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Research

Service of Foreign Judicial and Extrajudicial Documents

**Civil and Commercial Matters
in India: A Primer**

March 2024

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Contents

Introduction	1
Service to and From States Which are Not a Signatory to the Service Convention	2
Service to and From States Which are Signatories to the Service Convention	2
Documents Eligible for Transmission	3
Channels of Transmission under the Service Convention	3
India and the Service Convention	3
Process of Transmission under the Service Convention	6
Service to India under the Service Convention	7
Service to Defendants in Non-Signatory Countries	8
Service to India from a Non-Signatory Country	10
Ways to Reduce the Time Period for Completing Service	10
Conclusion	11

Introduction

‘Service of process’ marks the beginning of litigation as it is a formal delivery of documents that are legally sufficient to charge the defendant with notice of a pending action.¹ Service assists the opposite party to understand the case being made, and the court to adjudicate the case with full information at hand, thereby perpetuating fairness in trial.

Increasing globalization has prompted numerous cross-border litigations involving parties that are not bound by the legal regime of each other’s jurisdiction. In such circumstances, a need was felt to provide litigants with an effective and reliable channel to serve judicial or extra-judicial documents to parties residing in foreign jurisdictions to facilitate such proceedings. Consequently, countries adopted the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (“**Service Convention/Convention**”) at the Hague Conference on Private International Law in 1965 (“**Conference**”). Under the Convention, the signatory states would establish a process whereby documents can be served in a simple and efficient manner to ensure that defendants sued in foreign jurisdictions would receive actual and timely notice of legal proceedings and facilitate proof of service abroad.² With this channel for transmission of documents from one ‘State Party’ to another, the Service Convention seeks to develop mutual judicial assistance amongst countries.

Currently, about 82 states have signed the Service Convention (“**Contracting Parties**”). Of these, about 69 countries are members of the Conference. A country need not be a member of the Conference to be party to the Service Convention. A country can become a Party to the Service Convention, i.e., ratification, accession, succession or continuation. However, the difference in the manner of adoption has no impact on how the Service Convention operates in the country. India has acceded to the Service Convention subject to certain reservations. These reservations are discussed in subsequent sections of this paper.

The process prescribed under the Service Convention is only applicable if both the sender and recipient countries are signatories to the Service Convention. The signatory states are required to designate a central authority to request and receive service from other signatory states.³ The framework and the process for service are discussed in detail in subsequent sections of this paper. Service between India and a non-signatory country will be governed by the laws of India and the concerned country.

1 Brockmeyer v. May 361 F.3d 1222 (9th Cir. 2004).

2 Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 698 (1988).

3 Article 2 of the Service Convention.

Service to and From States Which are Not a Signatory to the Service Convention

The customary channel of service prior to the Service Convention was through letters rogatory. This channel continues to be utilized in cases of service to and from non-signatory countries. Letters rogatory can be time-consuming and costly as they are transmitted by way of diplomatic channels. The form of letters rogatory may depend on the country to which it is addressed for which local rules of the foreign jurisdiction must be followed.¹

Another option for serving legal documents in non-contracting states is through private service, which does not involve the assistance of the High Court. While private service is typically a faster process, it does carry the potential risk of the opposing party challenging the validity of the service method at a later stage. In private service, documents can be delivered privately and directly to the recipient. Despite its efficiency, parties should be aware that the validity of private service may be subject to challenge.

Service to and From States Which are Signatories to the Service Convention

The Service Convention deals primarily with the transmission of documents. It does not address or comprise substantive rules relating to the actual service of process.² The Service Convention represents a change from the previous regime which lacked the force of a treaty.³ It also identifies certain channels of transmission that signatories can use to transmit documents. Signatories can pick and choose the modes of transmission applicable to their country. The Service Convention allows the signatories flexibility to adopt special rules applicable for service in the form of reservations.

To effectuate service between India and a signatory country, the following broad requirements must be fulfilled:

- a. the documents must be eligible for transmission under the Service Convention,
- b. the channel of transmission must be accepted in India and the signatory country, and
- c. process should be in consonance with reservations adopted by India and the signatory country.

We have discussed each of the aforementioned requirements in the ensuing paragraphs.

1 <https://www.americanbar.org/groups/litigation/committees/admiralty/practice/2018/tips-for-handling-letters-rogatory/>.

2 HCCH, 'Outline of the Hague Service Convention' available at: <https://assets.hcch.net/docs/f4ccc07b-55ed-4ea7-8fb9-8a2b28549e1d.pdf> last accessed April 07, 2022.

3 Georges A.L. Droz, 'A Comment on the Role of the Hague Conference on Private International Law' 57 Law and Contemporary Problems 3, 5.

Documents Eligible for Transmission

The following criteria must be fulfilled for documents to be eligible for transmission under the Service Convention:

- i. The document must be a judicial or extra-judicial document;
- ii. The document must require transmitting under the applicable local laws;
- iii. The address of the person to be served must be known;
- iv. The documents must be connected to a civil or commercial matter and not criminal matter.⁴

Channels of Transmission under the Service Convention

Generally, the following channels of transmission of judicial and extra judicial documents are available under the Service Convention:

- i. Main channel of transmission (via Central Agencies)⁵
- ii. Alternative channels of transmission:⁶
 - a. Direct/indirect Consular or Diplomatic channels⁷
 - b. Postal channels⁸
 - c. Direct communication between judicial officers, officials or other competent persons of the State of origin and the State of destination⁹
 - d. Direct communication between an interested party and judicial officers, officials or other competent persons of the State of destination.¹⁰
 - e. Direct communication between authorities.¹¹

India and the Service Convention

India signed the Service Convention on November 23, 2006 and the Service Convention was entered into force in India on August 01, 2007.¹² India is amongst about 82 other countries who have signed the convention. We now discuss the reservations adopted by India with respect to the process envisaged under the Service Convention.

4 Article 1, Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 1965 (“Service Convention”).

5 See generally, Articles 2-7, Service Convention.

6 Articles 8 through 11 of the Service Convention.

7 Articles 8 and 9 respectively, Service Convention.

8 Article 10 (a), Service Convention.

9 Article 10 (b), Service Convention.

10 Article 10 (c), Service Convention.

11 Article 11, Service Convention.

12 <https://mea.gov.in/service-of-summons-abroad.htm>.

To give effect to the Service Convention, the Central Government by way of notification dated January 12, 2009,¹³ provided that the process for service under Section 29(c) of the Civil Procedure Code, 1908 (“CPC”), would be applicable to all civil courts in all the countries that are party to the Service Convention.

Even though the Service Convention permits for alternate channels for service to or from India (“**Alternative Channels**”), India has objected to such Alternative Channels viz:¹⁴

- a. *The freedom to send judicial documents, by postal channels, directly to persons abroad,*
- b. *The freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,*
- c. *The freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.*

India has issued its reservations against all modes of service via Alternative Channels under Article 10. This implies that a valid service can be done only through the Ministry of Law and Justice (“**Central Authority**”) into India under the Service Convention. The detailed process of transmission through the under the Service Convention.

In America, there appears to be a controversy on whether service effectuated by social media and e-mail is excluded as a result of India’s Reservation. This arises from the dissonance in court decisions on the scope of India’s Reservation. Some courts are of the view that India’s Reservation only covers modes that are expressly specified in the Service Convention (postal service and service through judicial officers). Based on this, the courts considered that there is no bar on service through alternative mediums like e-mail when India is the destination country.¹⁵ However, few other cases have held that the language of Article 10 of the Service Convention includes service via an e-mail, thereby bringing it within the purview of India’s Article 10 Reservation.¹⁶ American Courts have also noted that since service in India through the Central Authority have often exceeded 6–8 months, alternative service mediums like e-mail are more preferable.¹⁷

The Supreme Court of California has in *Rockefeller Technology Investments (Asia) VII v. Changzhou SinoType Technology Company, Ltd.*,¹⁸ held that even if a signatory country has expressed reservation on the application of Article 10 of the Service Convention, the process of service could be held valid if the parties in their contract expressly provided so. In this case, the appellant was an US based entity whereas the defendant was a China based entity. It is pertinent to note that China had expressed reservations on the application of Article 10 of the Service Convention. The agreement entered into between the parties provided that the process of service should be undertaken by post and corresponding email. The court observed that when parties waive off their rights through an express agreement, the clauses or conditions of the Service Convention will not be applicable.

13 Notification [F.No.11(28)/2004- Judl.], dated 12 January 2009.

14 Article 10 (c), Service Convention.

15 *FTC v. PCCare, 247, Inc.*, 12 FRD CIV 7189 (2013); *Gurung v. Malhotra*, 279 F.R.D. 215, 219; *In re S. African Apartheid Litig.*, 643 F. Supp. 2d; *Philip Morris USA Inc. v. Veles Ltd.*, No. Civ. 2988 (GBD), 2007 WL 725412.

16 *Agha v. Jacobs*, No. C 07-1800 Rs., 2008 WL 2051061; *Graphic Styles/Styles International LLC v. Men’s Wear Creations & Richard Kumar*, Civil Action No. 14-4283 (16-7-2014).

17 *Richmond Techs., Inc. v. Aumtech Business Solutions*, No. 11-CV-02460-LHK, 2011 WL 2607158.

18 S249923, Supreme Court of California.

Service to and From States Which are Signatories to the Service Convention

Therefore, for a service to be successful in India, the following reservations under the Service Convention must also be accounted for:¹⁹

- i. Documents for service must be in the English language;²⁰
- ii. The service of judicial documents through diplomatic or consular channels will be limited to the nationals of the State in which the documents originate;²¹
- iii. None of the alternative methods of transmission (such as postal delivery) provided in Article 10 of the Service Convention are applicable to service in India;
- iv. Indian Courts may render a judgment if all conditions specified under Article 15²² are fulfilled; and
- v. For purposes of Article 16, an application for relief will not be entertained if filed after the expiration of one year following the date of the judgment.²³

For successful transmission from India to another signatory country, the reservations adopted by the signatory country should be accounted for. Further, Article 24 of the Service Convention allows signatories to enter into alternate supplementary agreements for service. Therefore, for service from India to another signatory country, supplementary agreements entered by the signatory country must also be considered.

For instance, the European Union (except for Denmark) has entered into ‘Council Regulation (EC) No. 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters’ (“**Service Regulation**”).²⁴ The Service Regulation permits service through designated receiving agencies in each of the member states. The Service Regulation also allows service through consular or diplomatic agents, postal service or direct service. There is no hierarchy between the methods of service under this Service Regulation.²⁵

In America, the member states have signed the Inter-American Convention on Letters Rogatory and Additional Protocol (“**IACAP**”).²⁶ The IACAP and the subsequent Inter-American Convention on Taking of Evidence and Additional Protocol govern the service process within the American continent. IACAP allows service through judicial, diplomatic or Central Authority-facilitated channels initiated by a foreign central authority to other member states. While the terms of the IACAP limit its application to civil and commercial matters, it also permits countries to choose to apply it to criminal and administrative matters.²⁷

19 India has made declarations and reservations with respect to Articles 8, 10, 15 and 16.

20 <https://mea.gov.in/service-of-summons-abroad.htm>.

21 India’s reservations: <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=984&disp=resdn>.

22 Article 15 of the Service Convention allows a court to obtain jurisdiction over a foreign defendant for purposes of giving judgment when a plaintiff has not received a certificate of service or delivery if:

- a) The document was transmitted by one of the methods provided for in this Convention,
- b) A period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,
- c) No certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

23 Article 16 of the Service Convention permits the Court to grant the defendant relief from the law of limitation concerning appeals in cases where they do not have sufficient time or knowledge of the judgment or have expressed a defence to the case on merits. In India, such application will not be entertained if it is filed after the expiration of one year following the date of the judgment.

24 Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007R1393&from=EN>.

25 Plumex v. Young Sports NV, Case C-473/04.

26 Lucinda A. Low, ‘International Judicial Assistance among the American States – the Inter-American Conventions’ International Lawyer (p. 707, 710)

27 <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/international-judicial-asst/Service-of-Process/Inter-American-Service-Convention-Additional-Protocol.html>

In addition to the above reservations, the Service Convention also provides for an exemption which, if exercised, permits states to refuse service where compliance with the request would infringe their sovereignty or security.²⁸

Process of Transmission under the Service Convention

In India, the Department of Legal Affairs, Ministry of Law and Justice (“**Law Ministry**”) is the central authority under the Service Convention. All transmission requests for issuance of service are to be directed to the Law Ministry. The Law Ministry has issued an ‘Office Memorandum’ for service to persons residing abroad (“**Guidelines**”).²⁹ The Guidelines are enforceable as law by any High Court. Broadly, the Guidelines state that the transmission request must be in the format prescribed in the ‘Model Form’ under the Service Convention. If the request fulfills the requisite criteria, the service would be undertaken by the central authority.

India has taken a position that the domestic implementation of the Service Convention would be done in accordance with the provisions of Section 78 read with Order XXVI Rules 19–22 of the Code of Civil Procedure (“**CPC**”).³⁰

Under the Service Convention, the process issued by a foreign court of a state which is a party to the Service Convention can be sent to Central Authority of the addressee state. The Central Authority may reject or object to the Service Request specifying the reasons. The execution of a Service Request may be refused when the state addressed considers that its sovereignty or security would be prejudiced thereby.³¹ Under the Service Convention, a State cannot refuse a service request solely on the ground that it claims exclusive jurisdiction under its internal law over the subject matter of the action. Further, a State also cannot refuse a service request on the ground that its internal law would not admit a right of action on it.³²

If the Central Authority takes no objections, it would issue service upon the defendant. The service undertaken would be considered as summons issued by the Indian court under Section 29(c) of the CPC. Once the service is complete, the central authority would issue an acknowledgment to the transmitter. This entire process can take up to 6 to 8 months. We have set out an example on the typical process in the below diagram.

28 Article 13, Service Convention.

29 Ministry of Law and Justice, ‘Office Memorandum concerning Service Convention’ available at: <https://delhicourts.nic.in/circulars/Sep%2011/21b.pdf>, last accessed January 30, 2024.

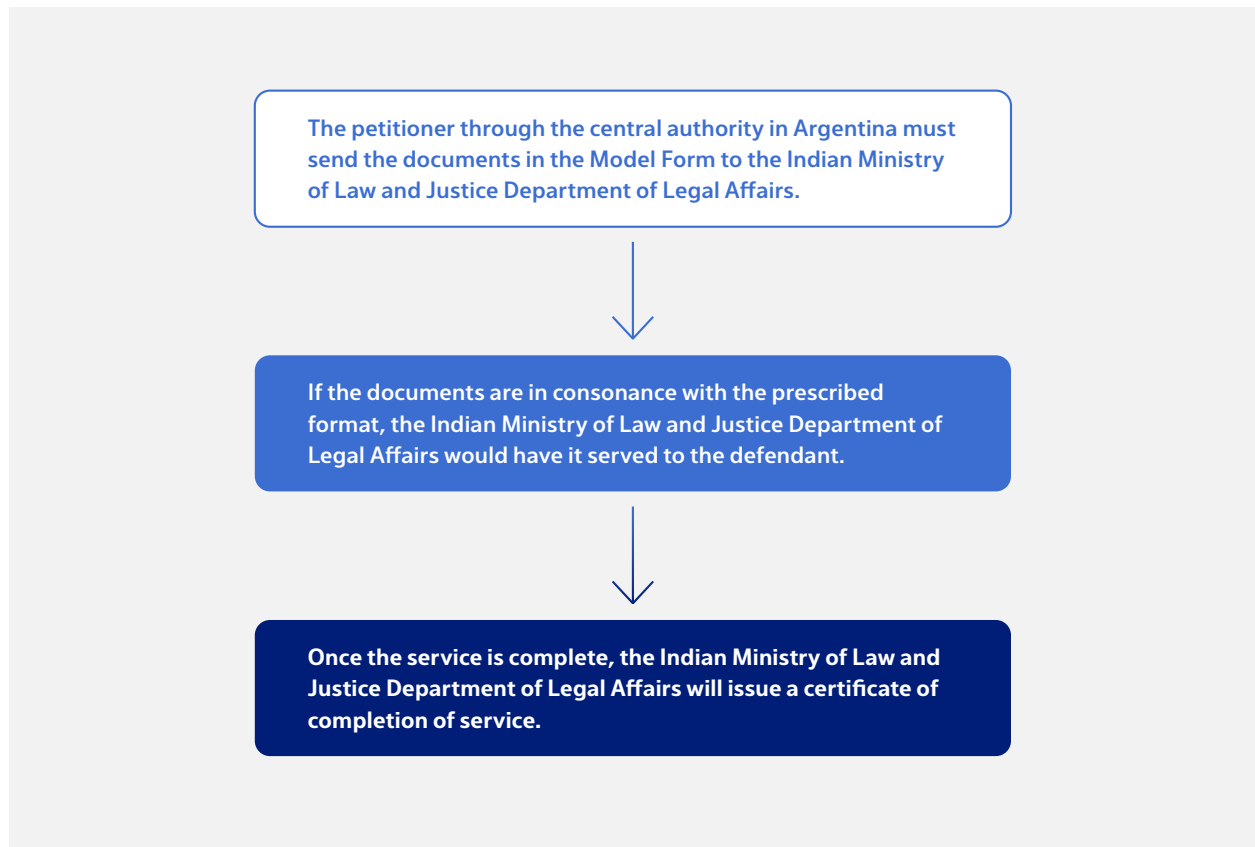
30 <https://assets.hcch.net/upload/wop/2008synopsis20.pdf>.

31 Article 13, Service Convention.

32 Id 29.

Service to India under the Service Convention

A petitioner residing and conducting business in, say, Argentina (a signatory) wants to complete service on the defendant residing in Delhi, India.



It is also pertinent to note that the request and the document have to be served in duplicate.³³ Further the part of the request which contains a summary of the document to be served is also to be served by the law ministry along with the service order/document.³⁴

Concomitantly, where any Indian Court is issuing writ of summons or an equivalent document for service abroad, and any judgement has been passed *ex parte*, without the presence of such person. The judge in such a case will have the power to exempt such defendant from the limitation period otherwise applicable to prefer an appeal against the said judgement, if the defendant is able to show no knowledge of the proceedings and disclosure of *prima facie* defence to the action on merits of the case. Such applications to grant extension of time may be maintained provided it is filled in within a reasonable time frame.³⁵ Further, any objection regarding service of the said summons on the ground that it is not duly originated from authority or the judicial officer, can only be taken before the originating court.³⁶

³³ Article 3, the Service Convention.

³⁴ Article 5(4), the Service Convention.

³⁵ Article 16, the Service Convention.

³⁶ *Anupama Sharma v. Union of India*; 2014 SCC OnLine Bom 229, 11.

Service to Defendants in Non-Signatory Countries

The service of process can be undertaken by means of Letters of Request/Rogatory. ‘Letters Rogatory’ refer to formal written requests by a Court in which action is pending to the foreign Court/Judge requesting the service of summons or related acts.³⁷ Generally, the most common remedies sought by letters rogatory include service of process, execution of a civil judgment and the taking of evidence.³⁸ These letters are issued because in absence of permission from the foreign court to perform the said act, it would constitute a violation of the country’s sovereignty. Letters rogatory, although addressed to Courts, are customarily transmitted by way of diplomatic channels, with the entire process would span over a year.³⁹ The document to be served from the originating Court is transmitted to the foreign ministry in the State of origin, which then forwards it to the destination State’s foreign ministry. The foreign ministry then forwards the documents to the local court, which passes an order permitting such service. After this, a certificate of service is passed on in reverse to reach the originating Court. In certain jurisdictions, Courts can sometimes also forward service requests to the foreign ministry or the foreign court directly, cutting out one or more steps in the process.

The Service Convention does not affect the present system of letters rogatory, as Article 19 allows for other modes of transmission, as permitted by internal law of countries, to continue to remain applicable if invoked.⁴⁰ Thus, countries that are not signatories to the Service Convention rely on their internal laws for the service of legal documents.

In *Mollykutty v. Nicey Jacob and Others*,⁴¹ the Kerala High Court took the view that service between India and signatory countries must adhere to the Service Convention to be considered proper. In India, Section 29 of the CPC governs the process of service through foreign courts.⁴² Section 29 of the CPC permits foreign courts to issue summons to defendants in India through the civil court whose jurisdiction the defendant resides.

37 ABA, ‘Tips for handling Letters Rogatory’ available at: <https://www.americanbar.org/groups/litigation/committees/admiralty/practice/2018/tips-for-handling-letters-rogatory/>, last accessed 26 January 2021.

38 Thomson Reuters Glossary, ‘Letters Rogatory’ available at: [https://uk.practicallaw.thomsonreuters.com/8-519-1439?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/8-519-1439?transitionType=Default&contextData=(sc.Default)&firstPage=true), accessed 26 January 2021.

39 ABA, ‘Tips for handling Letters Rogatory’ available at: <https://www.americanbar.org/groups/litigation/committees/admiralty/practice/2018/tips-for-handling-letters-rogatory/>, last accessed 26 January 2021.

40 Stephen Downs, ‘The Effect of the Service Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters’ 2 (1) Cornell Int’l L.J. (p. 131).

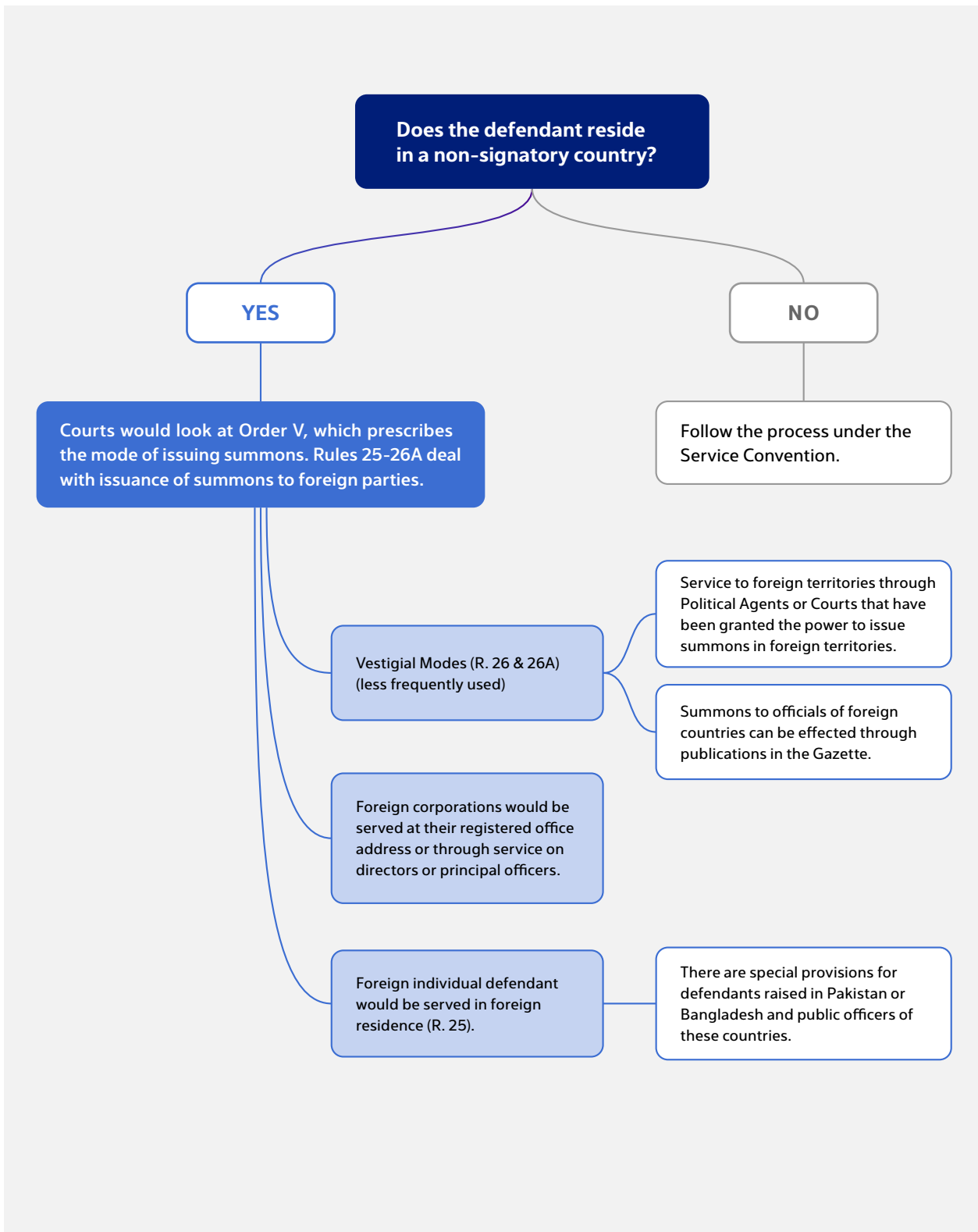
41 2018 SCC OnLine Ker 20657.

42 “Section 29 Service of Foreign Summons
Summons and other processes issued by:

- a) any Civil or Revenue Court established in any part of India to which the provisions of this Code do not extend, or
- b) any Civil or Revenue Court established or continued by the authority of the Central Government outside India, or
- c) any other Civil or Revenue Court outside India to which the Central Government has, by notification in the Official Gazette, declared the provisions of this section to apply,

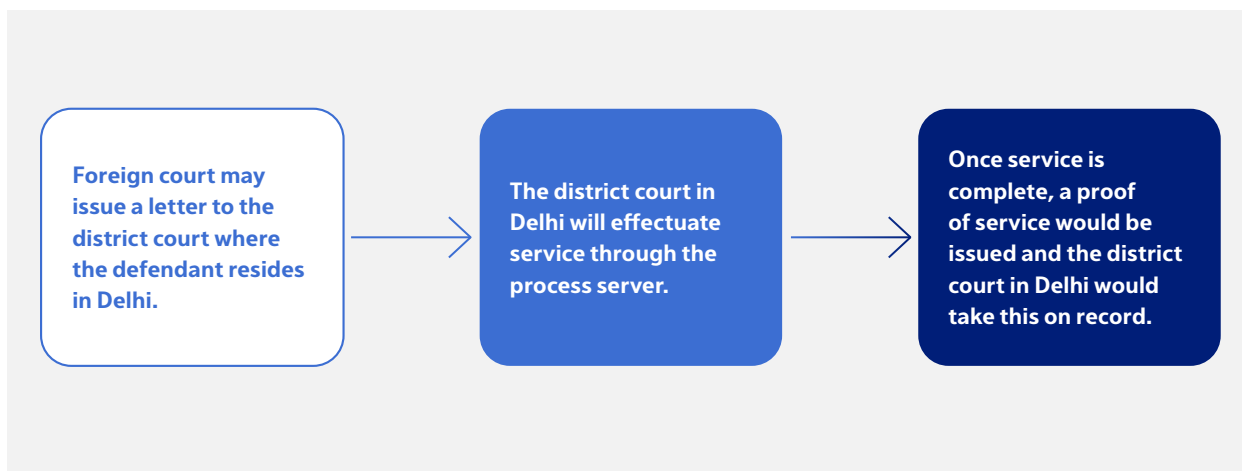
may be sent to the Courts in the territories to which this Code extends and served as if they were summonses issued by such Courts.”

The process followed by the court is represented diagrammatically below:



Service to India from a Non-Signatory Country

A petitioner residing and conducting business in a non-signatory country wants to complete service on the defendant residing in Delhi, India (say).



Ways to Reduce the Time Period for Completing Service

It is a trite that the process of service under the Service Convention is a formal channel which involves layers of authorities in case of main channel of transmission. In case of India, the problem further aggravates because action by Ministry of Law and Justice which is the Central Authority and concerned Courts may take months to process and make it onerous. To avoid the same, two available methods are (a) process of service to a resident agent, and (b) waiver clause in the agreement.

A. Process of Service to a Resident Agent

The Service Convention is applicable only in cases where there is inter-state request for process of service. In context of the same, when a resident agent is appointed by the foreign party in the forum state, the court can directly issue the request to such agent without the applicability of the Service Convention. Such resident agent can be both voluntarily and involuntarily appointed by the Defendant party. The US Supreme Court in the case of *Volkswagenwerk Aktiengesellschaft v. Schlunk*⁴³ noted that the process of service to the subsidiary of a defendant will be considered valid and will not attract the Service Convention, even when such subsidiary is not a party to the main agreement between the parties.

Based on this, it is arguable that appointment of a resident agent and providing the same in the agreement will not only save time for the parties but will also make the whole process expeditious.⁴⁴

⁴³ 486 U.S. 694, 698 (1988).

⁴⁴ John F. Coyle, et.al, Contracting Around the Hague Service Convention, (2019) University of California Davis Law Review, Vol. 53, 56.

Conclusion

B. Waiver Clause in the Agreement

The parties in their agreement can also agree to waive off the provisions of the Service Convention and agree to their own terms of process of service.⁴⁵ Through this method parties can decide their own convenient way to process the service and bind themselves by such agreement as was noted in the case of *Rockefeller Technology*.⁴⁶ However, this is a riskier method and can promote litigation on the validity of the service because of the conundrum and lack of judicial precedent on this issue.

Conclusion

To a large extent, the signing of the multilateral Service Convention between countries has eased this process by streamlining such requirements. India's objections to alternate channels of transmission of documents under the Service Convention makes the process of service longer, and less desirable. Foreign courts have also been particularly concerned about delays in service due to India's objections. Jurisprudence and legislative will in this regard appears to be scant, it remains to be seen whether such reservations shall be removed in the distant future.

⁴⁵ Century Metal Recycling Private Limited vs. Sachin Chhabra and Ors., Delhi High Court, 2017.

⁴⁶ S249923, Supreme Court of California.

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We are a research and strategy driven international firm with offices in Mumbai, Palo Alto (Silicon Valley), Bengaluru, Singapore, New Delhi, Munich, and New York. Our team comprises of specialists who provide strategic advice on legal, regulatory, and tax related matters in an integrated manner basis key insights carefully culled from the allied industries.

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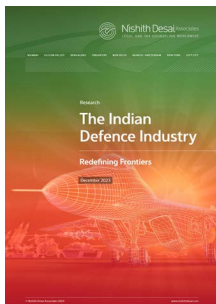
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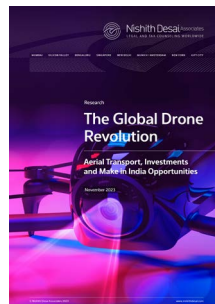
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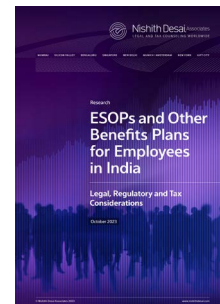
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