SERVICE OF PROCESS ABROAD: NO INTERNATIONAL AGREEMENT?

NO PROBLEM. RELY ON FRCP 4(F)(2) & (3)

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Long ago were the times when serving a lawsuit required plaintiffs to shout and speak their cause of action, [1] send mail carried by a steam ship, [2] or serve via telex. [3] Service of process in many countries has caught up with the times. A court in the United Kingdom, for example, allowed an injunction to be served via Twitter. [4] Even though U.S. courts have authorized service of this kind under special circumstances, [5] courts have lagged on implementing these alternative methods on a larger scale. In fact, the advisory committee of the Federal Rules of Civil Procedure (the "FRCP") has recognized that this aspect of litigation is in need of reform. [6]

Service of process on a defendant that is located abroad adds an extra layer of complexity.

Fortunately, courts are increasingly authorizing service of defendants abroad by new methods of service permitted by the statute and guided by due process principles. After all, a basic foundation of constitutional due process is the right to be heard, and the notice function protects a defendant's right not to be deprived of life, liberty, or property without due process of law. [7]

FRCP 4(f) provides the procedural framework to authorize service of process on defendants located abroad and sets forth a three ways to serve an individual in a foreign country:

(1) by any internationally agreed upon means that are reasonably calculated to give notice;

(2) if no such means exist, or if international agreement allows, by a method that is reasonably calculated to give notice; and

(3) by any other means not prohibited by international agreement, as ordered by the court. 8

1 See Adriana L. Shultz, Comment, Superpoked and Served: Service of Process Via Social Networking Sites, 43 U. RICH. L. REV. 1497, 1499, 1528 n.10 (2009) ("One of the earliest known legal codes, the Code of Eshnunna, required plaintiffs to 'shout' or 'speak' their cause of action.") (citing Revuen Yaron, THE LAWS OF ESHNUNNA 118-19 (Magnes Press 1988)).

2 See New England Merchants Nat. Bank v. Iran Power Generation & Transmission Co., 495 F. Supp. 73, 81 (S.D.N.Y. 1980).

3 See id.

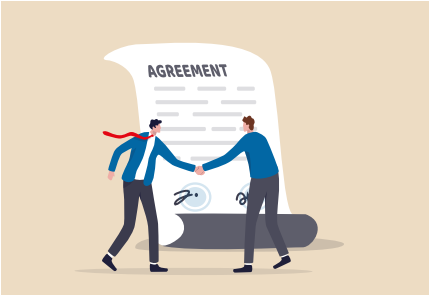
4 John G. Browning, Served Without Ever Leaving the Computer: Service of Process via Social Media, 73 TEX. B.J. 180, 182 (2010).

5 See, e.g., WhosHere, Inc. v. Orun, No. 1:13-cv-00526-AJT-TRJ, 2014 WL 670817 (E.D. Va. Feb. 20, 2014) (authorizing service on an individual in Turkey by email and through Facebook and LinkedIn); see also FTC v. PCCare247 Inc., No. 12 Civ. 7189(PAE), 2013 WL 841037 (S.D.N.Y. Mar. 7, 2013) (authorizing service on individuals in India by email and through Facebook). In St. Francis Assisi v. Kuwait Finance House, the plaintiff was unable to determine the whereabouts of the individual defendant and the state of Kuwait was not a signatory to the Hague Convention, so the magistrate judge allowed service via Twitter to the individual defendant who "used the social-media platform to fundraise large sums of money for terrorist organizations by providing bank-account numbers to make donations," which was the subject of the lawsuit. No. 3:16-CIV-3240 LB, 2016 WL 5725002, at *1 (N.D. Cal. Sept. 30, 2016).

6 Jessica Klander, Civil Procedure: Facebook Friend or Foe?: The Impact of Modern Communication on Historical Standards for Service of Process-Shamrock Development v. Smith, 36 WM. MITCHELL L. REV. 241, 259 (2009).

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

8 FED. R. CIV. P. 4(f)(1)–(3).



Application of Rule 4(f)(1)

FRCP 4(f)(1) provides for internationally agreed service that is reasonably calculated to give notice. This form of service is typically based on international agreements like the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the "Hague Convention").[9] The Hague Convention provides a uniform framework for serving process within member nations [10] and is considered to be the international equivalent of the Full Faith and Credit Clause, binding courts of member nations.[11] Countries also have the ability to serve by mail, courier, or through a judicial official under Article 10 so long as the country where service is sought does not opt out of these provisions. [12] As one may expect, some countries opted out of these provisions under Article 10 [13] while others declared no objection to them. [14]

Though international agreements like the Hague Convention govern service between member countries, how should a plaintiff proceed if no international agreement exists? Litigants who dread this scenario should consider that it poses a unique opportunity to effect service via alternative methods available under FRCP 4(f)(2) & (3). In fact, service under FRCP 4(f)(2) & (3) may be more effective and speedier than under an international agreement.

Application of Rules 4(f)(2) & (3)

There is no hierarchy of service methods under Rules 4(f)(2) & (3). [15] Though courts tend to construe these rules liberally in an effort to facilitate, and not hinder, service, [16] imperative to the analysis is whether the proposed service method is "reasonably calculated" to give notice as set forth in Mullane v. Central Hanover Bank & Trust Co. [17]

In Mullane, the Supreme Court held that due process is afforded so long as the form 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." [18]

Rule 4(f)(2) provides that in the absence of international agreement, service may be effected by enumerated methods that are "reasonably calculated" to give notice.[19] These methods are service as prescribed by the foreign country's law, as directed in the foreign country in response to letter rogatory or letter of request, or, "unless prohibited by the foreign country's law," by personal service or using a form of mail that the clerk addresses and sends with signed receipt.

The majority of courts consider that a foreign country "prohibits" a form of service when the foreign law explicitly prohibits the proposed method of service. [20] Indeed, one Court held that "[a] form of service is not 'forbidden by authority' merely because it is not a form explicitly 'prescribed' by the laws of a foreign country." [21] In Polargrid LLC v. Videsh Sanchar Nigam Ltd., [22] the judge held that mailing the defendant located in India via Fedex satisfied subsection (f)(2)(C)(ii) even though India did not specifically permit service via FedEx. Compare this case to the view taken in Jung v. Neschis, [23] where the judge held that international registered mail to a defendant in Liechtenstein did not satisfy subsection (f)(2)(C)(ii) when Liechtenstein law only permitted foreign service by way of letters rogatory but did not expressly prohibit register mail. There, an administrative law judge and attorney licensed to practice law in Liechtenstein stated that "service of an international summons and complaint must be made" through letters rogatory. [24]The court relied on Resource Ventures, Inc. v. Resources Mgmt. Int'l, Inc., [25] which held that "subsection (f)(2)(C)(ii) limits the forms of service to those that do not violate the law of the country where service is attempted."

Rule 4(f)(3) is a catch-all provision, which allows service by other means as ordered by the court so long as it's not prohibited by an international

9 The United States is a signatory to the Hague Convention.

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

11 The Hague Convention is mandatory and applies when documents are to be served in a Convention country. See Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 699 (1988). Yvonne A. Tamayo, Catch Me If You Can: Serving United States Process on an Elusive Defendant Abroad, 17 HARV. J.L. & TECH. 211, 214–16 (2003).

12 In Birmingham v. Doe, No. 21-CV-23472, 2022 WL 871910 (S.D. Fla. Mar. 24, 2022), the Court highlighted that among the countries that do not specifically object to Article 10(a) are Canada, Hong Kong, and the United Kingdom.
See, e.g., TracFone Wireless, Inc. v. Bitton, 278 F.R.D. 687, 690–91 (S.D. Fla. 2012) (finding that service upon a Canadian resident via FedEx is permissible pursuant to Rule 4(f)(2)(C)(ii) because Canada does not object to Article 10(a) of the Hague Convention); TracFone Wireless, Inc. v. Unlimited PCS Inc., 279 F.R.D. 626, 631 (S.D. Fla. 2012) (finding that FedEx service of summons and complaint to Hong Kong defendant was a permissible postal channel under Article 10(a)); Strax Americas, Inc. v. Tech 21 Licensing Ltd., 16-25369-CIV, 2017 WL 5953117, at *2 (S.D. Fla. Mar. 23, 2017) (holding that service via FedEx on the United Kingdom defendants was an acceptable form of alternative service, not prohibited by international agreement, and reasonably calculated to fulfill due process requirements).
Birmingham, 2022 WL 871910, at *6.

13 These countries include Argentina, Austria, India, China, Russia, Germany, Japan, Korea, and Switzerland, among others. See id.

14 These countries include Albania, Canada, France, Italy, Morocco, Netherlands, Portugal, Romania, and Spain, among others. Authorities, https://www.hcch.net/en/instruments/conventions/authorities1/?cid=17 (last visited Apr.8, 2022).

15 See Swarna v. Al–Awadi, No. 06 Civ. 4880(PKC), 2007 WL 2815605, at *1–2 (S.D.N.Y. September 20, 2007). See also Nuance Commc'ns, Inc. v. Abbyy Software House, 626 F.3d 1222, 1239 (Fed.Cir.2010) ("Rule 4(f)(3) is not subsumed within or in any way dominated by Rule 4(f)'s other subsections; it stands independently, on equal footing."

16 See, e.g. Caputo v. City of San Diego Police Dep't, No. 16-cv-00943-AJB-BLM, 2018 WL 4092010, at *4 (S.D. Cal. Aug. 28, 2018); United Food & Commercial Workers Union v. Alpha Beta Co., 736 F.2d 1371, 1382 (9th Cir. 1984)); Nowak v. XAPO, Inc., No. 20-CV-03643-BLF, 2020 WL 5877576, at *2 (N.D. Cal. Oct. 2, 2020); FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson, 636 F.2d 1300, 1312 & n. 61 (D.C.Cir.1980).

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

18 Id.

19 FED. R. CIV. P. 4(f)(2); The Knit With v. Knitting Fever, Inc., No. CIV. A. 08-4221, 2010 WL 2788203, at *8 (E.D. Pa. July 13, 2010).

20 Dee–K Enters., Inc. v. Heveafil SDN Bhd., 174 F.R.D. 376, 379–80 (E.D. Va. 1997); Resource Ventures, Inc. v. Resources Mgmt. Int'l, Inc., 42 F. Supp. 2d 423, 430 (D. Del. 1999); Trueposition, Inc. v. Sunon, Inc., No. 05–3023, 2006 U.S. Dist. LEXIS 39681, at *12–14 (E.D. Pa. June 14, 2006); SEC v. Alexander, 248 F.R.D. 108, 112 (E.D.N.Y. 2007); Fujitsu Ltd. v. Belkin Int'l, Inc., 2011 U.S. Dist. LEXIS 99922 at *8–9; SignalQuest, Inc. v. Tien–Ming Chou & Oncque Corp., 284 F.R.D. 45, 48 (D.N.H. 2012); Taser Int'l, Inc. v. Phazzer Elecs., Inc., No. 616CV366ORL40KRS, 2016 WL 7137560, at *2 (M.D. Fla. July 14, 2016).

21 Dee–K Enters. Inc. v. Heveafil Sdn. Bhd., 174 F.R.D. 376, 380 (E.D.Va.1997).

22 No. 04–cv–9578 (TPG), 2006 WL 903184, at *2–3 (S.D.N.Y. Apr. 7, 2006).

23 No. 01 Civ. 6993(RMB), 2003 WL 1807202 (S.D.N.Y. Apr.7, 2003).

24 Id. at *2.

25 42 F.Supp.2d 423, 430 (D.Del.1999)

agreement. [26] Courts also consider whether the proposed method of service "minimizes offense to foreign law." [27] Though service under this rule must comport with constitutional notions of due process, [28] and the "reasonably calculated" standard still applies, this rule allows for broad flexibility to meet the needs of particularly difficult cases. [29] For instance, in adidas AG v. Individuals, [30] the court permitted Rule 4(f)(3) service via social media accounts, including private messaging applications. In Birmingham v. Doe, the court authorized service via email, social media messages, and publication on plaintiffs' websites for defendants located in Canada, Hong Kong, and the United Kingdom. [31]

In In re Zawawi, Plaintiffs made several attempts to serve fledging defendants in Oman, including at defendants' home and place of business. [32] Service became extremely difficult: In one instance, an employee of one defendant used force to retrieve a signed acknowledgement of service from the process server. [33] As a result, plaintiffs' attorneys sought an alternative means of service under FRCP (f)(2) & (3). The judge ultimately authorized all ten of plaintiffs' proposed methods of service, which included service via FedEx, email, and SMS message (including Whatsapp Messenger as an alternative). [34]

Hurdles

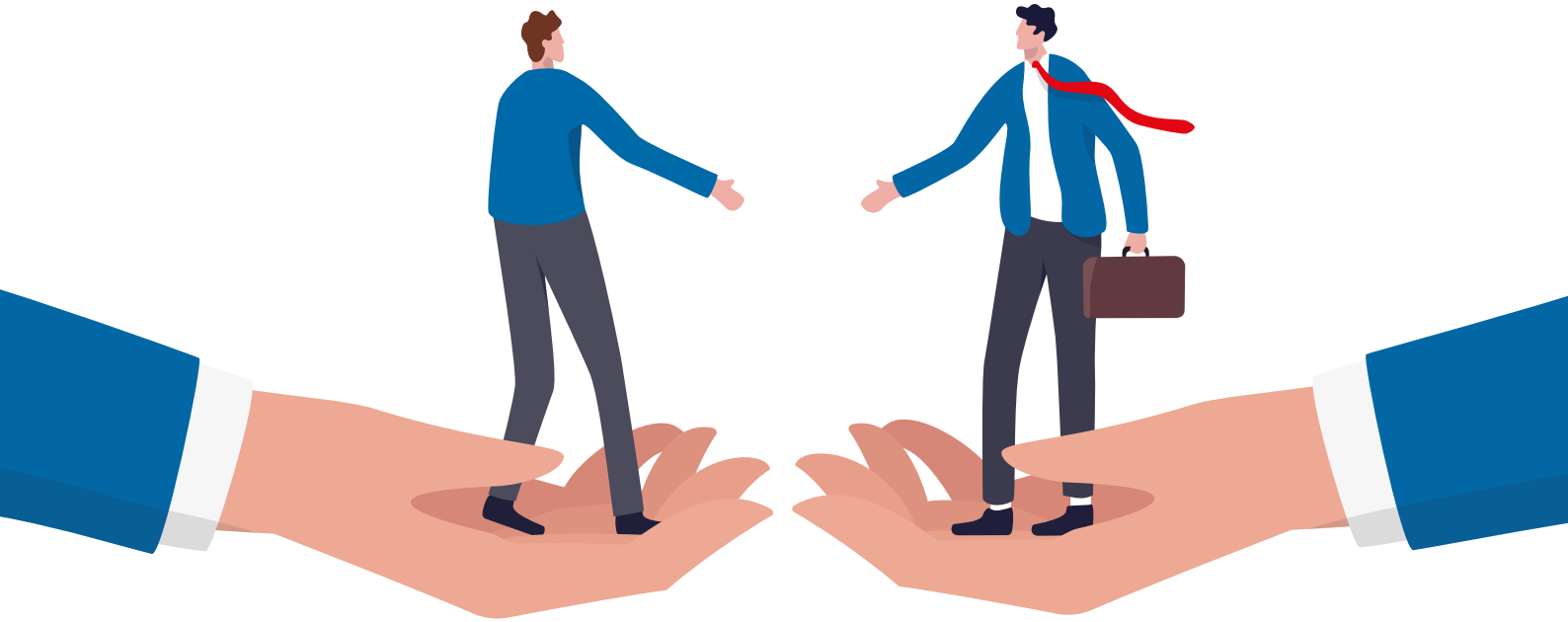
Rule 4(f)(2) & (3) provide powerful tools to assist counsel to serve defendants abroad. Counsel serving under these rules should tread carefully, however.

For one part, counsel should ensure that their motion or application establishes that the defendant is not located in the United States, whether the defendant is evading service and explain the efforts to locate the defendant. [35]

Courts have declined to authorize service when the plaintiff failed to establish these elements [36] or simply alleged the defendant's location is unknown. [37]

Counsel should also be aware of practical considerations that may hinder service efforts. In Birmingham v. Doe the court took into account the current conflict in Ukraine in declining to authorize the alternate means of service for defendants in Ukraine that it granted as to other defendants residing outside of Ukraine.[38] Notably, the court noted that the lack of food, water, power, internet, and other basic fundamental needs gave the court "no confidence that any of the alternative means of service proposed by Plaintiffs are currently reasonably calculated . . ." [39]

Even with the advent of modern technology and development of case law in the field, serving a foreign defendant has been depicted as "one of the most challenging [problems] that a court can be called upon to face." [40] Thus, becoming familiar with the tools available under Rule 4(f)(2) & (3) and its limitations is necessary, especially for plaintiffs who find themselves dealing with the challenges of serving a fledging defendant in foreign jurisdictions.



26 FED. R. CIV. P. 4(f)(3).

27 Prewitt Enterprises, Inc. v. Org. of Petroleum Exporting Countries, 353 F.3d 916, 927 (11th Cir. 2003) (citing Advisory Committee Notes to Fed. R. Civ. P. 4(f)).

28 See, e.g., Rio Properties, Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1017 (9th Cir. 2002) (requiring that service under Rule 4(f)(3) satisfy due process standards under Mullane); Secs. & Exch. Comm'n v. Anticevic, No. 05 CV 6991(KMW), 2009 WL 361739, at *3 (S.D.N.Y. Feb. 13, 2009) (holding that "a Court may fashion means of service on an individual in a foreign country, so long as the ordered means of service (1) is not prohibited by international agreement . . . and (2) comports with constitutional notions of due process."); U.S. Commodity Futures Trading Comm'n v. Lake Shore Asset Mgmt. Ltd., No. 07 C 3598, 2008 WL 4299771, at *4 (N.D.Ill. Sept.17, 2008) (same).

29 In re Int'l Telemedia Assocs., Inc., 245 B.R. 713, 720 (Bankr. N.D. Ga. 2000).

30 adidas AG v. Individuals, Partnerships, & Unincorporated Associations Identified on Schedule "A", No. 19-63109-CIV, 2019 WL 9595881, at *2 (S.D. Fla. Dec. 27, 2019).

31 Birmingham v. Doe, No. 21-CV-23472, 2022 WL 871910, at *6 (S.D. Fla. Mar. 24, 2022). See id.

32 See id.

33 See id.

34 See Order Granting Motion for Order Authorizing and Approving Alternative Methods of Service, In re Zawawi, No. 6:21-ap-00136 (Bankr. M.D. Fla. Mar. 10, 2022), ECF. No. 20.

35 American Veteran Enterprise Team, LLC, v. Silver Falcon, Inc., Holland Sales Team of NC, LLC, William L. Holland, William E. Holland, Khalid Shafique & Timothy Brumlik, No. 6:21-CV-647-CEM-EJK, 2021 WL 2435253, at *2 (M.D. Fla. Apr. 30, 2021).

36 See id.

37 Codigo Music, LLC v. Televisa S.A. de C.V., No. 15-CIV-21737, 2017 WL 4346968, at *9 (S.D. Fla. Sept. 29, 2017) (citing Rio Props., Inc. v. Rio Intern. Interlink, 284 F.3d 1007, 1015 (9th Cir. 2002) (holding that service under Rule 4(f)(3) is not a "last resort" or "extraordinary relief" and instead is one of several means for serving an international defendant)).

38 Birmingham v. Doe, No. 21-CV-23472, 2022 WL 871910, at *8 (S.D. Fla. Mar. 24, 2022).

39 See id. at *7.

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