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INTERNATIONAL SERVICE OF PROCESS: THE TREND MOVES AWAY FROM UNIFORMITY

INTRODUCTION

The most frequently used method of service of process¹ is "personal service" which is the hand delivery of the summons to the defendant by someone authorized to do so by law.² Personal service may be considered the preferred custom of providing notice, but due process³ does not require that the defendant be personally served.⁴ Instead, due process requires notice that is reasonably calculated under the circumstances of the case to reach the interested parties.⁵ The procedures for providing such notice are perplexing when the interested parties reside in a foreign state. Moreover, some civil law states only permit service of process from outside the jurisdiction via letters rogatory.⁶ In response, the Federal Rules of Civil Procedure, the United States' municipal law, attempts to limit the confusion by providing a rule for service upon international parties.⁷ This

¹ Service of process is "[t]he service of writs, complaints, summonses, etc., signifies the delivering to or leaving them with the party to whom or with whom they ought to be delivered or left; and, when they are so delivered, they are then said to have been served." BLACK'S LAW DICTIONARY 1368 (6th ed. 1990).

² JACK H. FREIDENTHAL ET AL., CIVIL PROCEDURE § 3.20, at 170 (2d ed. 1993).

³ Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved.

BLACK'S LAW DICTIONARY 500 (6th ed. 1990).

⁴ FREIDENTHAL, *supra* note 2.

⁵ *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

⁶ See Daniel L. Goelzer et al., *Judicial and Other Developments in the Securities Laws Under the Restatements of Foreign Relations Law and the Hague Evidence and Service Conventions*, C489 A.L.I.-A.B.A. 39, 102-03 (1989).

⁷ FED. R. CIV. P. 4(f) [hereinafter *FRCP* 4]. Rule 4(f) provides:

Service Upon Individuals in a Foreign Country. Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent per-

rule provides different options to facilitate the complex procedure of serving a party in a foreign state.⁸

One of the options provided by the Federal Rules is a letter rogatory or letter of request.⁹ Letters rogatory are:

[T]he medium whereby one country, speaking through one of its courts, requests another country, acting through its own courts and by methods of court procedure peculiar thereto and entirely within the latter's control, to assist the administration of justice in the former country, and such request is usually granted by reason of the comity existing between nations in ordinary peaceful times.¹⁰

The United States is a signatory to two treaties¹¹ which govern the execution of letters rogatory between countries.¹²

son, may be effected in a place not within any judicial district of the United States:

(1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or

(2) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

(A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or

(B) as directed by the foreign authority in response to a letter rogatory or letter of request; or

(C) unless prohibited by the law of the foreign country, by

(i) delivery to the individual personally of a copy of the summons and the complaint; or

(ii) any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

(3) by other means not prohibited by international agreement as may be directed by the court.¹¹

⁸ *Id.*

⁹ *Id.* at 4(f)(2)(B).

¹⁰ *Tiedmann v. The Signe*, 37 F. Supp. 819 (D.C. La. 1941).

¹¹ Constitutional provisions confer treaty making power upon the federal government, specifically the President and the Senate. The President "shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur. . . ." U.S. CONST. art. II, 2, cl. 2. For a further discussion on treaty powers see JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW §§ 6.5-6.8, 216-21 (5th ed. 1995).

¹² See generally Jonathan Pratter & Joseph R. Profaizer, *A Practitioner's Research Guide and Bibliography to International Civil Litigation*, 28 TEX. INT'L L. J. 633 (1993) (cites treaties and other primary and secondary sources that aid in international service of process). See also Amy J. Conway, Note, *In Re Request for*

These treaties are the Inter-American Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters¹³ and the Inter-American Convention on Letters Rogatory.¹⁴

The United States Court of Appeals for the Fifth Circuit recently decided a case interpreting the latter of these Conventions.¹⁵ This article will briefly discuss *Kreimerman v. Casa Veerkamp*,¹⁶ the recent Fifth Circuit case, and analyze the court's interpretation of the Inter-American Convention in comparison to the Hague Service Convention's application in the United States. The first section of this article will review the formation of the Inter-American Convention and examine the

Judicial Assistance from the Federative Republic of Brazil: A Blow to International Judicial Assistance, 41 CATH. U. L. REV. 545 (1992). Conway examines letters rogatory that request assistance in gathering evidence. *Id.* It recognizes that when letters are executed under a treaty, they are customarily administered by the foreign judiciary. *Id.* However, in the absence of a treaty the foreign authority is under no obligation to adhere to the request. *Id.* It may respond by either granting jurisdiction and service over the defendant for international comity purposes or refusing to process the request entirely. *Id.*

¹³ Convention of the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, Ant. & Barb., Barb., Belg., Bots., Can., P.R.C., Cyprus, Czech., Den., Egypt, Fin., Fr., F.R.G., Greece, Isr., Italy, Japan, Lux., Malawi, Neth., Nor., Pak., Port., Sey., Slovak Rep., Spain, Swed., Turk., U.K., U.S., 20 U.S.T. 361, T.I.A.S. No. 6638 [hereinafter *Hague Service Convention*]. The Hague Service Convention evolved from the Hague Conference on Private International Law which organized in 1893 and acts as an international forum for representatives of various countries to advance treaty regimes for the unification and harmonization of private law. For further background information on the Hague Service Convention's formation, see generally GARY B. BORN with DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 136-60 (1989).

¹⁴ Inter-American Convention on Letters Rogatory, Jan. 30, 1975, Arg., Chile, Costa Rica, Ecuador, El Sal., Guat., Hond., Mex., Pan., Peru, Spain, U.S., Uru., Venez., S. TREATY DOC. NO. 27, 98th Cong., 2d Sess. (1984) [hereinafter *Inter-American Convention*].

¹⁵ *Kreimerman v. Casa Veerkamp*, 22 F.3d 634, cert. denied, 115 S.Ct. 577 (5th Cir. 1994). The Fifth Circuit also interpreted the Hague Service Convention in *Sheets v. Yamaha Motors Corp.*, United States of America, 891 F.2d 533 (5th Cir. 1990). In *Sheets*, the court held that FED. R. CIV. P. 11 sanctions were improper because service of process under the Hague Service Convention was appropriately demanded by the defendants. For a further discussion of *Sheets*, see Nancy A. Norfolk, *International Law—Service of Process—Improper To Sanction Foreign Defendant For Insisting On Service of Process, Pursuant to the Hague Convention Provisions*, *Sheets v. Yamaha Motors Corp.*, *United States of America*, 14 SUFFOLK TRANSNAT'L L.J. 680 (Spring 1991).

¹⁶ 22 F.3d 634.

facts and the opinion of the Fifth Circuit case which resulted in the Inter-American Convention's limited role. The second section will compare this recently decided case to two United States Supreme Court cases¹⁷ which construe similar treaties. The third section will focus on the impact of the Inter-American Convention's recent interpretation versus the Hague Service Convention's current role in American civil procedure. Finally, this article will conclude by advocating that service of process should be attempted under the Inter-American Convention as a method of first resort.

I. THE INTER-AMERICAN CONVENTION ON LETTERS ROGATORY¹⁸

Due to the rise in international civil litigation,¹⁹ an increasing number of plaintiffs are confronted with numerous difficulties when serving process abroad. This expansion in international litigation revealed the need for judicial cooperation between the American nations.²⁰ In response to this recognized void in international civil procedure, the Organization of American States²¹ convened for the First Inter-American Spe-

¹⁷ See *infra* notes 99 and 108 and accompanying text.

¹⁸ Inter-American Convention, *supra* note 14.

¹⁹ See, e.g., Peter H. Pfund, *International Unification of Private Law: A Report On U.S. Participation—1987-88*, 22 INT'L LAW. 1157 (1988).

²⁰ S. TREATY DOC. No. 27, 98th Cong., 2d Sess. I (1984). The Senate Treaty Documents contained a Letter of Transmittal from President Ronald Reagan and a Letter of Submittal from the Department of State. *Id.*

²¹ YEARBOOK OF INTERNATIONAL LAW 1251 (Union of Int'l Ass'n ed., 31st ed. Vol. 1 1994/95). Established Apr. 14, 1890, Wash. D.C. at the First International Conference of American States; AIMS: (a) To strengthen peace and security of continent; (b) To promote and consolidate representative democracy, with due respect for the principle of non-intervention; (c) To prevent possible causes of difficulties and to ensure the pacific settlement of disputes that may arise among the Member States; (d) To provide for common action on the part of those States in the event of aggression; (e) To seek the solution of political, juridical, and economic problems that may arise among them; (f) To promote, by cooperative action, their economic, social, and cultural development; (g) To achieve an effective limitation of conventional weapons that will make it possible to devote the largest amount of resources to the economic and social development of the Member States; (h) To eradicate extreme poverty which constitutes an obstacle to the full democratic development of the peoples of the hemisphere. MEMBERS: AM Ant. & Barb., Arg., Bah., Barb., Belize, Bol., Braz., Can., Chile, Colum., Costa Rica, Cuba(*), Dom. Rep., Ecuador, El Sal., Gren., Guat., Guy., Haiti, Hond., Jam., Mex., Nicar., Pan., Para., Peru, St. Kitts-Nevis, St. Lucia, St. Vincent-Gren., Surin., Trin. & Tobago, US, Uru., Venez Af Alg., Angola, Egypt, Eq. Guinea, Morocco, Tunis As India, Isr., Japan, Korea,

cialized Conference on Private International Law²² with the intention of designing a multilateral treaty regime to advance the methodical and efficient service of foreign judicial documents through letters rogatory.²³ For this purpose, the OAS members negotiated in Panama during January 1975, and adopted the Inter-American Convention on Letters Rogatory.²⁴

The United States did not originally sign the Inter-American Convention because it asserted that additional provisions were needed to complete the treaty's potential effectiveness.²⁵ The United States was already a party to the Hague Service Convention,²⁶ and recognized its promotion of "orderly and efficacious service of foreign judicial documents."²⁷ Because the United States believed that the Hague Service Convention proved successful, it designed the additional provisions for the Inter-American Convention using the Hague Service Convention as a model.²⁸ The United States felt that the incorporation of additional provisions would increase the efficiency and accomplishment of service of judicial documents abroad similar to the Hague Service Convention.²⁹ Hence, the United States proposed a draft of additional protocol to the Inter-American Convention at the Second Inter-American Specialized Conference

Pak., Saudi Arabia EU Aus., Belg., Cyprus, Fin., Fr., Germany, Greece, Holy Sea, Hung., Italy, Neth., Pol., Port., Rom., Russia, Spain, Switz [hereinafter OAS]. * since 1962, the Gov't of Cuba has been excluded from participation in the inter-Am. system. *Id.*

²² Marian N. Leich, *Contemporary Practice of the United States Relating to International Law*, 81 AM. J. INT'L L. 197, 198 (1987). The first Inter-American Specialized Conference on Private International Law (CIDIP-I) included OAS members who convened in Panama City in January 1975. *Id.*

²³ *Id.* Letters rogatory are defined as: "A request by one court of another court in an independent jurisdiction, that a witness be examined upon interrogatories sent with the request." BLACK'S LAW DICTIONARY 905 (6th ed. 1990).

²⁴ Inter-American Convention, *supra* note 14.

²⁵ Leich, *supra* note 22, at 198.

²⁶ Hague Service Convention, *supra* note 13. Aside from the U.S., Barbados was the only other OAS member who acceded to the Hague Service Convention. Inter-American Convention, *supra* note 14, at IV.

²⁷ Leich, *supra* note 22, at 198.

²⁸ Inter-American Convention, *supra* note 14, at IV-V. In the President's Letter of Submittal to the Senate, the success of the Hague Service Convention was attributed to the "increasing number of countries which have become parties to it (. . . most of major Western European States and Japan) and [to] the heavy volume of service requests processed." Inter-American Convention, *supra* note 14, at III.

²⁹ Inter-American Convention, *supra* note 14, at IV.

On Private International Law.³⁰ The United States viewed the ratification of the Inter-American Convention and the Additional Protocol as "a significant step in filling the void that [then existed] in the area of judicial cooperation with other OAS countries."³¹

The Additional Protocol³² is significant in several aspects which resemble certain articles of the Hague Service Convention.³³ The first of these similarities is the prerequisite that each Member State designate a central authority to perform functions under the Inter-American Convention.³⁴ The next observable similarity is the limitation on the required authentication for documents transmitted by letters rogatory and the prescribed forms for issuance and execution of such letters.³⁵ The final notable resemblance is the establishment of a procedure for each member State to follow when computing costs and expenses which will save litigants time and money.³⁶

³⁰ Leich, *supra* note 22, at 198. The Second Inter-American Specialized Conference on Private International Law (CIDIP-II) convened in Montevideo from April 13 to May 8, 1979.

³¹ Inter-American Convention, *supra* note 14, at I.

³² The Additional Protocol consists of twelve articles and an annex which contains three forms required to accompany a request for service under the Convention and Additional Protocol. Inter-American Convention, *supra* note 14.

³³ Inter-American Convention, *supra* note 14, at IV.

³⁴ Inter-American Convention, *supra* note 14, at Additional Protocol Section II, art. 2. Section II, Central Authority, Article 2 states that, "each State Party shall designate a central authority that shall perform the functions assigned to it in the Convention and in this Protocol" Inter-American Convention, *supra* note 14, at Additional Protocol art 2.

³⁵ Inter-American Convention, *supra* note 14, at Additional Protocol Section III, art. 3. Section III, Preparation of Letters Rogatory, Article 3 states, ". . . Letters rogatory shall be prepared on forms that are printed in the four official languages of the Organization of American States or in the languages of the State of origin and of the State of destination The copies shall be regarded as authenticated for the purposes of Article 8(a) of the Convention if they bear the seal of the judicial or other adjudicatory authority that issued the letter rogatory" Inter-American Convention, *supra* note 14, at Additional Protocol Section III, art. 3.

³⁶ Inter-American Convention, *supra* note 14, at Additional Protocol Section V, arts. 5-7. Section V, Costs and Expenses, Article 5 asserts:

The party requesting the execution of a letter rogatory shall, at its election, either select and indicate in the letter rogatory the person who is responsible in the State of destination for the cost of such services or, alternatively, shall attach to the letter rogatory a check for the fixed amount that is specified in Article 6 of this Protocol

Under article 5:

Before the Inter-American Convention was ratified, the United States made two reservations to limit its rights and obligations under the Inter-American Convention.³⁷ First, "letters rogatory that have as their purpose the taking of evidence shall be excluded from the rights, obligations and operation of this Convention between the United States and another State Party."³⁸ The second recommended reservation was that "the United States accepts entry into force and undertakes treaty relations only with respect to States which have ratified or acceded to the Additional Protocol as well as the Inter-American Convention, and not with respect to States which have ratified or acceded to the Inter-American Convention alone."³⁹ Thereafter, the Additional Protocol was adopted on May 8, 1979 at Montevideo, Uruguay.⁴⁰ The United States then ratified the Inter-American Convention and its Additional Protocol, with the two reservations, on August 27, 1988.⁴¹

The United States' participation in international agreements, such as the Inter-American Convention, and the amended Federal Rules of Civil Procedure reflect the growing concern of the government in formulating a uniform body of civil international law.⁴² One way the judiciary branch em-

Contracting States may not charge for processing services provided by the Central Authorities or by their judicial or administrative authorities but may seek payment for services for which, under local law, the interested parties are required to pay.

Article 6 requires each Contracting State to provide the OAS General Secretariat with a fee schedule indicating the cost of such services, and article 7 allows the Contracting States to propose on a reciprocal basis that neither will charge or both will accept a fixed amount. Inter-American Convention, *supra* note 14, at X-XI.

³⁷ Inter-American Convention, *supra* note 14, at V.

³⁸ Inter-American Convention, *supra* note 14, at V. At the Inter-American Convention, where the Convention on Letters Rogatory was adopted, the participating OAS members also adopted the Inter-American Convention on the Taking of Evidence Abroad. However, at this time the United States did not sign this Convention because it believed that "it should be modified by an additional protocol to make it more closely parallel the Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters . . ." Inter-American Convention, *supra* note 14, at V.

³⁹ Inter-American Convention, *supra* note 14, at V.

⁴⁰ Leich, *supra* note 22, at 197.

⁴¹ Inter-American Convention, *supra* note 14.

⁴² See Symposium, *The Federal Rules and the Hague Conventions: Concerns of Conformity and Comity*, 50 U. PRR. L. REV. 903 (1989) (discusses the relationship between the Hague Service and Evidence Conventions and the Federal rules); see also FRCP 4, *supra* note 7 and accompanying text. For a discussion on the United

barked on achieving this goal was through its power of treaty interpretation.⁴³ However, the United States is relatively new to private international law,⁴⁴ and as a result, the courts have had few occasions to decide how treaties will coexist with current substantive and procedural law.⁴⁵ Consequently, since the Inter-American Convention's ratification, only a few lower courts have had the opportunity to interpret it and decide how it is to be applied in the arena of civil international litigation.⁴⁶

II. THE INTER-AMERICAN CONVENTION'S ROLE IN UNITED STATES' CIVIL PROCEDURE

The United States Court of Appeals for the Fifth Circuit is one of the first circuit courts to decide a case which utilized service of process through letters rogatory under the Inter-American Convention's prescribed method.⁴⁷ The plaintiffs⁴⁸ brought

States' involvement in the unification of private international law see Pfund, *supra* note 19. This report describes the status of the U.S. in the United Nations Commission on International Law (UNCITRAL); the Hague Conference on Private International Law; International Institute for the Unification of Private Law (UNIDROIT); and the Inter-American Specialized Conferences on Private International Law (CIDIP). *Supra* note 19.

⁴³ Federal judicial power is extended by the U.S. Constitution to include cases involving treaties formed under the authority of the federal government. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. CONST. art. III, § 2, cl. 1. For discussion see NOWAK, *supra* note 11.

⁴⁴ Symposium, *supra* note 42, at 904 (stating that the US was not a party to the first Hague assembly in 1905, but with the urging of the American Bar Association, Congress finally authorized participation in the 1964 conference). See also Pfund, *supra* note 42.

⁴⁵ See cases cited *infra* note 70 and accompanying text.

⁴⁶ See *infra* note 94. Before the Inter-American Convention was ratified, the issue of its mandatory application came before the Ninth Circuit in *Securities Exchange Comm'n v. Int'l Swiss Inv. Corp.*, 895 F.2d 1272 (9th Cir. 1990). In *Int'l Swiss*, the court noted that the Inter-American Convention might be applicable to service abroad, but the treaty ineffectual because it was not ratified at the time it was ineffectual. See also Robert A. Kellan, *Jurisdiction — Service of Process — Rules of Civil Procedure Govern SEC Service on Foreign Parties, Securities and Exchange Commission v. International Swiss Investments Corp.*, 15 SUFFOLK TRANSNAT'L L.J. 858 (1992).

⁴⁷ See *Kreimerman*, 22 F.3d 634. This article provides a detailed restatement of the facts to illustrate the problems confronted when effecting international service by means other than those under the Inter-American Convention. *Id.*

⁴⁸ *Id.* at 636. The plaintiffs were Alberto Kreimerman, Hermes International, Inc., and Hermes Trading Co. (Kreimerman). "Alberto Kreimerman is the sole

a cause of action against defendants⁴⁹ for libel, slander, and civil conspiracy.⁵⁰ The cause of action arose out of Kreimerman's claim that he was defamed when Veerkamp sent copies of an article accusing Kreimerman of involvement in drug trafficking, gun running, and money laundering to some of Kreimerman's suppliers.⁵¹ Kreimerman sued Veerkamp, in Texas state court, serving process on all defendants by direct mail through the Texas Secretary of State under the Texas Long-Arm Statute.⁵²

The defendants removed the case to the United States District Court for the Southern District of Texas, Houston Division.⁵³ In addition, the defendants moved to dismiss the case for lack of jurisdiction and improper service.⁵⁴ The District Court granted the motion to quash service under the long-arm statute and held that the Inter-American Convention estab-

owner and stockholder of Hermes Music and Hermes International, Inc., which sells numerous music related products. These two companies have their principal places of business in Hidalgo County, Texas which is also where Kreimerman resides." *Id.*

⁴⁹ *Id.* The defendants were Casa Veerkamp, S.A. de C.V., Walter Veerkamp, Electronica Solida Mexicana, S.A., and Jorge R. Mendez (Veerkamp). Electronica Solida Mexicana, S.A. and Jorge R. Mendez never made an appearance and are not parties to the appeal. *Id.* "Walter Veerkamp resides in . . . [Mexico City and] . . . is the owner of Casa Veerkamp, S.A. de C.V. which sells music related products and has its principal place of business in Mexico." *Id.*

⁵⁰ *Id.*

⁵¹ *Kreimerman*, 22 F.3d at 637 & n.4. The alleged article was from a Mexican political magazine which Kreimerman claimed was accompanied by explanatory cover letters. *Id.*

⁵² *Kreimerman*, 22 F.3d at 636 & n.2 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 17.041, et seq (West 1994)). In addition to the Texas long-arm statute, Texas Rule of Civil Procedure 108a affords several options for serving process upon a party located in a foreign country, consisting of: 1) the method authorized by the internal laws of that country for service in an action in any of its courts of general jurisdiction; 2) the method directed by the foreign authority in response to a letter rogatory or a letter of request; 3) personal delivery of the citation and petition; 4) certified or registered mailing of the citation and petition; 5) delivery of the citation and petition to a person over sixteen years of age at the defendant's usual place of business abroad; 6) a method pursuant to the terms and provisions of any applicable treaty or convention; 7) service by diplomatic or consular officials; or 8) service by any other means directed by the court that is not prohibited by the law of the country where service is to be made. TEX. R. CIV. P. 108a(1).

⁵³ *Id.* at 636.

⁵⁴ *Id.* Kreimerman replied to Veerkamp's motion by requesting that the case be remanded back to state court or in the alternative to the proper venue, the McAllen Division of the Southern District of Texas. *Id.*

lished the exclusive means for service of process on parties residing in Member States.⁵⁵

Kreimerman, then moved to extend the time allotted to serve Veerkamp and requested the court to issue four letters rogatory for service of process under the Inter-American Convention.⁵⁶ The court issued the letters and forwarded them to Mexico through Kreimerman's American counsel.⁵⁷ The Mexican counsel plaintiff retained was to receive the letters and then transmit them to a subsequent attorney in Mexico City where the papers were to be filed.⁵⁸

Throughout the several months that followed, the plaintiffs received reports that the letters were filed, but not yet served because of administrative difficulties.⁵⁹ Kreimerman petitioned the court for a second extension of time which the court subsequently granted.⁶⁰ During that additional time, plaintiff's Mexican attorneys informed them that the service of letters rogatory was completed, but that a processing delay would hinder the return of the certified copies.⁶¹ Kreimerman notified the court through a writing that service was effected, but again sought more time for the receipt of the certified copies.⁶²

At this time, Veerkamp moved for sanctions against plaintiff's counsel for the misrepresentation that service was effected.⁶³ The defendant's motion for sanctions resulted in Kreimerman's discovery that their Mexican counsel misrepresented that letters rogatory were executed as prescribed under the Inter-American Convention, hence, service was never actu-

⁵⁵ *Id.* at 637.

⁵⁶ *Kreimerman*, 22 F.3d at 637.

⁵⁷ *Id.*

⁵⁸ *Id.* "Kreimerman retained Mexican counsel in Ciudad Juarez (on the Mexican side of the Rio Grande River, across from El Paso, Texas)" who was to receive the letters and expedite service by hiring another Mexican attorney with offices in Mexico City, "where the letters rogatory had to be filed." *Id.*

⁵⁹ *Id.* The Mexican attorney reported that the letters were filed with the Federal District Court of Mexico, but not yet served because of the limited personnel available to serve process in international cases. *Id.*

⁶⁰ *Kreimerman*, 22 F.3d at 637.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

ally effected.⁶⁴ For a third time, plaintiff moved for an extension of time to complete service through letters rogatory under the Inter-American Convention, which the District Court continued to designate as the sole means available to the plaintiffs.⁶⁵

The magistrate judge held an evidentiary hearing where it was recommended that the plaintiff's case be dismissed without prejudice, but denied the defendant's motion for sanctions.⁶⁶ The District Court adopted the magistrate's recommendations and dismissed the case.⁶⁷ Kreimerman appealed to the Fifth Circuit Court of Appeals.⁶⁸

The Fifth Circuit Court of Appeals narrowed the issue on appeal by focusing solely on whether the history, language, and purpose of the Inter-American Convention was designed to operate as the exclusive means of serving process on parties residing in a signatory nation.⁶⁹ In deciding this issue, the Fifth Circuit analyzed several Supreme Court cases that set forth rules for construing a treaty.⁷⁰ In these cases the Supreme

⁶⁴ *Kreimerman*, 22 F.3d at 637. Kreimerman only ascertained the truth about the lack of service by its Mexican counsel because Veerkamp moved for sanctions. *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* The magistrate judge conducted a hearing to review plaintiff's motion to extend time for service and defendant's motions to dismiss the action and to order sanctions. *Id.* In denying plaintiff's motion for a third extension of time, the magistrate judge concluded that they would not be prejudiced by a dismissal because the applicable statute of limitations had been tolled . . . , permitting them to refile later. *Id.* The Fifth Circuit noted that the statutes of limitations referred to by the magistrate judge were presumably under Texas law. *Id.*

⁶⁷ *Id.* Kreimerman filed timely written objections to the magistrate judge's recommendations, but before the district court received them it had already adopted the magistrate's findings. *Id.* In addition, Kreimerman moved for reconsideration, but their motion was denied. *Id.*

⁶⁸ *Kreimerman*, 22 F.3d at 637.

⁶⁹ *Id.* at 638. The court stated, "The central question in this case is whether the Convention preempts all other conceivable means for effecting service on defendants who reside in Mexico," and recognized, "this question is *res nova* in this and other United States courts of appeals." *Id.* The court specifically excluded the issue of whether service under the Texas Long-Arm Statute was valid. *Id.*

⁷⁰ See *United States v. Alvarez-Machain*, 112 S.Ct. 2188 (1992)(construed Extradition Treaty); *Eastern Airlines v. Floyd*, 499 U.S. 530 (1991)(interpreted Warsaw Convention); *Chan v. Korean Air Lines*, 490 U.S. 122 (1989)(deciphered Warsaw Convention); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988)(defined meaning of Hague Service Convention); *Air France v. Saks*, 470 U.S. 392 (1985)(construed Warsaw Convention).

Court began "with the text of the treaty and the context in which the written words [were] used."⁷¹ The Supreme Court acknowledged that "treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties."⁷² Additionally, the Supreme Court held in these cases that the proper interpretation of a treaty includes reference to the records of its drafting and negotiations.⁷³ From this precedent, the Fifth Circuit determined that the Inter-American Convention should be interpreted narrowly to keep the State's sovereignty intact.⁷⁴

⁷¹ *Eastern Airlines*, 499 U.S. at 534; *Alvarez-Machain*, 112 S.Ct. at 2193 (quoting *Air France v. Saks*, 470 U.S. 392, 396 (1985)).

⁷² *Eastern Airlines*, 499 U.S. at 535 (quoting *Air France v. Saks*, 470 U.S. 392, 396 (1985)).

⁷³ *Saks*, 470 U.S. at 400. *But cf.* The Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331. The Vienna Convention has not been ratified by the United States, but the State department acknowledged that the Vienna Convention's substantive provisions are recognized as the "authoritative guide to current treaty law and practice." *Acrilicos v. Reagan*, 617 F. Supp. 1082, 1086 n.15 (Ct. Int'l Trade 1985). The Vienna Convention was the first attempt to codify customary international law principles of treaty interpretation. The procedures of the Vienna Convention consist of textualist, intentional, and teleological canons of construction. By its terms, if a treaty's text "in the light of its object and purpose" resolves the issue presented, the court is not required to look further into legislative intent. The Vienna Convention further espouses that a treaty's intent should only be evaluated through extrinsic sources in "exceptional occurrence[s]" when a certain level of textual ambiguity exists. See David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 964-73.

⁷⁴ *Kreimerman*, 22 F.3d at 639. However, the Fifth Circuit did not take into account the sovereignty of the Mexican judiciary which utilizes letters rogatory as a common method of service in interstate conflicts. *Id.* Typically, under Mexican civil procedure defendants are served through letters of request from one court to another, maintaining the courts' supervision throughout the process. *Id.* See Carlos Loperena, *Overview of Selected Mexican Treaties Affecting International Judicial Cooperation*, 1990 BILATERAL JUDICIAL TREATMENT OF TRANSNATIONAL ISSUES BETWEEN THE U.S. AND MEXICO at I-1, I-12. Alternatively, the Texas courts simply function as a repository for the documents proving service was performed. Therefore, a domestic attorney, not inclined to consider Mexican civil procedures, may opt for the familiar procedures of direct mail of personal service to serve the defendant which may be defective, and subsequently, any Texas court judgment would probably be unenforceable. Moreover, an attorney who simply resorts to domestic procedures without regarding the foreign State may be viewed as violating the sovereignty of such State which could result in diplomatic protests and potential criminal sanctions for the process server. *Id.* See Ryan G. Anderson, *Transnational Litigation Involving Mexican Parties*, 25 ST. MARY'S L.J. 1059, 1069-70 (1994).

After its initial decision to interpret the treaty in a manner that would "derogate minimally from the sovereign power of the State," the court analyzed several textual arguments asserted by the parties on appeal.⁷⁵ First, Fifth Circuit examined the decision of a District Court in Florida, the only other federal court to address this issue in a published opinion.⁷⁶ The Florida District Court concluded that the language of the Inter-American Convention is not preemptive.⁷⁷ Similarly, the Fifth Circuit determined the language to denote that the Inter-American Convention applied only when letters rogatory are elected as the means to serve process.⁷⁸

Second, the Fifth Circuit compared the Hague Service Convention with the Inter-American Convention.⁷⁹ The court stated that "the Convention's scope appears to be limited to regulating that one procedural mechanism,"⁸⁰ referring to letters rogatory. Conversely, it assessed the scope of the Hague Service Convention procedures to be applicable in all cases "where there is occasion to transmit a judicial . . . document abroad."⁸¹

⁷⁵ *Kreimerman*, 22 F.3d at 639. The court notes that the parties raised both textual and non-textual arguments in support of each of their interpretations of the Inter-American Convention. In so noting, it recognizes that the district court did not disclose which arguments it found persuasive. Nevertheless, the court concludes by finding that nondisclosure is of no consequence here because interpretation of treaty provisions is a question of law which frees the court to review the district court's decision de novo. *Id.*

⁷⁶ See *Pizzabioche v. Vinelli*, 772 F. Supp. 1245, 1249 (M.D.Fla. 1991). This case involved shareholders of a Florida Corporation who brought action against residents of Uruguay and Argentina. The defendants were accused of making misrepresentations involving the corporation. The defendants moved to quash service of process claiming it was insufficient under the Inter-American Convention. The District Court held that the Inter-American Convention did not prohibit other methods of service of process and even permitted service under alternative methods. *Id.* See also *Mayatextil v. Liztex U.S.A., Inc.*, No. 92 CIV. 4528 (SS), 1994 WL 198696 (S.D.N.Y. May 19, 1994) (unpublished decision that followed *Pizzabioche* by holding that the Inter-American Convention merely provides one possible method of service which is neither mandatory nor exclusive).

⁷⁷ *Pizzabioche*, 772 F. Supp. at 1249. The Florida court emphasized that the Inter-American Convention does not expressly prohibit other means of service of process. It found that the Inter-American Convention "does not state that letters rogatory are the only means of serving process in the signatory countries." *Id.*

⁷⁸ *Kreimerman*, 22 F.3d at 639-40.

⁷⁹ *Id.* at 639.

⁸⁰ *Id.* at 640. The Court compared the titles of the Inter-American Convention and the Hague Service Convention in coming to this conclusion. *Id.*

⁸¹ *Id.* (quoting Hague Service Convention, *supra* note 13, 20 U.S.T. at 361, art. 1).

In addition to comparing the scope of each Convention, the court contrasted the preambles of the Conventions.⁸² Through this comparison, the court found the Hague Service Convention to be preemptory, while finding the Inter-American Convention preamble modest, lacking such preemptive intent.⁸³

Third, the Fifth Circuit analyzed a recent Supreme Court decision that interpreted the Hague Evidence Convention.⁸⁴ The court concluded this case that held that in the absence of a clear statement of preemptive intent in a treaty, such treaty does not preempt other alternative methods which were in existence before the treaty.⁸⁵ Hence, the Fifth Circuit held that the method of service under the Inter-American Convention does not supplant all other means available under the Federal Rules of Civil Procedure.⁸⁶

Finally, the court addressed several arguments raised by defendant Veerkamp, but responded with its reasoning that the same limited interpretation of the plain meaning of the treaty's language applied.⁸⁷ The court gave some credence to Veer-

⁸² *Id.* The Inter-American Convention's preamble reads, "[t]he Governments of the Member States of the Organization of American States, desirous of concluding a convention on letters rogatory, have agreed as follows:" *Id.* The Hague Service Convention's preamble states,

The States signatory to the present Convention, [d]esiring to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time, [d]esiring to improve the organization of mutual judicial assistance for that purpose by simplifying and expediting the procedure, [h]ave resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Id.

⁸³ *Kreimerman*, 22 F.3d at 640.

⁸⁴ *Id.* at 640 & n.34. See *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522 (1987) (held Hague Evidence Convention did not provide exclusive and mandatory procedure for obtaining documents and information located within territorial foreign signatory).

⁸⁵ *Id.* The Fifth Circuit indicates that the Supreme Court found the absence of such a statement significant and as a result decided that the Hague Evidence Convention did not preempt other methods of discovery. *Id.*

⁸⁶ *Id.* See FRCP 4, *supra* note 7 and accompanying text.

⁸⁷ *Kreimerman*, 22 F.3d at 640. Veerkamp asserts that the Supreme Court's holding in *Schlunk*, *infra* note 108, should apply in the case at bar because similar mandatory language can be found in the Inter-American Convention. *Id.* The court responds by continuing to insist that the Inter-American Convention's application does not go beyond letters rogatory, thereby finding any mandatory language to be insignificant. *Id.*

kamp's argument that Article 15 of the Inter-American Convention prohibits unilateral service practices by Member States.⁸⁸ However, the court did not go beyond the plain meaning of the treaty, and therefore, it found nothing indicative of a requirement of ascension to unilateral procedures by other signatory states.⁸⁹

III. TREATY INTERPRETATION

International law is binding on all states and every state is obliged to give it effect.⁹⁰ Consequently, the United States Constitution through, the Supremacy Clause,⁹¹ dictates that all treaties are the supreme law of the land.⁹² The United States Supreme Court interpreted the Supremacy Clause to give preemptive force to treaties over state law, but has not defined how treaties will coexist with the federal rules.⁹³ Consequently, the vehicle and the means to carry out treaty obligations are provided without designation of its proper application which may render treaty law ineffective. The U.S. Constitution furnishes federal courts with the power to interpret treaties with preemp-

⁸⁸ *Id.* at 641. Article 15 provides: "This Convention shall not limit any provisions regarding letters rogatory in bilateral or multilateral agreements that may have been signed or may be signed in the future by the States Parties or PRECLUDE THE CONTINUATION OF MORE FAVORABLE PRACTICES IN THIS REGARD THAT MAY BE FOLLOWED BY THESE STATES." *Id.* (emphasis added). Veerkamp argued that the latter portion of this article forbid other methods of service, unless the signatory nations involved agreed upon it in advance. Veerkamp utilized the State Department's comments on art. 15, *see supra* note 27, but the court found they did not support his position.

⁸⁹ *Kreimerman*, 22 F.3d at 641. The court does not go beyond the plain meaning of Article 15. It states, "[t]his article indicates nothing about whether those practices must be assented to by other signatory nations." *Id.*

⁹⁰ LOUIS HENKIN ET AL., *INTERNATIONAL LAW* 149 (3d ed. 1993).

⁹¹ U.S. CONST. art. VI, § 2. The Supremacy Clause reads as follows:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

⁹² *See* Mark Davies et al., *Service of Process Abroad: A Nuts and Bolts Guide*, 122 F.R.D. 63 (1989) (*citing Schlunk*, 486 U.S. at 699; and reviewing decisions interpreting the Hague Service Convention and providing a step by step guide in effecting service under that treaty).

⁹³ *Id.* (discussing the disparity in the federal courts as to whether the Hague Evidence Convention supersedes FRCP 4).

tive force over municipal law and the power to hold municipal law superior to treaty obligations. It is the latter authority which frequently causes advancements in international law to be trumped by the claim of State sovereignty.

In determining how to use its power, the Fifth Circuit did not have much precedent to guide it since the Inter-American Convention was only ratified recently. Hence, there had not been many courts which had the opportunity to decipher the meaning of its language, and to determine the capacity in which it was to function. The few courts⁹⁴ that were called upon to decide this issue employed United States Supreme Court cases that interpreted the Hague Evidence Convention⁹⁵ and the Hague Service Convention⁹⁶ as guidance. The Supreme Court's analysis in these cases is an appropriate model for cases involving the Inter-American Convention because both Hague Conventions provide methods that aid litigants in receiving judicial cooperation abroad in private international law matters.⁹⁷

A. *The Hague Conventions*

The Hague Evidence Convention⁹⁸ was first interpreted by the Supreme Court in *Societe Nationale Industrielle Aerospa-*

⁹⁴ See, e.g., *Mayatextil v. Liztex*, No. 92 CIV. 4528 (SS), 1994 WL 198696 (S.D.N.Y. May 19, 1994); *Taylor v. Costa Cruises*, No. 90 CIV. 2630 (KC), 1992 WL 196793 (S.D.N.Y. Aug. 3, 1992); *Pizzabioche v. Vinelli*, 772 F. Supp. 1245 (M.D. Fla. 1991).

⁹⁵ The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, Arg., Barb., Cyprus, Czech., Den., Fin., Fr., F.R.G., Isr., Italy, Lux., Monaco, Neth., Nor., Port., Sing., Spain, Swed., U.K., U.S., 23 U.S.T. 2555, T.I.A.S. No. 7444 [hereinafter *Hague Evidence Convention*]. In addition to the Hague Evidence Convention, there exists an Inter-American Convention on Taking Evidence Abroad, for a comparison of the two, see Karl Schwappach, *The Inter-American Convention on Taking Evidence Abroad: A Functional Comparison with the Hague Convention*, 4 N.Y. INT'L L. REV. 69 (1991).

⁹⁶ Hague Service Convention, *supra* note 13.

⁹⁷ See *infra* notes 98 - 114 and accompanying text. Although the Hague Evidence Convention does not directly deal with service of process abroad, the Supreme Court's interpretation of it is relevant to the Inter-American Convention because in *Kreimerman* the Fifth Circuit followed the interpretation of the Hague Evidence Convention rather than the Hague Service Convention. *Kreimerman*, 22 F.3d at 640. For a further discussion on the Hague Conventions and their affect on international securities law, see Daniel L. Goelzer et al., *Judicial And Other Developments In The Securities Laws Under The Restatements Of Foreign Relations Law And The Hague Evidence And Service Conventions*, C489 ALI-ABA 39 (1989).

⁹⁸ Hague Evidence Convention, *supra* note 95.

tiale v. United States District Court for the Southern District of Iowa.⁹⁹ The petitioner contended that the Hague Evidence Convention was the exclusive means of obtaining documents abroad.¹⁰⁰ The respondents in *Societe Nationale* served two requests on French petitioners for the production of documents without utilizing the methods prescribed under the Hague Evidence Convention.¹⁰¹ The petitioners denied the second request because they claimed that the Hague Evidence Convention "provide[d] the exclusive and mandatory procedures for obtaining documents and information located within the territory of a foreign signatory."¹⁰² The Court rejected this "extreme position"¹⁰³ as unwarranted by the plain meaning of the treaty's language.¹⁰⁴ The Supreme Court held that the Hague Evidence Convention's permissive language applies when a litigant chooses its means as a method to facilitate discovery procedures.¹⁰⁵ However, in a footnote, the Court recognized that the Hague Service Convention differed from the Hague Evidence Convention in that the Service Convention contains mandatory language in Article 1.¹⁰⁶

After the United States Supreme Court differentiated the language of the two conventions in *Societe Nationale*,¹⁰⁷ it granted certiorari to *Volkswagenwerk Aktiengesellschaft v. Schlunk*¹⁰⁸ the following year to review the Illinois Appellate Court's interpretation of the Hague Service Convention. In *Schlunk*, the respondent served process under Illinois law on a

⁹⁹ 482 U.S. 522 (1987).

¹⁰⁰ *Id.* at 529.

¹⁰¹ *Id.* at 525.

¹⁰² *In Re Societe Nationale Industrielle Aerospatiale and Societe de Construction d'Avions de Tourism v. United States Court of Appeals*, 782 F.2d 120, 124 (8th Cir. 1986).

¹⁰³ *Societe Nationale*, 482 U.S. at 529. The Court termed the petitioners' position as "extreme" because they asserted that the Hague Evidence Convention set forth the mandatory procedures for obtaining documents abroad. Their position was that the Hague procedure was not followed, therefore, they refused to release any documents. *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 534.

¹⁰⁶ *Id.* at 534 n.15, Article 1 of the Hague Service Convention provides, "The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." *Id.*

¹⁰⁷ *Societe Nationale*, 482 U.S. at 522.

¹⁰⁸ 486 U.S. 694 (1988).

foreign corporation through its domestic subsidiary, the corporation's involuntary agent.¹⁰⁹ The Court held that the Hague Service Convention does not apply when the foreign defendant is served through its involuntary agent which is a domestic subsidiary.¹¹⁰ However, the Supreme Court held that if the internal law of the forum dictates service of process abroad, then the Hague Service Convention and its procedures are applicable.¹¹¹ Under the Illinois long-arm statute it was sufficient to serve the domestic subsidiary,¹¹² thus there was no need to utilize the Hague Service Convention.¹¹³ Alternatively, if the plaintiffs were obligated to serve the parent company in West Germany, the Supreme Court would mandate the method under the Hague Service Convention.¹¹⁴

B. *The Hague Conventions and the Inter-American Convention*

The Fifth Circuit's holding in *Kreimerman* strays from the holding in *Schlunk* because the Fifth Circuit concluded that the Inter-American Convention is merely an alternative means without any preemptive force.¹¹⁵ Although the language in the

¹⁰⁹ *Id.* at 696. The foreign corporation, petitioner, was Volkswagen Aktiengesellschaft (VWAG) which established itself under the laws of the Federal Republic of Germany (F.R.G.), has its place of business in F.R.G., and its wholly owned domestic subsidiary was Volkswagen of America (VWoA). *Id.* at 696-697. Originally, plaintiffs complaint was only filed against VWoA, but VWoA's answer denied designing or assembling the automobile at issue. Thereafter, plaintiffs amended the complaint to include the parent corporation, VWAG. *Id.* at 696-97.

¹¹⁰ *Id.* at 699.

¹¹¹ *Schlunk*, 486 U.S. at 700.

¹¹² See ILL. REV. STAT. ch. 110, para. 2-209(a)(1) (1985).

¹¹³ Symposium, *supra* note 46, at 911-12 (citing Brief for the United States as Amicus Curiae at 19). The United States Supreme Court decision in *Schlunk* which upheld service of process on the domestic subsidiary under Illinois law met much disappointment on the international front. The German government sent a note to the State Department expressing disagreement with the method the plaintiffs utilized. The note stated that the plaintiff's method was "in conflict with the letter and spirit of the Convention and ignores its mandatory character." The United Kingdom, Japan, and France also sent notes supporting Germany's position. Symposium, *supra* note 46, at 911-12.

¹¹⁴ *Schlunk*, 486 U.S. at 705.

¹¹⁵ *Kreimerman*, F.3d at 640. The Fifth Circuit states:

As letters rogatory . . . are . . . merely one of many procedural mechanisms . . . to assist the initiating court in its administration of justice, the Convention's scope appears to be limited to regulating that one procedural mechanism. In contrast, the scope of the Hague Service Convention is

Inter-American Convention is not mandatory, as it is in the Hague Service Convention, it was intended by the President of the United States and the United States Department of State to have the same effect as the Hague Service Convention.¹¹⁶ The United States designed the Additional Protocol after the Hague Service Convention so that it would have the same success as the latter.¹¹⁷ It placed great emphasis on the Additional Protocol by explicitly refusing, in a reservation, to have treaty relations with any member state that did not ratify the Additional Protocol.¹¹⁸ In addition, the Department of State recognized that "[t]he Convention and Additional Protocol establish a treaty-based system of judicial assistance analogous to that which exists among States that are parties to the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters."¹¹⁹

Furthermore, when domestic lower courts apply the *Schlunk* decision to cases involving the Hague Service Convention, the issue occasionally turns to whether the internal law of the foreign state allows the method of service attempted by the parties. For instance, United States courts have recognized that Japan does not allow service of process by direct mail. Such courts have held that since service of process by mail is not consonant with Japanese law, it is forbidden under the Hague Service Convention.¹²⁰ These courts have accurately

much broader, applying as it does to all service abroad upon defendants residing within signatory states."

Id.

¹¹⁶ See *supra* note 14 and text accompanying note 26. See also Inter-American Convention, *supra* note 14, at I, III (in the President's Letter of Transmittal and the State Department's Letter of Submittal it is related that the Inter-American Convention is in effect analogous to the Hague Service Convention).

¹¹⁷ Inter-American Convention, *supra* note 14, at IV. See *supra* note 14 and text accompanying note 27.

¹¹⁸ See Inter-American Convention, *supra* note 14 and text accompanying note 39.

¹¹⁹ Inter-American Convention, *supra* note 14, at III. Veerkamp refers to this statement in one of its arguments. However, the Court dismisses the statement because it determined the word 'analogous' meant similar in some respects but dissimilar in other ways. Inter-American Convention, *supra* note 14, at III.

¹²⁰ *E.g.*, *Charas v. Sand Technology Systems Int'l, Inc.*, 1992 WL 296406 (S.D.N.Y. Oct. 7, 1992) (the district court examined Japanese municipal law to determine whether it intended to allow service by the mails which it held would not be permitted in Japan, hence, prohibited under the Hague Service Convention). See also *Bankston v. Toyota Motor Corp.*, 889 F.2d 172 (2d Cir. 1989) (hold-

recognized that the national interest of the State should be accommodated and kept intact while implementing treaty obligations. It is arguable that these courts selected the receiver State's sovereignty over the sovereignty of the sender State. Nonetheless, the recent interpretation of the Inter-American Convention fails to adhere to this principle because it permits service by mail when the internal laws of Mexico utilize letters rogatory to fulfill its obligation of personal service.¹²¹

The Fifth Circuit's decision gives the Inter-American Convention little effective power because it simply categorizes it as an option to the Federal Rules.¹²² The *Kreimerman* Court followed the United States Supreme Court's interpretation of the Hague Evidence Convention in *Societe Nationale* rather than following *Schlunk* and its interpretation of the Hague Service Convention which is more analogous to the Inter-American Convention.¹²³ Obtaining documents abroad is a more complex process which has the potential of infringing upon privileged matters,¹²⁴ whereas service of process merely involves procedural risks. The interpretation of a service of process treaty should not be derived from the interpretation of an evidence treaty when a similar service of process treaty exists. The Inter-American Convention and the Hague Service Convention were established for the same purpose; to save time, effort, and expense that were previously expended serving process abroad.¹²⁵ Nevertheless, the Fifth Circuit based its decision

ing that sending summons and complaint to the Japanese defendant was not a method under the Hague Service Convention because it was not authorized in Japan). *Accord Silver Top Limited v. Monterey Industries Ltd.*, 1995 WL 70599 (S.D.N.Y. Feb. 21, 1995) (holding that service of process by mail is permitted since the internal laws of Hong Kong allow such service).

¹²¹ See Ryan G. Anderson, *Transnational Litigation Involving Mexican Parties*, 25 ST. MARY'S L.J. 1059, 1067 (1994).

¹²² *Kreimerman*, 22 F.3d at 643. The *Kreimerman* Court identifies the Inter-American Convention as a "dependable mechanism—but not necessarily the only lawful mechanism—by which they [plaintiffs] may effect service on defendants residing in another signatory nation." *Id.*

¹²³ *Kreimerman*, 22 F.3d at 640. The Fifth Circuit follows the U.S. Supreme Court's decision in *Societe Nationale* by recognizing that "the Supreme Court found the absence of such a 'plain statement of preemptive intent' significant in deciding that the Hague Evidence Convention did not preempt other methods of discovery." *Id.*

¹²⁴ See FREIDENTHAL, *supra* note 2, Section 7.4 at 385-94.

¹²⁵ Inter-American Convention, *supra* note 14, at I.

solely on the plain meaning of the Inter-American Convention's language while ignoring the Congressional intent.

Throughout the treaty documents which recommend ratification of the Inter-American Convention to the Senate, the President and State Department consistently referred to the Hague Service Convention as the "analogous" convention already in existence.¹²⁶ The defendants in *Kreimerman* asserted this argument, but the Fifth Circuit disagreed by defining analogous to mean "similar in certain respects" and "dissimilar" in other respects.¹²⁷ The Fifth Circuit then questioned what similarities exist between the treaties.¹²⁸ However, the court never ventured beyond a comparison of the preambles to answer the question it posed.

The President and Department of State did not merely label the Hague Service Convention as "an analogous treaty" in The Letters of Transmittal and Submittal. They went further by drafting the Additional Protocol based on the provisions contained in the Hague Service Convention.¹²⁹ Moreover, the Additional Protocol's importance to the United States is evidenced by the reservation which limits treaty relations to only those member states that have ratified the Additional Protocol as well as the Inter-American Convention.¹³⁰

Finally, it is noteworthy that the Fifth Circuit chose to interpret the Inter-American Convention narrowly through a strict textual analysis to preserve State sovereignty. However, the court disregarded article 17 of the Inter-American Convention which expressly allows "[t]he State of destination [to] refuse to execute a letter rogatory that is manifestly contrary to its public policy."¹³¹ Article 17 safeguards sovereignty by permitting a State to decline to process a letter of request if it offends the State's public policy.¹³² Therefore, in addition to

¹²⁶ Inter-American Convention, *supra* note 14, at I & III.

¹²⁷ *Kreimerman*, 22 F.3d at 642.

¹²⁸ *Id.*

¹²⁹ See Inter-American Convention, *supra* note 14 and text accompanying note 26.

¹³⁰ See Inter-American Convention, *supra* note 14 and text accompanying note 36.

¹³¹ Inter-American Convention, *supra* note 14, at art. 17.

¹³² David A. Strauss, *Kreimerman v. Casa Veerkamp, S.A. DE C.V.: The Fifth Circuit Severely Limits the Scope of the Inter-American Convention on Letters Rogatory*, 3 TUL. J. INT'L & COMP. L. 249, 260 (1995).

preserving state sovereignty by the right to refuse a letter rogatory under article 17, the court takes sovereignty one step further by allowing the parties to ignore Inter-American Convention methods and instead operate under internal procedures. This increased protection against infringement on State sovereignty is unnecessary because it precludes proper use of the treaty and renders it useless.

III. THE INTER-AMERICAN CONVENTION'S RECENT INTERPRETATION'S IMPACT ON INTERNATIONAL SERVICE OF PROCESS

Initially, the *Kreimerman* holding appears to benefit domestic litigants by allowing them to choose among different methods of service on foreign parties. This liberal interpretation of the Inter-American Convention may seem to save parties money, time, and additional burdens at first impression, but in reality it has the opposite effect. Some United States state statutes prohibit a court from ordering service on a foreign party when such method of service is forbidden by the internal law of that country.¹³³ Attorneys should abide by such restrictions when deciding which method of service to utilize. For example, in Mexico, a foreign judgment will not be enforced against a party unless the party seeking enforcement can prove that the judgment-debtor was served personally with both the petition and the citation at his domicile.¹³⁴ Hence, although state statutes may allow for other methods of service, such methods may be fatally deficient in the foreign jurisdiction.

As a signatory to the Inter-American Convention, the United States not only issues letters rogatory to other member states, it must also receive letters rogatory. If the United States courts follow the holding in *Kreimerman*, potential litigants will consistently serve process under domestic law upon foreign parties in signatory states in an unilateral manner ignoring the slightly more involved Inter-American Convention

¹³³ See e.g. TEX. R. CIV. P. 108a, *supra* note 52.

¹³⁴ See Luis M. Perez de Acha & Maria T. Llantada de Duclaud, *Service of Process and the Taking of Evidence Abroad*, 1990 BILATERAL JUDICIAL TREATMENT OF TRANSNATIONAL ISSUES BETWEEN THE U.S. AND MEXICO at F-1, & F-6 (citing Article 309(I) of Mexican Federal Code of Civil Procedure and Article 114(I) of Mexican Code of Civil Procedure for Federal District).

procedures. As a result, member states may retaliate by electing to keep their national service of process rules in effect as alternatives to letters rogatory. If all signatory states permit their residents to serve under each respective forum's procedures, the Inter-American Convention will prove ineffective and worthless. Since the Court did not look past the treaty's language, it never had the opportunity to contemplate this issue.

In addition, the procedure a litigant follows in effecting service abroad should not be determined by the defendant's country of residence. For example, if the plaintiff in *Kreimerman* brought an action against a defendant residing in France, the Hague Service Convention's methods would be the exclusive and mandatory means to serve process simply because France is a signatory to the Hague Service Convention. Conversely, under the Fifth Circuit's interpretation of the Inter-American Convention in *Kreimerman*, if the defendant's residence was Panama, a signatory to the Inter-American Convention, service of process administered through the Inter-American Convention would not be necessary and could be effected under the federal rules or state law. Hence, simply because a country is a signatory nation to the Inter-American Convention rather than the Hague Service Convention, different procedural rules apply to United States' litigants under current case law.¹³⁵ These two diverse interpretations defeat any hope of uniformity and international comity for service of process in the international community.¹³⁶

¹³⁵ *Kreimerman*, 22 F.3d 634. See also *Pizzabioche v. Vinelli*, 772 F. Supp. 1245 (M.D. Fla. 1991).

¹³⁶ For a further discussion, see Symposium, *supra* note 42 and accompanying text. Following different procedures places various burdens on plaintiffs in the U.S. For example, if two U.S. potential plaintiffs, A and B, decide to bring a cause of action against their business associates for breach of a contract, A will have to follow Hague Service Convention methods because her business associate lives in Spain, while B can utilize any method available under U.S. procedural rules because the defendant being sued in that case resides in Portugal. The *Kreimerman* decision also thwarts "comity of nations" which is defined by BLACK'S LAW DICTIONARY 267 (6th ed. 1990) as "[t]he recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws."

Furthermore, the procedures under the federal rules and state law are not unequivocally accepted in other nations.¹³⁷ A plaintiff that operates under the United States domestic laws in serving a foreign party may find that the goal of litigation, securing an enforceable judgment, may be unattainable.¹³⁸ In dicta, the Fifth Circuit acknowledged that "plaintiffs may discover that their failure to employ the Convention's safe harbor procedures makes enforcement of their judgments abroad more difficult or even impossible."¹³⁹ In many instances the litigants will not reach the stage in the judicial process where a judgment is rendered because of some procedural mishap. For example, jurisdiction over a foreign defendant may not be attainable or, as in *Kreimerman*, service of process will never be effected correctly within the statute of limitations.

In addition to the effect the Inter-American Convention's recent interpretation has on litigants and foreign countries, it also curtails the United States' advancements in private international law. The United States' efforts to expand judicial cooperation are evident from the amended Federal Rules,¹⁴⁰ existing treaties¹⁴¹ and a Congressional statute¹⁴² enacted to provide the United States District Courts with the authority to render

¹³⁷ Symposium, *supra* note 42, at 908. Speaker, Weis, notes service by mail within the certain signatory nation's borders may not be accepted. Weis also points out that foreign nationals have difficulties when confronted with different service methods available through procedural laws of the fifty states. *Supra* note 42 at 910-12.

¹³⁸ Symposium, *supra* note 42, at 911. After *Schlunk* was decided, the German Government sent a note to the U.S. State Dep't objecting to the service the plaintiff utilized and stated that "it was in conflict with the letter and spirit of the [Hague Service] Convention and ignores its mandatory character." France, Japan, and the United Kingdom also sent notes supporting Germany's position. Symposium, *supra* note 42, at 911. For a discussion focusing on enforcing judgments in Mexico see Symposium, *Rendering and Enforcing Foreign Judgments in Mexico and the United States: A Panel Discussion*, 2 U.S.-MEX. L.J. 91 (1994).

¹³⁹ *Kreimerman*, 22 F.3d at 644.

¹⁴⁰ *FCRP* 4, *supra* note 7.

¹⁴¹ Hague Service Convention, *supra* note 13; Inter-American Convention, *supra* note 14; Hague Evidence Convention, *supra* note 95.

¹⁴² 28 U.S.C.A. § 1782 (West 1994). This statute reads:

The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be

judicial assistance to foreign tribunals. This statute, in its current amended version, allows foreign entities to gather evidence more effectively in the United States alleviating some of the difficulties foreign parties encounter when seeking aid from the American legal sector.¹⁴³ The statute, as well as the treaties, further indicates the United States' objective to establish a domestic judicial system that is amenable to foreign litigants.¹⁴⁴ The power to advance international judicial cooperation is presently vested in the American courts, but unfortunately some resistance is evident from recent decisions such as *Kreimerman*.¹⁴⁵

CONCLUSION

The Inter-American Convention has been recognized by domestic case law as a "safe harbor" or dependable mechanism for parties to an action.¹⁴⁶ The Fifth Circuit noted certain risks¹⁴⁷ that plaintiffs shoulder if they do not serve process under the Inter-American Convention, but it did not decide the case in a manner that would alleviate such risks.¹⁴⁸ By permitting state and federal procedural law to operate as an alternative method

given, or the document or other thing be produced, before a person appointed by the court.

Id.

¹⁴³ See Conway, *supra* note 12, at 549-50. Before granting requests courts must resolve two issues: 1) whether the nature of the proceeding falls within the meaning of § 1782 and 2) the likelihood of a formal proceeding in the future if one is not already pending. See Conway, *supra* note 12, at 549-50.

¹⁴⁴ In re Request For Judicial Assistance From Seoul Dist. Crim. Ct., Seoul, Korea, 428 F.Supp. 109, *aff'd* 555 F.2d 720 (D.C. Cal. 1977). The enactment of the 1964 amendments to § 1782 pertaining to assistance to foreign and international tribunals, was intended by Congress to enable the United States to take the initiative in rendering such assistance, with the hope that this would stimulate reciprocal aid. *Id.*

¹⁴⁵ See, e.g., In re request for International Judicial Assistance (Letter Rogatory) for the Federative Republic of Brazil, 936 F.2d 702 (2d Cir. 1991) (the Second Circuit adopted a standard requiring the proceedings to be 'imminent' or 'very likely to occur within a brief interval from the request'). For a review of the ramifications of this Second Circuit decision, see Christopher L. Eldridge, Case Comment, 16 SUFFOLK TRANSNAT'L L.REV. 255 (1992). See also Conway, *supra* note 12.

¹⁴⁶ *Kreimerman*, 22 F.3d at 643.

¹⁴⁷ *Id.* at 644 (Fifth Circuit realized that the 1) risk that other legal principles, like the principle of international comity, might hinder their establishment of jurisdiction over the defendants and 2) enforcement of judgments abroad may be more difficult or impossible to enforce).

¹⁴⁸ *Id.*

to Inter-American Convention procedures, the Court of Appeals did not empower the treaty to perform as the supreme law of the land. The Fifth Circuit claimed that it interpreted the treaty narrowly to retain the United States' sovereignty. However, its interpretation infringes on the sovereignty of the State receiving process. Moreover, the Fifth Circuit precluded the treaty from operating as the primary method of service abroad when Inter-American Convention signatories are involved because it focused predominantly on the preamble of the Inter-American Convention which is not legally binding.

The *Kreimerman* holding creates the potential for international friction among signatories of the Inter-American Convention. If the Inter-American Convention's methods of service are employed, the risk that international comity will interfere with the establishment of jurisdiction over the defendants is nullified.¹⁴⁹ However, if the Inter-American Convention is ignored, other signatories may view that as friction between the Inter-American Convention's goals and the United States' domestic procedures.¹⁵⁰ This could lead to reduced judicial cooperation among those signatory nations. Moreover, the Inter-American Convention makes enforcement of judgments abroad almost certain, whereas service abroad under municipal methods could amount to attaining an unenforceable judgement.¹⁵¹

The Additional Protocol was drafted by the United States to provide provisions that would render the Inter-American Convention more similar to the Hague Service Convention. The Fifth Circuit avoids this truism by using a play on words. The notion of the two treaties being identical has never been asserted, nor could it be maintained. They are separate and distinct treaties. However, while remaining separate and distinct, they are comparable and capable of achieving the same results. The United States undertook the task of drafting the Additional Protocol to append to the Inter-American Convention certain provisions of the Hague Service Convention to enable the former to achieve the success of the latter. Clearly, the Inter-American Convention could not be identical to the Hague Service Convention simply because the parties are different.

¹⁴⁹ *Id.*

¹⁵⁰ See *supra* note 134.

¹⁵¹ See *supra* note 134.

Notwithstanding that, the Additional Protocol increases the likelihood that the Inter-American Convention would accomplish the same results as the Hague Service Convention which was the goal at the time the Additional Protocol was drafted.

For the above stated reasons, the Inter-American Convention and its procedures for service of process utilizing letters rogatory should be employed initially before resorting to other means provided under the Federal Rules or state law. The recognized success of the Hague Service Convention demonstrates the effectiveness of a mandatory procedure when service of process abroad is required. Although the Inter-American Convention does not contain mandatory language as noted by the Fifth Circuit, it should not be eliminated from being utilized as a method of first resort. Application of the Inter-American Convention as a method of first resort provides litigants with the protection of Inter-American Convention safeguards, while leaving other methods available as viable options if the party serving process establishes that Inter-American Convention methods do not provide adequate and timely notice.

Initially, more time, money, and resources may be expended through the Inter-American Convention procedures, but in the long run it will prove most effective by ensuring that foreign defendants are properly served. In assigning the Inter-American Convention the role of first resort, the obstacles that arose in *Kreimerman*, namely, defective service, can be avoided while allowing the Inter-American Convention to perform as it was intended; a vehicle to "facilitate the service in the territory of one Contracting State of documents emanating from civil and commercial proceedings in another Contracting State."¹⁵² Both the Hague Service Convention and the Inter-American Convention originated with the intent to establish a uniform procedure for serving process. However, this initial notion of uniformity has unfortunately been diluted by reservations and interpretations designed to maintain sovereignty which would not be diminished by assigning the Inter-American Convention its

¹⁵² Inter-American Convention, *supra* note 14, at I.

contemplated role of first report when service abroad is necessary.

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