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CATCH ME IF YOU CAN: SERVING UNITED STATES PROCESS ON AN ELUSIVE DEFENDANT ABROAD

*Yvonne A. Tamayo**

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* Associate Professor of Law, Willamette University College of Law; J.D., Loyola University School of Law; B.S., Louisiana State University. This Article builds on two prior writings of the author: *Are You Being Served?: E-Mail and (Due) Service of Process*, 51 S. CAR. L. REV. 2 (2000); *Who? What? When? Where? Personal Jurisdiction and the World Wide Web*, 4 RICH. J.L. & TECH. 3 (1998). I wish to thank Abbey Vanderbeek and Ezra Van Negri for their enduring love and support. An additional thanks to Marie Ashe and Jeffery Atik for their help and advice, and Amy Velazquez-Banta and Elizabeth Cooley for their excellent research assistance. Financial support for this research was provided by the Willamette University College of Law.

"I AM A RESIDENT OF SAUDI ARABIA AND THERE'S NOTHING ANYONE CAN DO TO ME HERE."[1]

I. INTRODUCTION

As global economic activity expands, foreign legal systems are increasingly involved in settling disputes among international parties.[2] In these multinational suits, as in any kind of litigation, service of process is a significant procedural tool for carrying out the substantive norms of each country's legal processes.[3] The increasing swell in international litigation demands serious inquiry into whether electronic communication may supplement traditional methods of serving process on foreign defendants to enhance function, consistency, and reliability in the resolution of cross-border disputes.

Service of process of a summons and complaint marks the official commencement of an action.[4] Despite its importance in the administration of a lawsuit, however, serving a defendant abroad remains a difficult and complex endeavor.[5] In fact, serving a foreign defendant has been portrayed as "one of the most challenging [problems] that a district court can be called upon to face."[6]

Along with the proliferation of international lawsuits, the legal profession has experienced an unprecedented shift in the manner in which lawyers communicate.[7] For an ever-increasing number of liti-

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1. Hollow v. Hollow, 747 N.Y.S.2d 704 (2002) (e-mail message from Michael Hollow to his wife regarding his ongoing evasion from service of process through traditional methods in a divorce action).

2. *See* Martha Neil, *Over There*, 89 A.B.A. J. 54 (2003) (discussing the increased expansion of legal markets as a result of growth in global economy); Yvonne A. Tamayo, *Who? What? When? Where? Personal Jurisdiction and the World Wide Web*, 4 RICH. J.L. & TECH. 7 (1998) (examining how the Internet has reshaped traditional notions of geographic boundaries for establishing personal jurisdiction on a defendant).

3. *See* John A. Jolowicz, *On The Comparison of Procedures in* LAW AND JUSTICE IN A MULSTISTATE WORLD (James A.R. Nafziger and Symeon S. Symeonides, eds., 2002) at 721, noting that "if the harmonization of substantive law is to succeed in bringing similar results in similar cases in the various jurisdictions concerned, there must also be some harmonization of their respective procedures."

4. *See* Henry H. Perritt, Jr., *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1, 31 (1996), stating that "[S]ervice of process performs two functions in Anglo-American civil procedure: it represents assertion of judicial power of the forum state over the person of the defendant, and it is the formal means of providing notice to the defendant so that he or she may defend the lawsuit."

In this Article, "initial service of process," "service of process," "service of summons," and "notice" refer to the delivery of a complaint and summons or initial legal paper notifying the defendant of the proceedings against him. Service of process of subsequent papers is beyond the scope of the Article.

5. In this Article, the terms "foreign" and "abroad" refer to nations other than the United States. The words "country" and "nation" are used interchangeably.

6. Mayoral-Amy v. BHI Corp., 180 F.R.D. 456, 458 (S.D. Fla. 1998).

7. The legal profession has mirrored the general population's embrace of electronic communication. One study predicts that by the year 2006, more than 60 billion e-mails will be transmitted each day. Nick Farrell, *You Have Mail: 31 Billion a Day*, *available at*

gators, e-mail has become an indispensable tool for conducting quick, reliable, and efficient communication.[8] Recently, there have been important and perhaps predictable moves towards judicial recognition that a defendant may be "found" at his electronic address. On March 20, 2002, the Ninth Circuit Court of Appeals held in *Rio Properties Inc. v. Rio International Interlink* that e-mail service of a federal court summons and complaint on a Costa Rican gambling operation complied with federal statutory and constitutional requirements for adequate notice.[9] The *Rio* decision is the first Circuit Court of Appeals opinion to recognize that in particular circumstances, e-mail presents an appropriate and constitutionally sound method of serving a defendant with process.[10] Although the Ninth Circuit ruled that e-mail transmission of service of process may be superior to traditional methods, the *Rio* decision unfortunately does not yet hold much promise for facilitating service of process in international litigation. *Rio* does not begin to navigate through international resistance to modernized procedural systems that involve e-mail transmission of initial service of process.

This Article explores the feasibility of serving initial federal court pleadings by e-mail on a defendant residing outside of the United States. Focusing on the recent *Rio* decision, it examines the benefits of e-mail service of process in international litigation, and the potential consequences of obtaining a judgment based on service that is not compliant with either the Hague Convention or foreign countries' internal laws.

Part II examines the *Rio* court's well-reasoned legal analysis and application of both Federal Rule of Civil Procedure ("FRCP") 4(f)(3)

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http://www.vnunet.com/News/1135485 (last visited October 24, 2003). In fact, the Florida Supreme Court has observed that "email transmissions are quickly becoming a substitute for telephonic and printed communications, as well as a substitute for direct oral communications." In re: Amendments to Rule of Judicial Administration, 2.051 — Public Access to Judicial Records, 651 So.2d 1185, 1186 (Fla. 1995).

8. *See generally* Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561 (2001) (examining use of e-mail in discovery); Samuel A. Thumma & Darrel S. Jackson, *A History of Electronic Mail in Litigation*, 16 SANTA CLARA COMPUTER & HIGH TECH. L.J. 1, 1–4 (1999) (describing tremendous increase in e-mail during past two decades); Henry H. Perritt, Jr., *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1, 5 (1996) (noting that "the [Internet] will force the international legal community at least to modify the way in which it deals with transnational conflict"); *see also* Richard M. Georges, *The Impact of Technology on the Practice of Law-2010*, FLORIDA FUTURE LAWYER (1997), *available* at http://www.futurelawyer.com/flabar.htm (last visited October 24, 2003) ("Email is the most popular Internet application, and the most used by lawyers, because it enables rapid, efficient communication and file sharing with anyone in the world, from the lawyer's desk. . . . Some lawyers are already conducting much of their business over the Internet using the Email function."); Al Harrison, *Delivery of Electronic Documents*, 61 TEX. B.J. 476, 476 (1998) ("Electronic communications and electronic document transfer are rapidly becoming a focal point of modern law practice.").

9. 284 F.3d 1007, 1016–17 (9th Cir. 2002).

10. *See id.*

and the Supreme Court's due process standard in *Mullane v. Central Hanover Bank & Trust Co.*[11] to uphold electronic service of process on a foreign defendant. Part III discusses two significant post-*Rio* judicial opinions, and considers their importance in the emerging line of post-*Rio* cases. Part IV examines the existing obstacles to e-mail service of process posed by foreign countries' formalistic internal laws governing service of process within their boundaries. The discussion considers the particular challenges attendant to serving process in Hague Convention member nations and in countries not signatories to the treaty. Part IV also explores the contours of the *Rio* opinion and the limits of its impact on future litigation involving service of process on individual and corporate parties residing in other nations. The Article concludes that in order to enhance international efficiency and cooperation in serving process abroad, foreign nations should consider the utility of e-mail service of process on defendants residing within their boundaries. However, this shift towards accommodating modern electronic developments is likely to entail a lengthy, complex, and laborious process.

II. SERVING PROCESS ABROAD

In serving a foreign defendant with initial process,[12] a federal court plaintiff must comply with statutory and due process requirements detailed in FRCP 4(f) and in the Supreme Court decision in *Mullane v. Central Hanover Bank & Trust Co*.[13] Additionally, if a litigant seeks subsequent enforcement of a United States judgment in a foreign country, he must ensure that process is served according to applicable treaties and the enforcing country's internal laws.[14] Rule 4(f)(1) states that in member countries to the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters ("Hague Convention"), process must be served according to the Convention.[15] The Hague Convention, an interna-

11. 339 U.S. 306 (1950).

12. Throughout this article, the discussion will focus on service to an individual foreign defendant or a corporation, not a foreign country, an infant, an incompetent, or a government body.

Generally, Rule 4 applies to foreign defendants actually located abroad, regardless of citizenship. FED. R. CIV. P. 4(f); *see also* Stars' Desert Inn Hotel & Country Club, Inc. v. Hwang, 105 F.3d 521, 524 (9th Cir. 1997) ("The plain language of Rule 4(f) indicates that application of the rule is not triggered by the citizenship of the individual being served but rather the place in which service is effected.").

13. 339 U.S. at 70; *see also* FED. R. CIV. P. 4 (furnishing notice requirements in federal actions); U.S. CONST. amend. V ("No person . . . shall be . . . deprived of life, liberty, or property, without due process of law . . . ."); U.S. CONST. amend. XIV ("No State shall . . . deprive any person of life, liberty or property, without due process of law . . . .").

14. 1 BRUNO A. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE (CIVIL AND COMMERCIAL), §§ 3-1-3, 3-1-8, 4-3-1 (2000).

15. Rule 4(f) states in pertinent part:

tional equivalent to the United States' Full Faith and Credit Clause, binds courts of member nations to recognize one another's judicial decisions.[16] Specifically, the Hague Convention provides a uniform framework for serving process in civil or commercial cases within member nations.[17] As of September 1, 2002, fifty countries including

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> Unless otherwise provided by federal law, service upon an individual . . . may be effected in a place not within any judicial district of the United States: (1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents . . . .

FED. R. CIV. P. 4(f); s*ee also* Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 705 (1988) (stating that the Hague Convention is the primary method for serving process in signatory countries, and "compliance with the Convention is mandatory in all cases to which it applies").

This Article focuses solely on the Hague Convention. Besides the Hague Convention, the United States is a member of the Inter-American Convention on Letters Rogatory, a multilateral treaty pertaining to transnational service of process and entered into force on January 16, 1976. 28 U.S.C.A. § 1781 (West 1994 & Supp. 2003).

To examine other treaties to which the United States is a signatory, *see Treaties in Force: A List of Treaties and Other International Agreements of The United States in Force as of January 1, 2000*, available at http://www.state.gov/www/global/legal_affairs/tifindex.html (last visited October 23, 2003). *See also Additional Protocol to the Inter-American Convention on Letters Rogatory, available at* http://www.oas.org/juridico/English/Sigs/b-46.html (last visited October 23, 2003).

16. The Full Faith and Credit Clause states that: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. CONST. art. IV, § 1; *see also* Pa. Fire Ins. Co. of Phila. v. Gold Issue Min. & Mill. Co., 243 U.S. 93 (upholding application of state statute permitting personal service on out-of-state insurance agent for cause of action arising in another state).

17. 20 U.S.T. 361, 362 [hereinafter *Hague Convention*]. The Hague Convention, formulated under the aegis of the Hague Conference on Private International Law, is an international forum for signatory nations to develop multilateral treaties in private international law. *See* Pfund, *International Unification of Private Law: A Report on United States Participation, 1985–86*, 20 INT'L LAW. 623 (1986); Amram, *Report on the Tenth Session of the Hague Conference on Private International Law,* 59 AM. J. INT'L L. 87 (1965).

The preamble of the Hague Convention states that its purpose is to "improve the organization of mutual judicial assistance . . . by simplifying and expediting the procedure." Hague Convention at 361; *see also Volkswagenwerk*, 486 U.S. at 698 (1988) (noting that the Hague Convention was created "to provide a simpler way to serve process abroad, to assure that defendants sued in foreign jurisdictions would receive actual and timely notice of suit, and to facilitate proof of service abroad").

The Hague Convention only provides the manner of giving notice to a party through the requisite authority. It does not create a basis for personal jurisdiction in federal court, which must be established substantively through FRCP 4, or through applicable state and federal long-arm statutes. *See* DeJames v. Magnificence Carriers, Inc., 654 F.2d 280, 289 (3d Cir. 1981) (noting that the Hague Convention does not affect a state's chosen limits on the jurisdictional reach of its courts); *accord* Lana Mora, Inc. v. S.S. Woermann Ulanga, 672 F. Supp. 125, 128 (S.D.N.Y. 1987); Hantover, Inc. v. Omer, S.N.C. of Volentieri & C., 688 F. Supp. 1377, 1384 n.10 (W.D. Mo. 1988). In expressly differentiating between jurisdiction and service of process, FRCP 4(f) and 4(k) also indicate that the Hague Convention provisions do not establish personal jurisdiction in federal courts.

The Hague Convention does not define the phrase "civil or commercial," and the term remains ambiguous. In fact, disputes have arisen regarding its meaning. *See* Kenneth B. Reisenfeld, *Service of United States Process Abroad: A Practical Guide to Service Under the Hague Service Convention and the Federal Rules of Civil Procedure,* 24 INT'L LAW. 55, 67–68 (1990) (discussing Germany's refusal to serve complaints in United States civil ac-

the United States were members of the Hague Convention.[18] Rule 4(f)(2) authorizes service of process in countries not signatories to the Hague Convention as directed either by the foreign country's law or by a prescribed foreign authority.[19] Lastly, Rule 4(f)(3) authorizes alternative forms of court-ordered service, as long as the method chosen does not contravene an international treaty.[20] In every case, however, service of process must meet the constitutional standard articulated by the Supreme Court in *Mullane*: the method chosen must be reasonably calculated to give a defendant actual notice and an opportunity to be heard.[21] Although Rule 4(f), the *Mullane* standard, and the Hague Convention provide a flexible infrastructure for serving process abroad, questions arise concerning how they may be harmoniously applied to yield a federal court judgment that is recognizable and enforceable in a foreign country.

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tions seeking punitive damages because Germany deemed the actions penal in nature, and thus outside the scope of the Hague Convention).

18. Signatories to the Hague Convention are: Antigua and Barbuda, Argentina, Bahamas, Barbados, Belarus, Belgium, Botswana, Bulgaria, Canada, China, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Ireland, Israel, Italy, Japan, Korea, Kuwait, Latvia, Lithuania, Luxembourg, Malawi, Mexico, Netherlands, Norway, Pakistan, Poland, Portugal, Russian Federation, San Marino, Seychelles, Slovak Republic, Slovenia, Spain, Sri Lanka, Sweden, Switzerland, Turkey, Ukraine, United Kingdom, United States, and Venezuela. MARTINDALE-HUBBELL, *Selected International Conventions, in* MARTINDALE-HUBBELL INTERNATIONAL LAW DIGEST 2003 IC-2.

19. Rule 4(f)(2) states:

> [Service is allowed upon an individual outside of the United States if] there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice;
>
> (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or
>
> (B) as directed by the foreign authority in response to a letter rogatory or letter of request; or
>
> (C) unless prohibited by the law of the foreign country, by
>
> (i) delivery to the individual personally of a copy of the summons and the complaint; or
>
> (ii) any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served.

FED. R. CIV. P. 4(f)(2); *see also* INTRODUCTION TO THE LAW OF THE UNITED STATES at 391–94 (David S. Clark and Tuğrul Ansay eds., 2002) (providing general overview of notice requirements in United States courts).

20. Rule 4(f)(3) authorizes service in a country not signatory to any treaty "by other means not prohibited by international agreement as may be directed by the court." FED. R. CIV. P. 4(f)(3).

21. 339 U.S. 306, 314–15 (1950).

A. Federal Rule of Civil Procedure 4(f)(3): Statutory Basis for Serving a Foreign Defendant

Personal service, whereby the defendant is given "in hand" service of the summons and complaint, is a preferred method of service because it almost always satisfies the reasonableness requirement of the Due Process Clause.[22] Historically, the preference for personal service arose from the territorial concept of jurisdiction espoused by the United States Supreme Court in *Pennoyer v. Neff*.[23] In that case, the Court established that personal service of process within the territory of the forum state subjected a defendant to personal jurisdiction.[24] Today, personal service of process is still considered superior to other methods of service because it guarantees the defendant's actual receipt of the summons and complaint.[25] This preference for personal service is evidenced in modern judicial opinions and statutory provisions.[26] Although Rule 4 provides various alternative means for serving process on a defendant, personal service remains the preferred method.[27]

Notwithstanding a judicial and statutory preference for personal notice, instances arise when serving a foreign defendant in person is exceedingly difficult or impossible. Rule 4(f)(3) provides relief in those situations by authorizing service in any manner directed by the

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22. *See Mullane*, 339 U.S. at 313, 319 ("Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding . . . . Of course personal service . . . serves the end of actual and personal notice."). Some courts have held, however, that "in hand" delivery is not required to effectuate personal service. *See, e.g.*, Novak v. World Bank, 703 F.2d 1305, 1310 n.14 (D.C. Cir. 1983) (noting that service may be effected on a person evading service by leaving papers near that person (citing Errion v. Connell, 236 F.2d 447, 457 (9th Cir. 1956))).

23. 95 U.S. 714 (1877) (holding that a state had power to adjudicate a claim over a nonresident defendant only if the plaintiff personally served the defendant or attached his property within the forum state).

24. *See id.* at 720.

25. *See* Milliken v. Meyer, 311 U.S. 457 (1940) (finding that personal service is always valid); *Mullane*, 339 U.S. at 313.

26. *See, e.g.*, Greene v. Lindsey, 456 U.S. 444, 449 (1982) (calling personal service the "ideal circumstance under which to commence legal proceedings"); Medlock v. SuperAmerica Group, Inc., 1993 WL 285871, at *1 (D. Minn. July 16, 1993) (finding that the preferred method of service under Fed. R. Civ. P. 4 is personal service); Kott v. Superior Court, 53 Cal. Rptr. 2d 215, 220 (Cal Ct. App. 1996) (holding that personal service remains the method of choice under the statutes and the Constitution); Evartt v. Superior Court, 152 Cal. Rptr. 836, 838 (Cal. Ct. App. 1979) (noting that in drafting the Jurisdiction and Service of Process Act, the California Legislature showed a "conscious, deliberate . . . [and] knowing preference" for personal service as a primary method of service that would more certainly assure actual notice).

27. *See* FED. R. CIV. P. 4 advisory committee's notes ("[P]ermitting foreign service by personal delivery on individuals and corporations, partnerships, and associations, provides for a manner of service that is not only traditionally preferred, but also is most likely to lead to actual notice.").

court,[28] so long as the method of service does not contravene an applicable international agreement and is reasonably calculated to give notice.[29]

Rule 4(f)(3) is a flexible procedural tool that facilitates giving notice to a foreign defendant by tailoring service of process to suit the specific circumstances of a case.[30] The flexibility inherent in the Rule is borne out by its history. In 1963, Rule 4(i)(1)(E), the predecessor to Rule 4(f)(3), was enacted to amplify the choices available to federal courts in serving foreign defendants with process.[31] Rule 4(i)(1) furnished five alternative methods for serving process abroad.[32] The fifth method, "as directed by order of the court,"[33] was a residual method adopted for the specific purpose of increasing flexibility to courts in ordering service adaptive to the particular circumstances of each case.[34] In the past, federal courts have interpreted this provision, and its successor Rule 4(f)(3), to permit notice of legal proceedings through non-traditional means including: ordinary mail to a defen-

28. *See, e.g.*, Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1018 (9th Cir. 2002) (authorizing e-mail service on defendant who could only be reached by e-mail at its web page); SEC v. Tome, 833 F.2d 1086, 1094 (2d Cir. 1987) (condoning service of process by publication in the *International Herald Tribune)*; Smith v. Islamic Emirate, Nos. 01 Civ. 10132, 01. Civ. 10144, 2001 WL 1658211 (S.D.N.Y. Dec. 26, 2001) (authorizing service of process on Osama bin Laden and Al Qaeda by publication); Levin v. Ruby Trading Corp., 248 F. Supp. 537, 541 (S.D.N.Y. 1965) (employing service by ordinary mail); Int'l Controls Corp. v. Vesco, 593 F.2d 166, 176–78 (2d Cir. 1979) (approving service by ordinary first class mail to last known address); Forum Fin. Group v. President and Fellows of Harvard College, 199 F.R.D. 22 (D. Me. 2001) (authorizing service to defendant's attorney); New Eng. Merchs. Nat'l Bank v. Iran Power Generation & Transmission Co., 495 F. Supp. 73, 80 (S.D.N.Y. 1980) (allowing service by telex for Iranian defendants); Broadfoot v. Diaz (*In re* Int'l Telemedia Assocs.), 245 B.R. 713, 719–20 (Bankr. N.D. Ga. 2000) (authorizing service by fax, e-mail, and ordinary mail to the defendant's last known address).

29. *See Diaz*, 245 B.R. at 719 ("Thus, so long as the particular method of service adopted is not contrary to international agreement, Rule 4(f)(3) provides the court with the same degree as its predecessor, empowering courts to fit the manner of service utilized to the facts and circumstances of the particular case."); Mayoral-Amy v. BHI Corp., 180 F.R.D. 456, 460 (S.D. Fla. 1998).

30. *See Diaz*, 245 B.R. at 719 (noting that Rule 4(f)(3) was adopted to provide discretion and flexibility in authorizing alternative methods for serving process in foreign countries); *Levin*, 248 F. Supp. at 540 (stating that the purpose of the Rule is to provide choice and flexibility while assuring a foreign defendant adequate notice).

31. *See Diaz*, 245 B.R. at 719 (Rule 4(i)(1)(E) was adopted to "add flexibility by permitting the court by order to tailor the manner of service to fit the necessities of a particular case." (quoting FED. R. CIV. P. 4 advisory committee's notes)).

32. Entitled "Alternative Provisions for Service in a Foreign Country," Fed. R. Civ. P. 4(i)(1) authorized service: "(a) in the manner prescribed by the law of the foreign country, (b) as directed by the foreign authority in response to a letter rogatory, (c) by delivery to the individual personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent, (d) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served, and (e) as directed by order of the court." FED. R. CIV. P. 4(i)(1) (1992).

33. FED. R. CIV. P. 4(i)(1)(e) (1992).

34. *See Mayoral-Amy*, 180 F.R.D. at 460 (S.D. Fla. 1998) (noting that Rule 4(f)(3) authorizes courts to "unilaterally define an appropriate method for service").

dant's last-known address,[35] publication in a law journal,[36] serving the defendant's attorney,[37] and telex.[38] These flexible judicial interpretations confirm that new Rule 4(f)(3) retains the spirit of flexibility, judicial discretion, and accommodation contained in the old Rule.

B. Mullane: *The Constitutional Standard for Adequate Notice*

In *Mullane v. Central Hanover Bank & Trust Co.*, the Central Hanover Bank ("Hanover"), as trustee of a three million dollar common trust fund, petitioned the New York Surrogate Court to, in effect, certify its first accounting of the trust's value.[39] Thereafter, Hanover published notice of the proceedings to the fund's beneficiaries in a local newspaper once weekly during four successive weeks.[40] Kenneth Mullane was then appointed guardian for all income beneficiaries not represented by legal counsel, and he objected to the notice given as violative of due process requirements.[41]

In *Mullane,* the Supreme Court found that in situations where personal service of process is unlikely or impossible, notice is sufficient if it meets the following constitutional standard:

> An elementary and fundamental requirement of due process in any proceeding . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information and it must afford a reasonable time for those interested to make their appearance.[42]

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35. *See* Int'l Controls Corp. v. Vesco, 593 F.2d 166, 178 (2d Cir. 1979) (allowing service of summons of complaint to last-known address).

36. *See* Fed. Home Loan Mortgage Corp. v. Mirchandani, No. 94 CV 1201 (FB), 1996 WL 534821, at *4 (E.D.N.Y. 1996) (authorizing service of complaint by publication once a week for six weeks in the *New York Law Journal*).

37. *See* Mayatextil S.A. v. Liztex U.S.A., Inc., No. 92 CIV 4528(55), 1994 WL 198696, at *5, (S.D.N.Y. 1994) (approving service of counterclaim on counterclaim-defendants' attorneys).

38. *See* New Eng. Merchs. Nat'l Bank v. Iran Power Generation & Transmission Co., 495 F. Supp. 73, 80–81 (S.D.N.Y. 1980) (allowing service of summons and complaint by telex to Iranian defendants); Int'l. Schs. Serv. v. Gov't of Iran, 505 F. Supp. 178, 179 (D.N.J. 1981) (approving service of summons and complaint by telex to Iranian government); Cooper v. Church of Scientology, 92 F.R.D. 783, 786 (D. Mass. 1982) (authorizing service of summons and complaint by telex).

39. 339 U.S. 306, 306 (1950).

40. *Id.*

41. *Id.* at 310–11. The trial court overruled Mullane's objection, and the New York Appellate Division and Court of Appeals both affirmed. *Id.* at 311.

42. *Id.* at 314 (citations omitted).

Having set forth the constitutional standard, the Court separated the class of beneficiaries into two groups: those with known addresses, and unknown beneficiaries or beneficiaries with unknown addresses.[43] Regarding the known beneficiaries, the Court found that notice by publication was not reasonably calculated to apprise them of the pending action.[44] However, notice by publication to the unknown beneficiaries or those whose addresses were unknown was sufficient since no superior method of notice existed in these circumstances.[45]

The Supreme Court's ruling in *Mullane* clearly states that upon complying with the "reasonableness" standard for notice, if "with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements [of due process] are satisfied."[46] Accordingly, whether service is reasonably calculated to give adequate notice to a defendant depends on the circumstances attendant to a particular case[47] and the availability of alternative forms of service.[48]

Recognizing the implausibility of creating inflexible procedures "universally applicable to every imaginable situation,"[49] the Supreme Court has refused to adopt a strict formula for due process standards since its benchmark holding in *Mullane*.[50] The reasonableness stan-

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43. *Id.* at 317–18.

44. *Id.* at 318. The Court held that newspaper publication alone was insufficient "not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand." *Id.* at 319; *see also* Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983) (stating that notice by publication might not be sufficient when the identity of creditors is reasonably ascertainable).

45. *See Mullane*, 339 U.S. at 317–18.

46. *Id.* at 314–15.

47. *See id.* at 313 (stating that the Due Process Clause requires "notice and opportunity for hearing appropriate to the nature of the case"); Greene v. Lindsey, 456 U.S. 444, 451 (1982) (noting that the constitutionality of service is determined by the "realities of the case" at issue).

48. *See Greene*, 456 U.S. at 454 ("Of course, the reasonableness of the notice provided must be tested with reference to the existence of 'feasible and customary' alternatives and supplements to the form of notice chosen." (quoting *Mullane*, 339 U.S. at 315)).

49. Cafeteria & Rest. Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961) (reflecting the general principle that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation").

50. *Mullane*, 339 U.S. at 314 (refusing to commit "itself to any formula achieving a balance between these interests in a particular proceeding or determining when constructive notice may be utilized or what test it must meet"); *see also* Walker v. City of Hutchinson, 352 U.S. 112, 115 (1956) (acknowledging that due to the "impossibility of setting up a rigid formula as to the kind of notice that must be given; notice will vary with [the] circumstances and conditions [of the case]").

In *Schroeder v. City of New York*, 371 U.S. 208, 212 (1962), the Court elaborated on the flexible nature of due process, noting that in *Mullane*

> [T]he Court thoroughly canvassed the problem of sufficiency of notice under the Due Process Clause, pointing out the reasons behind the basic constitutional rule, as well as the practical considerations which make it impossible to draw a standard set of specifications as to what is constitutionally adequate notice, to be mechanically applied in every situation.

dard is not grounded in perfection. It only requires that a party apply the best efforts practicable for giving notice.[51] *Mullane* therefore does not require that service of process assure receipt of notice, but instead holds that service must be reasonably calculated to reach the defendant after considering the particular circumstances of each case.[52]

C. The Road to Rio: *The Early Cases*

Despite past rulings applying Rule 4(f)(3) to serve evasive parties by non-traditional methods, until *Rio*, no federal appellate court had authorized initial service of process on a foreign defendant through e-mail or the Internet.[53] Two court rulings in class action and bankruptcy contexts, *Greebel* and *Diaz,* prefaced the *Rio* court's opinion in approving the use of e-mail or the Internet to facilitate service of process.[54] In this respect, the *Greebel* and *Diaz* opinions paved the way for the Ninth Circuit's ruling in *Rio*.[55] In particular, the *Diaz* decision's display of pragmatism and flexibility in applying the statutory and constitutional standards to a modern factual scenario significantly shaped the analysis of the *Rio* court.[56]

On August 15, 1996, Massachusetts Federal District Court Chief Judge Joseph Tauro held in *Greebel v. FTP Software Inc.* that an electronic press release to news media, online databases, and the Internet satisfied due process and federal securities statutory requirements for giving notice to class action parties seeking appointment as lead plain-

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Id. at 212.

51. In *Mullane*, the Supreme Court did not require delivery of personal notice to absentee parties, stating that "under such circumstances reasonable risks that notice might not actually reach every beneficiary are justifiable." 339 U.S. at 319.

52. The Court stated:

> The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.

Id. at 315 (citations omitted); *see also Greene*, 456 U.S. at 455 ("We need not go so far as to insist that in order to 'dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required . . . .'" (quoting McDonald v. Mabee, 243 U.S. 90, 92 (1917))).

53. *See supra* notes 35–38 and accompanying text.

54. *See* Greebel v. FTP Software, 939 F. Supp. 57 (D. Mass. 1996); Broadfoot v. Diaz (*In re*: Int'l Telemedia Ass'ns, Inc.), 245 B.R. 713 (Bankr. N.D. Ga. 2000).

55. Outside of the United States, the first judicial authorization of e-mail notice to an individual defendant occurred in 1996. There, an English High Court authorized service on a defendant through e-mail, his preferred method of communication. *See* Yvonne A. Tamayo, *Are You Being Served?: E-Mail and (Due) Service of Process*, 51 S.C. L. REV. 227, 244–46 (2000); *see also* Wendy R. Liebovitz, *U.K. Court: Serve Process Via E-mail,* NAT'L. L.J., July 8, 1996 at B1.

56. *Diaz*, 245 B.R. at 713–23.

tiff.[57] In examining the applicable federal notice provision, the *Greebel* court reasoned that the statute targeted institutional investors who were sophisticated parties most likely reachable through electronic and computer methods of communication.[58] Due to the wide use of electronic media among the targeted investors, the court concluded these methods were reasonably calculated to reach the intended parties.[59]

The four years following *Greebel* produced no federal or state decisions involving electronic service of process. Then on February 15, 2000, in *Broadfoot v. Diaz* (*In re International Telemedia Associates, Inc.*), the United States Bankruptcy Court for the Northern District of Georgia authorized Rule 4(f)(3) electronic notice of a summons and complaint in involuntary bankruptcy proceedings on a debtor attempting to evade service of process.[60]

In *Diaz*, corporate officer Arjuna Diaz consistently refused to disclose his location in Europe, frustrating the bankruptcy trustee's efforts at serving him with a summons and complaint through traditional methods.[61] Despite his evasiveness, Diaz revealed an electronic clue as to his whereabouts. Diaz sent the trustee a letter informing him that all future correspondence with Diaz should be through his new permanent fax number, and all faxes would be forwarded to one of Diaz's e-mail addresses.[62] Diaz also provided the trustee with his two e-mail addresses.[63]

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57. The Private Securities Litigation Reform Act of 1995 sets forth the procedure for giving notice to potential lead plaintiffs in class actions. The Act requires publication of notice "in a widely circulated national business-oriented publication or wire service." *Greebel,* 939 F.Supp. at 62 (quoting the Private Securities Litigation Act, 15 U.S.C.A. § 78u-4(a)(3)(A)(i) (1995)).

58. *Id.* at 63.

59. *Id.* at 64.

60. *Diaz*, 245 B.R. at 722 (affirming grant of plaintiff's motion for service of process by e-mail and fax). Federal Rule of Bankruptcy Procedure 7004 incorporates service of process as authorized by FRCP 4(f)(3). Rule 7004 states, in pertinent part: "Rule 4 . . . (e)–(j) . . . F.R.Civ.P. applies in adversary proceedings." U.S.C.S. Bankr. R. 7004(a).

The unprecedented opinion in *Diaz* received substantial press coverage. *See, e.g.*, *Can Foreign Defendant Be Served by E-Mail?,* LAW. WKLY. USA, Nov. 1, 1999, at 6: *Bankruptcy Court Issues Default Judgment Based on Failure to Answer E-Mailed Service,* U.S. LAW WEEK, Sept. 28, 1999, at 2167; Barney Turney, *Bankruptcy Court Issues Default Judgment Based on Failure to Answer E-Mailed Service*, BNA'S BANK. LAW REP., Sept. 23, 1999, at 796; *Bankruptcy Court Authorizes Service Via E-Mail, Fax, Internet Law and Regulation,* June 22, 1999, *at* www.internetlaw.pf.com.

61. Along with e-mail, Diaz was served by fax and by mail to his last known address. *Diaz,* 245 B.R. at 720. The court labeled Diaz a "moving target," pointing out his successful attempts at evading service by: 1) refusing to provide the trustee a telephone number or permanent business or residential address; 2) claiming to be traveling in Europe, but refusing to identify his location at any given time; and 3) giving the trustee the address of a friend, where service of bankruptcy papers was refused. *Id.* at 718.

62. *Id.* at 718.

63. *Id.*

In determining that e-mail service on Diaz satisfied statutory and constitutional requirements, the *Diaz* court relied on two findings that would influence the Ninth Circuit in *Rio*. First, troubled by Diaz's evasiveness, Chief Judge Cotton disclosed his intent to employ electronic means to thwart Diaz's efforts at eluding service of process.[64] Second, Diaz's stated preference for communicating through e-mail and fax weighed heavily in establishing the reasonableness of those methods for serving Diaz with process.[65]

The *Diaz* court's analysis of Rule 4(f)(3)'s applicability in this case was grounded in unwavering pragmatism. First, the court acknowledged that e-mail and fax are widely-used, advanced methods of communication in our global society.[66] In fact, a review of case law established that courts had indeed applied Rule 4(f)(3) to authorize service by non-conventional means, including telex, an electronic precursor to fax and e-mail.[67] That Rule 4(f)(3) did not specifically enumerate e-mail as a permissible means of serving process, the court reasoned, did not prevent its application for that purpose.[68]

The *Diaz* court next considered whether Diaz was afforded due process.[69] Service of process, Chief Judge Cotton noted, was effected electronically at an address that Diaz had personally provided to the trustee.[70] On this issue, Chief Judge Cotton stated:

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64. The court stated:

> [C]ommunication by facsimile transmission and electronic mail have now become commonplace in our increasingly global society. . . . A defendant should not be allowed to evade service by confining himself to modern technological methods of communication not specifically mentioned in the Federal Rules. Rule 4(f)(3) appears to be designed to prevent such gamesmanship by a party.

Diaz, 245 B.R. at 721–22.

65. *Id.* at 718.

66. *Id.* at 721.

67. *Id.* at 719–20 (citing Int'l Controls Corp. v. Vesco, 593 F.2d 166, 176–78 (2d Cir. 1979) (approving service by mail to last known address); Federal Home Loan Mortgage Corp. v. Mirchandani, No. 94 CV 1201(FB), 1996 WL 534821 at 4 (E.D.N.Y. Sept. 18, 1996) (allowing service by publication in a law journal); Mayatextil, S.A. v. Liztex U.S.A., Inc., No. 92 CIV. 4528(SS), 1994 WL 198696, at 5 (S.D.N.Y. May 19, 1994) (authorizing delivery to defendant's attorney-agent); New Eng. Merchs. Nat'l Bank v. Iran Power Generation & Transmission Co., 495 F.Supp. 73, 80 (S.D.N.Y. 1980) (allowing service by telex for Iranian defendants); Levin v. Ruby Trading Corp., 248 F. Supp. 537, 541–44 (S.D.N.Y. 1965) (holding that service by ordinary mail was proper under the circumstances)).

68. *Id.*

69. The court stated:

> Even when the Federal Rules authorize the use of an alternative method of service, the Due Process Clause mandates an inquiry into whether that method of service is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

Id. at 721 (*quoting* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); Hanson v. Denckla, 357 U.S. 235, 245 (1958) (applying same standard)).

70. *Id.* at 721.

> Indeed, the Court authorized service was made by the very methods of communication preferred by Diaz . . . . If any methods of communication can be reasonably calculated to provide a defendant with real notice, surely those communication channels *utilized and preferred* by the defendant himself must be included among them.[71]

Chief Judge Cotton concluded that *Mullane*'s reasonableness standard required nothing more than delivery of the summons and complaint to a defendant's designated address, whether it be electronic or physical.[72]

Until 2002, judicial authorization of e-mail notice of legal proceedings existed only in class action and bankruptcy cases.[73] On March 20, 2002, however, the decision in *Rio Properties Inc. v. Rio International Interlink* broke new ground as the first federal appellate court opinion to uphold e-mail service on a foreign defendant sued in a commercial dispute.[74]

D. The Elusive Rio *Defendant*

The dispute in *Rio* arose out of a trademark infringement lawsuit filed by Rio Properties Inc. ("Rio") against Rio International Interlink ("Interlink") in the Federal District Court of Nevada.[75] Rio owned the "Rio All Suite Casino Resort" in Las Vegas, Nevada. The facility included a casino, hotel, restaurants, and entertainment services catering to customers worldwide.[76] Rio also operated the "Rio Race and Sports Book," a betting service for professional sports events. On February 1, 1989, Rio began using the service mark and trademark "RIO" in promoting its entertainment services.[77] On August 31, 1996, Rio registered the domain name *www.playrio.com* to advertise its services and to enable guests to make online reservations.

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71. *Id.* (emphasis added).

72. *Id*. Although the trustee did not believe that Diaz would be found at his last-known physical address, the court nonetheless ordered supplemental service by mail at Diaz's Singapore address. *Id.* at 716.

73. *See Greebel*, 939 F.Supp. 57 *and Diaz*, 245 B.R. 713.

74. 284 F.3d 1007, 1012–23 (9th Cir. 2002).

75. *Id.* at 1012.

76. Br. of Pl.-Appellee Rio Props., Inc., at 3 (Case Nos. 01-15466 and 01-15784) (on file with author).

77. *Id.* Rio also owned numerous trademarks that protect its exclusive rights to the "RIO" name. *Rio*, 284 F.3d at 1012. In fact, the U.S. Patent and Trademark Office granted Rio various registrations for numerous versions of the term RIO: Reg. No. 1,845,968 (for RIO); Reg. No. 1,845,967 (for RIO (Stylized)); Reg. No. 1,984,925 (for RIO & Design); Reg. No. 2,053,740 (for RIO LAS VEGAS); Reg. No. 2,207,792 (for RIO LAS VEGAS & Design); Reg. No. 1,757,490 (for RIO SUITE HOTEL & CASINO & Design). Br. of Pl.-Appellee Rio Props., Inc., at 4.

Interlink was an Internet gambling operation based in Costa Rica, conducting business as Rio International Sportsbook, Rio Online Sportsbook, and Rio International Sports.[78] Interlink's customers bet on sporting events online or by calling a toll-free telephone number. As part of its publicity campaign, Interlink advertised in the Nevada *Daily Racing Form* and purchased radio time in Las Vegas.[79] Interlink's advertisements also invited prospective customers to log on to their website, *www.betrio.com*, and displayed a "RIO" logo strikingly similar to Rio's own trademark.[80]

On November 24, 1999, Rio sued Interlink in Federal District Court in Nevada to enjoin Interlink's use of the domain name "betrio.com" and the name "RIO."[81] The complaint asserted claims for federal trademark and service trademark infringement, use of false designations of origin, false descriptions and false representations, federal service mark dilution, and state service mark infringement.[82]

Subsequent to filing the complaint, Rio made numerous unsuccessful attempts to serve Interlink.[83] The web page did not contain a street address for Interlink, but directed that payments by personal or cashier's checks be mailed to "Glemo Corporation" at an address in Miami, Florida.[84] Rio originally attempted to serve Interlink through International Express Courier ("IEC"), Interlink's shipping agent in Miami.[85] However, IEC declined service on behalf of Interlink, and refused to disclose either IEC's or Interlink's Costa Rican addresses.[86] Nonetheless, IEC agreed to forward the summons and complaint to Interlink in Costa Rica.[87]

In December 1999, Rio's attorney David Stewart received a call from John Carpenter, a Los Angeles attorney.[88] Carpenter told Stewart that Interlink had retained him in the *Rio v. Interlink* litigation; however, Carpenter refused to accept service of process on behalf of Inter-

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78. *Rio*, 284 F.3d at 1012.

79. *Id.*

80. Pl.'s Mem. of P. & A. in Opp'n to Def.'s Mot. to Dismiss for Lack of Jurisdiction and Insufficiency of Serv. of Process at 3, (Case No. CV-S-99-1653-PMP-RLH) (on file with author). Although Interlink's original website was www.riosports.com, it subsequently terminated its use of this address in response to Rio's demands that it disable the http://www.riosports.com/ offending website. Shortly thereafter, however, Interlink created a second website titled www.betrio.com. The new website offered customers sports gambling services that were identical to those of the prior site.

81. *Rio*, 284 F.3d at 1013.

82. Pl.'s Mem. of P. & A. in Opp'n to Def.'s Mot. to Dismiss for Lack of Jurisdiction and Insufficiency of Serv. of Process at 4.

83. *Rio*, 284 F.3d at 1013.

84. Decl. of Sydney Lamb, Jan. 10, 2000, attachment to Pl.'s Emergency Mot. for Alternate Serv. of Process of the Summons and First Am. Compl. (Case No. CV-S-99-1653-PMP-RLH) (on file with author).

85. *Rio*, 284 F.3d at 1013.

86. *Id.*

87. *Id.*

88. *Id.*

link.[89] Rio's subsequent efforts to obtain a Costa Rican street address for Interlink were unsuccessful.[90] Thereafter, District Court Judge Philip Pro granted Rio's request for a court order directing service on Interlink pursuant to Rule 4(f)(3).[91] The order authorized Rio to deliver the complaint to Interlink by (1) serving Interlink's attorney John Carpenter in Los Angeles, (2) sending U.S. mail to Rio's Miami shipping agent IEC, and (3) sending electronic notice to Interlink at its e-mail address betrio@email.com.[92] Satisfied that Rio had taken these steps, on February 14, 2001, the district court entered a default judgment granting permanent injunctive relief against Interlink.[93]

E. The Ninth Circuit Court Ruling

On appeal, Interlink contested the grant of Rio's motion authorizing Rule 4(f)(3) electronic service on Interlink.[94] The crux of Interlink's argument was twofold. First, Interlink contended that electronic service did not comply with Rule 4(f)'s hierarchy of preferred methods for serving process.[95] Second, Interlink asserted that even if the district court properly applied Rule 4(f)(3), electronic service violated the due process requirements announced by the United States Supreme Court in *Mullane*.[96] These claims did not sway the Ninth Circuit. In its unprecedented ruling, on March 20, 2002, the court upheld electronic service of process on Interlink under Rule 4(f)(3).[97]

In support of its first argument, Interlink asserted that Rio must show prior failed attempts at service through other channels, including letters rogatory[98] and diplomatic methods, before a court may author-

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89. Aff. of David J. Stewart, Jan. 6, 2000, attachment to Pl.'s Emergency Mot. for Alternate Serv. of Process of the Summons and First Am. Compl.

90. *Rio*, 284 F.3d at 1013.

91. FED. R. CIV. P. 4(h)(2) authorizes service on a foreign corporation under the methods set forth in Rule 4(f) for individuals. It states, in pertinent part:

> **Service Upon Corporations and Associations.** Unless otherwise provided by federal law, service upon a domestic or foreign corporation . . . shall be effected . . . (2) in a place not within any judicial district of the United States in any manner prescribed for individuals by (f) . . . .

FED. R. CIV. P. 4(h)(2)

92. Order granting Pl.'s Emergency Mot., January 14, 2000 (on file with author).

93. *See* Br. of Pl.-Appellee Rio Props., Inc., at 14 (The judgment ordered transfer of domain names riosports.com and betrio.com to Rio, broadly enjoined Interlink from passing itself off as Rio, ordered the destruction of all Interlink's advertisements which incorporate the Rio mark, and awarded attorney's fees to Rio.).

94. *Rio*, 284 F.3d at 1014–15.

95. *Id.* at 1014.

96. *Id.* at 1016–17.

97. *Id.* at 1017.

98. A letter rogatory is a formal document generally referred to as a "Request for International Judicial Assistance."

ize service of process under Rule 4(f)(3).[99] Rule 4(f)(3) provides that a foreign defendant may be served (1) pursuant to international treaty, (2) under the receiving country's law or by a foreign authority, or (3) by other court-ordered means not prohibited by foreign treaty.[100] On that issue, the court found that the three subsections of Rule 4(f)(3), each independently separated by the word "or," implied that no provision was favored over, or subsumed by, another.[101] Additionally, case law confirmed the propriety of Rule 4(f)(3) service without prior attempts at service through other means mentioned in (f)(1) and (f)(2).[102] Service under Rule 4(f)(3), the court concluded, was neither extraordinary nor a last resort.[103]

Next, the Ninth Circuit considered Interlink's second argument. The court began its constitutional analysis by applying the *Mullane* test in a familiar legal context: Interlink's receipt of notice via traditional methods.[104] First, the court examined the efficacy of service on Interlink through IEC, Interlink's forwarding agent in Miami.[105] Interlink had established three connections to IEC: (1) when registering its domain name, Interlink had listed IEC's address as its own; (2) Interlink had directed customers to submit payments to Interlink at the IEC address; and (3) the facts confirmed that Interlink had received the original summons and complaint previously served on IEC.[106] On this showing, the court readily concluded that Interlink's heavy reliance on IEC for conducting business demonstrated IEC's effectiveness in forwarding information to Interlink in Costa Rica.[107] Accordingly, service on Interlink through IEC was reasonably calculated to give Interlink notice of the proceedings.[108]

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99. In support of its argument, Interlink relied on the district court holding in *Graval v. P.T. Bakrie & Bros.*, 986 F.Supp. 1326 (C.D. Cal. 1996). There, the court found that Rule 4(f)(3) should only be employed as a last resort after the plaintiff utilized "more appropriate" methods for serving process under foreign law or a prescribed foreign authority. *Id.* at 1330. The *Graval* court, however, erroneously interpreted Rule 4(f)(3). In fact, the "more appropriate methods" requirement was applicable solely to Rule 4(f)(2), and thus the Ninth Circuit held that it in no way limited a district court's authority to issue a Rule 4(f)(3) order. *Rio*, 284 F.3d at 1015.

100. FED. R. CIV. P. 4(f).

101. *Rio*, 284 F.3d at 1015, stating that the language of subsections 4(f)(1) and (f)(2) did not indicate any primacy over (f)(3). Further, the court noted, the language of 4(f)(3) lacked qualifiers or limitations, and thus stood on equal footing with the other subsections.

102. *Rio*, 284 F.3d at 1015 (citing Forum Fin. Group v. President & Fellows, 199 F.R.D. 22, 23–24 (D. Me. 2001) (finding that Rule 4(f)(3) requires only that service not be barred by international agreement)).

103. *Id*. (noting that Rule 4(f)(3) court-directed service is as favored as service under 4(f)(1) or (2)).

104. *Id*. at 1016–17.

105. *Id.* at 1017.

106. *Id.*

107. *Id.*

108. *Id.*

Next, the court considered whether service of process on John Carpenter, Interlink's Los Angeles attorney, had been proper. Not only had Interlink consulted Carpenter about the lawsuit, but communications between Carpenter and Interlink in Costa Rica were ongoing.[109] Those contacts, the court reasoned, clearly established that service on Carpenter was reasonably calculated to notify Interlink of the lawsuit.[110]

Having found that service of process on Interlink through conventional methods satisfied due process, the court considered the more novel question of whether service of process on Interlink via its e-mail address established constitutionally adequate notice. The Ninth Circuit prefaced its discussion by acknowledging that court-ordered e-mail service of process was unprecedented in United States courts of appeals decisions.[111] Despite "tread[ing] upon untrodden ground," however, the court was undeterred.

Regarding the constitutional issue, the court noted that *Mullane* did not encumber due process with the requirement of service of process by any particular method.[112] Rather, the Ninth Circuit pointed out that under *Mullane*, notice must be reasonably calculated to reach the defendant, and nothing more.[113] The *Mullane* standard, the court explained, is sufficiently flexible to encompass the use of contemporary communication methods in serving notice.[114] In fact, the Ninth Circuit noted that:

> In proper circumstances, this broad constitutional principle unshackles the federal courts from anachronistic methods of service and permits them entry into the technological renaissance. . . . *Indeed, when faced with an international e-business scofflaw, playing hide-and-seek with the federal court, email may be the only means of effecting service of process*.[115]

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109. *Id.*

110. *Id.*

111. *See id*.

112. *Id.* (citing *Mullane,* 339 U.S. at 314 (noting that "the Constitution does not require any particular means of service of process, only that the methods selected be reasonably calculated to provide notice and an opportunity to respond")).

113. *See id*.

114. *Id.*

115. *Id.* (emphasis added) (citing New Eng. Merchs. Nat'l Bank v. Iran Power Generation & Transmission Co., 495 F. Supp. 73 (S.D.N.Y. 1980)). In *New England Merchants*, the district court authorized service on defendants in Iran by telex, stating that:

> Courts . . . cannot be blind to changes and advances in technology. . . . Electronic communication via satellite can and does provide instantaneous transmission of notice and information. No longer must process be mailed to a defendant's door when he can receive com-

Next, the *Rio* court turned its attention to Interlink's whereabouts. Interlink had no easily discoverable physical address in the United States or Costa Rica, but it had reaped large profits from conducting business through its active electronic address.[116] Indeed, Interlink not only preferred using electronic communication, but in fact could be contacted *only* through the Internet.[117] These facts, the court concluded, rendered e-mail superior to other potential methods for serving notice on Interlink:

> If any method of communication is reasonably calculated to provide [Interlink] with notice, surely it is email — the method of communication which [Interlink] utilizes and prefers. In addition, email was the only court-ordered method of service aimed directly and instantly at [Interlink], as opposed to methods of service effected through intermediaries like IEC and Carpenter.[118]

E-mail was not only a proven method of communication, but it also was fast, efficient, and did not necessitate third-party intervention in dispatching notice to Interlink.[119] In these circumstances, the court concluded, serving Interlink by e-mail clearly complied with the reasonableness standard of *Mullane*.[120]

Despite e-mail's benefits in the *Rio* context, the Ninth Circuit was cognizant of e-mail's limitations.[121] Specifically, the court listed the manner in which imperfect technology may hamper the adequacy of electronic notice.[122] First, in some cases receipt of e-mail messages may not be reliably confirmed. Second, problems may exist in verifying electronic signatures. Third, imprecise imaging technology and incompatibility of computer systems may hinder successful transmittal of attachments.[123] Interlink's notification of the lawsuit, however,

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> plete notice at an electronic terminal inside his very office, even when the door is steel and bolted shut.

New England Merchants, 495 F. Supp. at 81.

116. *Rio*, 284 F.3d at 1017–18.

117. The court noted that Interlink listed its e-mail address on its web page and in print media as its preferred — and indeed its sole — method of contact. *See id.* at 1018.

118. *Id*.

119. *See id*. at 1017.

120. *Id.* at 1016.

121. The court stated: "[W]e leave it to the discretion of the district court to balance the limitations of e-mail service against its benefits in any particular case. In our case, the district court performed the balancing test admirably, crafting methods of service reasonably calculated under the circumstances to apprise [Interlink] of the pendency of the action." *Id.* at 1018–19 (citations omitted).

122. *See id.* at 1018.

123. *See id.*

was not thwarted by any imperfection in the transmission of notice.[124] In fact, the court noted, Interlink never argued that notice of the action was delayed, incomplete, or delivered in a manner prejudicial to Interlink's filing of an effective and timely response.[125]

Clearly, the ruling of the Ninth Circuit in *Rio* is a judicial imprimatur for the notion that, in a modern world, the legal infrastructure for serving process requires flexible application constrained by reasonableness. Specifically, *Rio* paves the way for future court authorization of e-mail service of process when attempts at serving a defendant by traditional means are unduly burdensome or likely futile, and where e-mail is a defendant's sole or preferred method of communication.[126] *Rio*, however, leaves important issues unresolved. First, the *Rio* court did not specify whether its decision included consideration of supplementary methods for giving Interlink notice of the proceedings.[127] Second, even if the Ninth Circuit's decision is widely followed by other United States courts, its interplay with the legal norms of foreign countries has not been tested.

III. *RIO* KEEPS ROLLIN' ALONG: POST-*RIO* JUDICIAL AUTHORIZATION OF E-MAIL SERVICE OF PROCESS

Since the Ninth Circuit issued its *Rio* ruling on March 20, 2002, two judicial opinions have authorized service of process on a foreign defendant through e-mail.[128] These rulings further develop the emerging legal precedent that when traditional forms of service are unsuccessful, serving process of a summons and complaint through e-mail on evasive defendants through their preferred methods of communication meets the statutory and constitutional requirements for legally adequate notice.[129] More importantly, they are a meaningful harbinger of future judicial findings that e-mail service of process of initial pleadings is an acceptable and desirable method for notifying a defendant of a legal action.

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124. *See id.*

125. *See id.* at 1019 n.8.

126. *See id*. at 1018; Ryan v. Brunswick Corp., No. 02-CV-0133E(F), 2002 WL 1628933 (W.D.N.Y. May 31, 2002) at *2 (finding service by regular mail, fax, and/or e-mail constitutionally permissible when defendant maintains website directing parties to communicate with it by regular mail, phone, fax, and e-mail).

127. Again, along with electronic notice, Rio used a process server to attempt to serve Interlink through Interlink's attorney and through its international carrier. *See Rio*, 284 F.3d at 1013. The *Rio* court did not specify whether it included those forms of notice in judging the adequacy of e-mail service of process. Rather, it generally stated that it would "leave it to the discretion of the district court to balance the limitations of e-mail service against its benefits in any particular case." *Id.* at 1018.

128. *Ryan*, 2002 WL 1628933; Hollow v. Hollow, 747 N.Y.S.2d 704 (N.Y. Sup. Ct. 2002).

129. *Id.*

A. Ryan v. Brunswick

On May 31, 2002, the United States District Court for the Western District of New York issued a Memorandum and Order marking the first post-*Rio* authorization of e-mail service of process.[130] In *Ryan v. Brunswick*, Susan Ryan filed a personal injury action against the Brunswick Corporation on behalf of her minor son.[131] The lawsuit sought damages for injuries caused by an allegedly defective bicycle component manufactured by Brunswick, a Taiwanese corporation.[132]

Unable to serve Brunswick by traditional means, Ryan requested a district court order declaring that jurisdiction over Brunswick could not be obtained.[133] The court, however, denied Ryan's request and *sua sponte* applied FRCP 4(f)(3) to authorize electronic service on Brunswick.[134] Regarding the application of Rule 4(f)(3) to serve an elusive foreign defendant, the *Ryan* court cited *Rio*, noting that Rule 4(f)(3) service is neither extraordinary relief nor a last resort.[135]

Next, the court turned to Brunswick's chosen methods of communication. Brunswick received e-mail at its website www.ballisticfork.com, maintained telephone and fax numbers in Taiwan, and accepted mail at a Taiwanese address.[136] Like the Ninth Circuit in *Rio*, the *Ryan* court determined that notice through e-mail, one of Brunswick's preferred methods of communication, complied with *Mullane*'s standard of reasonableness.[137] The *Ryan* court noted that the *Mullane* standard "unshackles the federal courts from anachronistic methods of service and permits them entry into the technological renaissance."[138] This flexibility, the *Ryan* court reasoned, permits a court to sculpt the method for serving process to the particu-

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130. *Ryan*, 2002 WL 1628933. The district court authorized service on Brunswick through e-mail, fax, and/or regular mail. *Id.* at *2.

131. *Id.*

132. *Id.* Taiwan is not a member of the Hague Convention or any other pertinent international agreement governing service of process. *Id.* at *1.

133. In order to avoid limitations on defendants' joint liability, Ryan requested an order pursuant to N.Y. C.P.L.R. 1602(10) (McKinney 2003), which states that if a plaintiff shows that she is unable to obtain jurisdiction over a defendant, N.Y. C.P.L.R. 1602(1) (limiting proportionate liability of tortfeasors in personal injury actions) shall not apply. *Ryan* at *1, n.3.

134. *Ryan* at *2.

135. *Id*. The court stated that "service of process ordered under Rule 4(f)(3) may be accomplished in contravention of the laws of the foreign country. Moreover, subsection (f)(3) is an independent basis for service of process and is neither 'extraordinary relief' nor a 'last resort' to be used only when parties are unable to effectuate service under subsections (f)(1) or (f)(2). Courts have relied on [Rule] 4(f)(3) (and its predecessor [Rule] 4(i)(1)(E)) in authorizing alternative methods of service including, *inter alia*, service by fax, e-mail, ordinary mail and publication." *Id.* (citations and quotation omitted).

136. *Id.*

137. *Id.*

138. *Id.* (quoting *Rio*, 284 F.3d at 1017).

lar circumstances of the case.[139] The court concluded that service via e-mail, a method preferred by the defendant, complied with constitutional due process requirements.[140]

B. Hollow v. Hollow

The New York Supreme Court's opinion in *Hollow v. Hollow* marked the second judicial adoption of *Rio's* analysis and conclusion regarding e-mail notice.[141] Janice Hollow, a New York resident, filed a divorce action against her husband, a resident of Saudi Arabia.[142] After his relocation to Saudi Arabia, Michael Hollow communicated with his wife solely through e-mail.[143] In fact, Mr. Hollow boasted that his new residence enabled him to evade service of process, stating in an e-mail message to his wife that "I am a resident of Saudi Arabia and there's nothing anyone can do to me here."[144]

Thereafter, Mrs. Hollow's numerous attempts to serve her husband with a summons and complaint failed.[145] First, she employed Interserve, an international process server, to effect service. Interserve apprised Mrs. Hollow that the Kingdom of Saudi Arabia permitted service of process only through letters rogatory, a slow process requiring government intervention and taking up to one-and-a-half years to complete.[146] Mrs. Hollow also alleged that service on Mr. Hollow was complicated by his working within a company-owned compound, which rendered him inaccessible to process servers, as they would be subject to criminal charges if they attempted to serve security guards at the compound.[147]

Subsequently, Mrs. Hollow petitioned the court for an order authorizing electronic service of process pursuant to New York Civil Practice Law and Rules Section 308(5).[148] Like FRCP 4(f)(3), N.Y. C.P.L.R. 308(5) provides the court flexibility to authorize a method of service appropriate to the particular circumstances of the case.[149]

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139. *See id*.

140. *Id.* The Order noted "[i]nasmuch as [Brunswick] conducts its business through [regular mail, fax, and/or e-mail], such are reasonably calculated to apprize [Brunswick] of the pendency of this action and afford it an opportunity to respond." *Id.*

141. Hollow v. Hollow, 747 N.Y.S.2d 704 (N.Y. Sup. Ct. 2002).

142. *Id.* at 705.

143. *Id.*

144. *Id.*

145. *Id*.

146. *Id.*

147. *Id*. Mr. Hollow's employer, Parson's Engineering, also refused to allow its legal counsel to accept service on behalf of Mr. Hollow. *Id.*

148. N.Y. C.P.L.R. 308(5) (McKinney 2003).

149. N.Y. C.P.L.R. 308(5) states: "Personal service upon a natural person shall be made by any one of the following methods . . . [or] in such manner as the court, upon motion, without notice, directs, if service is impracticable under paragraphs one, two or four of this section." *Id.* Unlike FRCP 4, a party must establish prior unsuccessful attempts at service

As in *Ryan*, the *Hollow* court's expansive view of the legal adequacy of e-mail notice relied on two premises. First, *Mullane*'s flexible standard and Rule 4(f)(3) do not require service through any particular method, as long as the method chosen is reasonably calculated to reach the defendant.[150] Second, Mr. Hollow not only preferred e-mail, but had "secreted himself behind a steel door, bolted shut, communicating with the plaintiff and his children exclusively through e-mail."[151] The court noted that e-mail is widely used to communicate in our "increasingly global society," and that courts need not ignore society's embracement of technological advancement.[152] Because Mr. Hollow preferred to utilize e-mail communication, the court noted, e-mail service of the summons and complaint was particularly appropriate in *Hollow*.[153] Concluding that e-mail service on Mr. Hollow complied with New York due process standards, the *Hollow* court authorized service on Mr. Hollow at his last known e-mail address, through international registered air mail, and through international standard air mail.[154]

The *Ryan* and *Hollow* opinions represent the first judicial constructions of the Ninth Circuit's ruling in *Rio*. Like the *Rio* panel, the *Ryan* and *Hollow* courts found that under certain circumstances, e-mail service meets statutory and constitutional due process requirements for notifying foreign defendants of pending legal proceedings.[155] The *Ryan* and *Hollow* courts additionally followed *Rio*'s lead in finding that electronic service was appropriate when traditional methods had proved, or were likely to prove, unsuccessful.[156] Lastly, the *Rio*, *Ryan*, and *Hollow* decisions similarly found that a defendant who has established a pattern of communicating electronically, and in some cases has expressed a preference for such a method of communication, could reasonably be found to have received notice through that same method.[157]

In adopting *Rio*, the *Ryan* and *Hollow* courts displayed a willingness to employ the flexibility inherent in the *Mullane* due process and

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through prescribed methods in order to invoke New York Rule 308(5). *See Hollow,* 747 N.Y.S.2d at 706.

150. *Hollow*, 747 N.Y.S.2d at 708.

151. *Id.*

152. *Id.* at 708 n.3 (quoting Broadfoot v. Diaz (In re: Int'l Telemedia Assocs., Inc.), 245 B.R. 713, 717 (Bankr. N.D. Ga. 2000)).

153. *Id.*

154. *Id*.

155. *See Rio*, 284 F.3d at 1016–19; *Ryan*, 2002 WL 1628933, at *2; *Hollow*, 747 N.Y.S.2d at 707–08.

156. *See Rio*, 284 F.3d at 1016 (stating that the plaintiff need not attempt "every permissible means of service" before seeking court-ordered alternative service under Rule 4(f)(3)); *Ryan*, 2002 WL 1628933, at *2 ("[A] party need not exhaust all possible methods of service."); *Hollow*, 747 N.Y.S.2d at 708.

157. *See Rio*, 284 F.3d at 1017–18; *Ryan*, 2002 WL 1628933, at *2; *Hollow*, 747 N.Y.2d. at 708.

statutory standards to authorize service of summons and complaint on defendants. More importantly, those opinions reinforce the judicial trend towards a modern procedural paradigm responsive to the problems posed by defendants who play transnational electronic hide-and-seek during international litigation.[158]

IV. *RIO*'S MUDDY WATERS

Electronic service of process is a recent innovation in civil procedure holding tremendous potential for furthering the goals of facilitating and simplifying service of process on foreign defendants.[159] In *Rio*, the Ninth Circuit recognized this potential, demonstrating that Rule 4(f)(3)'s plain language permitting service of process abroad is constrained only by applicable international treaties and judicial discretion.[160] The Ninth Circuit additionally confirmed that, together, Rule 4(f)(3) and the *Mullane* due process standard provide a flexible, resilient statutory and constitutional framework for effecting legally adequate notice in a modern world.[161] The *Rio* decision, however, left important issues unresolved.

A. Are Complementary Methods of Service Required When Serving Process Electronically?

Notwithstanding *Rio*'s groundbreaking decision, the opinion's precedential value is constrained by its ambiguous legal analysis. Specifically, the Ninth Circuit did not disclose whether the availability of traditional methods of service supplementing e-mail notice influenced its finding that electronic notice met the constitutional standard enunciated in *Mullane*.[162] Instead, the *Rio* court left the balancing of e-mail's limitations and benefits to the discretion of district courts in light of the specific circumstances of the case.[163]

Although the Ninth Circuit failed to specify whether complementary forms of notice should be considered when applying the reasonableness test, *Mullane* certainly does not require such procedural reinforcements when specific factors are present.[164] In *Mullane*, the

158. *See Rio*, 284 F.3d at 1018 ("Indeed, when faced with an international e-business scofflaw, playing hide-and-seek with the federal court, e-mail may be the only means of effecting service of process.").

159. *See generally* Konstantinos D. Kerameus, *Procedural Unification: The Need and the Limitations, in* INTERNATIONAL PERSPECTIVES ON CIVIL JUSTICE 47 (I.R. Scott ed., 1990).

160. *See Rio*, 284 F.3d at 1014–15.

161. *See id*. at 1017.

162. *See supra* note 127.

163. *Id.* at 1018.

164. *Mullane*, 339 U.S. at 313 (stating that "[The Due Process Clause] require[s] . . . notice and opportunity for hearing appropriate to the nature of the case."); *see also* United States v. Raddatz, 447 U.S. 667, 675 (1980); Joint Anti-Fascist Refugee Comm. v.

Supreme Court did not specify the methods of service that should be employed in effecting notice.[165] Instead, the focus in *Mullane* was on whether a method of service was reasonably chosen to fit the specific circumstances of a case.[166] Indeed, the Supreme Court has noted that due process does not require perfection.[167] Rather, the Court in *Mullane* specified that due process is satisfied when efforts at giving notice provide fundamental fairness by exhibiting a *reasonable* probability of actual notice.[168]

In cases where traditional methods of service have been unsuccessful or are otherwise impracticable and an evasive defendant has shown a preference for communicating electronically, service solely via e-mail clearly meets the *Mullane* standard of reasonableness as it is the most likely method of giving the defendant notice of the proceedings. This argument is particularly compelling in cases where the defendant may be contacted *only* through electronic methods. In those circumstances, *Mullane*'s rigorous but flexible standard clearly allows the use of e-mail as the sole method for serving process. As the number of people who utilize e-mail as their principal means of communication increases, e-mail's reliability in delivering notice of legal proceedings will become patently clear. In time, this realization should pave the way for broad judicial recognition that in certain circumstances, serving process *solely* via e-mail easily satisfies the constitutional due process requirements established by *Mullane*.[169]

B. Beyond Our Shores: Enforcing a Judgment When Service of Process Has Contravened Foreign Law

Another limitation of the *Rio* decision lies in its failure to address the problems inherent in enforcing a judgment based on service of process through a method not compliant with the enforcing country's laws. This issue has become increasingly important as the number of international lawsuits continues to rise. If a United States judgment requires enforcement in a foreign country, the service of process on which the judgment is based must have complied with the internal

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McGrath, 341 U.S. 123, 162–63, (holding "'due process', unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances"; rather, it is "a delicate process of adjustment inescapably involving the exercise of judgment."); Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (finding that the flexibility of due process lies in its scope, and that different procedural safeguards may require different mechanisms).

165. *Mullane*, 339 U.S. at 314, 319.

166. *Id*. at 315, 318.

167. *See* Mackey v. Montrym, 443 U.S. 1, 13 (1979) (stating that "[t]he Due Process Clause has never been construed to require that the procedures used to guard against an erroneous deprivation of a protectible 'property' or 'liberty' interest be so comprehensive as to preclude any possibility of error").

168. *See Mullane*, 339 U.S. at 317–18.

169. *See* discussion *supra* Section II-B.

laws of the enforcing country.[170] Despite this well-established precept, Rule 4(f)(3) does not expressly forbid service abroad in violation of the receiving country's laws.[171] This lack of proscription is not a result of Congressional oversight. Rather, the framers believed that the likely unenforceability of a judgment obtained through non-conforming service would deter litigants from effecting such service, and encourage them to select a method of service that was least objectionable in the foreign country.[172]

Rule 4(f)(3) affords a court substantial discretion in choosing a method for giving notice; however, such service may render a subsequent judgment unenforceable in the country where non-compliant service was effected.[173] In light of the potential pitfalls created by Rule 4(f)(3)'s statutory scheme, its language must be considered in concert with the procedural mechanisms of the Hague Convention and foreign law in assessing the utility of serving process through e-mail.[174]

1. Serving Process Under International Law

Compliance with the Hague Convention is of paramount importance to ensure subsequent recognition of a judgment in a Hague signatory country.[175] An advantage to serving process under the Hague Convention is that each country's Central Authority has agreed to carry out the tasks involved in actually serving the papers.[176] The Central Authority accepts "letters of request" for service of process

170. *See* RISTAU, *supra* note 14, § 3-1-8.

171. Rule 4(f)(3) was amended in 1993 to proscribe service "prohibited by international agreement." FED. R. CIV. P. 4(f)(3) advisory committee's notes. Neither the language of Rule 4(f)(3) nor the advisory committee's notes forbid a district court order directing service abroad in violation of foreign law. *Id.*; *see also* Mayoral-Amy v. BHI Corp., 180 F.R.D. 456, 459 (S.D. Fla. 1998) (holding that Rule 4(f)(3) authorized serving process on Belizean citizens by fax in contravention of Belizean law, as long as the order did not contradict any applicable international agreement).

172. 12A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, advisory committee notes 107 (2003).

173. With few exceptions, foreign countries will not recognize judgments obtained pursuant to service effected in contravention of their laws. *See* Arthur R. Miller, *International Cooperation in Litigation Between the United States and Switzerland: Unilateral Procedural Accommodation in a Test Tube*, 49 MINN. L. REV. 1069, 1086 (1965); *see also* FED. R. CIV. P. 4(i) advisory committee's notes ("The enforcement of a judgment in the foreign country in which the service was made may be embarrassed or prevented if the service did not comport with the law of that country."); SYMEON C. SYMEONIDES ET AL., CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL, 867–68 (1998) (comparing principles governing recognition of judgments in foreign countries).

174. *See* Gary N. Horlick, *A Practical Guide to United States Service of Process Abroad*, 14 INT'L. LAW. 637, 638 (1980).

175. The United States Supreme Court has held that "compliance with the Convention is mandatory in all cases to which it applies." Volkswagenwerk AG v. Schlunk, 486 U.S. 694, 705 (1988).

176. *See* Horlick, *supra* note 174, at 647.

from the issuing country, arranges for service on a party under the internal law of the receiving country, and returns proof of service to the party in the forum country.[177] In addition to the Central Authority, the Hague Convention provides other methods of serving process in signatory countries. Unless a member nation has specifically opposed a particular method of service,[178] the Hague Convention also permits service through a country's diplomatic or consular agent, by a judicial officer or other competent person, pursuant to the internal law of the receiving country[179], and by "postal channels."[180] Despite the varying choices for serving process under the Hague Convention, the Central Authority of each member nation is the gateway for serving process under the Convention in that it delineates a clear first step towards effecting service in a manner authorized by the enforcing country.[181] However, since process must still comport with the internal laws of the enforcing country, the availability of service by e-mail will be determined on a country-by-country basis, even amongst Hague Convention signatories. Currently, only the internal laws of United States

177. Article 2 of the Hague Convention directs signatory countries to designate a Central Authority which accepts service requests from other signatory countries. *Hague Convention*, *supra* note 17. Article 3 requires that the documents be accompanied by a formal request form sent in duplicate to the Central Authority of the receiving nation. If the documents contain no errors, service will be attempted under the receiving nation's internal laws pursuant to Articles 4 and 5. Article 5 authorizes signatory countries to require translation of the documents into their native tongue. If service is successful, Article 6 of the Hague Convention requires the Central Authority to complete an official form certifying the time, place, and method of service, and the name of the person receiving the documents. Article 7 requires that the documents must be written in French, English, or the official language of the receiving nation. *Id.*

178. *See id.*, Articles 8–10, 19, 21. Numerous countries have stated objections to various methods of service. For example, on October 1, 1969, Sweden included the following declaration upon signing the Hague Convention: "Swedish authorities are not obliged to assist in serving documents transmitted by using any of the methods referred to in sub-paragraphs (b) and (c) of Art. 10." Entraide Judiciaire Et Extradition, *available at* http://www.etat.lu/LEGILUX/DOCUMENTS_PDF/LOIS_SPECIALES/ENTRAIDE_JUD.pdf (last visited Nov. 3, 2003). Similarly, Japan did not object to service by mail, but nonetheless declared that "no objection to the use of postal channels for sending judicial documents to persons in Japan does not necessarily imply that the sending by such method is considered valid service in Japan; it merely indicates that Japan does not consider it as infringement of its sovereign power." Statement by Japanese Delegation to Hague Conference on Private International Law, 28 I.L.M. 1556, 1561 (1989).

179. *See* DeJames v. Magnificence Carriers, Inc., 654 F.2d 280, 288 (3d Cir. 1981) ("[T]he purpose and nature of the [Hague Convention] demonstrates that it does not provide independent authorization for service of process in a foreign country. The treaty merely provides a mechanism by which a plaintiff authorized to serve process under the laws of its country can effect service.").

180. Article 10(a) states: "Provided the State of destination does not object, the present Convention shall not interfere with - (a) the freedom to send judicial documents, by postal channels, directly to persons abroad." *Hague Convention*, *supra* note 17, at 363.

181. The certificate of service issued under Article 6 subsequent to service through the Central Authority is considered strong evidence that the foreign defendant received actual notice of the suit. *See* Peter S. Selvin, *Personal Jurisdiction Over Non-U.S. Defendants — Recent Developments*, 670 PLI/LIT 11 (2002).

and United Kingdom have recognized e-mail service of process as an acceptable method of giving a defendant notice of legal proceedings.

On April 11, 1996, a British court authorized electronic service of process of an order of injunction against a defendant who could only be reached by e-mail.[182] The case involved an action for injunctive relief against an anonymous defendant who threatened to disseminate defamatory material on the Internet about a "media personality" plaintiff.[183] Although the defendant's whereabouts were unknown, the defendant had previously provided the plaintiff with his two e-mail addresses.[184] Finding that service through traditional methods was impossible, the Royal Court of Justice, Queen's Bench Division, in London granted the plaintiff's request for substituted service through e-mail.[185]

Contrary to the American and British movements towards accepting service of process by e-mail, other countries' internal laws staunchly resist this modern method of communication. Indeed, in some countries, service of process in violation of their internal laws is regarded as a sanctionable act that transgresses national sovereignty.[186] For example, the Federal Trade Commission's attempt to serve a subpoena in France without complying with French law was countered by a diplomatic response reflective of that country's protectionist attitude regarding service of process within its territory.[187] In that instance, a French diplomatic note protesting United States service of process effected without the aid of French government authorities contained the following rebuke:

> The Embassy of France informs the Department of State that the transmittal by the FTC of a subpoena

182. *See* Paul Lambeth & Jonathan Coad, *Serving the Internet: Nowhere to Hide in Cyberspace*, 1 No. 6 CYBERSPACE LAW. 6, 6–7 (1996); *see also* Yvonne A. Tamayo, *Are You Being Served?: E-Mail and (Due) Service of Process*, 51 S.C. L. REV. 227, 244–46 (2000).

183. *See* Tamayo, *supra* note 182, at 244–46.

184. *Id.*

185. *Id.*

186. *See* 4B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1133, at 304–05 (3d ed. 2002); *Instructions of Administrative Office of U.S. Courts Concerning Mail Service Abroad,* Memorandum to all United States District Court Clerks (November 6, 1980) *reprinted in* RISTAU, *supra* note 14, § 3-1-9 ("When summonses and complaints are mailed abroad in accordance with rule 4(i)(1)(D), this method of service, according to some foreign states, violates either the judicial sovereignty of those foreign states or international law.") (e.g., Austria, France, Italy, Germany, Japan, Switzerland, Yugoslavia); *see also* FTC v. Compagnie De Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1306 n.18 (D.C. Cir. 1980) (citing French diplomatic protest); Curtis T. Ettinger, *Service of Process in Austria*, 9 INT'L LAW. 693, 694 (1975); Peter Heidenberg, *Service of Process and the Gathering of Information Relative to a Law Suit Brought in West Germany,* 9 INT'L LAW. 725, 728–29 (1975); Riccardo Gori-Montanelli & David A. Botwinik, *International Judicial Assistance — Italy*, 9 INT'L LAW. 717, 718 (1975).

187. FTC v. Compagnie De Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300 (D.C. Cir. 1980).

> directly by mail to a French company (Saint-Gobain Pont-a-Mousson) is inconsistent with the general principles of international law and constitutes a failure to recognize French soverignty [sic].
>
> Furthermore, the response to certain of the requests from the FTC could subject the directors of Saint-Gobain Pont-a-Mousson to civil and criminal liability and therefore expose them to judicial proceedings in France.
>
> Consequently, the Embassy of France would be grateful if the Department of State would make this position known to the various American authorities concerned by informing them that the French Government wishes such steps both in this matter and in any others which may subsequently arise, to be taken solely through diplomatic channels.[188]

Similarly, Switzerland's public policy requires deep governmental involvement with service of process on a party residing within its territory.[189] Switzerland's extreme view of sovereignty is borne out by the secrecy and protection which it affords the assets maintained in the country by residents and foreigners alike.[190] As a result, the Swiss government routinely investigates the nature of all documents to be served within its borders, and rejects service of any legal actions to which it objects.[191] Presently, Switzerland considers service of process by any means other than by letter rogatory through Swiss governmental personnel a criminal act.[192] Not only is service through letter rogatory difficult and expensive, its availability may be affected by Swiss public policy at the time the service is attempted.[193]

Clearly, despite membership in the Hague Convention, signatory countries retain formalistic laws not readily susceptible to changes embracing modern electronic advancements in communication. None-

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188. *Id.* at 1306 n.18 (quoting Note to the U.S. State Department from the French Embassy Regarding the FTC Investigation of SGPM, 10 January 1980 (translated by Department of State Division of Language Services)).

189. Ronan E. Degnan & Mary Kay Kane, *The Exercise of Jurisdiction Over and Enforcement of Judgments Against Alien Defendants*, 39 HASTINGS L.J. 799, 836 (1988).

190. *See* Miller, *supra* note 173, at 1074.

191. *See id.* at 1076.

192. *See* Horlick, *supra* note 174, at 641; *see also* Code Penal [CP] art. 271(1) (Switz.) ("Whoever, without authorization, executes acts on Swiss territory which are attributed to an administrative or government authority, on behalf of a foreign state, and whoever executes such acts on behalf of a foreign state, and whoever executes such acts on behalf of a foreign person or another foreign organization, and whoever encourages or otherwise participates in such acts, will be punished with prison, and in severe cases with penitentiary.").

193. *See* Horlick at 641–42.

theless, the question arises — to what extent, if any, would a broader interpretation of the Hague Convention's language facilitate e-mail's foray into the field of internationally accepted methods for serving process?[194]

2. Interpreting the Hague Convention in a Modern Context

The Hague Convention does not expressly authorize e-mail service of process; however, the issue has been quietly moving to the forefront in discussions among member nations.[195] In 1999, the Permanent Bureau of the Hague Convention organized a roundtable discussion attended by member representatives of the Hague Conference on Private International Law.[196] The roundtable consisted of various Commissions that examined problems raised by the use of electronic commerce and the Internet in private international law.[197] Specifically, Commission V ("the Commission") considered e-mail's integration into the existing procedural framework for serving process.[198]

Generally, the Commission enthusiastically acknowledged the advent of e-mail and its usefulness in facilitating service of process under the Hague Convention, and welcomed any development that reduces delays in communication among member nations.[199] Indeed, it noted that transmitting documents by electronic means would further the objectives of the Hague Convention by "significantly enhanc[ing] the usefulness and effectiveness of the Convention."[200] On this issue, the Commission stated:

> [T]he use of means of communication as rapid and simple as electronic mail reflects two fundamental aims of the Convention, which are to bring the document in question to the actual knowledge of the addressee in due time to enable the defendant to pre-

194. The notion of "comity" may also be considered in overcoming countries' resistance to judicial acts occurring outside of their territories. Although outside the scope of this Article, for insightful discussions on the comity doctrine, see generally Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1 (1991); Hessel E. Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 1 (1967).

195. *Hague Convention*, *supra* note 17; *see also* Charles T. Kotuby, Jr., Note, *International Anonymity: The Hague Conventions on Service and Evidence and their Applicability to Internet-Related Litigation*, 20 J.L. & COM. 103, 111 (2000) ("As the Hague Service Convention was adopted over thirty-five years ago, none of the specified methods of transmission refers expressly to the use of electronic media, such as e-mail, the Internet, or fax machines.").

196. Catherine Kessedjian, Preliminary Document No. 7 on Electronic Data Interchange, Internet and Electronic Commerce, *at* ftp://hcch.net/doc/gen-pd7e.doc (April 2000).

197. *Id.*

198. *Id.* at 25–30.

199. *Id.* at 25–28.

200. *Id.* at 28.

> pare a defense and to simplify the method of transmission of these documents from the requesting country to the country addressed.[201]

Specifically, the Commission considered whether the existing methods of transmission for serving process under the Hague Convention should be amended to include electronic communication.[202] The Commission enumerated e-mail's potential benefits and stated its view that, due to the Convention's neutral language regarding communication methods, assimilating the use of electronic transmissions into the Convention's clauses posed few problems.[203] In examining this issue, the Commission considered the breadth of the term "address" in Article 1, which provides that the Convention does not apply "where the address of the person to be served with the document is not known."[204] The Commission found that in principle, the term "address" should be broadly interpreted to include a recipient's electronic address.[205] It did not, however, proceed to examine the possible ramifications of this finding.

At the same time, the Commission addressed the use of e-mail to transmit legal documents for serving process through a foreign country's Central Authority.[206] A Central Authority carries out the tasks involved in actually serving the legal papers to a defendant.[207] The Commission noted that a Central Authority may take months, in some cases years, to return the certificate of completion of service.[208] Clearly, transmission of documents electronically to the Central Authority would significantly enhance the goals of the Convention by reducing delays in transferring legal documents from the issuing court to the receiving country.[209] The Commission recommended the use of electronic transmissions for communicating with a Central Authority, provided that e-mail meets certain requirements.[210] First, e-mail must guarantee the message's confidentiality, integrity, and inalterability.[211] Second, the electronic transmission must provide a method for ascer-

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201. *Id.* at 27–28 (quotations omitted).
202. *Id.* at 26.
203. *Id.* at 27.
204. *Id.* at 26 (quoting *Hague Convention*, *supra* note 17).
205. *Id*. The Commission stated:

> If the intention is to permit the use of electronic means in the framework of the Convention, it is difficult to see how the term 'address' could fail to include an electronic address. Consequently, if only the electronic address of the recipient is known, the Convention may in principle apply.

Id.
206. *Id.* at 27.
207. *See* discussion *supra* Part IV.B.i.
208. Kessedjian, *supra* note 196, at 28.
209. *Id.*
210. *Id.* at 27.
211. *Id.*

taining the true identity of the sender.[212] Finally, the electronic service must be operational at all times.[213]

The Commission next considered Article 10(a) of the Hague Convention, which permits parties to "send judicial documents by postal channels directly to persons abroad."[214] Article 10(a)'s neutral terms "send" and "postal channels," the Commission decided, were adaptable to reflect technological progress.[215] Nonetheless, it expressed concern over some countries' refusal to recognize initial service of process by mail under Article 10(a).[216]

The controversy surrounding the scope of Article 10(a)'s language involves the issue of whether "send[ing] judicial documents" includes serving process of initial legal documents in member nations.[217] One line of cases has found that Article 10(a) authorizes sending documents only subsequent to initial service of process through a Central Authority.[218] Other courts have interpreted the language of Article 10(a) more broadly, holding that the article also permits sending initial pleadings directly to a foreign defendant.[219] The Commission did not adopt any recommendations regarding the

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212. *Id.*

213. *Id.*

214. *Hague Convention*, *supra* note 17, at 363.

215. *See* Charles T. Kotuby Jr., *International Anonymity: The Hague Conventions on Service and Evidence and their Applicability to Internet-Related Litigation*, 20 J.L. & COM. 103, 111 (2000) ("[N]ational representatives of member states to the Hague Conference pondered the issue of electronic service under the Convention . . . [and] noted that the language of the Convention is neutral as to the communication method to be used . . . [which] allows the Convention to adjust with technological progress.").

216. China, Germany, Norway, Turkey, and Egypt are examples of countries objecting to the use of Article 10(a). Conversely, countries including the United States, Japan, France, and the United Kingdom have not objected to Article 10(a). GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 811 (3d ed. 1996); *see also Hague Conference on Private International Law*, *at* www.hcch.net/e/status/stat14e.html for a list of signatory countries with registered objections to service under Article 10(a) (last visited October 16, 2003).

217. *See* Kessedjian, *supra* note 196, at 27.

218. *See* Bankston v. Toyota Motor Corp., 889 F.2d 172, 174 (8th Cir. 1989); Anbe v. Kikuchi, 141 F.R.D. 498, 500 (D. Haw. 1992).

> [T]he question of service by mail is not addressed by the Convention; it merely discusses the right to send subsequent judicial documents by mail. Any other process would be a rather illogical result, as the Convention sets up a rather cumbersome and involved procedure for service of process; and if this particular provision allowed one to circumvent the procedure by simply sending something through the mail, the vast bulk of the Convention would be useless.

Id., quoting E. Routh, *Litigation between Japanese and American Parties, in* CURRENT LEGAL ASPECTS OF DOING BUSINESS IN JAPAN AND EAST ASIA 190–91 (J. Haley ed., 1978); *see also* Knapp v. Yamaha Motor Corp., 60 F. Supp. 2d 566, 573 (S.D. W.Va. 1999); Golub v. Isuzu Motors, 924 F. Supp. 324, 328 (D. Mass. 1996).

219. *See* Ackermann v. Levine, 788 F.2d 830, 839–40 (2d Cir. 1986) (holding that Article 10(a) of the Hague Convention permits service of process through registered mail); *see also* Eli Lilly & Co. v. Roussel Corp., 23 F. Supp. 2d 460, 470–74 (D.N.J. 1998); Trump Taj Mahal Assocs. v. Hotel Servs., Inc., 183 F.R.D. 173, 179 (D.N.J. 1998); R. Griggs Group Ltd. v. Filanto Spa, 920 F. Supp. 1100 (D. Nev. 1996).

amendment of Article 10(a) to include electronic transmissions, but rather left the issue for future consideration by the Convention.[220] Although the meaning of Article 10(a) remains in dispute, it is reasonable to expect that in light of the increased focus on electronic service of process, the article will most certainly receive future judicial interpretation and scrutiny from member representatives.

One step toward the legal institutionalization of electronic service of process in international litigation involves interpreting the Hague Convention's neutral language to include electronic transmissions. If Article 10 is interpreted to encompass electronic communication, it would greatly enhance a party's ability to serve a defendant quickly and efficiently. However, this is only the first step in modernizing international methods of serving process. More importantly, the internal laws of foreign countries must also evolve to recognize the efficacy of e-mail in serving process abroad.

3. Serving Process in Countries Not Signatories to the Hague Convention

Similar to serving process in a Hague Convention signatory country, any method used in serving process in a country not a member of the Hague Convention must comply with the internal laws of the foreign country in order to ensure the enforceability of a judgment.[221] A party serving process in a non-signatory country must, in addition to ensuring compliance with internal law, orchestrate the actual delivery of the papers.[222] Costa Rica, Interlink's home country in *Rio*, is not a member of the Hague Convention. In that case, it was not necessary that Costa Rica enforce the judgment, as the Ninth Circuit's judgment authorizing the disabling of Interlink's webpage was enforceable in the United States.[223] If, however, the *Rio* judgment had called for recognition and enforcement in Costa Rica, the plaintiff would have had

220. Kessedjian, *supra* note 196. To date, no United States courts have analyzed the applicability of Article 10(a) to electronic service. However, English and Canadian courts have interpreted Article 10(a)'s applicability to service of process by fax. *See* Holding Tusculum B.V. v. S.A. Louis Dreyfus & Cie, 82 A.C.W.S. (3d) 244 (Quebec Ct. of App. 1998) (stating that the Convention's intent to facilitate service allowed for use of modern methods of communication such as fax to serve process); Molins plc. v. GD SpA, 1 WLR 1741 (2000), 2 Lloyd's Rep 234 (2000) (finding that the Convention allowed service of writ of summons by any means authorized by the receiving state's internal law, and England allowed fax transmission in certain circumstances).

221. Service of process abroad has been called a "tricky proposition" and a "twisting process bordered on all sides with fatal pitfalls." GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN U.S. COURTS 757 (3d. ed. 1996) (citing Horlick, *A Practical Guide to Service of United States Process Abroad,* 14 INT'L LAW 637, 638 (1980) and Chowaniec v. Heyl Truck Lines, 1991 U.S. Dist. LEXIS 8138 (N.D. Ill. 1991)).

222. *Id.*

223. *See* discussion *supra* Part II.E.

to ensure that service of process complied with Costa Rica's internal law. Likely, this would require issuance of a letter rogatory.

A letter rogatory is a formal document, issued by the court where the action is pending, that requests assistance from the receiving country in serving process. Service by letter rogatory is a sluggish process. It requires meticulous attention to numerous steps involving (1) the completion of specified forms provided by U.S. Marshals' offices, (2) obtaining judicial permission to serve process abroad, (3) affixing the seal of the court by the clerk of court, and (4) transmitting the pertinent documents along with payment for service to the U.S. Embassy in the receiving country.[224] Once the documents are received, the Embassy transmits the request to the Ministry of Foreign Affairs, who in turn forwards the documents to the appropriate officials for service.[225] If process is successfully served, proof of service is transmitted to the American court by these same cumbersome procedures.[226] In most foreign countries, a letter rogatory is an accepted, indeed favored, method of serving process to ensure subsequent recognition of a United States judgment.[227] A letter rogatory perfectly exemplifies the burdensome formalistic aspects of service of process by a method developed in a pre-electronic era. This arduous process highlights the need for facilitating and expediting the currently available methods for serving process abroad.

In addition to the *Rio* opinion's ambiguity regarding specific requirements for supplementary forms of service, *Rio* is further limited in that it cannot not provide relief in cases where subsequent recognition of a United States judgment in a foreign country is imperative. In order to meet the needs of plaintiffs seeking to serve evasive defendants in international litigation, the outdated formalistic requirements of some foreign countries for serving process of initial legal papers must give way to a more modern procedural infrastructure. This, however, is a formidable goal, because the deep entrenchment of foreign procedural systems in culture, tradition, and policy makes it difficult to reconcile existing differences among nations. Nonetheless, each country's procedural laws contain similar goals of ensuring that service of process is effected in a manner providing actual notice and an opportunity to respond to a legal action.[228] This fundamental simi-

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224. See Horlick, *supra* note 174, at 640–41 ("No other papers should be attached, as they could cause confusion or delay. [Further], some countries (such as Mexico) will require an authentication of the seal of the court.").

225. *See id.*

226. *See id.*

227. *See* Daniel L. Goelzer et al., *Judicial and Other Developments in the Securities Laws Under the Restatements of Foreign Relations Law and the Hague Evidence and Service Conventions,* C489 A.L.I.-A.B.A. 39, 102–03 (1989).

228. *See* RISTAU, *supra* note 14, at Sec. 3-1-7 (stating that regardless of which method of service is chosen, service must comport with that country's due process requirements).

larity provides a point from which to begin including e-mail service of process among internationally accepted methods for serving process.

V. CONCLUSION

The *Rio* decision and its progeny establish that in certain circumstances, electronic service of process will satisfy statutory and constitutional requirements for serving process of a summons and complaint on a defendant residing abroad. Indeed, the Ninth Circuit's analysis of the adequacy of e-mail notice in *Rio* displays a keen understanding that the *Mullane* due process standard is subject to reasonableness and flexibility.

Despite a federal court plaintiff's compliance with statutory and due process requirements for giving notice to a defendant, the internal law of a foreign country remains the final determinant of whether a subsequent judgment will be recognized and enforced within its borders. Thus, a plaintiff seeking to satisfy a judgment in a foreign country must ensure that the initial service of summons and complaint is effected according to that country's laws. International legal systems often preserve long-established legal norms ingrained in a spirit of tradition, sovereignty, and formalism varying substantially from those of the United States. In countries where serving process is regarded as a sovereign act, service of process is subject to strict guidelines including requirements that specifically designated local government officials carry out the ministerial tasks involved in giving notice. Violating those countries' rules for serving process will not only result in an unenforceable judgment, but may constitute a criminal offense.

Overcoming the difficulties of serving process abroad in a manner supporting an enforceable judgment will require that the laws of foreign countries give way to the notion that, in some cases, electronic service of process will provide adequate notice to a foreign defendant. However, the evolution from methods of serving process restricted by entrenched concepts of national sovereignty to international acceptance of electronically transmitted notice will likely be a slow and laborious process. Although service of process by e-mail is in its legally formative stages, the *Rio* decision is a harbinger of broader judicial acceptance of electronic transmission as a modern, flexible, and superior method of providing a defendant with notice of initial legal proceedings against him. The remaining question is whether *Rio*'s pragmatic analysis of the adequacy of electronic service of process will influence other countries in confronting the herculean task of assimilating the benefits of modern technological transmissions into their long-standing procedural traditions.