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Objective	To provide information on contractual waiver – the law of the forum and the applicability of the 1965 Service Convention
Action to be Taken	For Decision ☐ For Approval ☐ For Discussion ☒ For Action / Completion ☐ For Information ☐
Annexes	Relevant excerpt of the Revised Draft of the Practical Handbook on the Operation of the Service Convention (draft Service Handbook)
Related Documents	Prel. Doc. No 7 of May 2024 – Revised Draft of the Practical Handbook on the Operation of the Service Convention

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Contractual Waiver and the 1965 Service Convention

I. Introduction

1 In preparation for the upcoming meeting of the Special Commission (SC) on the practical operation of the *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (Service Convention), the *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* (Evidence Convention), and the *Convention of 25 October 1980 on International Access to Justice* (Access to Justice Convention), the Permanent Bureau (PB) has prepared this document which examines the applicability of the Service Convention in circumstances of contractual waiver of service of process, pursuant to the law of the forum in certain jurisdictions. The exploration of this issue was motivated in light of a 2020 California Supreme Court decision (US), *Rockefeller Technology Investments (Asia) VII v Changzhou SinoType Technology Co., Ltd.* (Rockefeller). In Rockefeller, the California Supreme Court held that "because the parties' agreement constituted a waiver of formal service of process under California law in favor of an alternative form of notification, the Convention does not apply."[1] Notably, the court was required to consider the terms of the parties' agreement which included an agreement to "provide notice in the English language" by courier, to submit "to the jurisdiction of the Federal and State Courts in California and consent to service of process in accord with the notice provisions."[2] This was in circumstances where a notice was sent to the defendant in China, a Contracting Party to the Service Convention, where service of process by postal channels pursuant to Article 10(a) is not available.[3]

2 This document considers contractual waiver of service in the particular context of cross-border disputes and suggests that the upcoming meeting of the SC provides a useful opportunity to reflect on the operation and interpretation of the Service Convention. This document invites the SC to consider three issues that the case of Rockefeller raises. The first issue is where the law of the forum permits private parties to enter into contracts to waive service. How do these contractual agreements operate in circumstances where one party is located in a foreign jurisdiction which is a Contracting Party to the Service Convention? The second issue is the ability for Contracting Parties to determine how service is effected within State borders, including through objecting to the operation of Article 10(a) (postal channels). Where objections to Article 10(a) apply, they can act to protect sovereign interests and in many civil law countries, service is considered a sovereign act. The third issue concerns the circumstances where Article 10(a) applies. The exploration of these issues will also highlight the protection afforded to defendants under the Service Convention in respect of default judgments and will draw attention to important considerations for litigants seeking to recognise and enforce ensuing judgments in foreign jurisdictions.

A. The Service Convention: non-mandatory, but exclusive

3 It should be noted that the upcoming meeting of the SC is not the first occasion that the intersection between the law of the forum and the Service Convention has been considered. This issue was canvassed during the Diplomatic Session in 1964 where several delegations expressed the view that the "…Convention is applicable in all cases where, according to the law of the requesting State, transmission abroad for service is required […]."[4] This issue was also discussed at the 1989 meeting of the SC, where the Report of the meeting notes that "The principle that the forum is to

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1 *Rockefeller Tech. Invs. (Asia) VII v. Changzhou SinoType Tech.* Co., 460 P.3d 764 (Cal. 2020), at 767.

2 *Id*.

3 The People's Republic of China (Mainland) has made a declaration opposing the service of documents in its territory by the methods provided by Article 10 of the Service Convention.

4 HCCH, *Actes et documents de la Dixième session* (1964), Tome III, *Notification*, The Hague, *Imprimerie Nationale*, 1965, pp. 167, et 366. Available on the HCCH website at www.hcch.net. [translation in-text by the Permanent Bureau].

decide this question [*i.e.,* whether documents should be transmitted for service abroad] under its own law was broadly accepted…"[5]

4 At the 2003 meeting of the SC,[6] participants again discussed the nature of the Service Convention. At that meeting, delegates confirmed that the Convention was of a non-mandatory but exclusive character, without prejudice to international law on the interpretation of treaties.[7] What this means is that the Convention is non-mandatory, in the sense that it will only apply if it is determined under the internal law of the forum that there is occasion to transmit a document for service abroad. If it is determined under the internal law of the forum that a document has to be transmitted for service abroad, the Convention will apply between Contracting Parties. In this way, the Convention is described as exclusive in character (*i.e.*, one of the methods of transmission under the Convention must be used). The exclusive nature of the Convention is elaborated in the *Practical Handbook on the Operation of the Service Convention* (Service Handbook), the relevant excerpts of the Service Handbook in its draft 5th edition are enclosed in the Annex of this document.

B. Contractual waiver – 2003 SC

5 At the SC meeting in 2003, following a discussion on the applicability and nature of the Service Convention, participants considered whether private parties to a contract could exclude the application of the Service Convention by introducing a contractual clause that would determine in advance, the manner in which notification would be effected. It was submitted that, at least in one jurisdiction, it was becoming increasingly common for parties to international contracts to agree to 'voluntary service' that would not fall under the Service Convention or under domestic law.[8] Participants were also advised that there were instances where the parties to a contract had agreed to waive service and had permitted notice through the mail. Noting that while this practice was permitted in some, but not most Contracting Parties, delegates exchanged views on the validity of such clauses and the broader implications of this practice, including the possible recognition and enforcement of judgments in foreign jurisdictions.

6 Based on the deliberations, the 2003 SC "took note of the practice reported in one State party to the Convention whereby contractual arrangements were entered into and upheld in the courts of that State which excluded the application of the Convention for service of documents as regards parties to such contracts, including parties outside that State."[9] The 2003 SC C&Rs reflect that "Several experts commented to the effect that this would not be allowed in their States and be considered as contrary to their internal law. Some experts indicated, however, that a judgment rendered pursuant to service in accordance with any such contractual arrangements would not necessarily be refused execution."[10] During that meeting, the SC also recalled the purpose and fundamental importance of Article 15, which is designed to ensure actual notice to a defender in sufficient time to organise their defence.[11]

7 The 2020 case of Rockefeller, decided by the Supreme Court of the state of California (US) revives some of the issues considered in previous meetings of the SC and further exploration of these issues is warranted. Section II of this document provides a brief overview of the Service Convention,

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5 "Report on the work of the Special Commission of April 1989 on the operation of the Hague Conventions of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters", p. 4, para. 13, available on the HCCH website at www.hcch.net under "Service Convention" then "Practical operation documents" then "Report on the work of the Special Commission of April 1989 on the operation of the Hague Service and Evidence Conventions".

6 Special Commission on the Practical Operation of the Service, Evidence and Apostille Conventions, which took place from 28 October to 4 November 2003 (2003 SC).

7 C&R No 73 of the 2003 SC.

8 The records of the 2003 SC do not elaborate on 'voluntary service'.

9 C&R No 76 of the 2003 SC.

10 C&R No 77 of the 2003 SC.

11 C&R No 74 of the 2003 SC.

including its objectives and nature. It also provides some specific information about Article 10(a) (postal channels) and objections to alternative channels. Section III presents the Rockefeller case and sets out the key issues involved. Section IV examines the Rockefeller case of contractual waiver through the lens of the Service Convention and the wider cross-border context. Section V discusses the operation of Article 10(a). Finally, Section VI lists some proposed points for discussion at the 2024 SC meeting.

II. Purpose, operation, and nature of the Service Convention

8 The service of documents fulfils a number of important purposes. Service enables the issue in dispute to be appropriately brought to the attention of the defendant, respondent, or other interested party. In several common law States, service is also the basis for establishing the jurisdiction of the court. Where not properly executed, service may be a ground of refusal for the recognition and enforcement of a judgment.

9 However, the Service Convention itself does not define the term service. The Convention does not address or comprise substantive rules relating to the actual service of process. The Convention's focus is on the transmission of documents from one Contracting Party to another Contracting Party. Noting though, that there are two channels of transmission provided for by the Convention where the transmission includes the service of process upon the ultimate addressee: direct diplomatic or consular channels (Arts 8) and postal channels (Art. 10(a)).[12] The Convention does not specify how service is to be effected under its Articles when documents are being transmitted under the main channel of transmission, nor does it specify how service is to be effected when using the alternative channels of transmission. In other words, the Service Convention does not determine the conditions or formalities of service. The degree of formality of service required varies from State to State.

10 The main objectives of the Service Convention are to simplify the method of transmission of documents from the Requesting State to the Requested State; to bring actual notice of the document to be served to the addressee in sufficient time to enable them to defend themselves, and to facilitate proof of service abroad.[13]

11 In relation to the application of the alternative channels of transmission, the Convention provides an objection mechanism, according to which, Contracting Parties may decide not to accept certain alternative channels, and can make a declaration of objection to this effect. The Convention does not require Contracting Parties to specify the reason for the declaration.

12 Postal channels, provided under Article 10(a), is one of the alternative channels of transmission. Article 10(a) reads "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,"

13 Accordingly, Article 10(a) facilitates the transmission of judicial documents through postal channels from the State of origin directly to the addressee. As mentioned in paragraph 9 above, transmission of documents via postal channels (Art. 10(a)) includes *service of process* upon the ultimate addressee.

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12 The Service Convention provides one main channel of transmission (via the Central Authority), several alternative channels of transmission (consular or diplomatic channels (Arts 8(1)) and 9), postal channels (Art. 10(a)), direct communication (Art. 10 (b) and (c)), and derogatory channels.

13 V. Taborda Ferreira, "Rapport explicatif", in *Actes et documents de la Dixième session* (1964) (*op. cit.* note 4), pp. 363 *et seq.* For discussions on the main objectives of the Service Convention, see HCCH, *Practical Handbook on the Operation of the Service Convention*, 4th Ed, The Hague, 2016, paras 6-13.

14 At the time of writing, 44 out of 84 Contracting Parties have made a declaration of opposition to the use of postal channels, including several qualified oppositions that set out the criteria for the use of postal channels. For example, Australia's declaration states that "documents forwarded via postal channels must be sent via registered mail to enable acknowledgement of receipt".[14] Israel has objected to the use of post channels in its territory "with respect to documents addressed to the State of Israel, including its political subdivisions, agencies, authorities and instrumentalities, and to officials, or agents acting or who acted on behalf of the Government of Israel". Israel's declaration further notes that "service of such documents shall be effected, subject to the provisions of the Convention, through the Directorate of Courts."[15]

15 In practice, the majority of court decisions have recognised the inadmissibility of service through the postal channels if the State of destination has objected to Article 10(a).[16] In these cases, service through the Central Authority has been considered to be a valid channel of transmission. If a State of destination has objected to alternative channels of transmission, including Article 10(a), the main channel of transmission should be used.

16 It should also be noted that the Service Convention does not contain any provisions allowing private parties to exclude the application of the Convention.

17 The Service Convention affords important protection to a defendant from a default judgment, regardless of the channel of transmission used. Article 15 of the Convention states that a default judgment shall not be given unless it is established that service was effective under the Convention. If the judgment has already been given, a defendant may apply for relief pursuant to Article 16.

III. Rockefeller and key issues

18 The Rockefeller case addressed the question of whether a US-based plaintiff and a China-based defendant who had entered into contractual arrangements to waive formal service of process by contract, as permitted under the law of the state of California in the United States (US), were nonetheless required to comply with the requirements of the Service Convention. Part of these considerations were in relation to the operation of Article 10(a), as it was asserted by the defendant that Article 10(a) and specifically China's (Mainland) objections to postal channels applied in this case.

19 Prior to the Rockefeller decision, some other US courts had affirmed the validity of waiver of service provisions contractually agreed between private parties and affirmed that the parties could effectively waive the operation of the Service Convention and send documents by mail. This is the case even when, in at least one circumstance, the State of destination had objected to Article 10(a). The courts analysed the specific terms of the parties' contracts. Further, the decisions suggested that it would not be appropriate to permit foreign defendants to avoid their contractual agreements and hide behind the provisions of the Service Convention by asserting that a contractual waiver was, from the perspective of the Service Convention, defective.

20 For example, in 2010, in *Alfred E. Mann Living Trust v. ETIRC Aviation S.a.r.l.*,[17] the Supreme Court of New York, Appellate Division, observed that the requirements of the Service Convention could be subject to waiver by the parties' agreement, and recognised the validity of service through e-mail on a defendant located in the Netherlands. In the contract at issue, the parties had explicitly agreed

14 See the declaration of Australia available on the Service Section of the HCCH website.
15 See the declaration of Israel available on the Service Section of the HCCH website.
16 See, *e.g., Tracfone Wireless, Inc. v. Pak China Group Co. Ltd.*, 943 F. Supp. 2d 1284 (S.D. Fla. 2012) (United States); *Advanced Aerofil Tecnologies, AG v. Todaro,* 2012 WL 299959 (S.D.N.Y. 2012) (United States); Cass., Ch. Civ. I, 28 March 2006, No 03-18284 (France)*; Continental Mark Ltd v. Verkehrs-Club De Schweiz,* Court of First Instance, 31 October 2001, HCA 7999/2000 (China (Hong Kong SAR)); *Israel Credit Lines complementary Financia Services Ltd v. Roni Elad,* RCA 1056/10 (Israel).
17 *Alfred E. Mann Living Tr. v. ETIRC Aviation S.a.r.l.*, 78 A.D.3d 137, 910 N.Y.S.2d 418 (N.Y. App. Div. 2010).

to "waive[s] personal service of the summons, complaint and other process issued in any such action or suit."[18] In this case, the court, citing domestic legal precedent,[19] observed that parties are free to contractually waive service of process and that by definition, such waivers render inapplicable the statues that normally direct and limit the acceptable means of service of process on a defendant. The court also considered that "precluding a contractual waiver of the service provisions of the Hague Convention would allow people to unilaterally negate their clear and unambiguous written waivers of service by the simple expedient of leaving the country".[20] Notwithstanding the fact that the court had determined that the Service Convention did not apply in this case, it should be noted that the Netherlands, the State of destination, has not objected to Article 10(a) of the Service Convention.

21 Similar to the abovementioned decision, the case of Rockefeller, decided by the Supreme Court of the state of California, involved a consideration of the law of the forum and a contractual agreement. The California Supreme Court had particular regard to the terms of the parties' memorandum of understanding and based its decision on the parties' waiver of formal service, noting there was a difference between formal service and notice.

A. Facts of Rockefeller

22 The defendant, a company based in China (Mainland), and the plaintiff entered into a memorandum of understanding (MOU) which provided that the parties would submit to the jurisdiction of California courts and to resolve disputes between them through California arbitration. The parties also agreed to the provision of notice of disputes "via Federal Express or similar courier, with copies via facsimile or email" and "consent[ing] to service of process in accord with the [those] notice provisions."[21]

23 When the relationship between the two entities soured, the plaintiff later sought arbitration to adjudicate the MOU, consistent with its terms. The defendant neither responded, nor appeared for the arbitration, and the arbitrator awarded the plaintiff $414,601,200. Subsequently, the US-based plaintiff petitioned to confirm the arbitration award in the California Superior Court for the County of Los Angeles. Consistent with the notice provisions of the MOU, the plaintiff provided a summons and petition to the defendant by FedEx in China.

24 The award was confirmed, and the judgment was entered without participation from the defendant. The defendant then moved to set aside the default judgment for insufficiency of service of process, arguing that the plaintiff's failure to comply with the Service Convention rendered the judgment, confirming the arbitration award, void.

B. Los Angeles County Superior Court

25 The Los Angeles County Superior Court declined to grant equitable relief "due to the lack of reasonable diligence by the defendant"[22] and opined that "[t]o allow parties to enter into a contract with one another and then proceed to unilaterally disregard provisions out of convenience, like the one at issue here, would allow parties to simply return to their respective countries in order to avoid any contractual obligations."[23] The trial court also referred to *Marine Trading LTD. v Naviera Commercial Naylamp S.A.*,[24] a case in which a federal court in the state of New York, US,

18 *Ibid.*, at 140 (capitalisation modified).
19 *Comprehensive Merchandising Catalogs, Inc. v. Madison Sales Corp.,* 521 F2d 1210, 1212 [7TH Cir 1975]; *National Equip. Rental v. DecWood Corp.*, 51 Misc 2d 999 [App Term 1966].
20 *Alfred E. Mann Living Tr.* (*op. cit.* note 16), at 141.
21 *Rockefeller Tech. Invs. (Asia) VII v. Changzhou SinoType Tech. Co.*, 24 Cal. App. 5th 115 (2018), at 121.
22 *Ibid.,* at 127.
23 *Ibid.*, at 126.
24 *Marine Trading LTD. v. Naviera Commercial Naylamp S.A.*, 879 F. Supp. 389, 391 (S.D.N.Y. 1995).

emphasised that "standards for service are to be liberally construed in the context of arbitration".[25] The trial court concluded that the parties could still agree to be served with legal process in the manner expressly contained in the MOU despite the fact that China (Mainland) has expressly objected to Article 10(a) of the Service Convention.

C. California Court of Appeal

26 The California Court of Appeal reversed the first instance court decision and held that service through mail to citizens of States which have filed objections to Article 10 of the Convention is not permitted.[26] It stated that the Service Convention "emphasizes the right of each contracting state – not the citizens of those states – to determine how service shall be effected"[27] and "requires service on foreign parties to be carried out as specified in the Convention by the receiving country".[28] The Court of Appeal concluded that "parties may not agree by contract to accept service of process in a manner not permitted by the receiving country".[29] Accordingly, as China (Mainland) has objected to Article 10(a), the Chinese-based appellant "was not validly served with the summons and petition to confirm the arbitration award".[30]

27 In its judgment, the Court of Appeal focused on giving effect to the Convention's terms and paying due regard to China's (Mainland) declared opposition to postal service under the Convention. In addition, it stressed that "permitting private parties to avoid a nation's service requirements by contract is inconsistent [...] with the Convention's stated intention to avoid infringing on the "sovereignty or security" of member states."[31]

D. Supreme Court of California

28 The Court of Appeal's decision was, however, reversed by the Supreme Court of California. The California Supreme Court, the highest court in the state of California, considered the applicability of the Service Convention. Following the US Supreme Court's decision in the Water Splash case,[32] the California Supreme Court stated that there is a "distinction between formal service and mere notice" and the law of the sending forum could decide what formal service is.[33]

29 The California Supreme Court went on to say that formal service of process involves two aspects: service as a method of obtaining personal jurisdiction over a defendant and formalized notification of court proceedings to allow a party to appear and defend against the action.[34] Based on the finding that "the Convention applies only when the law of the forum state requires formal service of process to be sent abroad",[35] and because the MOU "constituted a waiver of formal service of process under California law in favor of an alternative form of notification",[36] the Supreme Court of California concluded that "this case does not present an occasion to transmit a judicial document for service abroad within the meaning of Article 1",[37] and that the Service Convention therefore does not apply when parties waive formal service of process by contract.[38]

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25 *Ibid.*, at 392.
26 Rockefeller (*op. cit.* note 22), at 130.
27 *Ibid.,* at 132.
28 *Ibid.*, at 128.
29 *Ibid.*, at 133.
30 *Id.*
31 *Ibid.*, at 132.
32 *Water Splash, Inc. v. Menon*, 581 U.S. 137 S. Ct. 1504 (2017).
33 Rockefeller (Cal. 2020) (*op. cit.* note 1), at 770.
34 *Ibid.,* at 774.
35 *Ibid.,* at 767.
36 *Id.*
37 *Ibid.*, at 776.
38 *Id.*

30 This distinction, between formal service and an alternative form of notification, was a key factor in the Rockefeller decision which also had a bearing on the Supreme Court's view of the ability for the plaintiff to send documents to the defendant by FedEx despite China's (Mainland) objection to Article 10(a). Given the Supreme Court determined that the agreement was for notification through FedEx, there was, according to the Supreme Court, no engagement of the provisions of the Convention and no requirement to have regard to the operation of Article 10(a).

31 The California Supreme Court noted that if the Service Convention applied, and assuming service by FedEx constitutes a species of service by mail, China's (Mainland) objection to foreign mail service under Article 10(a) would preclude direct service via FedEx, regardless of whether California law authorised such service.[39]

32 In the judgment, the Supreme Court of California also noted that the conclusion did not authorise circumventing the Service Convention where the Convention would otherwise apply.[40] The decision went on to outline that "holding that the Convention does not apply when parties have agreed to waive formal service of process in favor of a specified type of notification serves to promote certainty and give effect to the parties' express intentions."[41]

33 The Rockefeller case has been cited in another decision in the state of California. In *Seagate Technology v. Goel,*[42] the Court of Appeal of the state of California, reached the same conclusion regarding a contractual provision on service: that the Service Convention would not apply in circumstances where parties had agreed to waive formal service of process under California law (the law of the forum) in favour of informal notification. In this case, pursuant to an agreement between the parties that service would be effected by mail, a US plaintiff attempted to serve an India-based defendant by post, even though India had opposed service by post under Article 10(a) of the Convention. The Court upheld service on the defendant in this case.

34 Following the California Supreme Court's findings in Rockefeller, a petition for a writ of certiorari was submitted to the Supreme Court of the United States of America.[43] Arguments seeking certiorari asserted that the "California Supreme Court's decision was wrong because the Convention provides the 'exclusive' means for serving documents transmitted for service abroad" and that the decision "undermines the uniformity and predictability that motivated the adoption of the Convention" and "suggests that private parties can create their own service procedures in countries that are parties to the Convention."[44] However, the U.S. Supreme Court denied certiorari. In September 2020, the Ministry of Justice of China wrote to the Department of Justice of the US, the US Central Authority, with a copy to be provided to the Supreme Court of California.[45] This letter set out China's position regarding the nature of the Service Convention in terms of service abroad between Contracting Parties and China's (Mainland) objection to the transmission of documents

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39 *Ibid.,* at 771.

40 *Id.*

41 *Id.*

42 *Seagate Tech. v. Goel.* Super. Ct. No. G060036, 2022 WL 3571988 (Cal. App. Ct. Aug. 19, 2022).

43 In common-law jurisdictions, a certiorari is a writ issued by a superior court for the re-examination of an action of a lower court. In the United States certiorari is used by the Supreme Court to review questions of law or to correct errors and to ensure against excesses by the lower courts. Such writs are also issued in exceptional cases when an immediate review is required. For the Supreme Court to issue a writ of certiorari, four of the court's nine justices must agree to review the case.

44 F. Hessick, J. Hubbard, & R. Simpson, "Brief of Amicus Curiae law professors in support of petitioner Changzhou Sinotype Technology Co., Ltd. filed (Distributed)" (23 Sep 2020), available online at: https://www.supremecourt.gov/DocketPDF/20/20-238/154748/20200923163301015_20-238%20tsac%20Law%20Professors.pdf.

45 A Contracting Party with an interest in a matter pending before the U.S. Supreme Court can move to be considered an *amicus curiae.* See, *e.g.*, U.S. Supreme Court Rule 37. While appellate courts in the United States are generally bound by the trial court record, the United States can file a Statement of Interest or an *Amicus Curiae* brief to address legal issues under certain circumstances. See 28 U.S.C. § 517; see, *e.g.*, *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, 23 F. 4th 1036 (D. C. Cir. 2022).

for service under Article 10(a) of the Service Convention.[46] It also noted that using the postal channel would therefore be deemed procedurally defective.[47] China emphasised that service in China (Mainland) can be executed via the channels provided under the Service Convention.[48]

E. Commentary on Rockefeller

35 The Rockefeller decision has received considerable attention, with commentators highlighting various positions and competing interests surrounding the issues identified in the case.[49] One line of commentary supports the primacy of the Service Convention and emphasises the interests of the State, which include considerations of upholding treaty obligations and respecting the sovereignty of Contracting Parties which have objected to Article 10(a).

36 Alternatively, another line of commentary emphasises party autonomy and private parties' interests in having their contractual arrangements to waive formal service of process upheld when permitted by the law of the forum State, noting also that the law of the forum is equally a sovereign interest.

37 In terms of party autonomy in international commerce, it has been said that contractual agreements enhance efficiency and predictability;[50] the speed of transmission and the speed of resolving international commercial disputes can be enhanced by allowing private parties to agree on the use of alternative service, without relying on service via the Central Authority or diplomatic channels. It has also been said that upholding contractual agreements provides parties with confidence that their agreed procedures will be followed.[51] Some commentators also highlight the importance of efficiency considerations in bringing actual notice to the defendants, this is despite the fact that the objectives of the Service Convention are to "greatly facilitate and streamline the transmission of documents for service abroad."

38 However, the "efficiency" of service must also be assessed against the principles of legal certainty and the rights of parties to a fair trial. The framework established under the Service Convention provides the appropriate means to ensure that judicial and extrajudicial documents can be brought to the notice of the addressee in sufficient time, affording protections to defendants for a fair trial, and affording legal certainty for the parties including that decisions issued can be capable of recognition and enforcement.

IV. Contractual waiver and service in a cross-border context

39 The requirements for service differ across legal systems and jurisdictions. In many civil law countries, service is regarded as a sovereign act. Whereas in common law countries, service is not considered an exclusive function of the State and can be conducted by private methods. In most common law countries, beyond enabling defendants to adequately prepare for their defence, service also serves to establish jurisdiction.

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46 T.J. Folkman, S. Qi, & S. Sugars, "Supplemental brief of petitioner Changzhou Sinotype Technology Co., Ltd. filed. (Distributed)", (28 Sep 2020), available online at https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-238.html, pp. 1-2.

47 *Ibid*.

48 The Chinese Ministry of Justice has launched an online system to facilitate the submission of requests to China (Mainland) under the main channel of transmission.

49 J.F. Coyle, R.J. Effron & M. Gardner, "Contracting Around the Hague Service Convention", 53 UC Davis Law Review online 53 (2019); T.G. Vanderbeek, "What's in the Contract?: Rockefeller, the Hague Service Convention, and Serving Process Abroad:, 76 Vand. L. Rev. 643; J. Huang, "Can Private Parties Contract out of the Hague Service Convention?" (19 June 2023), available at SSRN: https://papers.ssrn.com/so13/papers.cfm?abstract_id=3090734; T.J. Folkman, "Case of the Day: Rockefeller v. Changzhou SinoType |Letters Blogatory.

50 Application for permission to file amicus curiae brief, and proposed brief of amicus curiae California International Arbitration Council, in support of plaintiff and respondent Rockefeller Technology Investments (Asia) VII, available online at: https://www.courts.ca.gov/documents/9-s249923-ac-ca-international-arbitration-council-090419.pdf.

51 For discussion, see Vanderbeek (*op. cit.* note 49), pp. 666-670.

40 Service through a method agreed upon in a contract is permissible in numerous common law jurisdictions,[52] and the inclusion of provisions permitting alternative methods of service may be viewed as an *ex ante* waiver of formal service under procedural laws, as it was in the Rockefeller California Supreme Court decision. In practice, if a party does not challenge the validity of service conducted through mutually agreed methods, the court would not normally need to delve into the matter, as it may be considered a valid *ex post* waiver of service or a rectification of defective service under the *lex fori*. However, if a party contests the validity of service notwithstanding the contractual agreement, the court will need to adjudicate the validity of service[53] as well as the contractual provisions which attempt to opt out of service requirements under domestic law and, by extension, the Service Convention.

41 Another potential and important consequence of contractual waiver for a defendant could occur when the court seised delivers a default judgment based on the parties' agreement to waive service of process in favour of informal notification. Waiving the application of the Service Convention in this context deprives the defendant of the protection from a default judgment that Article 15 of the Service Convention offers.

V. Operation of Article 10(a)

42 A relevant issue in the context of cross-border contractual arrangements for service among Contracting Parties to the Service Convention is the need to have "respect for nation-states".[54] It is the State that determines how service is effected within its borders. In this vein, the California Court of Appeal rightly noted that "the Convention expressly allows each 'State of destination' to decide whether to permit mail service on its citizens by foreign defendants".[55]

43 Therefore, if the law of the forum requires transmittal of a document for service abroad, a plaintiff serving a foreign defendant in a Contracting Party to the Service Convention must ensure that the provisions of the Convention are followed (the Convention is exclusive), including any Article 10(a) objection by a foreign defendant's State.

44 What is the meaning of an Article 10(a) objection?

45 This objection by any Contracting Party to the Service Convention serves to prohibit the service of process via postal channels on defendants in the territory of that particular Contracting Party. Its purpose is to stipulate how service can and cannot be effected within its borders.

46 However, there may be certain situations in which Article 10(a) objections do not apply, including where service has already been effected and sending documents via the postal channels is supplementary to this service. It could also extend to circumstances where the parties have waived service and a notice is sent after that waiver. Article 10(a) applies to judicial documents.

Recognition and enforcement of judgments

47 The provision of notice to a defendant is required where a judgment is to be recognised or enforced in a foreign State other than the forum State. Failure to provide notice may be a ground for the refusal of recognition or enforcement.[56]

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52 See Huang (*op. cit.* note 49), footnote 43.

53 Noting that the validity and enforceability of such *ex ante* waive of service provisions differ among states within diverse legislative frameworks.

54 For discussion, see Vanderbeek (*op. cit.* note 49), pp. 664-665.

55 Rockefeller (*op. cit.* note 21), at 132.

56 For example, Article 7(1)(a)(i) of the Convention of 2 July 2019 on the Recognition an Enforcement of Foreign Judgments in Civil or Commercial Matters (Judgments Convention) provides for the ability for a court to refuse recognition and enforcement if a document instituting the proceedings was not notified to the defendant in sufficient time and in such a way as to enable them to arrange for their defence, unless the defendant entered an appearance and presented their case without contesting notification in the court of origin.

48 Regardless of whether a matter is allowed to proceed without formal service through the Convention, the practical consequence of the "contractual waiver" practice would be apparent and potentially addressable, particularly at the stage of recognition and enforcement. For example, although the court seised has recognised the validity of *ex ante* contractual provisions regarding the means of service of process and rendered a decision, its judgment may still be refused recognition and enforcement in the State which has made objections to the agreed-upon service method, based on the grounds of lacking valid service, infringing State sovereignty, or public policy.[57] This may lead to legal uncertainty for the litigants and is a risk that must be borne by the party choosing to proceed to judgment notwithstanding a failure to transmit a document for service under the Convention.[58]

49 Thus, the core of the "contractual waiver" issue could be discussed by having regard to private parties' interests (bringing notice to the defendant in an efficient manner) and States' interest (noting that there are two competing State sovereignty considerations: the State of destination and forum State), in light of the international nature of the Service Convention. The discussions should also consider legal certainty (ensuring that the decision issued will ultimately be capable of recognition and enforcement) and the rights of parties to a fair trial versus the efficiency of notification consideration.

VI. Items for discussion during the 2024 SC meeting

50 Based on the above, the SC invites the participants to consider the following circumstance:

Where the national procedural law of the State of origin allows the parties to waive service requirements, rendering the application of the Service Convention non-mandatory, by agreeing to informal notice through postal channels, whereas the State of destination has objected to the use of postal channels under Article 10(a) of the Service Convention.

51 The SC noted that waiver of formal service by the parties' contractual agreement is available under the law of certain jurisdictions.

52 However, the SC reminds courts and private parties of the benefits that the Service Convention offers, which includes facilitating the transmission of documents and bringing actual notice of the document to be served to the defendants, affording protection to defendants prior to and post default judgment, and contributing to the process of recognising and enforcing foreign judgments.

53 Thus, courts and private parties should have regard to contractual service provisions which waive service, and thereby rendering the Service Convention, non-mandatory, this can deprive a defendant of the protection from a default judgment under Article 15 of the Convention and the plaintiff from assurance that a favourable judgment will be recognised and enforced abroad.

54 Private parties negotiating contractual agreements for service by post abroad should have regard to Article 10(a) oppositions under the 1965 Service Convention. The regard for such oppositions might also be considered by courts when determining whether and to what extent the intent of the parties was, in fact, to waive procedural requirements.

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57 This was also discussed in Minutes No 12 of 2003 SC. For example, Art. 9 of the HCCH *Convention of 30 June 2005 on Choice of Court Agreements* and Article 7 of the HCCH *Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* list these as potential grounds for refusal for recognition and enforcement.

58 It may also lead to uncertainty for the parties if the service of process via the parties' "contract" is challenged at the jurisdiction stage or at the recognition and enforcement stage.

Annexes

Annex I

Relevant excerpt of the Revised Draft of the Practical Handbook on the Operation of the Service Convention (paras 48-90)

serve the document or arrange for service – the operation of the main Channel is the focus of Part 2.I of this Handbook.

43. The alternative channels of transmission available under the Convention are:

1) Diplomatic or consular channels (Arts 8 and 9)

2) Postal channels (Art. 10(a))

3) Direct communication between judicial officers, officials or other competent persons (Art. 10(b)), and

4) Direct communication between an interested party and judicial officers, officials or other competent persons (Art. 10(c)) – the operation of the alternative channels is the focus of Part 2.II of this Handbook.

44. There is no hierarchy of the channels of transmission, and transmission through one of the alternative channels does not lead to service of a lesser quality. The Convention also provides that derogatory channels can be used. There are two types of derogatory channels: those provided in bilateral or multilateral agreements concluded among Contracting Parties (Arts 11, 24 and 25), and those provided by the domestic law of the State of destination (Art. 19), and these are covered in Part 2.III of this Handbook.

ii. Objections to alternative channels

45. A Contracting Party may object to the use of the Convention's alternative channels. Information about objections is included in the status table on the Service Section of the HCCH website. These objections are the focus of Part 2.II.6 of this Handbook. These objections are the focus of Part 2.II.6 of this Handbook.

iii. Protection of the defendant

46. Regardless of the channel of transmission used, the Convention protects defendants from a default judgment. A default judgment shall not be given unless it is established that service was effective under the Convention (Art. 15). If judgment has already been given, a defendant may apply for relief (Art. 16). These protections are explained in Part 3 of this Handbook.

iv. Relationship with other Instruments

47. The relationship between the Convention and other Instruments is set out in Part 4 of this Handbook.

2. Applicability of the Convention

48. The Convention enables the transmission of documents for service abroad between Contracting Parties and will apply when there is (i) occasion to transmit documents for service abroad (paragraphs 49 and 331), (ii) where those documents are judicial or extrajudicial in nature (para. 120), (iii) relating to a civil or commercial matter (para. 134), and (iv) where the address of the person to be served is known (para. 155).

i. Occasion to transmit documents for service abroad

49. The Convention is silent on whether there is occasion to transmit a document for service abroad. To assess the applicability of the Convention, two questions must be addressed separately and in stages.

1) Which law determines whether a document must be transmitted for service abroad?

2) If, under the relevant law, it is determined that a document is required to be transmitted for service abroad, does the Convention necessarily have to be applied?

50. In addressing these two questions, the legal literature often uses a range of terminology, which either fails to properly distinguish the two stages in the analysis of the Convention's applicability or uses different terms for the same stage. As a result, it is often not clear what is meant by expressions describing the Convention as "binding" or "non-binding", "exclusive" or "non-exclusive", which are used in substitution or in combination with "mandatory" or "non-mandatory".

51. This Handbook suggests using the following:

> Question 1: Is the Convention of mandatory or non-mandatory character: Which law determines whether a document must be transmitted for service abroad? Is it the Convention itself, or is it the law of the forum that determines this?

> Question 2: Is the Convention of exclusive or non-exclusive character: If, under the relevant law, it is determined that a document must be transmitted for service abroad, must the Convention be used, meaning the Convention is of exclusive character?

1. Non-Mandatory nature of the Convention

- **The law of the forum**

52. It is now generally well established that it is the law of the forum that determines whether a document is required to be transmitted for service abroad. This has been confirmed in case law and by the Special Commission. In this sense, the Convention can be characterised as non-mandatory. That is, the Convention will only apply if it is determined under the law of the forum that there is occasion to transmit a document for service abroad. If, on the contrary, the law of the forum provides for a possible method of service of the document domestically (upon a designated representative, for example), and this method is chosen by the applicant, the Convention will not apply.

- **Case analysis: key historical judgments**

53. In the 1980s, the issue of whether or not a document has to be transmitted for service abroad (and therefore engaging the Convention) was explored by the Supreme Courts of two jurisdictions: the **Netherlands**[32] and the **United States**.[33] In both jurisdictions, it was held by the respective Supreme Courts that it is the law of the forum that determines whether or not a document is to be transmitted for service abroad. The first case was the Supreme Court of the Netherlands (*Hoge Raad*) in the *Mabanaft* case.[34] In this case, the plaintiffs served a writ of summons on the German-based defendant's attorney who was based in The Hague (where the lower court proceedings had taken place). They did so in accordance with the 1985 amendments of the *Code of Civil Procedure of the Netherlands*. Relevantly, the amendments to this Code enabled the service of notice, required upon appeal from a lower court judgment, to be made on an attorney

32 *Segers and Rufa BV v. Mabanaft GmbH*, HR 27 June 1986, *NJ* 1987, p. 764, *RvdW* 1986, p. 144 [hereinafter referred to as the *Mabanaft* case or decision].

33 *Volkswagen Aktiengesellschaft v. Schlunk*, 486 U.S. 694; *I.L.M.* 1988, p. 1093, annotated in: *Am. J. Int'l L.* 1988, p. 816; *IPRax* 1989, p. 313 [hereinafter referred to as the *Schlunk* case or decision].

34 *Segers and Rufa BV v. Mabanaft GmbH* (*op. cit.* note 32).

at whose office the addressee had elected domicile in the lower court proceedings. The Supreme Court had to determine whether this amended Code applied to strictly domestic cases or whether it also applied when the addressee resided abroad. The Court held that the issue of whether a document needed to be transmitted for service abroad must be examined and determined according to the law of the forum. However, it also held that the amendment of Dutch procedural law was not intended to displace the application of the 1965 Service Convention, and accordingly that the defendant, a company with its head office in Germany, should benefit from the protection provided by Article 15 of the Convention.

54. The second case was decided by the Supreme Court of the United States. In *Volkswagen Aktiengesellschaft v. Schlunk,* [35] the Court reached the same conclusion; that the law of the forum determines whether or not a document is to be transmitted for service abroad.

55. This case concerned a traffic accident in which the parents of Mr Schlunk were killed. In an Illinois court, Mr Schlunk brought a claim in damages based on product liability against Volkswagen of America (VWOA), incorporated under New York law (a wholly-owned subsidiary of the German car manufacturer *Volkswagenwerk Aktiengesellschaft* (VWAG)).

56. Mr Schlunk subsequently filed an amended claim, also bringing action against the German-based parent company VWAG. The amended claim was served on VWOA in the United States. The German-based defendant, VWAG, asserted the nullity of service on the grounds that it was inconsistent with the requirements of the 1965 Service Convention. Mr Schlunk's view, upheld by the Court at first instance and by the Court of Appeals, was based on the principle that VWOA was, owing to the extent of VWAG's control over its activity, the latter's agent for service in Illinois, even though it had not been expressly appointed for such a purpose. Since service on VWAG could be effected at VWOA's address in the United States under Illinois law, the Convention was not applicable.

57. The US Supreme Court held that "[i]f the *internal law of the forum state* defines the applicable method of serving process as requiring the transmittal of documents abroad, then the Hague Service Convention applies". [36] The Court then stated that in this particular case the Convention did not apply on the grounds that, under Illinois law (the law of the forum), VWOA was deemed to be an agent of VWAG for the purpose of receiving service of process directed at the latter, so that a transmission of the claim for service abroad was not required. [37] Under the law of the forum, there was accordingly no need to transmit a document abroad, and therefore no reason to apply the Convention.

58. In their dissenting opinions, some justices considered that the grounds for this decision, the outcome of which they approved, could lead to abuses detrimental to defendants. In their view, the Convention does not confer on each Contracting Party a discretionary power to decide whether or not documents should be served abroad, but on the contrary, sets boundaries – though admittedly not clearly defined ones – for this power.

59. It is important to emphasise that the *Schlunk* case does not allow plaintiffs to opt for service under state law as a way of circumventing the Convention's requirements; [38] nor does *Schlunk* stand for

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35 486 U.S. 694; *I.L.M.* 1988, p. 1093, annotated in: *Am. J. Int'l L.* 1988, p. 816; *IPRax* 1989, p. 313 (*op. cit.* note 33).

36 *Ibid*. at 700 [emphasis added].

37 The Court held that "[w]here service on a domestic agent is valid and complete under both state law and the Due Process Clause, our inquiry ends and the Convention has no further implications. […] The only transmittal to which the Convention applies is a transmittal abroad that is required as a necessary part of service. And, contrary to VWAG's assertion, the Due Process Clause does not require an official transmittal of documents abroad every time there is service on a foreign national" (*ibid.* at 707).

38 *Buffalo Patents, LLC, V. ZET Corp,* No. W-21-CV-01065-ADA, 2022 WL 2055285 (W.E. Tex. June 3, 2022) (finding the

the broad proposition that service upon a subsidiary in the United States is always effective against a foreign parent corporation. *Schlunk* merely recognises that "when the law of the forum state deems the local subsidiary as the parent's agent, then service on the parent can be made locally thereby eliminating the need to transmit documents abroad. In such a case, where documents do not need be transmitted abroad, then the Convention, pursuant to its express terms, does not apply".[39]

- **Consideration by the Special Commission**

60. The *Mabanaft* and *Schlunk* decisions were discussed at length during the 1989 Special Commission meeting on the practical operation of the 1965 Service and 1970 Evidence Conventions. The meeting Report summarises the discussions as follows:

> "The principle that the forum is to decide this question [*i.e.*, whether documents should be transmitted for service abroad] under its own law was broadly accepted, although the danger of permitting domestic service upon a person who had not been expressly designated as an agent to receive service of process was recognized. Such service might not fulfil the purposes of the Convention which were to assure timely notice of the legal action to the person to be served".[40]

61. Certain experts expressed regrets at the outcome of the *Schlunk* ruling, that the Convention was not applicable. However, the Special Commission's view in 1989 was that the practical impact of that ruling on subsequent cases was likely to be limited.

- **Historical account of the negotiations of the Convention**

62. The approach adopted by the Netherlands and United States Supreme Courts, together with the 1989 Special Commission, appears to be in line with the history of the negotiations leading to the adoption of the Convention. The Report on the work of the Special Commission mandated to prepare the preliminary draft Convention provides a clear explanation:

> "Also, it was felt that the issue of whether the Convention should be applied in a particular case is indeed determined by the law of the court seized, and it would be unwise under this condition to limit the possibilities available to the judge in possession of the case".[41]

63. This position was confirmed during the Diplomatic Session in 1964, with several delegations expressing agreement for this:

Convention is implicated in the case of service on foreign entities when state law requires the transmittal of a document abroad as a part of the method of serving procedure).

39 US District Court for the Eastern District of Louisiana in *Blades v. Illinois Central Railroad*, No. 02-cv-3132, 2003 U.S. Dist. LEXIS 3823 (E.D. La. Mar. 12, 2003). For a further application of the *Schlunk* decision to a case with similar facts, see also *Rubicon Global Ventures, Inc. v. Chongquing Zongshen Group Import/Export Corp.*, 494 F. App'x 736 (9th Cir. 2012) (finding the Convention inapplicable where a Chinese corporation and its American entity "were so closely related" that the latter was deemed the foreign corporation's agent as a matter of law, although it had not been formally designated as such).

40 Report of the 1989 SC (*op. cit.* note 24), para. 13.

41 Report of the 1964 SC (*op. cit.* note 23), p. 81 [translation by the Permanent Bureau and emphasis added].

> "This Convention is applicable in all cases where, according to the law of the Requesting State, transmission abroad for service is required [...]."[42]

64. The Rapporteur also emphasised that "it should be left to the Requesting State to determine whether a document is to be served abroad".[43]

- National practice

65. In the **Netherlands**, the principle laid down by the Supreme Court (*Hoge Raad*) in the *Mabanaft* case has not been challenged: when a party elects domicile in the Netherlands for the purpose of service, the Convention does not apply, even if that party lives or is established in another Contracting Party to the Convention.[44] However, in a subsequent case, the Supreme Court has laid down stricter requirements for the election of domicile: it must have been made in advance, expressly and in writing.[45]

66. In **Australia**, the Supreme Courts of two large state jurisdictions, Victoria and New South Wales, have confirmed that the Convention does not address or comprise substantive rules relating to the actual service of process, and have proceeded to apply the law of the forum in determining whether there is occasion to transmit a document abroad.[46]

67. Similarly, **Canadian courts** have had recourse to the law of the forum, the *lex fori*, to determine whether there is occasion to transmit a document abroad and whether the Convention applies.[47]

68. In **Germany**, in 1977 the Government, in an official document (*Denkschrift*) preparing the ratification of the 1965 Service Convention and the 1970 Evidence Convention, underlined the non-mandatory character of the Convention. This was confirmed in 1994 by the German Constitutional Court which held that the Convention applies only where domestic law requires service of process abroad.[48]

69. In the **United States**, the *Schlunk* decision has generally been followed by the courts. Most courts have relied on the relevant rules applicable in their respective fora to determine whether or not a

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42 "Procès-verbal No 3", Proposal Puhan, in *Actes et documents de la Dixième session* (1964) (*op. cit.* note 1), p. 167 [translation by the Permanent Bureau and emphasis added]. This proposal was followed by an intervention in the same sense by Mr Loeff.

43 "Procès-verbal No 8", in *ibid.*, p. 254 [translation by the Permanent Bureau].

44 *Wifac NV v. van Meerten*, Hof Amsterdam, 21 December 1989, *NJ* 1991, p. 485. In addition, Art. 63 of the Netherlands Code of Civil Procedure expressly provides the possibility of service at the offices of the lawyer in charge of the previous proceedings, in the event of objection, appeal, or appeal on a point of law in connection with that decision.

45 *Nieuwersteeg v. Colonia Versicherungen AG*, HR 2 February 1996, NJ 1997, p. 26.

46 See *Rio Tinto v English Datasystems LLC [2021] VSC 660* (Supreme Court of Victoria) and Gloucester (Sub-Holdings 1) *Pty Ltd v. Chief Commissioner of State Revenue* [2013] NSWSC 1419 (Supreme Court of New South Wales). In *Davenport & Rattray* [2012] FMCAfam 1097, the Federal Magistrates Court had the occasion to confirm that "[t]he law of the forum state determines whether or not a document has to be transmitted abroad for service in the other State" and that as such, "the Convention is not mandatory". Note that on 1 September 2021, the Federal Circuit and Family Court of Australia Act 2021 took effect and merged the Family Court of Australia and the Federal Circuit Court of Australia. It is now known as the Federal Circuit and Family Court of Australia (FCFCoA).

47 See, *e.g.*, *Zaniewicz v. Yungui Haixi Corp.*, 2012 ONSC 4904 and *Gray v. SNC-Lavalin Group Inc.*, 2012 ONSC 3735. In both cases, the courts held that the 1965 Service Convention did not apply because there was no need to transmit the documents to be served abroad and ordered substituted service on an authorised agent in Canada and on the defendant's lawyer, respectively.

48 BVerfG, 7 December 1994, *NJW* 1995, p. 649; *RIW* 1995, p. 320 (note Morisse, p. 370); *IPRax* 1996, p. 112 (note Tomuschat, p. 83); *EuZW* 1995, p. 218 (note Kronke, p. 221); *JZ* 1995, p. 716 (note Stadler, p. 218); *EWiR* 1995, p. 161 (note Geimer); *IPRspr.* 1994 No 160b. See also OLG München, Case number 7 W 3138/86, (judgment dated 30 December 1986), *NJW* 1987, p. 3086. The view of the mandatory character of the Convention as defended by the German Government in 1988 in "Brief for the United States as amicus curiae supporting respondent", Addenda A-D, in *Schlunk* (*op. cit.* note 33) has thus been overruled by the clear statement of the Constitutional Court.

transmission of documents for service abroad is required.[49] In many cases, the Convention has been held to apply.[50]

70. However, when the relevant forum rules have not required a transmission of documents for service abroad with service executed within the forum State, courts have held that the Convention is not applicable.[51]

71. In the case of service on a United States' state Secretary of State office or on another agent for service, a method often used in the United States, two lines of decisions have emerged. The first has held that if service is effected on the foreign defendant, upon the state Secretary of State's or agent's receipt of the document, which does not require transmission of the document abroad, the Convention does not apply.[52] Conversely, the other line of cases has held that service on the state Secretary of State office or another agent for service is only complete and effective with the transmission of the document (or a copy thereof) abroad to the addressee, and therefore the Convention will apply.[53]

⇒ A note about service on a US domestic subsidiary of a foreign corporation

72. While it is true that service of summons on an agent of a foreign defendant remains of great practical importance in the United States,[54] depending on the circumstances, service on an agent

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49 Service of process in a federal action is governed by *Fed. R. Civ. Pro.* 4. Pursuant to *Fed. R. Civ. Pro.* 4(f), a federal court may look to either a federal statute or to the law of the state in which it sits (which may or may not be a "long-arm" statute) to determine whether a defendant is amenable to service of process outside of the state.

50 See, *e.g.*, *Weinstein v. Volkswagen of America*, No. 88 C 1932, 1989 U.S. Dist. LEXIS 3809 (E.D.N.Y. Mar. 31, 1989); *McClenon v. Nissan Motor Corp.*, 726 F. Supp. 822 (N.D. Fla. 1989); *Raffa v. Nissan Motor Co.*, 141 F.R.D. 45 (E.D. Pa. 1991); *Borschow Hospital & Medical Supplies, Inc. v. Burdick-Siemens Corp.*, 143 F.R.D. 472 (D.P.R. 1992); *In re Hunt's Pier Associates*, 156 B.R. 464 (Bankr. E.D. Pa. 1993); *Golub v. Isuzu Motors*, 924 F. Supp. 324 (D. Mass. 1996); *Bowers v. Wurzburg*, 519 S.E.2d 148 (W. Va. 1999); *Schiffer v. Mazda Motor Corp.*, 192 F.R.D. 335 (N.D. Ga. 2000); *Broad v. Mannesmann Anlagenbau*, A.G., 10 P.3d 371 (Wash. 2000); *Denlinger v. Chinadotcom Corp.*, 2 Cal. Rptr. 3d 530 (Cal. Ct. App. 2003); *Uppendahl v. American Honda Motor Co.*, 291 F. Supp. 2d 531 (W.D. Ky. 2003); *Cupp v. Alberto-Culver USA, Inc.*, No. 03-2592-DV, 2004 U.S. Dist. LEXIS 4182 (W.D. Tenn. Feb. 9, 2004); *Loeb v. First Judicial District Court*, 309 P.3d 47 (Nev. 2013); *Norrenbrock Co., Inc. v. Ternium Mexico, S.A. De C.V.*, No. 3:13-CV-00767-CRS, 2014 WL 556733 (W.D. Ky. Feb. 12, 2014); *Buffalo Patents, LLC, V. ZET Corp (op. cit.* note 38) (finding that serving the state Secretary of State alone, who is not a defendant's subsidiary, is not proper service); *ACQIS LLC v. Lenovo Grp. Ltd.*, 572 F. Supp. 3d 291 (W.D. Tex. 2021) (finding that the Convention applied because the Texas long-arm statute required the Texas Secretary of State to mail service to the defendants abroad); *Howard v. Krull*, 438 F. Supp. 3d 711 (E.D. La. 2020) (finding that the Louisiana State statute required the plaintiff or the Secretary of State to send notice of service to a defendant abroad which implicated the Convention).

51 See, *e.g.*, *Kawasaki v. Guam*, No. 90-00024, 1990 WL 320758 (D. Guam Oct. 24, 1990); *Apollo Technologies Corp. v. Centrosphere Industrial Corp.*, 805 F. Supp. 1157, 1189 (D.N.J. 1992); *Daewoo Motor America, Inc. v. Dongbu Fire Insurance Co, Ltd.*, 289 F. Supp. 2d 1127 (C.D. Cal. 2001); *Eto v. Muranaka*, 57 P.3d 413 (Haw. 2002); *Rose v. Deer Consumer Products, Inc.*, No. CV 11-03701 DMG, 2011 WL 6951969 (C.D. Cal. Dec. 29, 2011); *James K. Donohue and Dryshod Int'l, LLC v. Wang*, No. A-22-CV-00583-LY, 2022 WL 4111924 (W.D. Tex. Sept. 7, 2022); *Meemic Ins. Co. v. Gree Zhuhai*, No. 19-13489, 2020 WL 2812769 (E.D. Mich. May 29, 2020).

52 For example, a court of the United States stated that "[s]ervice upon a foreign defendant's United States-based counsel is a common form of service ordered under 4(f)(3) […] [n]othing in the Hague Convention prohibits such service." See *Cadence Design Sys., Inc. v. Syntronic AB*, No. 21-CV-03610-SI, 2021 WL 4222040 (N.D. Cal. Sept. 16, 2021). For service upon an agent, see also *Voltage Pictures, LLC. v. Gussi, S.A. de C.V.*, No. 221CV04751FLARAOX, 2022 WL 18397525 (C.D. Cal. Dec. 6, 2022); *James K. Donohue and Dryshod International, LLC v. Wang*, No. A-22-CV-00583-LY, 2022 WL 4111924 (W.D. Tex. Sept.7, 2022); *Guiffre v. Andrew*, No. 21-CV-6702 (LAK), 2021 WL 4236618 (S.D.N.Y. Sept 17, 2021). The cases regarding service upon state Secretary, see *CPI Card Group v. Smart Packaging Solutions, SA,* No. 1:21-CV-482-HAB, 2022 WL 581011 (N.D. Ind. Feb. 25, 2022); *Melia v. Les Grands Chais de France,* 135 F.R.D. 28 (D.R.I. 1991).

53 *Buffalo Patents, LLC, V. ZET Corp* (*op. cit*. note 38); *Topstone Communications, Inc. v. Xu*, No. 4:22-CV-00048, 2022 WL 1569722 (S.D. Tex. May 18, 2022); *Howard v. Krull*, 438 F. Supp. 3d 711 (E.D. La. 2020); *ACQIS LLC v. Lenovo Grp. Ltd* (*op. cit*. note 50).

54 *Fed. R. Civ. Pro.* 4(h)(1) allows for service on a foreign corporation where service could be effected in the United States on the corporation's "officer, managing or general agent, or any other agent authorized by appointment or by law to

will be acceptable only if a sufficiently close link between the agent and the foreign addressee of the document is established. This is a major difference to *notification au parquet*, as that form of service disregards any links that the foreign addressee may or may not have with the forum.[55]

73. Numerous cases have addressed the question of whether or not a domestic subsidiary of a foreign corporation will be deemed to be the agent or alter ego of the foreign parent for service of process purposes. For example, in *Chung v. Tarom, S.A. et al.*,[56] a Court addressed the question of whether the service of a summons and complaint on the domestic United States-based subsidiary of a French corporation would be effective service on the French parent. Citing the *Schlunk* decision, the court first noted that "[i]f [...] service of process is accomplished entirely within the United States in accordance with state law and the Due Process clause, as is alleged in this case, then the service provisions of the Hague Convention do not apply".[57] The Court then addressed the question of whether the French corporation's subsidiary would be deemed to be its corporate parent's agent or alter ego for purposes of service of process. Recalling the general rule, according to which the mere existence of a parent-subsidiary relationship is insufficient to establish the close ties necessary for a subsidiary to be deemed a parent's agent for the service of process, the Court ultimately determined that the French parent exercised insufficient control over its domestic subsidiary to allow the subsidiary to be deemed an agent or alter ego of the parent. The Court concluded that the Convention had to be applied.[58]

74. However, in other cases, courts in various United States jurisdictions have found there to be an agency or alter ego relationship between a foreign parent and its United States-based subsidiary, so as to allow the United States-based subsidiary to be served on behalf of its foreign parent.[59]

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receive service of process". This means that a foreign corporation may be amenable to service in the United States, provided that service can be effected on an officer or agent of that corporation who is located within the United States. If no subsequent transmission to the foreign defendant is required, the Convention does not apply.

55 However, a court of Michigan found that service on a domestic subsidiary is not valid under the state law of Michigan, which requires corporations to be "personally" served, excluding service on a subsidiary or counsel. See *Michigan Motor Techs. LLC v. Volkwagen Aktiengesellschaft,* No. 19-10485, 2020 WL 3893038 (E.D. Mich. July 10, 2020).

56 990 F. Supp. 581 (N.D. Ill. 1998).

57 *Ibid.* at 584, n. 2. The same reasoning was applied, *e.g.*, in *Melia v. Les Grands Chais de France*, 135 F.R.D. 28 (D.R.I. 1991); *Sheets v. Yamaha Motor Co.*, 891 F.2d 533 (5th Cir. 1990); in *support, Rhodes v. J.P. Sauer & Sohn, Inc.,* 98 F. Supp. 2d 746 (W.D. La. 2000).

58 *Chung v. Tarom, S.A., et al.* (*op. cit.* note 56) at 584-587. See also *McClenon v. Nissan Motor Corp.* (*op. cit.* note 50); *Stone v. Ranbaxy Pharmaceuticals, Inc.*, No. JFM-10-CV-08816, 2011 WL 2462654 (S.D.N.Y. June 16, 2011); *Bays et al. v. Mill Supplies, Inc. et al.*, No. 1:10-CV-00432, 2011 WL 781464 (N.D. Ind. Feb. 28, 2011); *Fleming v. Yamaha Motor Co.*, 774 F. Supp. 992 (W.D. Va. 1991) (finding service of process on a domestic subsidiary to be inadequate absent sufficient evidence demonstrating that the parent and subsidiary failed to maintain separate corporate identities); *Blades v. Illinois Central Railroad* (*op. cit.* note 39) (stating that the plaintiffs did not submit evidence suggesting that the parent and its subsidiary "have done anything so as to deprive themselves of the legal distinctness to which they are otherwise entitled"). See also *Int'l Cultural Property Society v. Walter de Gruyter & Co.*, No. 99 Civ. 12329 (BSJ), 2000 U.S. Dist. LEXIS 9447 (S.D.N.Y. July 6, 2000) (laying down the conditions on which a branch office may be treated as an agent for service of a foreign company). In this latter case, the Court held that the plaintiff did not meet its burden of alleging facts sufficient to support a *prima facie* showing that the New York branch of the defendant was the foreign parent's general agent in New York or was so dominated by the foreign parent as to be a "mere department" of the parent. Therefore, service on the New York branch was held to be insufficient to effect service on the parent in Germany. See also *Michigan Motor Techs., LLC v. Bayerische Motoren Werke AG*, No. 22 CV 3804, 2023 WL 4683428 (N.D. Ill. July 21, 2023) (determining that the German defendant was improperly served because the plaintiff failed to demonstrate that the employee, who was personally served, was an authorised agent of the defendant's U.S. subsidiary, or that the subsidiary itself was an authorised agent of the defendant); *Crespl v. Zeppy, et al.*, No. A-2044-20, 2022 WL 815429 (N.J. Supper. Ct. App. Div. Mar. 18, 2022) (finding on appeal that the Superior Court erred in finding that service on a South Korean company's wholly owned Michigan subsidiary was sufficient, because the lower court judge did not conduct the necessary factual investigation to adequately determine if the subsidiary was an alter ego or agent of the principal such that service was complete without transmission of the documents aboard).

59 See, *e.g.*, *King v. Perry & Sylva Machinery Co.*, 766 F. Supp. 638, 640 (N.D. Ill. 1991) (finding that service on a Japanese corporation was accomplished by service on its US subsidiary because the subsidiary was deemed an "involuntary

Similarly, United States courts have also found that in certain circumstances, United States parent corporations could be served on behalf of their foreign subsidiaries.[60]

75. The above review of the practice of Contracting Parties confirms, subject to a few exceptions outlined in paragraph 76 below, the non-mandatory character of the Convention.

- **Some Contracting Parties may view the Convention as mandatory**

76. Some States do assert that the Convention should be considered mandatory in nature. This is the case in particular for **Switzerland**, which at the time of deposit of its instrument of ratification made a general declaration relating to Article 1 to stress that, in its view, the Convention was to apply on an *exclusive* basis (*i.e.*, in the terminology suggested by this Handbook: on a *mandatory* basis) among the Contracting Parties.[61]

77. However, the non-mandatory approach had been expressly accepted by the Special Commission.[62] Further, there is no indication that the Convention has been applied less in the aftermath of the *Schlunk* and *Mabanaft* rulings. However, other practices in Contracting Parties may also impact on whether the Convention is applied.

⇒ Contracts and the Convention

78. Can parties to a contract agree to exclude the application of the Convention when a defendant is located abroad?

79. At the outset, it should be noted that service is a key element of the right to a fair trial and is part of the procedural public policy of a number of Contracting Parties. The service of documents:

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agent" of its Japanese parent); *Voltage Pictures, LLC v. Gussi, S.A. de C.V.*, No. 221CV04751FLARAOX, 2022 WL 18397525 (C.D. Cal. Dec. 6, 2022) (finding that service on a Mexican corporation was effected by service on its US subsidiary which had a sufficiently close relationship with the defendant); *Yamaha Motor Co. v. Superior Ct.*, 94 Cal. Rptr. 3d 494 (Cal. Ct. App. 2009); *United States v. Int'l Brotherhood of Teamsters*, 945 F. Supp. 609 (S.D.N.Y. 1996) (recognising both the "agency" and "mere department" theories of service but declining to exercise jurisdiction because the plaintiff had not presented sufficient evidence to support either theory); *Fundamental Innovation Sys. Int'l, LLC v. ZTE Corp.*, No. 3:17-CV-01827-N. 2018 WL 3330022 (N.D. Tex. Mar. 16, 2018) (applying the "alter ego" theory of service, but determining that the Chinese defendant's U.S. subsidiary was not an alter ego of the defendant.). See also *New York Marine Managers, Inc. v. M.V. Topor-1*, 716 F. Supp. 783 (S.D.N.Y. 1989); *Doty v. Magnum Research Inc.*, 994 F. Supp. 894 (N.D. Ohio 1997); *Sankaran v. Club Med, Inc.*, No. 97 Civ. 8318 (RPP), 1998 U.S. Dist. LEXIS 11750 (S.D.N.Y. July 29, 1998); *Primary Succession Capital, LLC, v. Schaeffler*, KG, No. 09 Civ. 735 (SCR), 2010 WL 4236948 (S.D.N.Y. Oct. 26, 2010). See also *Mills v. Ethicon, Inc.*, 406 F. Supp. 3d 363 (D.N.J. 2019) (stating that service on a wholly owned subsidiary of the Swedish defendant in New Jersey was insufficient to be valid service on the defendant since the plaintiff failed to show that the Swedish defendant "so dominated the [U.S. subsidiary] that it had no separate existence but was merely a conduit for the parent."); *Sucesores de Done Carios Nunez y Dona Pura Galves. Inc. v. Societe Generale, S.A.*, No. 19-CIV-22842-GAYLES, 2019 WL 5963830 (S.D. Fla. Nov. 13, 2019) (holding that even though US subsidiaries are "wholly-owned" by defendants, the plaintiff also had to show "such a degree of control [...] that the activities of the subsidiary were in fact the activities of the parent [....]").

60 See, *e.g.*, *Frazer v. Johnson Controls, Inc.*, No. 7:11-CV-3956-JHE, 2013 WL 5519831 (N.D. Ala. Sept. 30, 2013), finding that the plaintiff failed to show that the American parent corporation was an agent on behalf of its Mexican subsidiary for the purpose of accepting service, and thus, because the summons and complaint were required to be transmitted abroad to Mexico, the Convention applied.

61 The contents of that declaration are as follows: "Switzerland takes the view that the Convention applies exclusively to the Contracting States. In particular, it believes that documents which are effectively addressed to a person resident abroad cannot be served on a legal entity who is not authorised to receive them in the country in which they were drawn up without derogating from Articles 1 and 15(1)(b) of the Convention".

62 See C&R No 73 of the 2003 SC. In particular: "Recalling the conclusions and recommendations of 1989, the SC confirmed the prevailing view that the Convention was of a non-mandatory [...] character [...]". The 2003 Special Commission also recalled the fundamental importance of Art. 15, the object of which is to ensure that the defendant is actually informed in sufficient time to organise a defence (C&R No 74). C&R No 12 of the 2009 SC.

1) enables the issue in dispute to be brought to the notice of the defendant, respondent, or other interested party,

2) in a number of common law States, is also the basis for establishing the jurisdiction of the court, and

3) where not properly executed, may be a ground for refusal to the recognition and enforcement of a judgment.

80. Courts in the United States have considered whether service was effected in accordance with *due process* in evaluating the validity of service, *i.e.*, if service was performed in a form providing "notice reasonably calculated, under all circumstances, to apprise interested parties of the action and afford them an opportunity to present their objections".[63] It was in the light of the criteria laid down by state law and by the principle of due process that the District Court of Pennsylvania reviewed the validity of a service clause contained in a guaranty agreement. The clause provided that notice could be validly served on two guarantors in Germany at an address in the United States (Pennsylvania), even if no notice of that service was then given to the guarantors in Germany.[64] The US District Court held that the German guarantors had contractually appointed a domestic agent for service of process. The court concluded that "because service at the address in Indianapolis as provided in the guaranty agreements is acceptable under Pennsylvania law and comports with the due process clause, the Convention is not implicated".[65]

81. While the above decision has to be read against the background of the *Schlunk* decision, it raises the question of whether the parties to a contract may agree to establish their own regime of service, and whether such contractual agreements can and should circumvent the Convention.

82. In civil law systems, this approach would be unusual as rules of procedure (such as those relevant to service) are not subject to variation by the parties to a contract; this applies even more in jurisdictions where service is seen as an act of sovereignty. In other words, if the law of the forum provides for service abroad – and thus triggers the applicability of the Convention – the parties are not able to decide otherwise.

83. Recently, courts in the state of California in the United States have examined this issue.[66]

84. In the case of ***Rockefeller***,[67] the United States-based plaintiff entered into a contractual agreement with the China-based defendant, in which the parties agreed to the provision of notice

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63 This criterion was laid down in the leading case of the Supreme Court of the United States, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

64 *Pittsburgh National Bank v. Kassir*, 153 F.R.D. 580 (W.D. Pa. 1994). The German guarantors had agreed to the following provision: "Any legal action or proceedings with respect to this Guaranty Agreement against the Guarantor may be brought at the option of the Bank in the Federal or State Courts in or of the Commonwealth of Pennsylvania and by execution and delivery of this Guaranty Agreement, the Guarantor hereby accepts, for itself and in respect of its assets, generally and unconditionally the non-exclusive jurisdiction of the aforesaid courts, and hereby authorizes service of process in such jurisdiction in any legal action or proceedings with respect to this undertaking at [the following address], and agrees that failure by any such process agent to give notice of such service of process to the Guarantor shall not impair or affect the validity of such service or any judgment based thereon."

65 *Ibid*.

66 *Rockefeller Tech. Invs. (Asia) VII v. Changzhou SinoType Tech. Co.*, 460 P.3d 764 (Cal. 2020) [hereinafter referred to as the *Rockefeller* case or decision]; *Seagate Tech. v. Goel Super Ct*, No. G060036, 2022 WL 3571988 (Cal. App. Ct Aug. 19, 2022) [hereinafter referred to as the *Seagate* case or decision].

67 *Rockefeller Tech. Invs, (Asia) VII v. Changzhou Sinotype Tech. Co.* (Cal. 2020) (op. cit. note 66) (The Defendant, a company based in China (Mainland), and the Plaintiff entered into a contract providing that the parties would submit to the jurisdiction of California courts and to resolve disputes between them through California arbitration. The parties further agreed to provide notice and service of process to each other through Federal Express or a similar courier. The Plaintiff later sought arbitration. The Defendant neither responded nor appeared for the arbitration, and the arbitrator awarded the Plaintiff $414,601,200. The award was confirmed, and the judgment was entered without participation from the Defendant. The Defendant then moved to set aside the default judgment for insufficiency of service of process,

of disputes "via Federal Express or similar courier, with copies via facsimile or email": and "consent[ing] to service of process in accord with the [those] notice provisions."[68] Subsequently, the United States plaintiff served a summons and petition on the China-based defendant by Federal Express (FedEx) in China, a State that has objected to service of process by postal channels under the Convention. The California Supreme Court, which is the highest court in the state of California, considered whether the parties were permitted to agree to notification of the civil action by FedEx.

85. In *Rockefeller*, the Los Angeles County Superior Court and the California Court of Appeal[69] had diverging views on whether the 1965 Service Convention prohibited the parties from agreeing to service of process by FedEx or similar courier. The California Court of Appeal reversed the decision of the Los Angeles County Superior Court and held that the agreed method of communication between the parties was not permitted by the Convention. The Court of Appeal focused on giving effect to the Convention's terms and paying due regard to China's declared opposition to service by mail under the Convention. However, the United States Supreme Court of California, again reversed that position and held that the Convention did not apply because the parties' contract constituted a waiver of formal service under Californian law in favour of an alternative form of notification. When reaching this decision, the Supreme Court of California held that "the Convention applies only when the law of the forum State requires formal service of process to be sent abroad". In other words, the Convention will apply when the law of the forum requires the transmission of documents for service abroad.

86. In the context of the above case, it should be reiterated that upon its accession to the Convention, China objected to the application of Article 10(a). Therefore, service in China using the postal channel is contrary to this declaration. It would be deemed procedurally defective and would prevent a judgment from being recognised by a Chinese court.[70]

87. Using a similar line of reasoning, the Californian Court of Appeal in *Seagate*[71] held that the Convention would not apply in circumstances where parties had agreed to waive formal service of process under Californian law (the law of the forum) and instead use a method of informal notification. In this case, pursuant to an agreement between the parties that service would be effected by mail, a United States plaintiff attempted to serve an India-based defendant by post, even though India had opposed service by post under Article 10(a) of the Convention. The Court, citing *Rockefeller* and noting that the agreement constituted a formal waiver of service in favour of informal notification, upheld service on the defendant in this case.

88. It has been observed by commentators that the case of *Seagate* appears to permit parties to opt for a form of service, that looks exactly like service, and has the same purpose and effect as service, but is not described as service, in order to avoid the requirements of the Convention. The concern with this approach is that provisions of the Convention enable Contracting Parties to object to certain channels of transmission, including service by postal channels and can serve to

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arguing that the Plaintiff's failure to comply with the Convention rendered the judgment, confirming the arbitration award, void. The motion was denied, reversing the Court of Appeal's decision. The California Supreme Court held (1) the Convention applies only when the law of the forum state requires formal service of process to be sent abroad; and (2) because the parties' contract constituted a waiver of formal service under California law in favour of an alternative form of notification, the Convention does not apply.)

68 *Rockefeller Tech. Invs. (Asia) VII v. Changzhou Sinotype Tech. Co.*, 24 Cal. App. 5th 115, 121 (2018).

69 *Rockefeller Tech. Invs. (Asia) VII* v. *Changzhou Sinotype Tech. Co., Ltd.*, No. BS149995, 2014 WL 12669294 (Cal. Supper. Oct. 23, 2014); *Rockefeller Tech. Invs.* (Asia) VII v. *Changzhou Sinotype Tech.* Co, 24 Cal. App. 5th 115 (2018).

70 The Chinese Ministry of Justice has launched an online system to facilitate the submission of requests to China (Mainland) under the main channel of transmission.

71 *Seagate Tech. v. Goel. Super. Ct. No.* G060036, 2022 WL 3571988 (Cal. App. Ct. Aug. 19, 2022) (*op. cit*. note 66).

protect States from infringements on their judicial sovereignty. In other words, when a State objects to service by postal channels in its territory, it is asserting its own interests, not (just) the interests of people in its territory who may be served with process.[72]

89. At the 2003 meeting of the Special Commission, several experts confirmed that such arrangements would not be possible in their States. However, others pointed out that enforcement of a judgment entered pursuant to service performed according to such arrangements would not necessarily be denied as a result.[73]

90. In this regard, some commentators have observed that there is a tension between the Convention's purpose of bringing actual notice to the defendant in an efficient manner, and notions of sovereignty and territoriality.[74] The "efficiency" of service must also be assessed against the principles of legal certainty (ensuring that the decision issued will ultimately be capable of recognition and enforcement) and the rights of parties to a fair trial.

~~2. *Exclusive character of the Convention*~~

~~91. Despite recent developments in the United States, it remains undisputed that if the law of the forum determines that transmission of documents for service abroad is required, the Convention must be applied.~~

~~92. The exclusive character of the Convention has been broadly acknowledged by case law,[75] and by scholars,[76] as well as by the Special Commission.[77] Even States that still use the *notification au parquet* have supported this view.~~

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72 See "Case of the Day: Seagate Technology v. Goel", *The Blog of International Judicial Assistance*, Ted Folkman of Rubin and Rudman LLP (Webpage accessible at the following address: https://lettersblogatory.com/2022/08/22/case-of-the-day-seagate-technology-v-goel/) [last consulted on 5 May 2024].

73 C&R No 77 of the 2003 SC.

74 See Louise Ellen Teitz, "Is the Service Convention ready for early retirement at age fifty-five? Or can it be 'serviceable' in a world without borders?", in HCCH, *HCCH a|Bridged Edition 2019 – The HCCH Service Convention in the Era of Electronic and Information Technology*, The Hague, 2020, pp. 63 *et seq*.

~~75 This is particularly true in the United States, where the question was examined in relation with the supremacy clause in Art. VI of the United States Constitution; in *Kadota v. Hosogai*, 608 P.2d 68 (Ariz. Ct. App. 1980), an ***Arizona Court of Appeal*** held that under the supremacy clause the 1965 Service Convention prevails over inconsistent means of service provided for under state law. In the leading case of *Volkswagen Aktiengesellschaft v. Schlunk* (*op. cit.* note 35), the ***Supreme Court of the United States*** confirmed that the Convention applies on an exclusive basis (by employing the term "mandatory" rather than referring to "exclusive means for service") and therefore prevails over federal or state procedural law in all cases where it is applicable. See also *Gebr. Eikhoff Maschinenfabrik v. Starcher*, 328 S.E.2d 492 (W. Va. 1985); *Kreimerman, et al., v. Casa Veerkamp*, 22 F.3d 634 (5th Cir. 1994)). In **Canada**, several courts have confirmed that the 1965 Service Convention is exclusive, noting that this is the prevailing view in their respective provinces. See decisions in Ontario: *Pharm Canada Inc. v. 1449828 Ontario Ltd (c.o.b. Trinity Worldwide Services Inc.)*, 2011 ONSC 4808; *Khan Resources Inc. v. Atomredmetzoloto JSC* (*op. cit.* note 28); *Pitman v. Mol*, 2014 ONSC 2551 (following Khan Resources, the Court held that the Convention must be complied with in family law proceedings as well); in support of these decisions (the Court of Appeal of Alberta): *Metcalfe Estate v. Yamaha Motor Powered Products Co., Ltd.* (*op. cit.* note 28). One court in **Australia**, which joined the 1965 Service Convention in 2010, has held, in *Davenport & Rattray* (*op. cit.* note 46), that "[i]f all th[e] requirements are met [i.e., 'the document is to be transmitted from one State Party to the Convention to another State Party, for service in the latter […] [a]n address for the person to be served is known […] [t]he document to be served is a judicial or extrajudicial document […] [and t]he document to be served relates to a civil or commercial matter'], the transmission channels provided for under the Convention must be applied", and that as such, "the Convention is exclusive". In **Portugal**, a court held that a domestic code on insolvency could not override the 1965 Service Convention and that the Convention applied: Lisbon Court of Appeal (*Tribunal da Relação de Lisboa*), case No 3/2009-6,12 February 2009. The Court further noted that to hold the contrary would be in breach of general rules of international law and the principle that international law prevails over domestic law. See also, in the same sense, Coimbra Court of Appeal (*Tribunal da Relação de Coimbra*), case No 3327/12.5TBLRA-B.C1, 19 December 2012.~~

~~76 T. Bischof (*op. cit.* note 18), p. 251, who refers, however, to the Convention's "obligatory" character; B. Ristau, *International Judicial Assistance (Civil and Commercial)*, Washington, D.C., International Law Institute, Georgetown University Law Center, Vol. I, Part IV, 2000 Revision, p. 160.~~

~~77 C&R No 73 of the 2003 SC; C&R No 12 of the 2009 SC.~~