

PROTECTING CONSUMERS IN AN AGE OF AMAZON: AMENDING THE HAGUE SERVICE CONVENTION TO MEET THE NEEDS OF THE VIRTUAL CONSUMER

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I. INTRODUCTION

Imagine, someone is listening to their new favorite album when, suddenly, their Bluetooth earbuds stop working. They consider heading to the department store, but quickly remember that they can probably get a better deal, plus free two-day shipping, with their Amazon Prime account.¹ Within minutes they have explored several options and chosen a pair at a bargain price—but just to be careful, they made sure to check for positive reviews. Two days later, they receive their package, unbox their earbuds, and attempt to charge them up before the first use. After leaving the earbuds to charge for a while, they return and realize a faulty battery has caused the earbuds to catch fire. By this time, smoke has taken over their entire bedroom, resulting in damage to their bedroom furniture, as well as their clothing and electronic devices.

Once they realize the burdensome cost of replacing all their property, they decide to contact the seller of the earbuds that caused the fire. Returning to Amazon, they go to the product's listing page and see that the seller is a corporation named "Music Buds USA."² However, once they click on the seller's name, the contact details inform them that the seller is not in the United States, but in China. When they later speak with their attorney, they learn that it will be extremely difficult, if not impossible, to recover from an

¹ Amazon is an ecommerce company, and the largest retailer in the world. Lauren Debter, *Amazon Surpasses Walmart As The World's Largest Retailer*, FORBES (May 15, 2019, 5:50 PM),

<https://www.forbes.com/sites/laurendebter/2019/05/15/worlds-largest-retailers-2019-amazon-walmart-alibaba/#3c10d454171c> [<https://perma.cc/Q3SZ-7DTU>].

² Similar Chinese corporation names include "Aioneus-US," located in Guangdong, China. Aioneus-US, Listing of *USB C Cable 3A Fast Charging 6FT 3Pack Nylon Type C Phone Charger Cord for Samsung Galaxy Note 20 S8 S9 S10 S20 FE A10e A01 A11 A20 A21 A50 A71, LG K51 Stylo 6 5 Q7 V60, Moto G Stylus Power G7 G6 Z4 Z*, AMAZON.COM, https://www.amazon.com/Charger-Charging-Aioneus-Braided-Compatible/dp/B07WF5ZF6C/ref=sr_1_52?dchild=1&keywords=phone+charger&qid=1605151219&sr=8-52 [<https://perma.cc/FC87-SN56>] (last visited Nov. 11, 2020).

Amazon third-party seller based in China. Their attorney could attempt to provide the corporation with service of process, which could take up to two years at the plaintiff's expense, but there is no guarantee that the service would be successful.³ Fearing that filing a claim will cause them to incur more expenses without receiving any recovery, they decide not to follow through with the claim.

Unfortunately, as Amazon's dominance in the U.S. marketplace continues to grow and their oversight of third-party sellers diminishes, more and more U.S. consumers are finding themselves encountering dangerous, unvetted products on the site.⁴ Consumers are particularly vulnerable on Amazon due to the platform's strong reliance on third-party sellers, who make up 60% of the company's physical merchandise sales.⁵ Although, in the past, one may have argued that it is the responsibility of the consumer to distinguish legitimate products from fake ones, it is becoming increasingly harder to make this distinction. In recent years, third-party sellers have increased their efforts to deceive consumers by competitively pricing their products just below the price of their legitimate counterparts and leaving fake reviews for their listings.⁶ These fake reviews are now reportedly being sold in bulk by companies promising to secure an "Amazon's Choice" label within two weeks of service, making a product appear completely

³ Jared L. Hubbard, *Serving Process on Chinese Companies in US Litigation*, FITCH L. PARTNERS LLP (June 3, 2019), <https://www.fitchlp.com/blog/2019/06/serving-process-on-chinese-companies-in-us-litigation.shtml> [<https://perma.cc/M3QY-75C8>].

⁴ Chaim Gartenberg, *Amazon is Reportedly Listing Thousands of Unsafe or Banned Products*, THE VERGE (Aug. 23, 2019, 2:22 PM), <https://www.theverge.com/2019/8/23/20829933/amazon-selling-third-party-unsafe-banned-products-wsj-report> [<https://perma.cc/UMY7-RBBD>] ("Amazon is reportedly selling thousands of products that are mislabeled, banned, or declared unsafe by federal agencies.").

⁵ Alexandra Berzon et al., *Amazon Has Ceded Control of Its Site. The Result: Thousands of Banned, Unsafe, or Mislabeled Products*, WALL ST. J. (Aug. 23, 2019, 9:56 AM), <https://www.wsj.com/articles/amazon-has-ceded-control-of-its-site-the-result-thousands-of-banned-unsafe-or-mislabeled-products-11566564990> [<https://perma.cc/KP98-A4BC>] ("[M]any of them anonymous, many in China . . ."); Dave Bryant, *How Chinese Sellers are Manipulating Amazon in 2020*, ECOMCREW, <https://www.ecomcrew.com/chinese-sellers-manipulating-amazon/> [<https://perma.cc/UX2G-2XMT>] (last visited Oct. 5, 2020) ("[I]t is estimated that there are over 200,000 Chinese businesses currently selling on Amazon . . .").

⁶ Sarah Ladd, *Customs Agents Seize \$95M in Counterfeit Goods Along with Thousands of Fake IDs*, USA TODAY (Nov. 27, 2019), <https://www.usatoday.com/story/news/nation/2019/11/27/customs-agents-seize-thousands-fake-ids-counterfeit-items/4324778002/> [<https://perma.cc/A6HD-WAW8>]; Bryant, *supra* note 5.

trustworthy when it is likely unsafe.⁷ In fact, there are so many potentially harmful products on Amazon's site, in an investigation published by the Wall Street Journal in 2019, Amazon reportedly had 4,152 products for sale "[t]hat ha[d] been declared unsafe by federal agencies, [we]re deceptively labeled[,] or [we]re banned by federal regulators."⁸ These items ranged from toys to medication.⁹ In one particularly devastating incident involving a faulty product sold on Amazon, a motorcyclist was killed in a motor vehicle collision because his helmet, purchased on Amazon, failed to stay on his head when he crashed.¹⁰ The helmet's listing claimed that it was certified by the U.S. Department of Transportation, however, the helmet was actually fraudulently labeled.¹¹

This note proposes a solution to increase the likelihood of consumer recovery from Chinese third-party sellers, resulting in increased consumer trust and willingness to file claims against such corporations. This recommendation centers around amending the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents ("Hague Service Convention"), a treaty that dictates the process by which specified foreign individuals and corporations must be provided service of process.¹² Service of process in China is governed by this treaty.¹³

In Part II, this note will provide an overview of the history of products liability laws in the U.S., as well as where those laws currently stand.¹⁴ This section will also provide relevant background on Amazon, its impact on the U.S. market, and a more in-depth analysis of the consequences of its influence. Part III will set out the current procedure for serving Chinese corporations under the Hague Service Convention, along with problems

⁷ Noah Manskar, *Fake Amazon Reviews are Being Sold in Bulk Online*, N.Y. POST (Feb. 16, 2021), <https://nypost.com/2021/02/16/fake-amazon-reviews-are-being-sold-in-bulk-online/> [<https://perma.cc/E4HA-3ZV6>]; see generally Jason Cohen, *How to Spot a Fake Review on Amazon*, PCMAG (Oct. 7, 2020), <https://www.pcmag.com/how-to/how-to-spot-a-fake-review-on-amazon> [<https://perma.cc/5F7C-4WCY>] (suggesting that only 33% of U.S. Prime Day users feel *somewhat* confident that they can spot a fake review).

⁸ Berzon, *supra* note 5.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² See generally Aaron Lukken, *How to Serve Process in China*, HAGUE L. BLOG (Jan. 12, 2017), <https://www.haguelawblog.com/2017/01/serve-process-china/> [<https://perma.cc/3V86-Q3PR>].

¹³ *China Judicial Assistance Information*, US DEP'T OF ST., <https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information/China.html> [<https://perma.cc/6YM8-ZL5D>] (last updated May 1, 2019).

¹⁴ Products liability laws address liability against sellers and manufacturers of defective products that harm purchasers of such products. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 1 (AM. LAW. INST. 1998).

associated with this procedure. The section will then discuss amending the Hague Service Convention to allow for service through the custom method of communication in the marketplace in which the seller operates: in this case, Amazon's messaging center. This solution will accomplish equity goals by placing the burden in the hands of the injuring party, as well as efficiency goals by expediting the service of process timeline. Part IV will provide an alternative solution, Amazon could incentivize arbitration agreements between sellers and consumers on its site, allowing consumers to avoid the Hague Service Convention requirements. However, this recommendation carries potential concerns of equity towards the consumer. Part V will conclude that Amazon's effects on the U.S. market have led to a need for change if there is any hope of consumer product liability protection. To best effectuate that change, we must first address the Hague Service Convention.

II. BACKGROUND

The U.S. government actively tries to detect and seize fraudulent imports through U.S. Customs and Border Protection enforcement measures.¹⁵ International third-party sellers on Amazon must import their shipments to U.S. consumers, making their products subject to potential inspection by Customs. Customs is unable to thoroughly inspect each shipment that enters the U.S.; instead, the agency relies on unknown algorithms to assess the risk of each shipment.¹⁶ Risky shipments will face one of three inspection examinations, ranging from a non-intrusive x-ray inspection to intensive, thorough inspections that can take up to thirty days.¹⁷ Due to these protective measures, Customs confiscates a large number of illegal shipments each year;¹⁸ however, not all illegal shipments are detected.¹⁹ It is not clear how these shipments slip through the cracks, but Customs has stated that the increase in "small, just-in-time packages" resulting from the rise in

¹⁵ Customs officers are authorized to inspect all persons and imports arriving in the U.S. to assure compliance with applicable laws and regulations by 19 U.S.C.S. § 1467 (LexisNexis 1938); *see also* Treas. Reg. § 162.6 (1979).

¹⁶ *Everything You Need to Know About Customs Exams (and How to Avoid Them)*, DEWITT MOVE WORLDWIDE, <https://www.dewittmove.com/customs-exam/> [<https://perma.cc/A6QA-FJ76>] (last updated Mar. 6, 2019).

¹⁷ *Id.*

¹⁸ *See* Marlo Safi, *US Customs Seized 13 Million Counterfeit Masks and Thousands of Banned Test Kits in 2020, Mostly From China*, DAILY CALLER (Feb. 4, 2021), <https://dailycaller.com/2021/02/04/us-customs-border-protection-seizures-13-million-confiscated-masks-test-kits-covid-19-china/> [<https://perma.cc/R9FW-DDT8>]; *see also* Ladd, *supra* note 6.

¹⁹ Grant Suneson, *Clothing, Jewelry, Prescription Drugs Among America's Most Counterfeited Items*, USA TODAY (Sept. 21, 2018), <https://amp.usatoday.com/amp/37022305> [<https://perma.cc/S7MS-K3H5>] ("Thousands more shipments of counterfeit goods likely went undetected and made it into the United States.").

ecommerce has created particular inspection challenges for the agency.²⁰ Illegal products that make it past Customs are then shipped to consumers and any risk associated with the product can only be addressed by the consumer filing a products liability action.

Generally, when a consumer is injured by a defective product, a seller of the product is subject to liability for the defect under products liability laws.²¹ Under these laws, a product may be deemed defective if, either: (1) the product does not meet the standards of its intended design (“manufacturing defect”), (2) the design of the product poses foreseeable risks, which could have been avoided by a reasonable alternative design (“design defect”), or (3) the design poses foreseeable risks, which could have been avoided by adequate warnings or instructions, and such warnings or instructions were not provided (“marketing defect”).²² Amazon’s process of allowing third-party sellers to sell directly to consumers exposes consumers to many more unregulated products, and makes them particularly vulnerable to harm from product defects.²³ Consequently, it is necessary to explore the history and purpose of products liability laws in the U.S., as well as Amazon’s effect on claims under these laws, before turning to this Note’s proposed solution. The following two sections will discuss each of these topics in part.

A. Products Liability Laws in the United States

1. History & Purpose

The history of products liability laws began under early U.S. common law.²⁴ Specifically, the common law doctrine of privity allowed an injured

²⁰ Fake Goods, Real Dangers, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/FakeGoodsRealDangers> [<https://perma.cc/7CY8-FHLY>] (last visited Feb. 28, 2021).

²¹ RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 1 (AM. LAW. INST. 1998); *Amazon Product Liability Suit Sent to Pennsylvania Supreme Court*, BEASLEY ALLEN L. FIRM (June 5, 2020), <https://www.beasleyallen.com/news/amazon-product-liability-suit-sent-to-pennsylvania-supreme-court/#:~:text=Amazon%E2%80%99s%20liability%20for%20third-party%20consumer%20products%20sold%20through,vendors%20can%20sell%20their%20products%20directly%20to%20consumers> [<https://perma.cc/4R38-7DQZ>].

²² RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 (AM. LAW. INST. 1998).

²³ BEASLEY ALLEN, *supra* note 21 (noting that, just in May 2020, a Tennessee family’s home was destroyed due to a fire caused by a defective Chinese-made hoverboard bought on Amazon).

²⁴ *Product Liability*, L. LIBR.-AM. L. AND LEGAL INFO., <https://law.jrank.org/pages/9466/Product-Liability-Historical-Development.html> [<https://perma.cc/RWN2-E789>] (last visited Oct. 8, 2020); Troy Segal, *Common Law*, INVESTOPEDIA (July 28, 2020), <https://www.investopedia.com/terms/c/common-law.asp> [<https://perma.cc/PLN5-BT46>] (“Common law is a body of unwritten laws based on legal precedents established by the courts.”).

party to sue a negligent party *if they were parties to a contract*.²⁵ This created problems for consumers, who may not have contracted with the party who caused the defect.²⁶ Over time, however, courts recognized the frustrations placed on injured consumers and decided to eliminate the privity requirement, no longer forcing injured consumers to show that they directly contracted with the injuring-party.²⁷ Throughout the twentieth-century, scholars debated whether the typical negligence scheme for products liability laws should be replaced by a strict liability standard.²⁸ In 1963, a California Supreme Court finally adopted the strict liability proposal, which led to sweeping liability reforms in most U.S. states.²⁹

In *Greenman v. Yuba Power Products, Inc.*, the court noted that the purpose of imposing strict liability regarding defective products is to ensure that the cost of injuries caused by the defect burden the party who created and marketed the product.³⁰ The court's opinion also relied heavily on Justice Traynor's concurring opinion in *Escola v. Coca Cola Bottling Co.*,³¹ which argued:

It is to the public interest to discourage the marketing of products having defects that are menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market.³²

Justice Traynor's argument has been further summarized to include three core policy arguments for strict products liability: (1) promoting social responsibility by fixing the cost on the most responsible party, (2) loss-spreading by shifting the burden in the most economically sound manner, and (3) incentivizing safe products in the market.³³ These arguments illustrate the courts' prioritization of consumer protection over commercial

²⁵ L. LIBR., *supra* note 24.

²⁶ *Id.*

²⁷ *Id.* (citing *Macpherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (N.Y. 1916)).

²⁸ *Id.*; *Strict Liability*, COLLINS DICTIONARY OF L. (2006), available at <https://legal-dictionary.thefreedictionary.com/strict+liability> [<https://perma.cc/Z5TX-3CV3>] (“Absolute legal responsibility for an injury that can be imposed on the wrongdoer without proof of carelessness or fault.”).

²⁹ L. LIBR., *supra* note 24; *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897, 901 (Cal. 1963).

³⁰ *See Greenman*, 377 P.2d at 901.

³¹ Interestingly, Justice Traynor wrote the concurring opinion in *Escola*, but later wrote the majority opinion in *Greenman*. *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring).

³² *Escola*, 150 P.2d at 441 (Traynor, J., concurring).

³³ Ryan Bullard, *Out-Teching Products Liability: Reviving Strict Products Liability in an Age of Amazon*, 20 N.C. J.L. & TECH. ON. 181, 189-92 (2019).

profits. As these purposes have been at the heart of products liability laws from the beginning of their development, it is essential that any modernization affecting products liability laws align with them, rather than interfere.

2. Overview: Current State Products Liability Laws

Because there is no federal products liability law, procedures regarding products liability claims vary state by state.³⁴ Notably, all fifty states have adopted some form of products liability law.³⁵ However, claims may vary by state, arising under different theories of liability, including but not limited to: strict liability, negligence, and warranty. When a claim arises under strict products liability, plaintiffs must show: (1) the seller was in the business of selling the specified product, (2) the product was defective at the time of sale, (3) the product was unreasonably dangerous, (4) the product did not substantially change before reaching the consumer, and (5) the product caused harm to the plaintiff.³⁶ Under negligence claims, the plaintiff must show (1) that the seller owed them a duty, (2) the seller breached that duty, and (3) such breach was the proximate cause of damage to the plaintiff.³⁷ Lastly, warranty claims arise under the law of contracts, and the plaintiff need only show that the seller breached an express or implied warranty of the contract.³⁸

Many states have adopted all three of these common claims, some adopting even more.³⁹ This structure allows for multiple opportunities for recovery among consumers, depending on what evidence they have available. For example, if a consumer did not have evidence of a lack of reasonable care by the seller, they would bring a claim under strict liability or warranty, rather than negligence. Like Justice Traynor's stated purpose behind strict liability,⁴⁰ states' willingness to adopt several opportunities for consumer recovery reflects the policy choice to protect the consumer over business.

As a general overview, theories of liability available in all fifty states have been summarized below:⁴¹

³⁴ *Products Liability*, CORNELL L. SCH., https://www.law.cornell.edu/wex/Products_liability [<https://perma.cc/43Q7-QVL5>] (last visited Oct. 8, 2020).

³⁵ *Id.*; *Product Liability in All 50 States*, MATTHIESON, WICKERT, & LEHRER, S.C., <https://www.mwl-law.com/wp-content/uploads/2018/02/PRODUCT-LIABILITY-LAW-CHART.pdf> [<https://perma.cc/H9BF-VYA8>] (last updated Oct. 17, 2019).

³⁶ 63 AM. JUR. 2D *Products Liability* § 530 (2020).

³⁷ 63 AM. JUR. 2D *Products Liability* § 209 (2020).

³⁸ 63 AM. JUR. 2D *Products Liability* § 619 (2020).

³⁹ MATTHIESON, *supra* note 35.

⁴⁰ *Escola*, 150 P.2d 436, 440.

⁴¹ MATTHIESON, *supra* note 35.

States	Liability Standard
Alaska California	Strict Liability Negligence Warranty Consumer Protection
Alabama Arizona Arkansas Colorado Connecticut District of Columbia Georgia Idaho Illinois Indiana Iowa Kansas Kentucky Maine Maryland Minnesota Mississippi Missouri Montana Nebraska Nevada New Hampshire New Mexico New York North Dakota Oregon Rhode Island South Carolina South Dakota Tennessee Texas Utah Vermont Washington West Virginia Wyoming	Strict Liability Negligence Warranty
New Jersey	Strict Liability Warranty Consumer Expectation
Hawaii Wisconsin	Strict Liability Negligence
Pennsylvania	Strict Liability Warranty
Florida Ohio	Strict Liability
Alabama Delaware North Carolina Virginia	Negligence Warranty
Massachusetts Oklahoma	Negligence
Michigan	Negligence Wrongful Death
Louisiana	Other

B. Amazon: The World's Largest Retailer

Before one can understand the need for procedural change regarding products liability claims in an age of Amazon, it is necessary to explore Amazon's background, as well as its effects on consumer behavior.

As previously mentioned, Amazon is of particular concern to consumer safety due to its exponential growth and dominance in the U.S. market,⁴² coupled with its unique reliance on third-party sales, of which it has little oversight.⁴³ Since its 1995 launch as an online bookseller, Amazon has experienced rapid growth.⁴⁴ Within only five years of its launch, Amazon went public, expanded its product offerings beyond books, opened international sites, and took other action to further its influence and deem Jeff Bezos the “king of cybercommerce.”⁴⁵ Amazon’s innovative and evolutionary nature has been at the center of its success thus far, and these traits will likely allow the company to continue to flourish beyond 2020.⁴⁶

1. Amazon’s Unique Platform & the Rise of Ecommerce

Before the internet, commercial transactions occurred almost entirely in person.⁴⁷ Even at the peak of mail-order catalogue shopping, in-person shopping remained dominant because packages arrived so slow, it was simply easier to visit a local store.⁴⁸ Today, transactions can be completed at the click of a button from all across the world, and the occurrences of internet

⁴² In 2020, nearly 60% of U.S. households subscribed to Amazon Prime. See Tugba Sabanoglu, *Total Number of Households in the United States with an Amazon Prime Subscription From 2018 to 2022*, STATISTA, <https://www.statista.com/statistics/861060/total-number-of-households-amazon-prime-subscription-usa/> [<https://perma.cc/9XAR-VP4U>] (last visited Feb. 28, 2021) (estimating 71.3 million household Prime subscriptions); Statista Res. Dep’t, *Number of Households in the U.S. from 1960 to 2020*, STATISTA, <https://www.statista.com/statistics/183635/number-of-households-in-the-us/#:~:text=Published%20by%20Erin%20Duffin%2C%20Nov%2028%2C%202019.%20In,there%20were%2052.8%20million%20households%20in%20the%20U.S.> [<https://perma.cc/9W97-EHAZ>] (last visited Feb. 28, 2021) (estimating 128.45 million total U.S. households).

⁴³ Gartenberg, *supra* note 4.

⁴⁴ *Amazon Opens for Business*, HISTORY, <https://www.history.com/this-day-in-history/amazon-opens-for-business> (last updated Oct. 9, 2020) [<https://perma.cc/9F5W-GKJS>]; Catherine Armstrong, *The History of Amazon.com*, TECHWALLA, <https://www.techwalla.com/articles/the-history-of-amazoncom> (last visited Oct. 9, 2020).

⁴⁵ Armstrong, *supra* note 44.

⁴⁶ Prableen Bajpai, *5 Reasons Why Amazon Will Continue to Grow*, NASDAQ (Feb. 5, 2020, 3:31 PM), <https://www.nasdaq.com/articles/5-reasons-why-amazon-will-continue-to-grow-2020-02-05> [<https://perma.cc/AQ2V-8GHK>].

⁴⁷ Allison Schrage, *We Wouldn’t Have Ecommerce Without Amazon*, QUARTZ (Oct. 22, 2019), <https://qz.com/1688548/amazons-control-of-e-commerce-has-changed-the-way-we-live/> [<https://perma.cc/BC66-9QHR>].

⁴⁸ *Id.* (“It took days or weeks to get a good.”).

transactions are continuously rising.⁴⁹ In fact, from 2000-2019 the number of Americans who shopped online increased by nearly 60%.⁵⁰

This dramatic shift in consumer culture has occurred in part due to Amazon's substantial influence on consumer activity.⁵¹ Amazon's site contains more products than any other retailer—over 12 million different products—while also offering consumers delivery services that make it easier to buy from its website than many brick-and-mortar stores.⁵² By expanding its platform in the 2000s to include third-party sellers, the company allowed consumers to compare prices and reviews of products unlike they ever had before.⁵³ Amazon's use of third-party sellers has since become central to its success, as various sellers from various locations correlates with an increase in price competition; consequently, the more third-party sellers Amazon has, the lower prices it is able to offer for a product.⁵⁴ Third-party sellers are now responsible for nearly 60% of Amazon's physical merchandise sales.⁵⁵

Amazon's influence has further been solidified by its creations of Amazon Prime in 2005, Amazon's consumer membership program, which made transactions even more efficient and included free delivery; subsequently, increasing customer loyalty.⁵⁶ With an Amazon Prime membership, consumers are able to order from anywhere in the world and receive their item in as little as twenty-four hours.⁵⁷ The success of Amazon's rapid delivery services has led to a change in consumer expectations, where now consumers expect instant gratification from online shopping⁵⁸ —*a standard that Amazon's competitors struggle to meet.*

Along with its customer base, Amazon's influence on the U.S. economy has substantially grown since its beginning.⁵⁹ Throughout the 2000s and

⁴⁹ *Id.*; Lydia DePillis, *It's Amazon's World. We Just Live in It.*, CNN BUSINESS (Oct. 4, 2018, 7:17 PM), <https://www.cnn.com/2018/10/03/tech/amazon-effect-us-economy/index.html> [<https://perma.cc/3F8P-ZMCK>].

⁵⁰ Schragger, *supra* note 47.

⁵¹ *Id.*; DePillis, *supra* note 49.

⁵² Schragger, *supra* note 47; DePillis, *supra* note 49.

⁵³ Schragger, *supra* note 47.

⁵⁴ *Id.*

⁵⁵ Berzon, *supra* note 5.

⁵⁶ Schragger, *supra* note 47; Today Amazon Prime memberships contain numerous benefits, including, but not limited to: free same-day shipping, streaming of movies, unlimited reading, and various shopping exclusives. *About Amazon Prime*, AMAZON.COM, <https://www.amazon.com/gp/help/customer/display.html?nodeId=201910360> (last visited Oct. 25, 2020) [<https://perma.cc/FG5B-73NC>].

⁵⁷ DePillis, *supra* note 49; AMAZON.COM, *supra* note 56.

⁵⁸ Riley Panko, *How Amazon Prime is Shifting Consumer Expectations*, RETAIL LEARNING CHANNEL (Sept. 30, 2019), <https://retaillearning.co/how-amazon-prime-is-shifting-consumer-expectations/> [<https://perma.cc/4DQZ-64MX>].

⁵⁹ Schragger, *supra* note 47.

2010s, the demand for products sold on Amazon significantly increased; Amazon responded by expanding its labor force.⁶⁰ This labor force expansion has led to the creation of over two million jobs in the U.S. in just the last decade.⁶¹ Simultaneously, Amazon's overtaking of the retail market has led to the depletion of over 500,000 department store jobs since 2001.⁶² Even more, the company has made independent sellers of products dependent on a presence on its marketplace for success.⁶³ Sellers cannot gain access to a similar audience size to that of Amazon from any other site on the internet.⁶⁴ Consequently, Amazon has created "a portal through which so much commerce must flow," sellers, consumers, and U.S. employees have come to rely on Amazon for a large proportion of commercial transactions.⁶⁵

2. Amazon's Financial Success & Where the Company Stands

Today

Today, Amazon has a market capitalization of over \$900 billion.⁶⁶ This makes Amazon the world's largest retailer, and has further led to Jeff Bezos becoming the world's richest person.⁶⁷ The company has over 100 million Amazon Prime subscribers in the U.S., making up over 30% of the total U.S. population, and of all ecommerce purchases in the U.S., 40% of transactions are completed through Amazon.⁶⁸ Further, Amazon has continued to expand

⁶⁰ *Amazon's Economic Impact in the US*, AMAZON.COM (Jan. 31, 2020), <https://blog.aboutamazon.com/job-creation-and-investment/amazons-economic-impact-in-the-u-s> [<https://perma.cc/9Z2B-6CVY>].

⁶¹ *Id.* ("Over the last decade, no other US-based company has created more jobs than Amazon.").

⁶² Schrage, *supra* note 47.

⁶³ DePillis, *supra* note 49.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Debter, *supra* note 1; James Chen, *What is Market Capitalization*, INVESTOPEDIA, <https://www.investopedia.com/terms/m/marketcapitalization.asp> [<https://perma.cc/PN9M-66JM>] (last updated May 13, 2020) ("Market Capitalization refers to the total dollar market value of a company's outstanding shares of stock. [I]t is calculated by multiplying the total number of a company's outstanding shares by the current market price of one share.").

⁶⁷ Debter, *supra* note 1.

⁶⁸ *Id.*; *United States Population (Live)*, WORLDMETER, <https://www.worldometers.info/world-population/us-population/> [<https://perma.cc/2T9W-NHSV>] (last visited Oct. 25, 2020); Stacey Widlitz, *Amazon: The Consumer's Everything in a Post-Covid World*, FORBES (July 31, 2020), <https://www.forbes.com/sites/staceywidlitz/2020/07/31/amazon-the-consumers-everything-in-a-post-covid-world/#69c6053095d5> [<https://perma.cc/Z4B6-XRUZ>].

its Amazon Prime benefits, allowing it to endlessly capture more of the U.S. market and making itself “a must-have in every household.”⁶⁹

Even throughout the 2020 Covid-19 pandemic, Amazon has shown substantial, continuous growth.⁷⁰ In fact, on the same day that the U.S. announced that the economy had collapsed by a record-setting 32.9%, Amazon reported its quarterly sales, which did not reflect such a collapse.⁷¹ The company had profited \$5.2 billion for the quarter, with sales of \$88.9 billion.⁷² Thus, the company experienced a profit 40% higher than that of the same quarter in 2019.⁷³ Unsurprisingly, Amazon is expected to continue this trend, becoming even more dominant in the post-Covid world.⁷⁴ Due to the Covid-19 virus, many large department store companies who were already struggling before the pandemic have seen decreased sales and many have filed for bankruptcy.⁷⁵ As a result, brands that have traditionally sold through department stores, and have never considered selling on Amazon, are now turning to Amazon at an increasing rate as they have no other choice if they want to stay in business.⁷⁶

3. *Consequences of Amazon on Products Liability Claims*

Amazon’s overtaking of the U.S. market has deemed it an essential presence in the U.S. economy, to which consumers, sellers, direct employees, and indirect employees rely.⁷⁷ However, increased presence in the marketplace comes with an increased likelihood of consumer encounters with unreasonably hazardous products—a circumstance which Amazon is no stranger to.⁷⁸ Unlike consumers in traditional brick-and-mortar department stores, consumers on Amazon are even more likely to encounter unreasonably hazardous products due to Amazon’s unique third-party seller

⁶⁹ Debter, *supra* note 1.

⁷⁰ Kari Paul, *Tech Giants’ Shares Soar as Companies Benefit from Covid-19 Pandemic*, THE GUARDIAN (July 30, 2020) <https://www.theguardian.com/business/2020/jul/30/amazon-apple-facebook-google-profits-earnings> [<https://perma.cc/9X3T-5KKA>].

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Widlitz, *supra* note 68.

⁷⁵ Nathan Bomey, *Can These 13 Retailers Survive Coronavirus? Permanent Store Closings, Bankruptcies Coming*, USA TODAY, <https://www.usatoday.com/story/money/2020/05/08/store-closings-chapter-11-bankruptcy-coronavirus-covid-19/3090235001/> [<https://perma.cc/528T-AN8S>] (last updated May 8, 2020).

⁷⁶ Widlitz, *supra* note 68.

⁷⁷ DePillis, *supra* note 49 (“[M]easured by importance to modern life and ability to shape the American economy in its own image, Amazon is second to none.”).

⁷⁸ See Berzon, *supra* note 5.

platform.⁷⁹ The reliance on these sellers has resulted in Amazon evolving “like a flea market,” making it extremely difficult for Amazon to conduct adequate oversight of all of its third-party sellers—particularly its international sellers, largely made up of sellers in China.⁸⁰ Ironically, this means that a key component of Amazon’s success is also a significant cause of consumers’ injuries from defective products.

Amazon’s failure to regulate the products sold by third-party sellers has led to (1) an increased number of dangerous products on its site, and (2) an increased number of consumers actually injured by dangerous products. Just in August 2019, over 4,000 defective products were found on Amazon’s site: 157 of which Amazon believed it had already banned, and all of which would have been banned from shelves in a traditional brick-and-mortar store.⁸¹ Even upon notice of the defective products, Amazon was only able to take down or reword the listings for fifty-seven percent of the defective products, the rest remained on its site.⁸²

Amazon’s difficulty in regulating third-party sellers’ products has resulted in numerous cases of consumers injured by those products. For instance, in *Eberhart v. Amazon.com, Inc.*, the plaintiff ordered a French press coffeemaker from a third-party seller on Amazon.⁸³ Although the coffeemaker was labeled as containing “heat resistant glass,” the glass shattered while being washed, causing lacerations and permanent nerve damage to the plaintiff.⁸⁴ The plaintiff was attempting to sue Amazon in this case, but the court held in favor of Amazon.⁸⁵

Amazon will continue to grow. With that growth, will come *more* consumers encountering *more* dangerous, illegal products from *more* third-party sellers outside of the U.S. When injuries occur, countries like China will continue to make it impossible for consumers to recover. To address this inevitable reality, many have argued that Amazon should be held liable as a “seller” under products liability laws.⁸⁶ Actually, the Pennsylvania Supreme

⁷⁹ See Bullard, *supra* note 33, at 197–206 (discussing cases where consumers bought defective products on Amazon from third-party sellers and tried to sue Amazon for their injuries).

⁸⁰ Kari Paul, *Amazon Removes Hundreds of Toxic and Unsafe Products After News Reports*, THE GUARDIAN (Aug. 23, 2019) <https://www.theguardian.com/technology/2019/aug/23/amazon-products-removed-toxic-wsj> [<https://perma.cc/YW3Z-4DS6>]; Berzon, *supra* note 5.

⁸¹ Berzon, *supra* note 5.

⁸² Paul, *supra* note 80.

⁸³ Bullard, *supra* note 33, at 205–06; *Eberhart v. Amazon.com, Inc.*, 325 F. Supp.3d 393, 395 (S.D.N.Y. 2018).

⁸⁴ Bullard, *supra* note 33, at 205; *Eberhart*, 325 F. Supp.3d at 395–96.

⁸⁵ *Eberhart*, 325 F. Supp.3d at 401.

⁸⁶ Bullard, *supra* note 33; Robert Sprague, *It’s a Jungle Out There: Public Policy Considerations Arising From a Liability-free Amazon.com*, 60 SANTA CLARA L. REV. 253 (2020).

Court agreed to hear such a case in July 2020, which would have made it the U.S.'s first higher court to decide on the matter.⁸⁷ Unfortunately, the case settled in September 2020 before any precedential decisions were made.⁸⁸

Rather than contribute to the discussion of whether Amazon should be held liable in products liability cases, the next section will be taking an alternative approach to the consumer recovery issue. Instead of looking to Amazon to recover for injuries caused by another, changes should be made to the procedure by which consumers recover from the international third-party sellers of the products, allowing injured persons to access the injuring party more easily.

III. ARGUMENT

A. Current Rules for Serving a Foreign Defendant

1. Civil Rule 4(h) and the Hague Service Convention

When a consumer brings a products liability claim, the claim is brought as a civil action and is subject to the Federal Rules of Civil Procedure (“FRCP”).⁸⁹ The FRCP govern civil proceedings in the United States district courts.⁹⁰ Even where a civil action occurs in a state court, rather than a federal district court, the FRCP almost always still apply because the rules have been adopted by nearly thirty-five U.S. states.⁹¹

⁸⁷ P.J. D’Annunzio, *Pa. Justices Agree to Take Up Amazon Products Liability Case From 3rd Circuit*, LAW.COM (July 21, 2020), <https://www.law.com/thelegalintelligencer/2020/07/21/pa-justices-agree-to-take-up-amazon-products-liability-case-from-third-circuit/> [https://perma.cc/G9N3-P9YD]; The Third Circuit Court of Appeals previously held that Amazon could be liable as a seller in products liability cases, but that opinion was later vacated. Erin K. Aronson, *Third Circuit Court of Appeals Vacates Amazon Strict Liability Ruling and Grants En Banc Hearing*, EASTBURN & GRAY, PC (Winter 2020), <https://www.eastburngray.com/publications/third-circuit-court-of-appeals-vacates-amazon-strict-liability-ruling-and-grants-en-banc-rehearing-2/> [https://perma.cc/3R5Q-SYKG].

⁸⁸ John Beauge, *Settlement Prevents Ruling Whether Amazon is Liable in Pa. for Defective Goods Injuries*, PA. REAL-TIME NEWS (Sept. 25, 2020), <https://www.pennlive.com/news/2020/09/settlement-prevents-ruling-whether-amazon-is-liable-in-pa-for-defective-goods-injuries.html> [https://perma.cc/J2CC-7M5S].

⁸⁹ FED. R. CIV. P. 1 (“These rules govern the procedure in all civil actions and proceedings in the United States . . .”).

⁹⁰ *Id.*

⁹¹ *State Rules of Civil Procedure*, US LEGAL, <http://civilprocedure.uslegal.com/rules-of-civil-procedure/state-rules-of-civil-procedure/#:~:text=State%20Rules%20of%20Civil%20Procedure.%20State%20Ru>

Under the FRCP, after filing a complaint with a court, a plaintiff must serve the defendant with a copy of the complaint, as well as a *summons*.⁹² When the defendant is an international corporation with no agent within the U.S., the summons must be served pursuant to an internationally acceptable means of service, including the Hague Service Convention.⁹³ It appears that the Hague Service Convention is an option for process of service, however, service pursuant to the Hague Service Convention is *mandatory* where it applies, which includes all civil actions where judicial or extrajudicial documents must be sent abroad.⁹⁴ Accordingly, the Hague Service Convention is always the method of service applicable to serving Amazon's third-party sellers who do not have a presence in the U.S.

2. Background and Purpose of the Hague Service Convention

The Hague Service Convention is an international treaty created in 1964.⁹⁵ There are thirty-nine distinct "Hague Conventions," the Hague Service Convention being the 14th convention.⁹⁶ The Hague Service Convention solely addresses international notice documents.⁹⁷ The treaty is the most widely recognized agreement to service, with sixty-eight signatory countries.⁹⁸ Pursuant to the terms of the treaty, each signatory country must designate a central authority within its nation that is responsible for receiving incoming service, as well as arranging for service in a manner permitted by that country.⁹⁹ The purpose behind the Hague Service Convention was to

les%20of,the%20federal%20rules%20are%20adopted%20by%20a%20state%2C [http://perma.cc/6KMK-WD93] (last visited Oct. 25, 2020); *Federal Rules of Civil Procedure: A Brief Guide*, LAWS, <http://federal.laws.com/federal-rules-of-civil-procedure> [http://perma.cc/V7LT-GTAM] (last updated Dec. 23, 2019).

⁹² FED. R. CIV. P. 4(c)(1).

⁹³ FED. R. CIV. P. 4(h)(2), f(1).

⁹⁴ *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 705 (1988).

⁹⁵ *Service in Foreign Jurisdictions*, AM. B. ASS'N (July 14, 2020),

http://www.americanbar.org/groups/gpsolo/publications/gp_solo/2011/april_may/service_in_foreignjurisdictions/#:~:text=The%20Hague%20Convention%20on%20the%20Service%20Abroad%20of,1967%2C%20and%20proclaimed%20by%20President%20Johnson%20in%201969 [http://perma.cc/Z54X-A7S2]; *Hague Service Convention*, CROWE FOREIGN SERVS.,

http://www.croweforeignservices.com/html/HagueServiceConvention.html?msclkid=b38c37c993101820188068ae45f72ca8&utm_source=bing&utm_medium=cpc&utm_campaign=**LP%20Search%20-%20Hague%20Service%20Convention%20%3E%20China&utm_term=%2Bhague%20%2Bservice%20%2Bconvention%20%2Bchina&utm_content=Hague%20Convention%20China [http://perma.cc/XX66-HG7F] (last visited Oct. 25, 2020).

⁹⁶ CROWE FOREIGN SERVS., *supra* note 95.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ AM. B. ASS'N, *supra* note 95.

simplify the process of serving international documents.¹⁰⁰ The idea was that, by designating central authorities as facilitators of service of process, service would occur more timely and courts could easily ensure proof of service abroad.¹⁰¹ As will be discussed later, the Hague Service Convention often fails to meet its original purposes in modern lawsuits.

3. *Serving Chinese Defendants Under the Hague Service*

Convention

Serving defendants in China has been described as “a matter of a simple procedure *with complicated implementation*.”¹⁰² China is a signatory country to the Hague Service Convention and, thus, has designated a central authority pursuant to the treaty’s required procedure.¹⁰³ Article 10 of the Hague Service Convention provides for alternative methods of service of process, including direct transmission through postal channels; however, China has expressly objected to the alternatives provided in Article 10.¹⁰⁴ Consequently, when serving a defendant in China, a plaintiff must serve the documents through China’s designated central authority, the Ministry of Justice of China.¹⁰⁵

Service through China’s Ministry of Justice includes several requirements. First, the plaintiff bringing the claim must complete a “model form” that will accompany the service documents.¹⁰⁶ Second, pursuant to Article 5, the plaintiff must have the service documents translated to simplified written Chinese.¹⁰⁷ Third, the plaintiff should hire a professional to determine the defendant’s true address because any error in the address

¹⁰⁰ *Id.* (citing Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 697 (1988)). In some cases, service pursuant to the Hague Service Convention is simple and efficient. *Outline Service Convention*, HCCH, <http://assets.hcch.net/docs/f4ccc07b-55ed-4ea7-8fb9-8a2b28549e1d.pdf> (last visited Oct. 25, 2020).

¹⁰¹ AM. B. ASS’N, *supra* note 95.

¹⁰² Lukken, *supra* note 12.

¹⁰³ US DEP’T OF ST., *supra* note 13; *See generally* 14. *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, HCCH (Nov. 15, 1965), <http://assets.hcch.net/docs/f4520725-8cbd-4c71-b402-5aae1994d14c.pdf>.

¹⁰⁴ HCCH, *supra* note 103; Lukken, *supra* note 12; US DEP’T OF ST., *supra* note 13.

¹⁰⁵ *China - Central Authority & Practical Information*, HCCH, <http://www.hcch.net/en/states/authorities/details3/?aid=243> (last updated June 27, 2018) [<http://perma.cc/H3GM-B3EC>]; For more information regarding China’s Ministry of Justice, visit: <http://en.moj.gov.cn/>.

¹⁰⁶ HCCH, *supra* note 100.

¹⁰⁷ Lukken, *supra* note 12; Aaron Lukken, *The Secret (Sauce) to Hague Service*, HAGUE L. BLOG (May 31, 2016), <http://www.haguelawblog.com/2016/05/secret-to-hague-service/> [<http://perma.cc/66BP-J25E>]; HCCH, *supra* note 103.

can result in a rejected request from China's Ministry of Justice.¹⁰⁸ Fourth, even though the Hague Service Convention seems to prohibit fees, the plaintiff must wire transfer \$95 to the Ministry of Justice.¹⁰⁹ Finally, all of the documents must be sent to the Ministry of Justice and the plaintiff must wait for its response regarding proof of service.¹¹⁰ The proof of service timeline can range from four months to two years.¹¹¹

4. *Where the Hague Service Convention Falls Short*

The Hague Service Convention seeks to provide a more efficient, timely service of process method for serving foreign defendants;¹¹² however, the treaty often fails to achieve that goal.¹¹³ In fact, nearly twenty percent of *all* service requests made pursuant to the Hague Service Convention are delayed for more than a year, and ten percent of requests are never processed at all—many of which are sent by U.S. plaintiffs.¹¹⁴ These types of procedural roadblocks are commonly attributed to the Hague Service Convention's central authority requirement.¹¹⁵

In addition to their exuberant compliance costs,¹¹⁶ central authorities pose serious risks to U.S. litigants because delays and rejected requests can result in “outcome-determinative consequences” to plaintiffs.¹¹⁷ Due to the deference provided to each country's central authority, the central authorities

¹⁰⁸ Lukken, *supra* note 12.

¹⁰⁹ *Id.*; Maria Gutierrez, *A Complete Guide to International Service in China*, JUD. PROCESS & SUPPORT (Oct. 11, 2019), <http://judicialsupport.com/a-complete-guide-to-international-service-in-china/#:~:text=The%20Chinese%20government%20requires%20a%20fee%20of%20%2495,They%20will%20accept%20funds%20in%20no%20other%20fashion> [<http://perma.cc/K4B7-WRXS>].

¹¹⁰ *Id.*

¹¹¹ Hubbard, *supra* note 3.

¹¹² AM. B. ASS'N, *supra* note 95.

¹¹³ Eric Porterfield, *Too Much Process, Not Enough Service: International Service of Process Under the Hague Service Convention*, 86 TEMP. L. REV. 331, 341, 344–45 (2014); *see generally* Cathleen Allison, *Suing Chinese Companies Often Useless*, NBC NEWS (Feb. 6, 2008, 3:37 PM), <http://www.nbcnews.com/id/wbna23034814#.X2ffgz-SIPY> [<http://perma.cc/HKL3-JNXB>] (“[E]very step in litigation can be an ordeal when the defendant is a Chinese company . . .”).

¹¹⁴ Porterfield, *supra* note 113, at 332, 346.

¹¹⁵ *Id.*; Interestingly, China's Central Authority, its Ministry of Justice, provides only one method of contact, an email address, which, when contacted, was not a working email address. *E-mail*, MINISTRY OF JUST. OF CHINA, http://subsites.chinadaily.com.cn/MinistryofJustice/2019-06/25/c_384191.htm [<http://perma.cc/Y2W4-7CRF>] (last updated June 25, 2019).

¹¹⁶ Compliance-related expenses can cost more than \$1,000, in addition to any mandatory reimbursement expenses (such as China's \$95 wire transfer requirement, discussed previously). Porterfield, *supra* note 113, at 344.

¹¹⁷ *Id.* at 345.

can refuse or fail to act upon a request for service for a number of reasons, including: mistranslations, use of electronic signatures and seals, or even a country's categorical choice to ignore the requirements of the treaty.¹¹⁸ Ultimately, these delays—even where unnecessary—can result in the dissolution of companies prior to service, or barred claims when the delay exceeds the statute of limitations for the claim.¹¹⁹

The Hague Service Convention forces U.S. plaintiffs to gamble on recovery where the odds are not in their favor, and even their best efforts to comply may result in a delayed or rejected service request. Often, when given the choice, plaintiffs find it more logical to avoid naming a Chinese defendant altogether, and instead attempt to recover from a U.S. company that does business with them.¹²⁰ Notably, this option does not practically apply to consumers who purchase through Amazon's site because, as previously mentioned, no state supreme court or federal circuit court has *ever* held that Amazon may be held liable for defective products sold by third-party sellers on its site.¹²¹ This means that when consumers are harmed by a defective product on Amazon's platform, they have no choice but to take the less logical option of attempting service of process in China. If consumers must attempt service, changes must be made to the Hague Service Convention's procedural requirements to address the distinct nature of virtual markets, like Amazon, and better ensure consumer recovery.

B. Proposed Solution

1. Amending the Hague Service Convention

The nature of commercial transactions has overwhelmingly transformed in the last two decades. Today, the virtual market allows for purchases to occur within a matter of seconds, and the proportion of purchases taking place through the internet will likely only increase. The Hague Service Convention, nearing its sixtieth anniversary, fails to account for these drastic changes and, therefore, is in desperate need of an amendment that modernizes the treaty, along with increasing speed and reliability, through the use of updated technology. A proper solution to this shortfall is the addition of an amendment to the treaty, allowing for service of process to occur through a

¹¹⁸ *Id.* at 344–45.

¹¹⁹ *Lexmark Int'l, Inc. v. Ink Techs. Printer Supplies, LLC*, 295 F.R.D. 259, 262 (S.D. Ohio 2013) (“[O]ther business entities have evaded enforcement efforts by effectively disappearing such that any further delay may prejudice Plaintiff’s ability to obtain relief.”); *Porterfield*, *supra* note 113 at 345–46 (citing *Paracelsus Healthcare Corp. v. Philips Medical Systems, Nederland, B.V.*, 384 F.3d 492 (8th Cir. 2004)).

¹²⁰ *Allison*, *supra* note 113.

¹²¹ Courts have heard arguments on the matter, but no court has set a precedent holding Amazon liable as a seller. *See, e.g., Beauge*, *supra* note 88.

marketplace's provided messaging system when a seller chooses to participate in an international virtual market.

Often, courts have allowed for service identical or similar to that in this proposal under FED. R. CIV. P. 4(f)(3).¹²² However, under current rules, courts may not permit this type of service until service pursuant to the Hague Service Convention has already been attempted.¹²³ For instance, in *Lexmark Int'l, Inc. v. Ink Techs. Printer Supplies, LLC*, the court allowed for service via a Chinese company's email address where it was shown that the company provided the email address on its website, and that the email address was both valid and actually used by the defendant.¹²⁴ The plaintiff had been attempting service for three years prior to the court issuing this order.¹²⁵ Under similar circumstances, courts have permitted service of process directly through Amazon's messaging center.¹²⁶ Accordingly, this proposal aligns with judicially permitted methods of service of process; it simply eliminates the requirements for needless waiting periods and court orders before service of process via Amazon's messaging center may be provided.

2. Process for Amending the Treaty

Substantive amendments to existing treaties require that parties ratify the treaty, a process identical to the original ratification process of the treaty.¹²⁷ This means that an amendment is not effective until it is negotiated and agreed to by all parties.¹²⁸ This also means that parties are not obligated to

¹²² Fed. R. Civ. P. 4(f)(3).

¹²³ Fed. R. Civ. P. 4(f)(1)–(3); *Noco Co. v. Liu Chang*, No. 1:18-cv-2561, 2019 U.S. Dist. LEXIS 83085, at *5 (N.D. Ohio May 16, 2019).

¹²⁴ *Lexmark Int'l*, 295 F.R.D. at 262.

¹²⁵ *Id.*

¹²⁶ *Noco Co. v. Chang*, No. 1:18-cv-2561, 2020 U.S. Dist. LEXIS 16964, at *4–6 (N.D. Ohio Feb. 3, 2020) (holding that Amazon's messaging center was an acceptable means of service where China's Ministry of Justice failed to serve a Chinese defendant for more than six months); *Shenzhen Ruobilin Network Tech., Ltd. v. SJG-LESN*, No. 16-cv-386-wmc, 2016 U.S. Dist. LEXIS 164081, at *4–5 (W.D. Wisc. Nov. 29, 2016) (holding that Hague Service Convention requirements were inapplicable because the defendant had no known address; nevertheless, the court permitted service via Amazon's messaging center, finding that it was "reasonably calculated" to provide notice of the action.).

¹²⁷ *International Treaties and Agreements*, US LEGAL, <https://internationallaw.uslegal.com/international-treaties-and-agreements/#:~:text=An%20existing%20treaty%20can%20be%20amended%20in%20three,will%20not%20become%20parties%20to%20the%20amended%20treaty> [https://perma.cc/Y5WV-BVXR] (last visited Nov. 14, 2020); David A. Koplow, *When Is an Amendment Not an Amendment?: Modification of Arms Control Agreements Without the Senate*, 59 U. CHI. L. REV. 981, 1023 (1992).

¹²⁸ See Koplow, *supra* note 127.

become parties to the new amendment.¹²⁹ In fact, should a party choose not to sign on to an amendment, that party is only bound to the original terms of the treaty.¹³⁰

A substantial portion of treaty ratification is the negotiation process.¹³¹ During this process, parties must balance their interests and come to mutually agreeable terms.¹³² Due to the difficulty of agreeing to terms, it is unclear how long it could take for the U.S. and China, or any of the remaining signatory countries, to come to an agreement regarding the amendment; however, there are some points that will likely give the U.S. some negotiating power in the process. First, the Hague Service Convention provides for five-year terms, automatically renewable at the end of each term unless a party objects.¹³³ That being so, the U.S. is not bound to this agreement indefinitely, but only for a maximum of five years. This benefits the U.S. because, even though China may choose to only be bound to the treaty's original terms, China may only rely on this option until the end of the particular five-year period. Then, they will have no choice but to negotiate, or risk termination of the treaty.

Second, this amendment would be much more lenient than the alternative means of service provided in Article 10 of the Hague Service Convention, of which China objects.¹³⁴ The amendment does not require all defendants in a signatory country to accept service of process through virtual communication, but instead only those who choose to participate in ecommerce and enjoy the benefit of the international virtual marketplace. This means that local Chinese merchants, and even Chinese companies that sell to U.S. consumers directly through their website, need not oversee their virtual mailboxes to screen for a potential service of process. The sellers that will be responsible for inspecting for service documents will only be those already actively using such mailboxes. Here, virtual communication would be "reasonably calculated" to reach the defendant through their routine business practices, making it a much more negotiable provision than Article 10's broad exemption.

3. Benefits

¹²⁹ *Amendment Procedure*, UNECE, <https://www.unece.org/env/pp/art14.html#:~:text=Amendment%20procedure%20A%20treaty%20may%20be%20amended%20by,amendment.%20Parties%20are%20not%20required%20to%20adopt%20amendments> [https://perma.cc/2Z93-DTK2] (last visited Nov. 14, 2020).

¹³⁰ *Id.*

¹³¹ *B. Steps in the Treaty-Making Process*, UNITED NATIONS U., <http://archive.unu.edu/unupress/unupbooks/uu25ee/uu25ee09.htm> [https://perma.cc/87JW-GCLC] (last visited Nov. 17, 2020).

¹³² *Id.*

¹³³ HCCH, *supra* note 103.

¹³⁴ Lukken, *supra* note 12; US DEP'T OF ST., *supra* note 13.

Amending the Hague Service Convention to allow service of process via an international virtual market's communication system will increase both the speed and the likelihood of receipt of service of process, as well as Amazon's ability to monitor, screen, and deny access to dangerous sellers. Further, the proposal meets equity goals by limiting the expense of the consumer plaintiff, while placing the cost of the injury in the hands of the injuring-party.

The proposed amendment will increase the efficiency and success of service of process because courts have routinely held that electronic communications are reasonably calculated to give ecommerce sellers notice of the action, with adequate time for objections.¹³⁵ In fact, service of process through electronic means has not only been held constitutional, but it also has been considered the means of service "*most likely*" to reach ecommerce defendants.¹³⁶ This method is effective due to these particular defendants' "depend[ence] on electronic communication . . . for [their] livelihood," and such communication is often the company's only option for interacting with customers.¹³⁷ Sellers participating in ecommerce have completely adopted and integrated electronic communication into their business.¹³⁸ Therefore, providing service of process directly to the company, through its primary means of communication, is likely the quickest, most reliable method to ensure receipt of service of process.

This proposal goes even further in protecting consumers. Here, even in a case where a seller attempts to avoid service of process, providing service of process directly through Amazon gives Amazon notice of potential bad actors within its community, allowing the company to stop deceptive sellers from forming new companies on its site during Amazon's third-party seller screening process. Currently, Amazon records and monitors all communication sent through its messaging center; however, Amazon's

¹³⁵ *Shenzhen Ruobilin Network Tech., Ltd. v. SJG-LESN*, No. 16-cv-386-wmc, 2016 U.S. Dist. LEXIS 164081, at *3 (W.D. Wisc. Nov. 29, 2016) (holding that notice was likely to reach the defendants because one week after receiving the plaintiff's complaint via Amazon's messaging center, the defendants removed the products and changed its company name); *Noco Co. v. Chang*, No. 1:18-cv-2561, 2020 U.S. Dist. LEXIS 16964, at *4–5 (N.D. Ohio Feb. 3, 2020) (holding that notice was likely to reach the defendant because the defendant had responded to at least one message via Amazon's messaging center in the past); *Chanel, Inc. v. Xu*, No. 2:09-cv-02610-cgc, 2010 U.S. Dist. LEXIS 6734, at *10 (W.D. Tenn. Jan. 27, 2010).

¹³⁶ *Chanel*, 2010 U.S. Dist. LEXIS 6734, at *10.

¹³⁷ *NOCO Co.*, 2020 U.S. Dist. LEXIS 16964, at *5.

¹³⁸ *Chanel*, 2010 U.S. Dist. LEXIS 6734, at *11 (explaining that email is an effective means of communication, adopted by "**all sectors**" of business).

current screening efforts are limited to flagging links associated with untrusted websites and inappropriate content.¹³⁹

Although critics have asserted that Amazon lacks concern over consumer safety,¹⁴⁰ recently, the company has been more active in decreasing the number of bad actor third-party sellers on its site.¹⁴¹ In 2020, Amazon launched new seller-verification technology—currently active in the U.S., U.K., China, and Japan—that allows Amazon to verify sellers’ identification and documentation through video calls.¹⁴² The verification technology also uses a “proprietary machine learning system” that analyzes data points and is able to flag risks, such as *whether the account is related to a previous Amazon account*.¹⁴³ Due to the company’s current practices, service of process through Amazon’s messaging center will provide the company with direct notice of the lawsuit, enabling the company to integrate this information into its currently available technology, and easily identify sellers attempting to sell again while avoiding service of process.

Finally, this proposal promotes equity goals by placing the burden in the hands of the negligent party and limiting the burden placed on the consumer.¹⁴⁴ Here, the consumer’s expenses are limited due to the ease of providing service of process electronically, which does not present the extensive requirements as service through a country’s central authority. Likewise, although it is not determinative of a plaintiff’s success, the increased likelihood of receipt of service assists in shifting the remaining damage expenses from the injured consumer to the at-fault seller.

Shifting losses to the seller is not only the most equitable result, it is also the most economically sound.¹⁴⁵ In Justice Traynor’s concurrence in *Escola*, Traynor explains that injured-parties are often economically unprepared to

¹³⁹ See generally *Buyer-Seller Messaging Service Overview*, AMAZON.COM, <https://sellercentral.amazon.com/gp/help/external/202125900> [<https://perma.cc/G3HT-RW34>] (last visited Nov. 19, 2020); *About the Buyer-Seller Messaging Service*, AMAZON.COM, <https://www.amazon.com/gp/help/customer/display.html?nodeId=201889440> [<https://perma.cc/NJN9-S6WH>] (last visited Nov. 19, 2020).

¹⁴⁰ BEASLEY ALLEN L. FIRM, *supra* note 21 (“[A]lthough Amazon knew of the safety defects, it did not recall the dangerous devices or adequately warn its customers about them.”).

¹⁴¹ Sarah Perez, *To Fight Fraud, Amazon Now Screens Third-Party Sellers Through Video Calls*, TECH CRUNCH (Apr. 27, 2020, 12:47 PM), <https://techcrunch.com/2020/04/27/to-fight-fraud-amazon-now-screens-third-party-sellers-through-video-calls/> [<https://perma.cc/73J5-G6HB>].

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Equity*, COLLINS DICTIONARY OF L. (2006) (“Equity is the quality of being fair and reasonable in a way that gives equal treatment to everyone.”), available at <https://www.collinsdictionary.com/dictionary/english/equity> [<https://perma.cc/8GK6-DJ78>].

¹⁴⁵ Bullard, *supra* note 33, at 190.

meet the high burden of injury due to the cost of the injury itself, as well as the loss of time or health associated with the injury.¹⁴⁶ Conversely, the risk of consumer injury is constant for the seller; thus, the seller is better equipped to prepare and protect against any cost of injury through methods such as price adjustments.¹⁴⁷ By shifting the burden to the seller, who will protect against the burden through nominal price increases, the loss is thinly spread among many consumers, and not overly burdensome on the particular consumer that is injured by the product.¹⁴⁸

4. *Remaining Obstacle to Plaintiff Recovery*

Even where service of process is successful under the Hague Service Convention, consumers may face other obstacles to recovery. A common hindrance is the difficulty in enforcing U.S. judgments in foreign jurisdictions.¹⁴⁹ Judgment enforcement is necessary where a court has entered a judgment, but the defendant ignores the judgment or refuses to pay damages.¹⁵⁰ When judgment enforcement is necessary, plaintiffs may face difficulty in enforcing their judgment for several reasons.¹⁵¹ Sometimes, although the court entering the judgment had personal jurisdiction over a defendant under U.S. law, the court may not have had personal jurisdiction under the foreign state's laws.¹⁵² Other times, foreign states may refuse to enforce a U.S. judgment where it violates their public policy goals, as is often the case with punitive or exemplary damages.¹⁵³ The expense of enforcing the judgment itself can also be a significant cost to the plaintiff.¹⁵⁴

Chinese courts often fail to enforce U.S. judgments, so this obstacle will be present even under an amended Hague Service Convention.¹⁵⁵ However, the benefits in avoiding the current requirements of the Hague Service Convention remain significant. As previously discussed, allowing service of process via virtual communication accelerates the notice process and lowers costs to the plaintiff. It also will result in increased consumer recovery

¹⁴⁶ *Id.*; See also *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440-44 (Cal. 1944) (Traynor, J., concurring).

¹⁴⁷ Bullard, *supra* note 33, at 190-91.

¹⁴⁸ *Id.*

¹⁴⁹ Porterfield, *supra* note 113, at 362.

¹⁵⁰ *Judgment Enforcement Guide. How to Enforce My Judgment.*, HALF DOME CAPITAL, <https://californiajudgments.com/judgment-enforcement/#:~:text=The%20need%20for%20judgment%20enforcement%20arise%20when%20a,to%20make%20the%20debtor%20pay%20up%20their%20debt> [https://perma.cc/7XE2-NRMD] (last visited Nov. 20, 2020).

¹⁵¹ Porterfield, *supra* note 113, at 362-63.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Dan Harris, *Suing Chinese Companies in US Courts*, ABOVE THE L. (Mar. 21, 2016, 12:22 PM), <https://abovethelaw.com/2016/03/suing-chinese-companies-in-u-s-courts/?rf=1> [https://perma.cc/MK9T-H648].

because this hindrance only arises when companies refuse to comply with court judgments. Even more, the proposed amendment encourages defendants to comply with court judgments because, under this proposal, Amazon is able to monitor and screen for bad behavior by third-party sellers on its site. Should a company choose to ignore a judgment and try to sell on Amazon anyway, Amazon could easily identify the bad actor and prohibit any more sales by that seller. Further, given Amazon's dominance in the global market, and sellers' growing dependence on the site for business, defendants will be more likely to comply with judgments, rather than conduct business without a presence on Amazon.

IV. ALTERNATIVE SOLUTION

A. *Amazon Could Incentivize Arbitration Agreements Between Users & Third-party Sellers*

Amending the Hague Service Convention will not be a simple process. Rather, it will be complex, requiring significant time for negotiations between nations. However, while consumers wait for such changes to be made, Amazon could act voluntarily to protect consumers by incentivizing arbitration agreements between consumers and third-party sellers on its site. Arbitration is similar to traditional court proceedings; however, arbitration is a more informal and simple method of dispute resolution that does not require the filing of a formal lawsuit.¹⁵⁶ As one of Amazon's guiding principles is "customer obsession rather than competitor focus,"¹⁵⁷ incentivizing arbitration agreements could likely benefit the consumer, as well as assist Amazon in accomplishing its business goals.

1. *What Could an Incentive Look Like?*

Although Amazon is in the best position to determine the most mutually beneficial method for incentivizing arbitration agreements between third-party sellers and consumers, a good starting point is adding flexibility to Amazon's referral fees. Amazon charges two separate sales-related fees to third-party sellers on its site: a referral fee and a closing fee.¹⁵⁸ Generally, referral fees are a percentage of a product's selling price that the seller must

¹⁵⁶ Jane Haskins, *What Is an Arbitration Agreement?*, LEGALZOOM, <https://www.legalzoom.com/articles/what-is-an-arbitration-agreement> [https://perma.cc/2JST-SF53] (last updated Sept. 22, 2020).

¹⁵⁷ *Who We Are*, AMAZON.COM, <https://www.aboutamazon.com/about-us> [https://perma.cc/F479-XFBX] (last visited Sept. 8, 2020).

¹⁵⁸ Meaghan Brophy, *Amazon Seller Fees: Cost of Selling on Amazon in 2020*, FIT SMALL BUS. (Sept. 1, 2020), <https://fitsmallbusiness.com/amazon-seller-fees/#:~:text=Amazon%20assigns%20a%20Minimum%20Referral%20Fee%20to%20some,%28not%20both%21%29%2C%20based%20on%20your%20product%E2%80%99s%20selling%20price> [https://perma.cc/E78F-24RU].

turn over to Amazon; referral fees typically range from 8%-15%.¹⁵⁹ On the other hand, closing fees only apply to media products and are charged at a flat rate of \$1.80 for every product sold.¹⁶⁰ Because referral fees apply to all products and are already subject to variation, this would be an easy area in which to add incentives.

There are two ways Amazon could adjust referral fee costs to establish an incentive for sellers to agree to arbitration agreements. First, Amazon could adjust referral fee percentages, providing a discount by a certain percentage for sellers that agree to privately arbitrate with consumers. Under this method, sellers that sell to a large number of Amazon users will experience higher savings. Under this proposal, the incentive amount correlates with the likelihood that a consumer will come into contact with a defective product from the seller. Alternatively, Amazon could treat each agreement as a discount coupon to the purchase price. Currently, Amazon adjusts referral fees for prices actually discounted by coupons.¹⁶¹ For example, if a jacket is sold for \$40 with a referral fee of 10%, and a purchaser has a \$10 off coupon for the product, the 10% referral fee is charged against the final sale price of \$30 (making the cost \$3). By treating each agreement as a discount to the product's price, Amazon could accomplish the same end as the first suggestion; treating the price as if it were discounted would inevitably lower the referral fee cost. However, this method would likely be easier to eliminate in time, once private arbitration agreements become more custom, as Amazon could simply set an expiration on the "coupon," rather than reworking the entire referral fee percentage system.

Although either method would result in a loss of third-party sales profits for Amazon, Amazon would likely save money in legal expenses by avoiding litigation with consumers who cannot recover from the third-party sellers.¹⁶² Products liability cases against Amazon have increased due to courts allowing consumers to sue and attempt to recover from Amazon over defective third-party products.¹⁶³ Allowing these cases to continue would be a hassle for Amazon,¹⁶⁴ and there is a risk that Amazon could one day be considered a "seller" by a higher court, deeming it liable for future, similar injuries within that jurisdiction. However, if Amazon incentivizes arbitration agreements,

¹⁵⁹ *Id.*; *Let's Talk Numbers*, AMAZON.COM, <https://sell.amazon.com/pricing.html> [<https://perma.cc/MX6P-69M4>] (last visited Oct. 25, 2020).

¹⁶⁰ Brophy, *supra* note 158.

¹⁶¹ Seth Kniep, *How Amazon Referral Fees Work and Why This is AWESOME News for Sellers*, JUST ONE DIME (Oct. 18, 2016), <https://justonedime.com/blog/how-amazon-referral-fees-work-and-why-this-is-awesome-news-for-sellers> [<https://perma.cc/P7V2-XZAL>].

¹⁶² Thomas Barrabi, *What Amazon Product Liability Lawsuits Mean for E-commerce Giant's Business*, FOX BUSINESS (July 10, 2019), <https://www.foxbusiness.com/retail/amazon-product-liability-lawsuits> [<https://perma.cc/YM7R-DKFT>].

¹⁶³ *Id.*

¹⁶⁴ *Id.*

making third-party sellers more accessible for damage recovery, fewer consumers will need to attempt recovery from Amazon. This will reduce Amazon's legal expenses, including settlement costs. Even more, if Amazon acts fast enough, they may avoid a case reaching a higher court from which a precedent is set holding Amazon liable as a "seller."

2. Arbitration Allows Parties to Avoid Hague Service

Convention Requirements

Incentivizing arbitration agreements would be effective in increasing the likelihood of consumer recovery in products liability cases because arbitration allows parties to avoid many of the most burdensome requirements of filing a claim in federal court.¹⁶⁵ In particular, parties often agree to alternative means of service through arbitration agreements, allowing them to avoid the Hague Service Convention altogether.¹⁶⁶

Historically, courts have always given a lot of deference to arbitration agreements and show no sign of changing their position.¹⁶⁷ In fact, in a recent case heard by the Supreme Court of California, the court expanded the scope of an arbitration agreement's service of process provision beyond private dispute resolution, allowing the parties' consents to alternative service to circumvent Hague Service Convention requirements in a traditional court filing.¹⁶⁸

In *Rockefeller Technology Investments (Asia) VII v. Changzhou SinoType Technology Co., Ltd.*, private parties agreed to private arbitration in the event of a dispute, including a provision that allowed for service of process "via Federal Express or similar courier."¹⁶⁹ When a dispute arose, the

¹⁶⁵ See Haskins, *supra* note 156.

¹⁶⁶ *California Supreme Court Confirms That the Hague Service Convention Does Not Preempt Right of Parties to Contract for Their Preferred Method of Service*, GIBSON DUNN (Apr. 6, 2020), <https://www.gibsondunn.com/california-supreme-court-confirms-that-the-hague-service-convention-does-not-preempt-right-of-parties-to-contract-for-their-preferred-method-of-service/> [<https://perma.cc/8M5A-JWXP>] (discussing a case where parties agreed to service of process through FedEx or a similar courier).

¹⁶⁷ See William F. Fox & Yili Dautaj, *The Life of Arbitration Law Has Been Experience, Not Logic: Gorsuch, Kavanaugh, and the Federal Arbitration Act*, 21 CARDOZO J. CONFLICT RESOL. 1 (2019) (discussing SCOTUS' "pro-arbitration policy"); C.J.W. Baaij, *Hiding in Plain Sight: The Power of Public Governance in International Arbitration*, 60 HARV. INT'L L. J. 135, 143–44 (2019) (discussing courts' "deference to arbitration").

¹⁶⁸ *Rockefeller Technology Investments (Asia) VII v. Changzhou SinoType Technology Co., Ltd.*, 460 P.3d 764, 767 (Cal. 2020) ("[B]ecause the parties' agreement constituted a waiver of formal service of process under California law . . . the Convention does not apply").

¹⁶⁹ *Id.* at 767–68.

defendant did not respond, and later did not appear for arbitration.¹⁷⁰ The present suit came in response to the defendant's failure to appear, with the plaintiff now seeking to enforce its \$414,601,200 default award.¹⁷¹ In considering the defendant's motion arguing insufficiency of service of process, the court held that, when parties have agreed to an alternative service of process, that consent may act as a waiver to Hague Service Convention requirements in traditional courts.¹⁷²

This decision is significant and supportive of this proposed solution because it not only recognizes that private arbitration is not subject to the service requirements of the Hague Service Convention, but it also clarifies that private parties have a right to enforce their agreements in courts without disposing of their consents to an alternative service of process. Had the court not come out this way, consumers could still privately arbitrate with international corporations, but if they wanted to enforce their award in court, they would be required to serve the defendant under the Hague Service Convention—which, again, could take up to two years.¹⁷³ Instead, the court expressed its policy choice to protect U.S. consumers over foreign corporations.

Although the Supreme Court of California is the first court to recognize that agreed-to alternative service may preempt Hague Service Convention requirements in a traditional lawsuit, it is not unreasonable to expect other state courts to follow in its action. In both the *Escola* and *Greenman* cases mentioned above, California was the first state to act, and both cases were followed by sweeping reforms across most other U.S. states.¹⁷⁴ Due to this trend, California will likely influence other states' decisions on the matter, making arbitration agreements an even better method of protecting consumers and encouraging safe products in the market.

3. *This Proposal Aligns with Amazon's Already-Established Practices*

Incentivizing arbitration agreements would align with Amazon's established method for handling disputes because Amazon already mandates arbitration agreements between itself and its third-party sellers, as well as its

¹⁷⁰ *Id.* at 768.

¹⁷¹ *Id.*

¹⁷² *Id.* at 775 (“When the agreement also specifies the manner in which the parties ‘shall be served,’ . . . that agreement supplants statutory service requirements and constitutes a waiver of formal service in favor of the agreed-upon method of notification.”).

¹⁷³ Hubbard, *supra* note 3.

¹⁷⁴ L. LIBR., *supra* note 24; *Greenman*, 377 P.2d at 901; *Escola*, 150 P.2d at 440.

users.¹⁷⁵ Under Amazon’s Business Solutions Agreement (“BSA”), all third-party vendors are required to consent to, among other things, arbitration between themselves and Amazon in the event of a dispute.¹⁷⁶ In contrast, users do not have a specified agreement, but under Amazon’s Terms of Use, users “agree to be bound” to mandatory arbitration by using Amazon services.¹⁷⁷

Courts have routinely upheld both the BSA and the user mandatory agreements.¹⁷⁸ Specifically, courts have stated that Amazon’s mandatory arbitration agreements provide all parties with sufficient bargaining power to make the agreements “conscionable” and, in turn, enforceable.¹⁷⁹ Incentivizing arbitration between users and third-party sellers would extend this practice only slightly further, simply endorsing the method Amazon already uses to resolve disputes.

3. Benefits

Ultimately, this alternative proposal accomplishes many of the same goals as amending the Hague Service Convention. One apparent benefit is that, like an amendment, arbitration agreements increase the efficiency and likelihood of service of process. A key element of the popularity of arbitration is the speed of resolution compared to litigation.¹⁸⁰ In some circumstances, arbitration can be completed in as little as forty-five days.¹⁸¹ Because the terms are agreed to in advance, parties can easily resolve their disputes pursuant to their agreed-upon means rather than spend extended periods of time struggling to meet procedural requirements. Likewise, because arbitration generally resolves quicker than litigation, it is typically

¹⁷⁵ Amy E. Shehan, Note, *Amazon’s Invincibility: The Effect of Defective Third-Party Vendors’ Products on Amazon*, 53 GA. L. REV. 1215, 1218-19 (2019); see *Amazon Services Business Solutions Agreement*, AMAZON: SELLER CENT., https://sellercentral.amazon.com/gp/help/external/G1791?language=en_US [<https://perma.cc/LV2K-KZAQ>] (last visited Oct. 9, 2020); see also *Amazon Services Terms of Use*, AMAZON: HELP & CUSTOMER SERV., <https://www.amazon.com/gp/help/customer/display.html?nodeId=202140280> [<https://perma.cc/P2XZ-QJES>] (last updated Sept. 4, 2019).

¹⁷⁶ Shehan, *supra* note 175; see AMAZON: SELLER CENT., *supra* note 175.

¹⁷⁷ See AMAZON: HELP & CUSTOMER SERV., *supra* note 175.

¹⁷⁸ See, e.g., *Peters v. Amazon Servs., LLC*, 669 Fed. Appx. 487, 488 (9th Cir. 2016) (upholding BSA arbitration provision); *Ranazzi v. Amazon.com, Inc.*, 46 N.E.3d 213, 220 (Ohio Ct. App. 2015) (upholding user arbitration provision); *Fagerstrom v. Amazon.com, Inc.*, 141 F. Supp.3d 1051, 1073 (S.D. Cal. 2015) (upholding user arbitration provision).

¹⁷⁹ *Ranazzi*, 46 N.E.3d at 220; *Fagerstrom*, 141 F. Supp.3d at 1073.

¹⁸⁰ Carina Woo, *Three Reasons Why Arbitration Can Be Better Than Litigation*, SCHORR L., <https://schorr-law.com/three-reasons-why-arbitration-can-be-better-than-litigation/> [<https://perma.cc/C7T5-SJMY>] (last visited Nov. 19, 2020).

¹⁸¹ *Id.*

more cost-efficient for the parties.¹⁸² Just as an amendment to the Hague Service Convention, this meets equity goals by minimizing the consumer's expenses while shifting the cost of the injury to the injuring-party.

However, this proposal likely will not give Amazon the opportunity to monitor and screen dangerous sellers. Often considered an "attractive" characteristic of arbitration, the process is completely private and confidential.¹⁸³ Arbitration not only conceals the details and outcome of a case from the public, but any news of the company's bad behavior also remains hidden from those outside the proceedings.¹⁸⁴ Due to its discrete nature, Amazon will not be provided notice of the dispute, as would be the case under the proposed amendment to the Hague Service Convention.

4. Downfalls

Incentivizing arbitration agreements may have some benefits; however, the proposal is also subject to several downfalls. Some arguments suggest that mandatory arbitration agreements are harmful to consumers in that they (1) are inconsistent with the public good, and (2) may be unfair to parties forced to sign them.¹⁸⁵ Because arbitration agreements would be mandatory to a consumer under this proposal, it is necessary to address these concerns. The public good critique argues that arbitration fails to align with the public good and democratic values due to its private nature, inability to set precedents, and lack of transparency.¹⁸⁶ On the other hand, the second critique focuses more on the individual consumer, arguing that arbitration is not impartial and, often, terms of the agreement are in favor of the drafting-party.¹⁸⁷ Importantly, Amazon has already drawn the attention of advocates against its mandatory arbitration practices.¹⁸⁸ Although, as previously

¹⁸² *Arbitration*, ADR SERVS., INC., <https://www.adrservices.com/services/arbitration/> [https://perma.cc/NSC9-JDP5] (last visited Nov. 19, 2020).

¹⁸³ *Id.*

¹⁸⁴ *Arbitration vs. Public Courts: Important Considerations for Consumers*, BELL L. (Oct. 13, 2015), <https://bell-law-kc.com/arbitration-vs-public-courts-important-considerations-for-consumers/> [https://perma.cc/BTU3-A2CU].

¹⁸⁵ Sam Cleveland, Note, *A Blueprint for States to Solve the Mandatory Arbitration Problem While Avoiding FAA Preemption*, 104 MINN. L. REV. 2515, 2529–30 (2020).

¹⁸⁶ *Id.* at 2529; Richard C. Reuben, *Mandatory Arbitration: Democracy and Dispute Resolution: The Problem of Arbitration*, 67 L. & CONTEMP. PROB. 279, 282, 299–301 (2004).

¹⁸⁷ See Cleveland, *supra* note 185.

¹⁸⁸ David Dayen, *The Biggest Abuser of Forced Arbitration is Amazon*, THE AM. PROSPECT (July 10, 2019), <https://prospect.org/labor/biggest-abuser-forced-arbitration-amazon/> [https://perma.cc/4EHH-APXC].

discussed, courts routinely uphold these agreements, those opposed believe mandatory arbitration forces one party to “sign away a range of rights.”¹⁸⁹

Regarding the critique that arbitration is not impartial, it is important to note that, in this case, a satisfactory agreement would require that the arbitrator be within the U.S.; ideally, Amazon would uniformly draft the arbitration agreements with a single arbitrator. This is a key distinction because the argument of lack of impartiality centers around the fact that arbitrators are chosen by the seller and, for this reason, maybe partial toward the seller.¹⁹⁰ Here, because Amazon—a neutral party—is drafting the agreement and the seller is not incorporated within any state in the U.S., there likely would be no issue of partiality. Similarly, Amazon’s role as a neutral third-party in this transaction likely diminishes the concern of Amazon having substantial control and negotiating power over the terms of the agreement. Unlike Amazon’s mandatory agreements with users, here, Amazon is not a party to the transaction, but merely a facilitator.

Like the enforcement concern of the Hague Service Convention amendment, consumers may still face an obstacle under this proposal because China simply does not care about the international laws imposed upon it. Of particular concern here is whether service of process under an arbitration agreement will satisfy China law.¹⁹¹ Although it is unclear whether China would enforce a waiver of service against a Chinese defendant, a recent decision from the Supreme People’s Court of China actually suggests that a waiver may be enforceable.¹⁹² In *Tang Yimin v. China Development Bank*, the court held that a Japanese defendant could be served by postal channels under Article 10 of the Hague Service Convention even though Japan expressly objects to Article 10 service.¹⁹³ The court explained that, although service through postal channels was inconsistent with Japan’s stance under the Hague Service Convention, respecting parties’ reasonable choices and litigation interests were consistent with due process.¹⁹⁴

Although there are some public good concerns that will likely persevere under this proposal, the public interest likely weighs in favor of arbitration. Here, Amazon acting as a neutral party to arbitration minimizes both the concern of partiality from particular courts and the lack of consumer negotiating power. Further, Chinese courts have expressly held that waivers

¹⁸⁹ *Id.*

¹⁹⁰ Cleveland, *supra* note 185, at 2530.

¹⁹¹ Porterfield, *supra* note 113, at 362 (“[T]o enforce a domestically obtained judgment in a foreign country, the defendant must have been served with process in accordance with the internal laws of the country where enforcement is sought”).

¹⁹² Zilin Hao, *SPC Resolves Service by Post Under the Hague Convention*, CHINA JUST. OBSERVER (Feb. 28, 2021), <https://www.chinajusticeobserver.com/a/spc-resolves-service-by-post-under-the-hague-convention> [<https://perma.cc/FK26-DT8B>].

¹⁹³ *Id.*

¹⁹⁴ *Id.*

of service are enforceable against foreign defendants, so there is a substantial likelihood that they may enforce waivers of service against Chinese defendants as well. It is true that the lack of a public forum will make it impossible to satisfy many of the democratic values central to the U.S. court system; however, this could be a promising solution to bringing third-party sellers into U.S. courts where there is currently no alternative.

V. CONCLUSION

As Amazon's dominance in the U.S. market has grown in the last two decades, it has drastically changed consumer behavior. Today, a growing number of consumers are turning to the site for their purchases, and brick-and-mortar department stores, which cannot compete with Amazon's prices and delivery speed, are closing their doors at alarming rates. This phenomenon has led to increased consumer exposure to dangerous products on Amazon's site, and increased consumer injuries from these products. Often, injuries are tied to products sold by international third-party sellers on Amazon, the number of which has become too numerous for Amazon to adequately oversee. Despite Amazon's inadequate oversight, the company has yet to be held responsible for injuries caused by third-party sellers' products; instead, if a consumer seeks recovery, they must attempt a claim against the international seller. This process entails compliance with the Hague Service Convention. Generally, the Convention requires service of process via a country's designated central authority. Although intended to ease the notice process, this requirement creates substantial problems for U.S. consumers hoping to serve international third-party sellers, particularly those based in China.

To best protect consumers amid the growing virtual market, the Hague Service Convention must be amended to reflect technological advances routinely used in this market. Specifically, the Hague Service Convention should be amended to allow for service of process via a marketplace's provided messaging system when a seller participates in an international virtual market. While this proposal is narrowly tailored to only capture those sellers actually selling on sites like Amazon, it: (1) increases service of process efficiency and is the method most likely to reach the seller; (2) encourages safe products in the market by giving the marketplace notice of the claim; (3) promotes equity by placing the burden in the hands of the injuring-party; and (4) is the most economically sound due to its loss-spreading feature.

Although amending the Hague Service Convention is the ultimate solution, Amazon could protect consumers in the meantime by incentivizing the use of arbitration agreements between third-party sellers and consumers on its site through a preferred referral fee rate. Arbitration agreements are not subject to the Hague Service Convention; thus, under this proposal, consumers can avoid service of process requirements while achieving many of the same benefits as the proposed amendment.

As Amazon continues to grow, consumers will increasingly be injured by dangerous products sold by international third-party sellers on the platform. The Hague Service Convention's requirements are simply ineffective in protecting consumers participating in the virtual market. Accordingly, changes must be made to the service of process requirements to lower the burden placed on injured-consumers and simplify the process required to bring international sellers participating in the U.S. market into U.S. courts.