

<b>Title</b>	Waiver of service of process under U.S. law
<b>Document</b>	Info. Doc. No 1 of June 2024
<b>Author</b>	United States of America
<b>Agenda Item</b>	VI.5
<b>Mandate(s)</b>	N/A
<b>Objective</b>	To provide additional context for the concept of waiver of service of process under U.S. law.
<b>Action to be Taken</b>	For Decision <input type="checkbox"/> For Approval <input type="checkbox"/> For Discussion <input type="checkbox"/> For Action / Completion <input type="checkbox"/> For Information <input checked="" type="checkbox"/>
<b>Annexes</b>	N/A
<b>Related Documents</b>	N/A

## WAIVER OF SERVICE

1. In the United States legal system, service of process generally refers to the formal delivery of documents that is legally sufficient to provide the putative defendant with notice of a pending action and is a prerequisite to establish the court’s jurisdiction over a defendant unless the putative defendant has waived the right to service. Waiver of service of process allows a court to adjudicate an action without formal service of process because the defendant affirmatively agrees to voluntarily enter the lawsuit. When service of process is waived by a defendant, documents might nonetheless be directed to the defendant, but U.S. law does not require *service* in those instances.<sup>1</sup> The U.S. system encourages waiver to avoid unnecessary expenses associated with formal service of process, including government resources (such as when it must be executed by law enforcement) and the financial costs on a plaintiff that would otherwise be associated with legal requirements for personal delivery to the defendant and for any required translation of the process documents.

2. If a putative defendant declines to waive service of process after being requested to do so, the action will not proceed until formal service of process is effected because the court, at that time, lacks jurisdiction over the defendant.<sup>2</sup> If this occurs, a defendant located in the United States may be ordered to pay the costs associated with formal service of process unless the defendant can show good cause for the failure to waive it.<sup>3</sup> “Good cause” does *not* include objections to the grounds of the lawsuit, the venue, or the court’s jurisdiction over the matter.<sup>4</sup> Each of those issues may be challenged separately from any dispute over the efficacy of service of process or validity of a waiver.<sup>5</sup>

3. Importantly, waiver of service of process requires an affirmative act of voluntary consent by the putative defendant. One such act is signing and returning a waiver in response to a request mailed to the putative defendant by the plaintiff. Though it includes a copy of the complaint, a request for waiver is *not* a summons or official notice from the court. Rather, it is meant to provide the putative defendant with actual notice of the pending action and allow the defendant an opportunity to avoid the unnecessary expenses associated with formal service of process. When adopting the U.S. federal rule on waiver in its current form, the Advisory Committee that drafted the rule noted that “transmission of the notice and waiver form is a private nonjudicial act,” and

---

<sup>1</sup> Cf. Hague Conference on Private International Law, Practical Handbook on the Operation of the Service Convention ¶ 54 (2016) (“It is a matter for the *lex fori* to decide *if* a document needs to be served and *which* document needs to be served. Thus, if the law of the forum states that a notice is to be somehow directed to one or several addressee(s), without requiring *service*, the Convention does not have to be applied.”)

<sup>2</sup> *E.g., Omni Capital Int’l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987) (“Thus, before a court may exercise personal jurisdiction over a defendant, there must be more than notice to the defendant and a constitutionally sufficient relationship between the defendant and the forum. There also must be a basis for the defendant’s amenability to service of summons. Absent consent, this means there must be authorization for service of summons on the defendant.”).

<sup>3</sup> Fed. R. Civ. P. 4(d)(2) (requiring U.S. federal courts to impose certain expenses on a defendant located in the United States if the defendant refuses to waive service without good cause).

<sup>4</sup> Fed. R. Civ. P. 4 Annex (Notice of a Lawsuit and Request to Waive Service of Summons).

<sup>5</sup> Under the Federal Rules of Civil Procedure, even after a defendant has waived the right to service, the defendant may move to dismiss an action for, among other things, lack of subject-matter jurisdiction, lack of personal jurisdiction, and improper venue, Fed. R. Civ. P. 12(b).

thus was intended as a procedure meant to avoid offending foreign sovereignties.<sup>6</sup> Service of process is successfully waived when the defendant affirmatively signs and returns the mailed waiver to the plaintiff, who then files it with the court. Waiver cannot be effected by the mere receipt of a request for waiver, nor does mere receipt give rise to any obligation to answer the lawsuit or provide a basis for default judgment against the defendant.<sup>7</sup> In this sense, U.S. law clearly distinguishes between service of process—which constitutes a legal procedure obliging the defendant to respond to the action or risk default—and notice (or notification)—which may be actually provided by a request for waiver but does not establish the court’s jurisdiction over the defendant in the absence of the defendant’s voluntary consent.

4. Waiver may also take the form of a prior agreement between the parties. For example, parties to a contract may agree in advance to appoint an agent for the receipt of service or to waive service of process altogether, as long as such a waiver is consistent with the applicable state or federal law.<sup>8</sup> In general the U.S. Supreme Court has indicated that waiver of service of process should be voluntary, knowing, and intelligently made in order to be effective.<sup>9</sup>

5. If the defendant waives service of process, the action will proceed as if the defendant had been formally served. After waiving service of process, the defendant often has more time to answer the complaint than the defendant would have had with formal service. Under the U.S. Federal Rules of Civil Procedure, the defendant has 21 days to respond to the complaint after formal service of process, but 60 days or 90 days (depending on whether a defendant was outside the United States when served) to respond after a signed waiver is filed with the court.<sup>10</sup>

6. Waiving service of process does not prevent a defendant from objecting to the venue or the jurisdiction of the court.<sup>11</sup> Similarly, a defendant may object to the validity or existence of service without submitting to the jurisdiction of the court.<sup>12</sup> Challenges to service of process and challenges to the jurisdiction of the court are treated as separate issues with different legal considerations.<sup>13</sup> Therefore, by waiving service of process, a defendant does *not* implicitly waive other jurisdictional defenses.

---

<sup>6</sup> Fed. R. Civ. P. 4, advisory comm. nn. 1993 Amendments, Subdivision (d) (West 1993).

<sup>7</sup> *Id.* (“Unless the addressee consents, receipt of the request . . . does not give rise to any obligation to answer the lawsuit, does not provide a basis for default judgment, and does not suspend the statute of limitations in those states where the period continues to run until service.”).

<sup>8</sup> *Nat’l Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315-16 (1964).

<sup>9</sup> *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-87 (1972).

<sup>10</sup> Fed. R. Civ. P. 4(d)(3), 12(a)(1).

<sup>11</sup> Fed. R. Civ. P. 12(1), (2), (3) (permitting motions to dismiss for lack of subject-matter jurisdiction, lack of personal jurisdiction, and improper venue, respectively).

<sup>12</sup> Fed. R. Civ. P. 12(b)(5) (permitting a motion to dismiss for insufficient service of process).

<sup>13</sup> See, e.g., *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945) (discussing personal jurisdiction and effectiveness of service of process as distinct issues); Fed. R. Civ. P. 12(b)(2) (lack of personal personal jurisdiction); *id.* 12(b)(5) (insufficient service of process).