions when service by mail, fax or publication in such situations would also be permissible.
 - States that reserve the service function to duly authorized national authorities under domestic law should permit those authorities to effect service by e-mail, including at the request of foreign parties, in appropriate cases.
 - Electronic service of process should be permissible when
 - a. Prior efforts by the serving party to effect delivery of notice by traditional methods and procedures, including those authorized by applicable multilateral arrangements, have been unsuccessful or (due to lack of relevant information) impossible; and
 - b. The defendant has utilized e-mail or other forms of electronic communication as a preferred or exclusive means of *802 business communication or business conduct, or otherwise has a demonstrable connection to the e-mail or Internet address to which notice will be delivered; and
 - c. The defendant has evaded effective service by traditional methods, or has failed to disclose information permitting such service, or where e-mail is the only known way to contact the defendant;
- The guiding principle in all cases is that electronic service should be authorized when it is the means of communication most reasonably calculated to provide actual notice of the pending litigation to the defendant and to its right to present its objections and responses.
- Service of process on foreign parties should be authorized only if the party requesting such service demonstrates to the court or other authority that (1) the method of service requested is not contrary to the laws of the country in which the defendant is located or (2) the interests of justice nonetheless necessitate the requested method(s) of service.

VIII. CONCLUSION

As e-mail communications and Internet use continue to grow, especially in rapidly globalizing commercial contexts, domestic legal systems need to adapt to the changing circumstances of transnational legal practice. Inevitably, courts will increasingly be confronted with requests to use e-mail to accomplish service of process on evasive defendants in foreign jurisdictions. Refusal to acknowledge the necessity of such methods in appropriate

cases will only exacerbate the already-evident conflict and confusion between and among different judicial systems. To promote efficient dispute resolution and to facilitate consistency of judicial approaches, serious consideration should now be given to reaching some form of international agreement articulating workable standards for electronic service based upon readily identifiable factors that courts in several jurisdictions have in fact applied when faced with the problem. An international endorsement of those principles would at a minimum facilitate useful accommodation between national systems on issues and problems with e-mail service.

[FN1]. Anna Conley is a doctoral candidate in International and Comparative Law at the McGill University Faculty of Law and an adjunct professor at the University of Montana Law School. David Stewart serves as Assistant Legal Adviser for Private International Law in the U.S. Department of State in Washington, D.C. and as Adjunct Professor in the Graduate (LL.M.) Program in International and Comparative Law at Georgetown University Law Center. They gratefully acknowledge the assistance of colleagues (too numerous to name individually) who have read and commented on earlier drafts. The views expressed herein are, of course, those of the authors and not any organization or institution with which they are affiliated. © 2007 David P. Stewart & Anna Conley.

[FN1]. We do not here discuss the issue of whether, or to what extent, the e-mail or Internet activities of individuals or entities outside the U.S. may properly be the basis of personal jurisdiction in U.S. litigation. Since one can obtain personal jurisdiction over foreign defendants under state long arm statutes, as well as federal long arm statutes where applicable, this is an increasingly controversial area. *See, e.g., Zippo Mfg. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119, 1124 (W.D. Pa. 1997) (creating sliding scale test for jurisdiction based on defendant's Internet presence); *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 379 F.3d 1120 (9th Cir. 2004) (discussing jurisdiction based on Internet-activities). Our focus is, instead, on service of process for purposes of notice.

[FN2]. The Anti-Cybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d)(2)(A)(B) (2000), allows service on a defendant by "sending a notice of the alleged violation and intent to proceed ... to the registrant of a domain name at the postal and e-mail address provided by the registrant to the registrar." *See Banco Inverlat, S.A. v. www.inverlat.com*, 112 F. Supp. 2d 521, 522-23 (E.D. Va. 2000) (applying statute's service provision).

[FN3]. Federal Rule of Civil Procedure ("FED. R. CIV. P.") 5(b)(2)(D) was amended in 2001 to allow electronic service of pleadings and judicial documents (after process has been served) where parties consent. One court of appeals has adopted the presumption of paper service to apply to electronic filing. *See American Boat Co., Inc. v. Unknown Sunken Barge*, 418 F.3d 910, 913-14 (8th Cir. 2005) (agreeing with the district court below that "[e]lectronic case filing entries ... constituted the official clerk's docket entries," and "[i]f these entries indicated that an e-mail was sent and not returned as undeliverable, then receipt of that e-mail would be presumed."); *see also* Elisabeth A. Wilson, *Electronic Case Filing: What Happens When Counsel Does Not Receive E-mail Notices?*, 10 COMP. L. REV. & J. 229-33 (Winter 2006) (discussing electronic filing and *American Boat Company* case); *see also* Linda Burris Arwood, *Personal Jurisdiction: Are the Federal Rules Keeping up with (Internet) Traffic?*, 39 VAL. U. L. REV. 967, 992, 997 (Summer 2005) (discussing e-filing and technology innovations in courts).

[FN4]. *See* Richard L. Marcus, *E-Discovery and Beyond: Toward a Brave New World or 1984?*, 236 F.R.D. 598, 605 (Sept. 2006) (discussing the rise of the e-discovery industry); *see also* American Bar Association Legal Technology Research Center, *Helping Lawyers Solve the Technology Puzzle-FYI: Electric Discovery*, at

www.abanet.org/tech/ltrc/fyidocs/ediscovery.html.

[FN5]. See discussion *infra* Part VI.

[FN6]. FED. R. CIV. P. 4(f) governs service on individuals and entities *outside* the United States. FED. R. CIV. P. 4(e) governs service of process upon individuals *within* the United States. See discussion *infra* Part II. For more on service of process abroad see generally D. EPSTEIN, J. SNYDER AND C. BALDWIN, INTERNATIONAL LITIGATION: A GUIDE TO JURISDICTION, PRACTICE AND STRATEGY § 4.01-4.07 (3d ed. 1998).

[FN7]. Compare *Prewitt Enterprises, Inc. v. Org. of Petroleum Exporting Countries*, 353 F.3d 916, 927-28 (11th Cir. 2003) with *Rio Properties, Inc. v. Rio Int'l Interlink*, 284 F.3d 1007 (9th Cir. 2002), discussed in detail below.

[FN8]. Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters, done at The Hague Nov. 15, 1965, entered into force for the United States Feb. 10, 1969, 20 U.S.T. 361, TIAS 6638, 658 U.N.T.S. 163 [hereinafter Hague Service Convention]. The Convention covers “all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.” *Id.* art. 1. For the more than 56 States that are currently party to the Convention, it requires that an applicant must send a request for service directly to the Central Authority designated by the government of the receiving country, which will in turn serve the document (or arrange to have it served) in accordance with its national law. *Id.* arts. 2-3, 5. Whether and when a document must be transmitted abroad for service is an issue for the national law of the forum state. See generally PERMANENT BUREAU OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, PRACTICAL HANDBOOK ON THE OPERATION OF THE HAGUE SERVICE CONVENTION (3rd ed. 2006) ¶¶ 26-45 [hereinafter PRACTICAL HANDBOOK]. As a matter of U.S. law, when the Convention applies, its procedures are exclusive. See *Volkswagenwerk AG v. Schlunk*, 486 U.S. 694 (1988) (stating the Convention is inapplicable to domestic service on the domestic agent of a foreign corporation pursuant to state statute).

[FN9]. Hague Service Convention, *supra* note 8, art. 5.

[FN10]. *Id.* art. 1.

[FN11]. Neither do other multi-jurisdictional arrangements, such as European Council Regulation No. 1348/2000 of May 29, 2000 (OJ L 160, 30.6.2000 at 37), which applies to service of judicial and extrajudicial documents in civil or commercial matters within the territory of EU Member States (except Denmark, since questions of service between Denmark and other Member States are governed by the Hague Service Convention). Much as the Hague Service Convention does, this Regulation provides that documents can be sent to and from Member States through designated central authorities (described as “transmitting and receiving agencies”) by consular and diplomatic channels, by mail and “direct” service through judicial authorities. However, art. 7 of the Regulation also specifies that the mode of service must pay full respect to the sovereignty of the country in which the document is to be served. Like the Hague Service Convention, this Regulation does not apply when the defendant's address is not known. *Id.* art. 1.2. Thus, domestic law continues to govern the permissible methods of service within each Member State. Service in States not party to the Hague Service Convention (or the European Council Regulation) is subject to domestic law and (to the extent acknowledged) considerations of comity.

[FN12]. The text of [FED. R. CIV. P. RULE 4\(f\)](#) (in force as of Dec. 7, 2007) reads as follows:

Serving an Individual in a Foreign Country:

Unless federal law provides otherwise, an individual - other than a minor, an incompetent person, or a person whose waiver has been filed - may be served at a place not within any judicial district of the United States:

(1) 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;

(2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:

A. as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;

B. as the foreign authority directs in response to a letter rogatory or letter of request; or

C. unless prohibited by the foreign country's law, by:

i. delivering a copy of the summons and of the complaint to the individual personally; or

ii. using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or

(3) by other means not prohibited by international agreement, as the court orders.

[FN13]. See [FED. R. CIV. P. 4\(f\)\(1\)](#); Inter-American Convention on Letters Rogatory, Jan. 30, 1975, S. Treaty Doc. 98-27, reprinted at 14 INT'L LEG. MAT. 339 (1975) (entered into force for the United States Aug. 27, 1988), and Additional Protocol with annex (May 8, 1979), reprinted at 18 INT'L LEG. MAT. 1238 (1989) (entered into force for the United States Aug. 27, 1988).

[FN14]. [FED. R. CIV. P. 4\(f\)\(2\)](#).

[FN15]. The requirement of court authorization is noteworthy and has been enforced. Hence, a plaintiff may not serve a defendant abroad by e-mail or any other substituted service method without court approval. See [GMA Accessories, Inc. v. Megatoys, Inc.](#), No. 01 Civ. 12743(LAK), 2003 WL 193507, at *1 n.2 (S.D.N.Y. Jan. 14, 2003) (noting a plaintiff served a defendant via email, then petitioned the court for an order authorizing such service to prevent the default judgment from being invalidated due to insufficient service); [Wawa, Inc. v. Christensen](#), No. Civ. A. 99-1454, 1999 WL 557936 at *1-2 (E.D. Pa. July 27, 1999) (rejecting plaintiff's attempts to serve Danish citizen defendant by electronic mail but finding that the certified direct mailing of the complaint and summons met the constitutional requirement of service "reasonably calculated" to give notice and was allowed by Article 10(a) of the Hague Convention); [VED P. NANDA & DAVID K. PANSIUS](#), 1 LITIG. OF INT'L DISP. FOR U.S. CTS. §2:16 (2007) (noting that "service of process by e-mail will not be possible unless specifically authorized by court order.").

[FN16]. [FED. R. CIV. P. 4\(f\)\(3\)](#), advisory committee's note.

[FN17]. *Id.*

[FN18]. [Mullane v. Cent. Hanover Bank & Trust Co.](#), 339 U.S. 306, 314 (1950); see also [Volkswagenwerk AG v. Schlunk](#), 486 U.S. 694, 707 (1988) (declining to extend *Mullane* test).

[FN19]. [Mullane](#), 339 U.S. at 314; see also [Rio Props.](#), 284 F.3d at 1016-17 (citing to *Mullane* test); Yvonne A.

Tamayo, *Catch Me if You Can: Serving United States Process on an Elusive Defendant Abroad*, 17 HARV. J. LAW & TECH. 211, 214 (2003) [hereinafter Tamayo, *Catch Me*] (noting that “service of process must meet the constitutional standard articulated by the Supreme Court in *Mullane*”).

[FN20]. See, e.g., *Rio Props.*, 284 F.3d at 1018-19 (recognizing that one of the limitations to e-mail is “the difficulty of confirming receipt of an e-mail”); Charles T. Kotuby, Jr., Note, *International Anonymity: The Hague Conventions on Service and Evidence and Their Applicability to Internet-Related Litigation*, 20 J.L. & COM. 103, 119 (2000) (noting that “it is necessary to employ means of transmission that it maintain an irrefutable record of the exact date of dispatch and receipt of the message.”). See also discussion *infra* Part II(B).

[FN21]. See, e.g., *Broadfoot v. Diaz (In re Int'l Telemedia Assocs.)*, 245 B.R. 713, 719 (Bankr. N.D. Ga. 2000). See also discussion *infra* Part VI.

[FN22]. 12B CHARLES ALAN WRIGHT & ARTHUR D. MILLER, APPENDICES FEDERAL PRACTICE & PROCEDURE 62, 108 (2005). Accord Tamayo, *Catch Me*, *supra* note 19, at 218-19. The advisory committee note to FED. R. CIV. P. 4(f)(3) points out that the subsection “eliminates the requirement of explicit authorization” of allowed methods of service in the rule itself.

[FN23]. *In re Int'l Telemedia Assocs., Inc.*, 245 B.R. at 719. See also Jeremy A. Colby, *You've Got Mail: The Modern Trend Towards Universal Electronic Service of Process*, 51 BUFF. L. REV. 337, 358 (2003) (discussing bankruptcy court's flexibility analysis).

[FN24]. See *B.P. Prods. N. Am., Inc. v. Dagra*, 236 F.R.D. 270, 272-73 (E.D. Va. 2006) (authorizing service by publication in two Pakistani newspapers to a defendant presumed to reside in Pakistan); *Smith v. Islamic Emirate of Afg.*, Nos. 01 CIV 10132 (HB), 01 CIV 10144(HB), 2001 WL 1658211, at *3 (S.D.N.Y. Dec. 26, 2001) (allowing service by publication on Osama Bin Laden for the September 11 attacks). See also John M. Murphy III, Note, *From Snail Mail to E-Mail: The Steady Evolution of Service of Process*, 19 ST. JOHN'S J.L. COMM. 73, 90-91 (2004) (discussing *Smith* and noting that service by publication was allowed only on defendants with no ascertainable addresses).

[FN25]. See *Int'l Controls Corp. v. Vesco*, 593 F.2d 166, 181-82 (2d. Cir. 1977); *Levin v. Ruby Trading Corp.*, 248 F. Supp. 537, 541 (S.D.N.Y. 1965).

[FN26]. See *Forum Fin. Group, LLC v. President & Fellows of Harvard Coll.*, 199 F.R.D. 22, 24-25 (D. Me. 2001).

[FN27]. See *New England Merchs. Nat'l Bank v. Iran Power Generation & Transmission Co.*, 495 F. Supp. 73, 81 (S.D.N.Y. 1980). See also Aaron R. Chacker, *Effectuating Notice: Rio Properties v. Rio Int'l Interlink*, 48 VILL. L. REV. 597, 606-07 (2003) (discussing the *New England Merchants* case and the telex as a way to effectuate service). See WRIGHT & MILLER, *supra* note 22, at 64-65.

[FN28]. See *Smith*, 2001 WL 1658211, at *3 (ordering service of process on Bin Laden by television). See also Chacker, *supra* note 27, at 610-12 (discussing *Smith*).

[FN29]. See, e.g., *D'Acquisto v. Triffo*, No. 05-C-0810, 2006 WL 44057, at *1-2 (E.D. Wis. Jan. 6, 2006); *Viz Commc'n, Inc. v. Redsun*, No. C-01-04235, 2003 WL 23901766, at *2 (N.D. Cal. Mar. 28, 2003); *Rio Properties v. Rio Int'l Interlink*, 284 F.3d 1007 (9th Cir. 2002); *Ryan v. Brunswick Corp.*, 02-CV-0133E(F), 2002 U.S.

Dist. LEXIS 13837, at *6 (W.D.N.Y. May 31, 2002); *Williams v. Advert. Sex, LLC*, 231 F.R.D. 483, 484-85 (N.D. W.Va. 2005); *Broadfoot v. Diaz (In re Int'l Telemedia Assocs.)*, 245 B.R. 713, at 721 (Bankr. N.D. Ga. 2000); *Popular Enters, LLC v. Webcom Media Group, Inc.*, 225 F.R.D. 560, 561 (E.D. Tenn. 2004).

[FN30]. See Tamayo, *Catch Me*, *supra* note 19, at 235 (articulating these factors as follows: “[i]n cases where traditional methods of service have been unsuccessful or are otherwise impracticable and an evasive defendant has shown a preference for communicating electronically, service solely via e-mail clearly meets the *Mullane* standard of reasonableness as it is the most likely method of giving the defendant notice of the proceedings.”); Colby, *supra* note 23, at 370-72 (noting that “[c]ourts have permitted electronic service of process [on foreign defendants] where some combination of the following circumstances were present[:] proposed methods are reasonably calculated to provide defendant with notice ... traditional methods are futile or inadequate ... defendant is hard to find ... evading service ... [or] the defendant has relied on electronic methods of communication.”). See also Elec. Filing Comm., Electronic Service of Process Subcommittee Report at 15 (Aug. 8, 2003) (on file with author) [hereinafter ESOP Subcommittee Report] (stating that “general characteristics” of cases “in which courts have authorized e-mail service of process” include “defendants were attempting to evade process servers and service attempts through traditional methods” and “defendants had contacted the plaintiffs through e-mail, demonstrating that they were familiar with this form of communication”); Phillip B. Dye et al., *International Litigation*, 40 INT’L LAW 275, 278 (stating that the common thread between e-mail service cases “appears to be multiple, good faith, unsuccessful attempts by the plaintiff, and a recalcitrant defendant who engages in e-commerce”).

[FN31]. One commentator describes this as “emerging legal precedent that when traditional forms of service are unsuccessful, serving process of a summons and complaint through e-mail on evasive defendants through their preferred methods of communication meets statutory and constitutional requirements for legally adequate notice.” Tamayo, *Catch Me*, *supra* note 19, at 230. See also Maria N. Vernace, Comment, *E-mailing Service of Process: It's a Shoe In!*, 36 UWLA L. Rev. 274, 290 (2005) (stating that “[t]he need for alternative service of process becomes necessary when the defendant cannot be located to inform him of the pending litigation through traditional means”); Tatyana Gidirimski, *Service of United States Process in Russia Under 4(f) of the Federal Rules of Civil Procedure*, 10 PAC. RIM. L. & POL’Y J. 691, 713 (2001) (pointing out that some courts allow service under FRCP 4(f)(3) “upon a showing that the plaintiff made a diligent, but unsuccessful effort to locate the defendant”).

[FN32]. See Matthew R. Schreck, *Preventing “You’ve Got Mail,” from Meaning “You’ve Been Served”: How Service of Process by E-mail Does Not Meet Constitutional Procedural Due Process Requirements*, 38 J. MAR-SHALL L. REV. 1121, 1141-42 (Summer 2005).

[FN33]. *Broadfoot v. Diaz (In re Int'l Telemedia Assocs.)*, 245 B.R. 713, 722 (Bankr. N.D. Ga. 2000).

[FN34]. *Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1016 (9th Cir. 2002).

[FN35]. *Williams v. Advertising Sex, LLC*, 231 F.R.D. 483, 486 (N.D. W.Va. 2005).

[FN36]. *Viz Commc'ns, Inc. v. Redsun*, No. C-01-04255JF, 2003 WL 23901766, at *6 (N.D. Cal. Mar. 28, 2003).

[FN37]. *D'Acquisto v. Triffo*, No. 05-C-0810, 2006 WL 44057, at *1-2 (E.D. Wis. Jan. 6, 2006). See also *Philip Morris USA, Inc. v. Veles Ltd.*, No. 06 CV 2988(GBD), 2007 WL 725412, at *1 (S.D.N.Y. Mar. 12, 2007).

(indicating the court's requirement that traditional means be exhausted first when it held “in its motion for substitute service of process, plaintiff demonstrated that it had attempted to serve the complaint on defendants using traditional means”).

[FN38]. *Ryan v. Brunswick Corp.*, No. 02-CV-0133E(F), 2002 U.S. Dist. LEXIS 13837, at *7 (W.D.N.Y. May 31, 2002). *See also* Murphy, *supra* note 24, at 103-04 (discussing *Ryan's* requirement of previous attempts to serve defendant).

[FN39]. *Popular Enters. v. Webcom Media Group, Inc.*, 225 F.R.D. 560, 562 (E.D. Tenn. 2004).

[FN40]. *Id.*

[FN41]. *Pfizer v. Domains by Proxy*, No. 3:04cv741 (SRU), 2004 U.S. Dist. LEXIS 13030, at *4-5 (D. Conn. July 13, 2004).

[FN42]. *Id.* The court noted, “[i]t is not even clear from the papers how Pfizer knows [one of the defendants] is an individual in a foreign country.” *Id.* at *5.

[FN43]. *Id.* at *5. The court distinguished Pfizer from the plaintiff in *Rio* by pointing to the *Rio* plaintiff's repeated previous attempts to serve defendant before requesting alternative service. *Id.* at *2-3.

[FN44]. *See, e.g., Rio Props. Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1018 (9th Cir. 2002); *Williams-Sonoma Inc. v. Friendfinder Inc.*, No. C06-06572JSW, 2007 WL 1140639, at *2 (N.D. Cal. Apr. 17, 2007); *Philip Morris USA v. Veles Ltd.*, No. 06 CV 2988(GBD), 2007 WL 725412, at *3 (S.D.N.Y. Mar. 12, 2007); *Williams v. Adver. Sex*, 231 F.R.D. 483, 487 (N.D. W. Va. 2005); *Ryan*, 2002 Dist. LEXIS 13837, at *9; *Broadfoot v. Diaz (In re Int'l Telemedia Assocs.)*, 343 B.R. 713, 721 (N.D. Ga. 2000). *See also* Rachel Cantor, *Internet Service of Process: A Constitutionally Adequate Alternative*, 66 U. CHI. L. REV. 943, 967 (1999) (contending that due process requires e-mail service when e-mail is the sole contact available, and predicting that “[t]he constitutionality of internet service of process will become increasingly clear as the number of Americans who rely on the Internet as their principal means of communication increases.”); *Nanda & Pansius, supra* note 15 (stating “decisions permitting e-mail generally note that either through the structure of defendant's business or by instruction of the defendant himself, e-mail was designated as a permitted, if not preferred, method of contact.”). *But see* Schreck, *supra* note 32, at 1145 (arguing that “just because e-mail may be the only means of informing a defendant of an action does not necessarily mean that it satisfies due process requirements.”).

[FN45]. *Int'l Telemedia*, 245 B.R. at 721. *See also* Colby, *supra* note 23, at 357-59 (noting the defendant's preference for e-mail communication played a role in the court's allowance of e-mail service); Chacker, *supra* note 27, at 609 (noting that the court demonstrated defendant's preference for e-mail or fax communication and “[t]hus, like any method of communication utilized and preferred by a defendant, effectuating notice through these two communication channels sufficiently protected the defendant's due process rights.”).

[FN46]. *Int'l Telemedia*, 245 B.R. at 718.

[FN47]. *Id.* at 721.

[FN48]. *Rio Props.*, 284 F.3d at 1018. The court used similar logic granting service via the defendant's mail courier. *Id.* at 1016. *See* Colby, *supra* note 23, at 362-63 (discussing *Rio's* due process analysis); Tamayo, *Catch Me, supra* note 19, at 229 (noting that defendant “not only preferred using electronic communication, but in fact

could be contacted only through the Internet.”); Murphy, *supra* note 24, at 102 (stating that the *Rio* court concluded that due process allowed service by e-mail because the defendant “set up a business model where it could only be reached by e-mail”); Nanda & Pansius, *supra* note 15 (pointing out that the defendant's actions “designated e-mail as the principal basis for communication,” and therefore, “defendant was ill-positioned to object that use of that media created an excessive risk of nondelivery.”).

[FN49]. *Williams*, 231 F.R.D. at 487. *See also* Dye, *supra* note 30, at 278-79 (discussing *Williams*' due process analysis).

[FN50]. *Ryan v. Brunswick Corp.*, No. 02-CV-0133E(F), 2002 U.S. Dist. LEXIS 13837, at *9 (W.D.N.Y. May 31, 2002).

[FN51]. *Popular Enters. v. Webcom Media Group, Inc.*, 225 F.R.D. 560, 562-63 (E.D. Tenn. 2004).

[FN52]. *Viz Commc'ns, Inc. v. Redsun*, No. C-01-04235 JF, 2003 WL 23901766, at *6 (N.D. Cal. Mar. 28, 2003).

[FN53]. *D'Acquisto v. Triffo*, No. 05-C-0810, 2006 WL 44057, at *1 (E.D. Wis. Jan. 6, 2006).

[FN54]. *Id.* at *2.

[FN55]. *Ehrenfeld v. Khalid Salim Bin Mahfouz*, No. 4 Civ. 9641, 2005 WL 696769, at *3 (S.D.N.Y. Mar. 23, 2005). *See also* Dye, *supra* note 30, at 279 (discussing *Ehrenfeld*'s due process analysis).

[FN56]. *Ehrenfeld*, 2005 WL 696769 at *3 (citations omitted).

[FN57]. *Id.*

[FN58]. *Pfizer v. Domains by Proxy*, No. 3:04cv741 (SRU), 2004 U.S. Dist. LEXIS 13030, at *3-4 (D. Conn. July 13, 2004).

[FN59]. *Id.*

[FN60]. *See* WRIGHT & MILLER, *supra* note 22, at 64 (noting that “‘court-ordered’ service has been particularly useful to the courts when encountering elusive international defendants”); Murphy, *supra* note 24, at 108 (noting that “courts have held that service of process can be effectuated by e-mail where foreign defendants are evasive.”).

[FN61]. *Broadfoot v. Diaz (In re Int'l Telemedia Assocs.)*, 245 B.R. 713, 722 (Bankr. N. D. Ga. 2000).

[FN62]. *Id.*; *see also* Colby, *supra* note 23, at 356-59 (discussing the defendant's evasiveness as grounds for an order allowing e-mail service).

[FN63]. *Int'l Telemedia*, 245 B.R. at 718. *See also* ESOP Subcommittee Report, *supra* note 30, at 20 (discussing the case and pointing out that the defendant was “well traveled in his attempts to elude process servers, as he frequented hotels from Singapore to Switzerland”).

[FN64]. *Rio Props, Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1018 (9th Cir. 2002). The court commended the district court for using FRCP 4(f)(3) to “ensure smooth functioning of our courts of law” when faced with “an

elusive international defendant [] striving to evade service of process” *Id.* at 1016. *See also* Murphy, *supra* note 24, at 107-08 (discussing *Rio*'s holding regarding defendant's evasiveness).

[FN65]. *Popular Enters., LLC v. Webcom Media Group, Inc.*, 225 F.R.D. 560, 562-63 (E.D. Tenn. 2004). *See also* ESOP Subcommittee Report, *supra* note 30, at 16 (discussing *Rio* and quoting this language); Dye, *supra* note 30, at 278 (citing *Popular*'s quoting of *Rio*).

[FN66]. *Williams v. Adver. Sex LLC*, 231 F.R.D. 483, 486 (N.D. W.Va. 2005).

[FN67]. *Viz Commc'ns, Inc. v. Redsun*, No. C-01-04235 JF, 2003 WL 23901766, at *6 (N.D. Cal. Mar. 28, 2003).

[FN68]. *Id.* Like *Viz*, the court in *D'Acquisto* only authorized e-mail service after concluding that “defendant Triffo is attempting to evade service.” *D'Acquisto v. Triffo*, No. 05-C-0810, 2006 WL 44057, at *2 (E.D. Wisc. Jan 6, 2006). Conversely, in cases refusing to authorize e-mail service, courts do not voice concerns about the defendant's evasiveness.

[FN69]. *See, e.g., Prewitt Enters., Inc. v. Org. of Petroleum Exporting Countries*, 353 F.3d 916, 925 (11th Cir. 2003) (explaining Austrian law).

[FN70]. *See, e.g., id.* at 927-28, discussed *infra* notes 77-81 and accompanying text; Gidirimski, *supra* note 31, at 694 (arguing that the [Federal Rule of Civil Procedure 4\(f\)\(3\)](#) advisory committee note reference to foreign law is a “distinctive feature of [Rule 4\(f\)](#), which sets it apart from its predecessor 4(i)” with “the high emphasis it places on compliance with international and foreign law.”); Schreck, *supra* note 32, at 1128 (noting that [Rule 4\(f\)](#) “places high emphasis on complying with international and foreign law,” and “[a]s a result, courts are mindful to respect international and foreign laws by not allowing plaintiffs to serve process in ways that might violate these laws ...”).

[FN71]. *See, e.g., Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1014 (9th Cir. 2002); *BP Prods. N. Am., Inc. v. Dagra*, 232 F.R.D. 263, 264 (E.D. Va. 2005) (discussed *supra* note 34 and accompanying text); *Mayoral-Amy v. BHI Corp.*, 180 F.R.D. 456, 459 n.4 (S.D. Fla. 1998). This issue is part of the larger question that U.S. courts have dealt with for some time of whether to consider the law of the receiving state when answering judicial assistance questions generally. For discussions of this larger comity issue, see generally Alex Glasshauser, *Difference & Deference in Treaty Interpretation*, 50 VILL. L. REV. 25 (2005); Joseph F. Weis, Jr., *The Federal Rules and the Hague Conventions: Concerns of Conformity and Comity*, 50 U. PITT. L. REV. 903, 906 (1989).

[FN72]. *Rio Props.*, 284 F.3d at 1014.

[FN73]. *Id.* (emphasis added). One scholar has noted that “*Rio* does not begin to navigate through international resistance to modernize procedural systems that involve e-mail transmissions of initial service of process.” Tamayo, *Catch Me*, *supra* note 19, at 213.

[FN74]. *BP Prods. N. Am., Inc. v. Dagra*, 232 F.R.D. 263, 264-65 (E.D. Va. 2005).

[FN75]. *Id.* at 264.

[FN76]. *Mayoral-Amy*, 180 F.R.D. at 459 n.4.

[FN77]. *Prewitt Enters., Inc. v. Org. of Petroleum Exporting Countries*, 353 F.3d 916, 925-28 (11th Cir. 2003). *See also* Schreck, *supra* note 32, at 1133 (stating that “[t]he rationale behind the court’s decision was that Rule 4(f)(3) required that the defendant be served in a manner that ‘minimize[s] offense to foreign law.’”). Austria is not a party to the Hague Service Convention.

[FN78]. *Prewitt*, 353 F.3d at 919-20.

[FN79]. *Id.* at 928.

[FN80]. *Id.*

[FN81]. *Id.* at 928 n.21.

[FN82]. *D’Acquisto v. Triffo*, No. 05-C-0810, 2006 WL 44057, at *2 (E.D. Wisc. Jan 6, 2006).

[FN83]. *See supra* note 70 and accompanying text.

[FN84]. FED. R. CIV. P. 4(f)(2).

[FN85]. One scholar has redefined comity to include judges basing decisions on considerations of judicial efficiency on a global scale, rather than a definition of deference to other sovereigns. ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 67, 88-91 (2004). Even defining comity in this way, an international standard for e-mail service would give judges and practitioners a predictable and unambiguous standard for when e-mail service is authorized, thereby making the judicial process more efficient on a global scale.

[FN86]. For a discussion on the various ways in which U.S. and foreign judges and courts are connected, including through “exchanging opinions, meeting face to face in seminars and judicial outcomes, and even negotiating with one another over the outcome of specific cases,” see SLAUGHTER, *supra* note 85, at 65-69.

[FN87]. An example of transnational judicial interconnectedness in the area of e-mail service is seen in *In re International Telemedia Associates*, in which a U.S. bankruptcy judge cited to an English judge’s decision to authorize e-mail service. *Broadfoot v. Diaz (In re Int’l Telemedia Assocs.)*, 245 B.R. 713, 721 n.5 (Bankr. N. D. Ga. 2000). *Accord* Frédéric Bachand, *The “Proof” of Foreign Normative Facts which Influence Domestic Rules*, 43 OSGOOD HALL L.J. 269 (2005) (positing that Canadian judges are influenced by foreign normative facts).

[FN88]. *Accord* *The Bremen v. Zapata Off Shore Co.*, 407 U.S. 1; 9 (1972) (noting that the concept that all transnational disputes involving U.S. parties must be heard in U.S. courts is parochial).

[FN89]. *See supra* notes 8-9 and accompanying text discussing Article 5 of the Hague Service Convention. *See also Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 698-99 (1988).

[FN90]. *Cf.* ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS: ESSAYS IN PRIVATE INTERNATIONAL LAW 46 (1996) (describing courts’ choice of law determinations in transnational cases as “a kind of mediating role among the law of the states touched in some way by the transaction or controversy”).

[FN91]. As indicated in the Introduction, this article does not aim to provide a comprehensive review of the practices of foreign jurisdictions but focuses instead on three common law jurisdictions with developed statutory

law and/or caselaw regarding service on foreign defendants by e-mail or other forms of substituted service.

[FN92]. Peter Schlosser, *Lectures on Civil Law Litigation Systems and American Cooperation with Those Systems*, 45 U. KAN. L. REV. 9, 20 (1996) (“[i]t is inconceivable to base jurisdiction on the mere fact that a document is served upon the defendant”); Benjamin Kaplan, Arthur T. von Mehren & Rudolf Schaefer, *Phases of German Civil Procedure I*, 71 HARV. L. REV. 1193, 1204 (1958) (“The power of the court over the defendant does not turn on effecting service within the court's verge”).

[FN93]. In French law, a distinction is made between “signification” (where personal service by a judicial officer or *hussier* is required) and “notification” (service by mail or even fax is permissible). See, e.g., PRACTICAL HANDBOOK, *supra* note 8, ¶ 48.

[FN94]. For example, Germany allows service by publication as a form of substituted service. GERMAN COMMERCIAL CODE & CODE OF CIVIL PROCEDURE IN ENGLISH §§ 203-07, at 243-44 (Charles Stewart trans., Oceana Publications 2001) (1877). See also Schlosser, *supra* note 92, at 20 (“[i]n Germany, as a last resort, service of process may be realized by publishing the document initiating proceedings in a newspaper and simultaneously putting it on the court's official board”).

[FN95]. Brazil's recently amended civil procedure code takes a different approach, allowing defendants that registered with the courts to be served electronically by posting the documents on a web portal. Lei No. 11.419 de Dezembro de 2006, available at http://www.trt02.gov.br/geral/tribunal2/Legis/Leis/11419_06.html. Because a defendant must agree and register to be served by this method, this approach does not address situations in which only an e-mail address exists for an evasive defendant. It does, however, show that courts are attempting to adjust service rules to accommodate modern technologies, including the Internet.

[FN96]. Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters 44/2001, 2000 O.J. (L 012) 1.

[FN97]. Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, art. 27, Sept. 27, 1968, 1968 O.J. (L 299) 32 [hereinafter Brussels Convention].

[FN98]. See Case C-305/88, Lancray v. Peters & Sickert KG, 1990 E.C.R. I-2725, ¶¶ 18, 22. See also Carla Crifo, *First Steps Toward the Harmonisation of Civil Procedure: The Regulation Creating the European Enforcement Order for Uncontested Claims*, 24 CIV. JUST. Q. 200, 202 (2005) (“the reference to ‘due’ service ... has been dropped; now it suffices that service be effected ‘in sufficient time and in such a way as to enable the defendant to arrange his defence.’”).

[FN99]. See Council Regulation 1348/2000, *supra* note 11, arts. 4, 23.

[FN100]. Amendment of the Rules of Procedure of the Court of First Instance, 2001 O.J. (C 28) 48.

[FN101]. Regulation 805/2004, arts. 13(1)(d), 14(1)(f), 2004 O.J. (L 143) 15 (EC).

[FN102]. See Tamayo, *Catch Me*, *supra* note 19, at 244 (stating that “each country's procedural laws contain similar goals of ensuring that service of process is effected in a manner providing actual notice and an opportunity to respond to a legal action.”).

[FN103]. Although the United Kingdom jurisdictionally comprises England, Scotland, Wales and Northern Ire-

land, England and Wales have a separate unitary system from the systems of Scotland and Northern Ireland. Peter Leaver & Jeremy Carver, *England*, in PRE-TRIAL AND PRE-HEARING PROCEDURES WORLD-WIDE, 76, 76 (Charles Platto ed., 1990); WORLD LAW GROUP MEMBER FIRMS, INTERNATIONAL CIVIL PROCEDURE 179 (Shelby Grubbs ed., 2003). Accordingly, the terms “England” and “English” used in this article are meant to refer to the legal system of England and Wales specifically.

[FN104]. CIVIL PROCEDURE RULES, 1998, S.I. 1998/3132, R. 6.24(1)(a)-(c) (U.K.) [hereinafter CPR].

[FN105]. CPR 6.8 gives English courts the right to order alternative methods of service generally where there is a good reason and the plaintiff has made an application for such service. CPR, 1998, S.I. 1998/3132, R. 6.8(1)-(12) (U.K.). English courts have interpreted CPR 6.8 to give English judges the discretion to order alternative methods of service outside the jurisdiction “so long as it does not contravene the law of the country where service is to be effected.” *Habib Bank Ltd. v. Cent. Bank of Sudan*, [2006] EWHC 1767 [¶30] (Comm) (Eng.).

[FN106]. CPR 6.24(2) states “Nothing in this rule or in any court order shall authorise or require any person to do anything in the country where the claim form is to be served which is against the law of that country.” CPR, 1998, S.I. 1998/3132, R. 6.24(2). This aspect of English civil procedure is discussed in more detail *infra* notes 126-130 and accompanying text.

[FN107]. This English decision was issued in sealed proceedings. The lawyers who successfully obtained the order authorizing e-mail service published a summary of the order and proceedings at Paul Lambeth & Jonathan Coad, *Serving the Internet: Nowhere to Hide in Cyberspace*, 6 CYBERSPACE LAW, Sept. 1996. As the first case to authorize e-mail service, it is discussed in numerous subsequent cases and journal articles. Broadfoot v. Diaz (*In re Int'l Telemedia Assocs.*), 245 B.R. 713, 721 n.5 (Bankr. N.D. Ga. 2000); Cantor, *supra* note 44, at 965-66; Frank Conley, *Service with a Smiley: The Effect of E-mail and Other Electronic Communications of Service of Process*, 11 TEMP. INT'L & COMP. L.J. 407, 408-10 (1997); Yvonne A. Tamayo, *Are You Being Served?: E-mail and (Due) Service of Process*, 51 S.C. L. REV. 227, 244-46 (2000) [hereinafter Tamayo, *Served*].

[FN108]. *See* Cantor, *supra* note 44, at 966 (noting that the only reasonably calculated method to inform the defendant of the action in that case was e-mail because the defendant's physical location was unknown).

[FN109]. Lambeth & Coad, *supra* note 107. *See also* Conley, *supra* note 107, at 410; Tamayo, *Served*, *supra* note 106, at 246.

[FN110]. *Addax BV Geneva Branch v. Coral Suki SA* [2004] EWHC (Comm) 2882 (Eng.).

[FN111]. *Id.* ¶26.

[FN112]. *Id.* ¶23.

[FN113]. *Crystal Decisions (UK) Ltd. v. Vedatech Corp.*, [2004] EWHC (Ch) 1872 (Eng.).

[FN114]. *Id.* ¶¶20-21.

[FN115]. *Id.*

[FN116]. *Habib Bank Ltd. v. Central Bank of Sudan*, [2006] EWHC 1767 (Comm), [¶34] (Eng.).

[FN117]. *Id.* ¶26.

[FN118]. *Id.* ¶27.

[FN119]. *Id.* ¶41.

[FN120]. *Molins Plc. v. G.D. S.p.A.*, (2000) 1 W.L.R. 1741 (A.C.). *See* Colby, *supra* note 23, 358 (discussing *In re Int'l Telemedia*).

[FN121]. Article 21 of the Brussels Convention states: “Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting states, any court other than the court first seised shall of its own motion decline jurisdiction in favour of that court. A court which would be required to decline jurisdiction may stay its proceedings if the jurisdiction of the other court is contested.” Brussels Convention, *supra* note 97, art. 21.

[FN122]. *Molins*, 1 W.L.R. 1741, ¶ 9.

[FN123]. *Id.* ¶¶ 9-10.

[FN124]. *Id.* ¶ 11 (concluding that *Molins* had not been properly served pursuant to the Brussels Convention, and therefore, the Italian Court had not been “first seised.”). Accordingly, the English court refused to stay proceedings.

[FN125]. *See* Peter Devonshire, *Pre-Emptive Orders Against Evasive Dealings: An Assessment of Recent Trends*, J. BUS. L., May 2004, at 357, 362 (noting that “English courts are generally cautious in allowing process to be served on foreign persons out of the jurisdiction”).

[FN126]. CPR 6.24(2). *See also* SWEET & MAXWELL, CIVIL PROCEDURE WHITE BOOK 803 (2d. ed. 1999) (“no order of the English court may be taken to authorize or direct the doing of anything contrary to the law of the state where service is to be effected”); *BAS Capital Funding Corp. v. Medfinco*, [2003] EWHC 1798 (Ch), ¶156 (“nothing in the rule or any court order is to authorise or require any person to do anything in the country where the claim form is to be served which is against the law of that country”).

[FN127]. CPR 6.24(2).

[FN128]. Under English law, a “claim form” initiating suit may only be served on a foreign defendant in a foreign jurisdiction with the court's permission unless one of several narrow exceptions apply. *See e.g.* *Knauf U.K. GmbH v. British Gypsum Ltd.* [2001] EWCA (Civ) 1570 [¶30] (Eng.); ADRIAN BRIGGS AND PETER REES, CIVIL JURISDICTION AND JUDGMENTS, § 521 (4th ed. 2005).

[FN129]. *Shiblaq v. Sadikoglu* [2004] EWHC 1890 [¶59] (Comm.).

[FN130]. *Id.* ¶¶ H4, H6. The Hague Service Convention provides that it will not interfere with “the freedom to send judicial documents, by postal channels, directly to persons abroad.” Hague Service Convention, *supra* note 8, art. 10(a).

[FN131]. *Arros Invest Ltd. v. Nishanov*, [2004] EWHC 576 [¶¶ 9-13] (Ch).

[FN132]. *Id.* ¶ 39.

[FN133]. *Habib Bank Ltd. v. Cent. Bank of Sudan*, [2006] EWHC (Comm) 1767 [¶30] (Eng.).

[FN134]. Statutory Rules 1979 No. 140 as amended (2007), Federal Court Rules, Order 8, Div. 1, R. 3(1)(a) (Austl.) [hereinafter Federal Court Rules]. *See also* Federal Court Amendment Rules 2006 (No. 2), Explanatory Statement Issued by the Authority of the Judges of the Federal Court of Australia, S.L.I. 2006 No. 203, Attachment 1 R. 3, sched. 1, para. [6], Order 8 subrule 3(1) [hereinafter Explanatory Statement], *available at* http://www.austlii.edu.au/au/legis/cth/num_reg_esfcar20062n203o2006376.html.

[FN135]. Explanatory Statement, *supra* note 134, at Attachment 1, R.3., sched. 1, ¶ 5, Order 8 subrule 3(1).

[FN136]. *Id.* subrule 3(5).

[FN137]. *Id.* subrule 3(3).

[FN138]. *Id.* subrule 3(5).

[FN139]. *Id.* subrule 7(1).

[FN140]. *Austl. Competition and Consumer Comm'n v. Chaste Pty. Ltd.*, [2002] FCA 1183, *available at* <http://www.lib.murdoch.edu.au/find/citation/lawcite.html>.

[FN141]. *Id.* ¶ 16.

[FN142]. *LeBlanc v. Whitman*, 2005 ABQB 568 (Can.).

[FN143]. *Id.* ¶ 14.

[FN144]. *Id.* ¶ 11.

[FN145]. *Telewizja Polsat S.A. v. Radiopol Inc.*, [2005] F.C. 1179 ¶ 13. Although this case deals with e-mail service on a domestic defendant, it is noteworthy for the purposes of this article based on its emphasis on prior attempts to serve an evasive defendant as justification for e-mail service.

[FN146]. *Id.* ¶ 9.

[FN147]. *Id.* ¶ 10.

[FN148]. Hague Conference on Private Int'l Law, Response of Canada to Service Questionnaire: Central Authorities Response to the Questionnaire Accompanying the Provisional Version of the New Practical Handbook on the Operation of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ¶ 16.2(c), *available at* http://hcch.e-vision.nl/upload/wop/lse_ca_e.pdf [hereinafter Canadian Response].

[FN149]. Quebec Code of Civil Procedure, Article 138, R.S.Q. Chap. C-25.

[FN150]. Canadian Response, *supra* note 148, at ¶ 16.2(c). Prior to an amendment to the Quebec Code of Civil Procedure specifically authorizing service by fax in certain situations, the Quebec Court of Appeals allowed service by fax under this provision. *See S.A. Louis Dreyfus v. Holding Tusculum B.V.* [1998] R.J.Q. 1778 (Can.).

[FN151]. Canadian civil procedure law is made at the provincial level. See Teresa M. Dufort, *Canada*, in PRETRIAL AND PRE-HEARING PROCEDURES WORLDWIDE 215 (Charles Platto ed., 1990). Despite the lack of a federal code of civil procedure, a discrete set of rules does exist for Canadian federal courts. Accordingly, we discuss the approaches taken by the Canadian Federal Court Rules and the civil procedure rules for the provinces of Ontario and British Columbia regarding service on foreign defendants.

[FN152]. B.C. Reg. 221/90, s. 13(12).

[FN153]. See, e.g., *Tamlin Int'l Homes Co. v. Ikoma*, [2001] 93 B.C.L.R.3d 191 (Can.); *Mathers v. Bruce*, [2002] B.C.S.C. 210, ¶15 (Can.).

[FN154]. See *Tamlin*, 93 B.C.L.R.3d 191 ¶1. See also *Wall v. Toyota Motor Corp.*, [1993] 84 B.C.L.R.2d 395 ¶¶ 16-19 (Can.) (addressing service on defendant in member state pursuant to Supreme Court Rules of British Columbia).

[FN155]. See, e.g., *Wall*, 84 B.C.L.R.2d 395 ¶ 11; *Grant v. Grant*, [2003] 38 R.F.L. (5th) 89 ¶ 13 (Can.).

[FN156]. R.R.O. 1990, Reg. 194, s.17.05(3); see HOLMESTED & WATSON, ONTARIO CIVIL PROCEDURE, Rule 17 §7.

[FN157]. R.R.O. 1990, Reg. 194, s.17.05(2); S.O.R./98-106, s.137(1).

[FN158]. See, e.g., *Rio Properties, Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1018 (9th Cir. 2002) (recognizing that one of the limitations to e-mail is the difficulty of confirming receipt of an e-mail); *Kotuby*, *supra* note 20, at 119 (noting that “it is necessary to employ means of transmission that maintain an irrefutable record of the exact date of dispatch and receipt of the message”); *Tamayo, Served*, *supra* note 107, at 252 (stating that whether e-mail is a viable option for service depends on “whether present-day electronic technology is sufficiently sophisticated to provide the sender with a reliable confirmation of receipt by the served party”); *Vernance*, *supra* note 31, at 286 (stating that one main obstacle to instituting e-mail service is “obtaining confirmation of service”); *Nanda & Pansius*, *supra* note 15, at 2 (pointing out that in *Rio* the court “was concerned with the absence of a viable mechanism to confirm delivery when e-mail is employed.”). *But see Cantor*, *supra* note 44, at 965 (determining that e-mail may be superior to traditional methods of service because it “offers a way for the plaintiff to identify whether the defendant has at least opened the mail containing the complaint”); *Schreck*, *supra* note 32, at 1143 (noting return receipt issue and arguing that even if confirming receipt was possible, “confirming the delivery of an e-mail does not demonstrate that a defendant has actual notice of the claim against it” because the receiver or his/her computer may mistake the message for spam).

[FN159]. See discussion *supra* Part III. In *Hollow v. Hollow*, 747 N.Y.S.2d 704 (N.Y. 2002), a New York state court authorized e-mail service and dealt with due process concerns by reasoning that “[i]t is hornbook law that a constitutionally proper method of effecting substituted service need not guarantee that in all cases the defendant will in fact receive actual notice It suffices that the prescribed method is one “reasonably calculated, under the present circumstances, to apprise [the] interested part [y] of the pendency of the action.” See also *Colby*, *supra* note 23, at 367-68 (discussing *Hollow's* due process analysis); *Murphy*, *supra* note 24, at 104 (same). *Accord* ESOP Subcommittee Report, *supra* note 30, at 39 (stating that “e-mail can be one more method available to provide a reasonably calculated effort to give actual/adequate notice to defendant prior to a default judgment”).

[FN160]. See discussion of *American Boat Co., Inc.*, 418 F.3d 910 (8th Cir. 2005), *supra* note 3.

[FN161]. *Leblanc v. Whitman*, [2005] ABQB 568 (Can.).

[FN162]. See discussion *supra* Part V(A).

[FN163]. See Kotuby, *supra* note 20, at 118 (discussing U.S., Canadian and French post office cooperation on electronic postmarking programs); Tamayo *Served*, *supra* note 107 at 255 (discussing the post office and private companies' innovations in return receipt electronic service methods); Conley, *supra* note 107, at 424 (stating that the U.S. post office's electronic post marking system would "allow the sender of an e-mail message to send it through the Post Office's service for public key encryption and for tracking").

[FN164]. *Accord Vernace*, *supra* note 31, at 304 (arguing that "[f]or Internet service of process to be embraced by the legal community, the pitfalls of authenticity and return-receipt must be solved.").

[FN165]. Telephone interview with Leo Campbell, U.S. Postal Service, in Washington D.C. (June 28, 2006). See also Vernace, *supra* note 31, at 303 (noting that the U.S. Postal Service has "shut down" its programs attempting to provide electronic postmarking).

[FN166]. See Kotuby, *supra* note 20, at 112 (noting that "litigants will generally find resort to the [Hague Service] Convention preferable to these alternative national methods [pursuant to F.R.C.P. 4(f)(2) and (3)], especially when looking ahead to the eventual recognition of a domestic judgment."); Tamayo, *Catch Me*, *supra* note 19, at 214 (noting that "if a litigant seeks subsequent enforcement of a [U.S.] judgment in a foreign country, he must ensure that process is served according to applicable treaties and the enforcing country's laws.").

[FN167]. Gidirimski, *supra* note 31, at 694-95. See also Weis, *supra* note 71, at 906 (pointing out that the "process of commencing a suit must be valid under both the law of the forum and that of the place where enforcement is to take place. Consequently, it is necessary to satisfy both domestic and foreign law on service if the judgment is to be enforced abroad."). *Accord* Article 15(1) of the Hague Service Convention, *supra* note 8, which conditions entry of a default judgment on valid personal service either in compliance with the requirements of the requested State or the destination State (depending on which channel of transmission was used) or actually delivered by another method provided for by the Convention. See generally PRACTICAL HANDBOOK, *supra* note 8, at ¶¶274-285.

[FN168]. See Tamayo, *supra* note 19, at 236.

[FN169]. See Gidirimski, *supra* note 31, at 713-14.

[FN170]. NANDA & PANSIUS, *supra* note 15 (asking "when service is effected by e-mail where is the state of destination?").

[FN171]. *Cf. id.* (pointing out that if the internet provider is located in a foreign state, counsel may have to examine the laws of that state).

[FN172]. *Pfizer Inc. v. Domains By Proxy*, No. 3:04CV741 (SRU), 2004 U.S. Dist. LEXIS 13030, at *5 (D. Conn. July 13, 2004).

[FN173]. See Vernace, *supra* note 31, at 274 (noting that in January 2004, there were "nearly 717 million Internet users worldwide, with an estimated growth to over one billion by 2005"); Schreck, *supra* note 32, at 1121 (stating that "the number of people now using the Internet and electronic mail is rapidly growing" and "[a]s a

result, courts in the United States are now receiving requests to permit service of process by e-mail.”); Murphy, *supra* note 24, at 74 (noting that approximately 1.6 billion non-commercial e-mails are sent from the United States daily).

[FN174]. Circuit splits also exist, of course, on other international law issues, such as whether Article 10(a) of the Hague Service Convention permits service by mail, and the standard for granting comity-based abstentions in favor of foreign judicial proceedings. For cases illustrating the circuit split regarding Article 10(a), see cases cited *infra* note 205. See also Dye, *supra* note 30, at 275-76 (noting that “one issue that continues to cause disagreement among federal and state courts is whether article 10(a) of the Hague Convention ... authorizes the *service* of judicial documents by mail, or whether it merely authorizes the mailing of documents other than process.”). For cases illustrating the circuit split regarding comity-based abstentions, see *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 626 (5th Cir. 1996) (non-comity based liberal approach to abstaining in favor of foreign proceedings); *Quaak v. Klynreld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11 (1st Cir. 2004) (comity-based restrictive approach).

[FN175]. See Schreck, *supra* note 32, at 1151 (discussing amending FRCP 4(f)(3)).

[FN176]. One author has suggested that “any amended Rule 4 must continue to favor traditional means of service by limiting when and how alternate means, such as e-mail, may be utilized in serving process,” including making e-mail and fax service a “last resort” after traditional methods of service have failed, and requiring courts to “minimize offense to foreign law and international agreements.” *Id.* at 1149-50.

[FN177]. See *id.* at 1151 (stating that with regard to amending FRCP 4(f), “more must be required due to the practical aspects of trying to minimize offense to foreign law and international agreements”).

[FN178]. Hague Service Convention, *supra* note 8, art. 5(a).

[FN179]. See Catherine Kessedjian, *Electronic Data Interchange, Internet and Electronic Commerce*, Hague Conference on Private International Law General Affairs Prel. Doc. 7 (Apr. 2000); Hague Conference on Private Int'l Law, Conclusions and Recommendations, Adopted by the Special Commission on the Practical Operation of the Hague Apostille, Evidence and Service Conventions (2003) [hereinafter 2003 Conclusions and Recommendations]. See also Kotuby, *supra* note 20, at 112-13; Conley, *supra* note 107, at 414 (“[T]he Hague Convention in no way prohibits signatory states from using [fax and electronic mail] when process is served through the Central Authority”); Tamayo, *Catch Me*, *supra* note 19, at 240-42.

[FN180]. See Kessedjian, *supra* note 179, ¶ 5.2 (“[T]here is no doubt that transmission by electronic means would significantly enhance the usefulness and effectiveness of the Convention.”); 2003 Conclusions and Recommendations, *supra* note 179, ¶ 4 (“[T]he spirit and letter of the [Apostille, Evidence and Service] Conventions do not constitute an obstacle to the usage of modern technology and [] their application and operation can be further improved by relying on such technologies.”). See also Tamayo, *Catch Me*, *supra* note 19, at 240-42 (discussing the Hague Conference on Private International Law's openness to adopting new technologies).

[FN181]. See Kessedjian, *supra* note 179.

[FN182]. *Id.* at 25.

[FN183]. *Id.* at 26, 28 (“[I]n the Commission's view, opening the Convention to electronic means of communic-

ation ... does not call for a formal revision of the Convention.”).

[FN184]. *Id.* at 28.

[FN185]. 2003 Conclusions and Recommendations, *supra* note 179.

[FN186]. *Id.* ¶ 59.

[FN187]. *Id.* ¶ 60.

[FN188]. *Id.* ¶ 62.

[FN189]. *Id.* ¶ 63.

[FN190]. PRACTICAL HANDBOOK, *supra* note 8, ¶ 262. This reading of Article 5(1)(a) is to be approved.

[FN191]. *Id.*

[FN192]. The Convention states expressly that “[t]he Convention shall not apply where the address of the person to be served with the document is not known.” Hague Service Convention, *supra* note 8, art. 1(2). Although this provision is interpreted liberally, it is at best unclear whether the term “address” includes “electronic” or “e-mail” address, even where it is the only known address for the person to be served. *See generally* PRACTICAL HANDBOOK, *supra* note 8, ¶¶ 79-80.

[FN193]. *See* Kotuby, *supra* note 20, at 112.

[FN194]. Kessedjian, *supra* note 179, at 26. *See* Kotuby, *supra* note 20, at 111-112 (discussing Kessedjian's “functional equivalent” analysis); Tamayo, *Catch Me*, *supra* note 19, at 240-42 (same). Accord Conley, *supra* note 107, at 414 (acknowledging that “there is a trend toward recognition of the broader interpretation of methods of service under the existing wording of the Convention.”). The functional equivalence approach was used in articles 6, 7 and 8 of the UNCITRAL Model Law on Electronic Commerce regarding what constitutes a writing, authentication and signature. *See* UNCITRAL Model Law on Electronic Commerce, G.A. Res. 51/162, arts. 6-8, U.N. Doc. A/RES/51/162 (Dec. 16, 1996); UNCITRAL, Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (1996), at 20-21, available at http://www.uncitral.org/pdf/english/texts/electcom05-89450_Ebook.pdf. The approach was also used in article 9 of the U.N. Convention on the Use of Electronic Communications in International Contracts, adopted in 2005, regarding form requirements of contracts. *See* United Nations Convention on the Use of Electronic Communications in International Contracts, art. 9, G.A. Res. 60/21 A/RES/51/162 (Nov. 23, 2005) available at http://www.uncitral.org/pdf/english/texts/electcom/ch_x_18.pdf [hereinafter E-Commerce Convention]; UNCITRAL, Legal Aspects of Electronic Commerce: Explanatory Note on the Convention on the Use of Electronic Communications in International Contracts, 7-9. A/CN.9/608/Add1 (Mar. 17, 2006). *See also* Jose Angelo Estrella Faria, *The United Nations Convention on the Use of Electronic Communications in International Contracts - An Introductory Note*, 55 INT'L & COMP.L.Q. 689, 691 (July 2006) (discussing functional equivalent approach of both instruments).

[FN195]. Hague Service Convention, *supra* note 8, art. 1(2).

[FN196]. *See* Kotuby, *supra* note 20, at 114 (discussing Kessedjian's “functional equivalent” approach to Article

1(2)). Regrettably, the Commission “did not have time to study in detail the ramifications of this conclusion.” Kessedjian, *supra* note 179, at 26. See Tamayo, *Catch Me*, *supra* note 19, at 241 (discussing the Commission's Article 1(2) analysis and noting its failure to consider its ramifications).

[FN197]. Article 10(a) of the Hague Service Convention states: “Provided the State of destination does not object, the present Convention shall not interfere with a) the freedom to send judicial documents, by postal channels, directly to persons abroad” Hague Service Convention, *supra* note 8, art 10(a).

[FN198]. Kessedjian, *supra* note 179, at 29. The Commission then recommended that parties to the Hague Service Convention “inform the Permanent Bureau of the Hague Convention on Private International Law whether they agree to this form of services.” *Id.*

[FN199]. *Id.* at 27.

[FN200]. See Kotuby, *supra* note 20, at 113-14, 119; Colby, *supra* note 23, at 352 (noting that the Convention “may permit service by electronic means to the extent that such means constitute ‘postal channels’ within the meaning of article 10(a)”); Tamayo, *Catch Me*, *supra* note 19, at 242 (discussing Kessedjian's Article 10(a) analysis and advocating the functional equivalent approach to Article 10(a)).

[FN201]. It has been broadly endorsed, for example, in the area of electronic commerce. See, e.g., E-Commerce Convention, *supra* note 194. As the Convention's Preamble notes, “uniform rules should respect the freedom of parties to choose appropriate media and technologies, taking account of the principles of technological neutrality and functional equivalence.” *Id.* at 1. Article 8(1) provides that “[a] communication or a contract shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication.” Hague Service Convention, *supra* note 8, art. 8(1). See generally Henry Gabriel, *The United Nations Convention on the Use of Electronic Communications in International Contracts: an Overview and Analysis*, 2006 UNIF. L. REV. 285.

[FN202]. See discussion *supra* note 158 and accompanying text.

[FN203]. See PRACTICAL HANDBOOK, *supra* note 8, ¶¶ 201-210.

[FN204]. The following countries have objected to service by mail under Article 10(a): Argentina, Bulgaria, China, Croatia, the Czech Republic, Egypt, Germany, Greece, Hungary, India, Kuwait, Lithuania, Monaco, Norway, Poland, the Republic of Korea, the Russian Federation, San Marino, Slovakia, Sri Lanka, Switzerland, Turkey, Ukraine, and Venezuela. See U.S. DEPT OF STATE, HAGUE CONVENTION ON THE SERVICE ABROAD OF JUDICIAL AND EXTRA-JUDICIAL DOCUMENTS IN CIVIL AND COMMERCIAL MATTERS, n.7., available at http://travel.state.gov/law/info/judicial/judicial_686.html, and the Table Reflecting Applicability of Articles 8(2), 10(a)(b) and (c), 15(2) and 16(3) of The Hague Service Convention, available at http://www.hcch.net/index_en.php?act=publications.details&pid=4074&dtid=2.

[FN205]. See, e.g., *Bankston v. Toyota Motor Corp.*, 889 F.2d 172, 174 (8th Cir. 1989) (Article 10(a) does not allow for service of judicial documents by mail); *Ackerman v. Levine*, 788 F.2d 830, 839 (Article 10(a) allows for service by e-mail).

[FN206]. See, e.g., *Ackerman*, 788 F.2d at 839-40.

[FN207]. See *Prewitt Enters. v. Org. of Petroleum Exporting Countries*, 353 F.3d 916 (11th Cir. 2003).

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