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How May I Serve You? Service of Process by Mail Under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters

I. Introduction

Commensurate with the increased trade between the United States and other countries has been an increase in transnational litigation.¹ The Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the "Convention"),² has greatly facilitated the process by which an American plaintiff may commence suit against a foreign defendant.³ The Convention sets in place uniform methods for effecting service upon foreign defendants whose countries are signatories to the Convention;⁴ no longer does the American attorney have to engage in an exhaustive exploration of a foreign country's civil procedure in his quest to ensure effective service — or does he?

This Note discusses the Convention in the context of opposing decisions rendered by the Second and Eighth Circuits on whether the Convention, by its express terms, permits direct service of process by mail.⁵ This issue has been extensively litigated over the past decade in the United States.⁶ No conclusive inter-

1. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 471 introductory note (1986).

2. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *opened for signature* November 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 [hereinafter Convention].

3. Historically, an American plaintiff seeking to commence such a suit had to ensure that service of process complied with the internal law of the foreign state.

4. Convention, *supra* note 2, arts. 2-10.

5. The Second Circuit held that the Convention permits direct service of process by mail; *see infra* notes 46-74 and accompanying text. The Eighth Circuit, however, held that the Convention does not permit direct service of process by mail; *see infra* notes 75-92 and accompanying text.

6. Four of the twelve federal judicial circuits, the first, third, sixth, and tenth, have

pretation has been rendered. This Note attempts to resolve the conflict between the circuits and suggests a final resolution of the controversy.

Part II of this Note discusses the genesis of the Convention, the Convention itself, and the appropriate framework within which to interpret the Convention. Part III discusses the procedural history and decisions of the Second and Eighth Circuit cases. Part IV analyzes the interpretative approaches employed by the courts in light of: (1) the Convention's language;⁷ (2) Special Commission reports;⁸ (3) documents produced by the Permanent Bureau;⁹ (4) internal law;¹⁰ and (5) the Convention's negotiating history.¹¹ Part V concludes that if the efficacy of the Convention is to be maintained, signatory nations must agree to abide by a liberal interpretation of its provisions.

II. Background

A. *Genesis of the Convention*

The Convention was adopted at the tenth session of the Hague Conference on Private International Law (the "Conference"),¹² an association of independent nations whose primary

not had occasion to address the issue of whether the Convention permits direct service of process by mail. Two of the eight circuits that have addressed the issue, the second and eighth, have dealt with it at the court of appeals level and their decisions are the subject of this Note. *See supra* note 5. Of the remaining six circuits, district courts from the fourth, seventh, and the District of Columbia, have held that the Convention does permit direct service of process by mail. *See Zisman v. Sieger*, 106 F.R.D. 194 (N.D. Ill. 1985); *Chrysler Corp. v. General Motors Corp.*, 589 F. Supp. 1182 (D.D.C. 1984); *Weight v. Kawasaki Heavy Indus.*, 597 F. Supp. 1082 (E.D. Va. 1984). The Fifth, Ninth, and Eleventh Circuits conflict at the district court level on whether the Convention permits service of process by mail. *Compare, e.g., Smith v. Dainichi Kinzoku Kogyo Co.*, 680 F. Supp. 847, 850-51 (W.D. Tex. 1988) (service of process by mail comports with the Convention) *with Pochop v. Toyota Motor Co.*, 111 F.R.D. 464, 466 (S.D. Miss. 1986) (service of process by mail does not comport with the Convention).

7. *See infra* notes 101-10 and accompanying text.

8. *See infra* notes 111-17, 138-42 and accompanying text.

9. *See infra* notes 118-24 and accompanying text.

10. *See infra* notes 125-29 and accompanying text.

11. *See infra* notes 130-37 and accompanying text.

12. The first session of the Hague Conference on Private International Law was held in The Netherlands in 1893. In 1952 it was established as a permanent institution by a multilateral convention. James C. Dezendorf, *The Ninth Session of the Hague Conference on Private International Law*, 47 A.B.A.J. 909 (1961).

objective is the unification of conflict of laws rules.¹³ Located in the Netherlands, the Conference is staffed by a permanent bureau that operates under the supervision of a standing commission of the Netherlands government.¹⁴ The bureau and commission work together on the agenda for the quadrennial sessions and handle various administrative matters including the preparation of questionnaires to member nations on forthcoming topics.¹⁵ Special commissions made up of representatives of the member nations convene between sessions to prepare drafts of proposed conventions.¹⁶ These drafts are forwarded to all member nations for their observations. Responses to the drafts are then distributed at the sessions of the Conference.¹⁷ For each session, member nations send representatives from their countries including judges, legal scholars, legal advisers and experts on conflicts of laws.¹⁸

B. *The Convention*

The Convention was designed to update the 1905 and 1954 conventions on international civil procedure.¹⁹ Its dual purpose is to simplify and expedite the procedure for service of process by plaintiffs in one state upon defendants in another, and to ensure that such defendants receive notice of proceedings against them in time to appear or otherwise respond.²⁰

The Convention regulates numerous aspects of the service

13. Willis L. M. Reese, *The Ninth Session of the Hague Conference on Private International Law*, 55 AM. J. INT'L L. 447, 448 (1961).

14. *Id.*

15. Philip W. Amram, *Report on the Tenth Session of the Hague Conference on Private International Law*, 59 AM. J. INT'L L. 87, 88 (1965).

16. Willis L. M. Reese, *The Ninth Session of the Hague Conference on Private International Law*, 55 AM. J. INT'L L. 447, 448 (1961). Special commissions also meet to discuss the operation of various treaties in practice. In 1977 and 1989, special commissions met to discuss the operation of the Convention; see *infra* notes 111-17 and 138-42 and accompanying text.

17. Kurt H. Nadelmann, *The United States at the Hague Conference on Private International Law*, 51 AM. J. INT'L L. 618, 619 (1957).

18. *Id.*

19. Kurt H. Nadelmann & Willis L. M. Reese, *The Tenth Session of the Hague Conference on Private International Law*, 13 AM. J. COMP. L. 612, 613 (1964). The earlier conventions were ratified by numerous countries but not the United States. *Id.* The United States became a member of the Conference in 1964. *Id.* at 612.

20. Convention, *supra* note 2, preamble.

procedure. It permits methods of service, other than those provided for under the Convention, that are sanctioned by a receiving state's internal law.²¹ It proscribes a signatory state from objecting to a mode of service that satisfies the terms of the Convention, unless the state would deem compliance with the same an infringement of its sovereignty or security.²² It limits the right of a state to enter a default judgment against a nonappearing defendant and grants a state broad discretion to open such a judgment.²³ The Convention mandates that each state, at the time of ratification or accession: (1) designate all prescribed Central Authorities — agencies established by each member nation to receive and serve documents forwarded by other member nations; (2) state its opposition, if any, to the service methods provided for under the Convention, other than service through the Central Authority; and (3) declare any stipulations with respect to the entry of, or relief from, a default judgment.²⁴

The Convention is applicable to all civil and commercial cases and provides for three basic methods of service.²⁵ The most formal method is through the Central Authority.²⁶ Service through the Central Authority requires the sender to transmit not only the summons and complaint, but also completed specified forms — a service request form and a form summarizing the document to be served.²⁷ Having received the appropriate forms, each Central Authority may effect service in accordance with its country's internal law or by a method requested by the sender, provided such method conforms with internal law.²⁸ Delivery to an addressee who accepts it voluntarily would be an example of such a method.²⁹ Upon effecting service, the Central Authority completes a certificate stating that the document was served, how and upon whom service was made, and the date and place of such service.³⁰ This certificate is then forwarded directly

21. *Id.* art. 19.

22. *Id.* art. 13.

23. *Id.* arts. 15, 16.

24. *Id.* arts. 2, 21.

25. *Id.* arts. 1, 6-10.

26. *Id.* art. 2.

27. *Id.* art. 3.

28. *Id.* art. 5.

29. *Id.*

30. *Id.* art. 6.

to the individual who requested service.³¹

The second method allows service to be effected directly through diplomatic or consular agents, judicial officers, officials or other competent persons, provided the receiving state has not objected.³² Finally, the least formal but most questionable method of service, and the one that is the subject of this Note, is that designated under article 10(a), which permits judicial documents to be sent directly through the mail, provided the receiving state has not objected.³³

C. *Interpretation of the Convention*

The Convention is a multilateral treaty, binding on all signatories and, as with any contract, legal rules of construction apply.³⁴ The principal authority guiding the interpretation of treaties is the Vienna Convention on the Law of Treaties, a multilateral convention governing all aspects of treaties from the capacity of states to enter into them to the consequences emanating from their breach.³⁵ The articles pertaining to the interpretation of treaties were adopted without a dissenting vote³⁶

31. *Id.*

32. *Id.* arts. 8, 9, 10(b), (c). Article 8 provides that "[e]ach contracting State shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents. Any State may declare that it is opposed to such service within its territory" *Id.* art. 8.

33. *Id.* art. 10. Article 10 states:

Provided the State of destination does not object, the present Convention shall not interfere with —

(a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

(b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,

(c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

Id. (emphasis added).

34. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("A treaty is primarily a contract between two or more independent nations . . .").

35. Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, U.N. Doc. A/CONF. 39/27 reprinted in 63 AM. J. INT'L L. 875, 883-87 (1969) [hereinafter the Vienna Convention].

36. SHABTAI ROSENNE, THE LAW OF TREATIES, A GUIDE TO THE LEGISLATIVE HISTORY OF THE VIENNA CONVENTION 219 (1970) (article 31 was adopted by 97 votes to none, and article 32 by 101 votes to none).

and have thus been construed as declaratory of existing, customary international law — binding on *all* states, regardless of whether they are signatories to the Vienna Convention.³⁷

Articles 31 and 32 of the Vienna Convention outline the pertinent rules of construction. Article 31 provides that a treaty is to be interpreted in good faith,³⁸ and in accordance with the ordinary, contextual meaning of its terms in light of the treaty's object and purpose.³⁹ This is the overall governing principle.⁴⁰ In addition, article 31 states that a special meaning shall be applied to a term if it can be demonstrated that the parties so intended.⁴¹

Article 32 provides that recourse to supplementary sources of interpretation, including preparatory work, is permissible to confirm the meaning that results from applying article 31, to clarify an ambiguous, obscure, absurd or unreasonable meaning resulting from its application, or to avoid an application that leads to an absurd or unreasonable result.⁴² Sources that aid in

37. E. Jimenez de Arechaga, *International Law in the Past Third of a Century*, 159 R.C.A.D.I. 42 (1978-I) ("Legal rules concerning the interpretation of treaties constitute one of the Sections of the Vienna Convention which were adopted without a dissenting vote at the Conference and consequently may be considered as declaratory of existing law."). Existing law in this context refers to customary international law that results from a general and concordant practice followed by states under the belief that they are legally bound to do so. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1986).

38. Good faith has been construed to imply the requirement to remain faithful to the intention of the parties without defeating it by a literal interpretation or destroying the object and purpose of the treaty. *Report of the International Law Commission to the General Assembly on the Work of the Second Part of its 17th Session*, U.N. Doc. A/6309/Rev.1 (1966), reprinted in [1966] 2 Y.B. Int'l L. Comm'n 210-11, U.N. Doc. A/CN.4/SER.A/1966/Add.1 (Part I).

39. Vienna Convention, *supra* note 35. Context includes: (1) the treaty's preamble; (2) annexes; (3) agreements relating to the treaty reached among all the parties, or among some of the parties but accepted by all, in connection with the treaty's conclusion; (4) follow-up agreements among the parties regarding the treaty's interpretation or application; and (5) any relevant rules of international law applicable in the relations among the parties. Vienna Convention, *supra* note 35, art. 31.

40. Although the United States is not a party to the Vienna Convention, the Supreme Court has adhered to this principle in interpreting treaties. See *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988). In *Schlunk*, the Court was called upon to construe the legal sufficiency of service under the Convention. It noted that the starting point for interpreting a treaty is the language of the treaty itself and the context within which the words were written. *Id.* at 699, 700.

41. Vienna Convention, *supra* note 35, art. 31.

42. *Id.* art. 32. Similarly, the Supreme Court has adopted this construction of trea-

the interpretation of the Hague Convention include: the Convention itself, declarations made by the states at the time of accession or ratification,⁴³ a Practical Handbook,⁴⁴ and two Special Commission Reports emanating from meetings held in 1977 and 1989.⁴⁵ These sources will be examined to determine the intended meaning of article 10(a). The ramifications of overlooking such sources are illustrated by the decisions of the Second and Eighth Circuits.

III. Cases

A. *The Second Circuit Case*

Ackermann v. Levine involved a contract dispute between a West German law firm and an American client.⁴⁶ The action was commenced by Ackermann and other partners of his firm to enforce a default judgment entered against the defendant, Levine, by a German court.⁴⁷ The underlying German suit was an action for attorneys' fees for services allegedly rendered by Ackermann to Levine in connection with Levine's attempted sale of a New Jersey real estate project to a West German purchaser.⁴⁸

1. *The German Action*

Suit was commenced in the Regional Court of West Berlin which, pursuant to articles 8 and 10 of the Convention, forwarded the summons and complaint by registered mail to the Consulate General of the Federal Republic of Germany in New York for service upon Levine at his New Jersey business ad-

ties. *Schlunk*, 486 U.S. at 699, 700 ("[T]o ascertain [the] meaning [of a treaty] we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties") (quoting *Air France v. Saks*, 470 U.S. 392, 396 (1985)).

43. See *supra* note 24 and accompanying text.

44. PRACTICAL HANDBOOK ON THE OPERATION OF THE HAGUE CONVENTION OF 15 NOVEMBER 1965 ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS (HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW) (1983) [hereinafter HANDBOOK]. See *infra* notes 118-24 and accompanying text.

45. 17 I.L.M. 319 (1978) [hereinafter FIRST SPECIAL COMMISSION REPORT] and 28 I.L.M. 1556 (1989) [hereinafter SECOND SPECIAL COMMISSION REPORT]. See *infra* notes 111-17 and 138-42 and accompanying text.

46. *Ackermann v. Levine*, 788 F.2d 830 (2d Cir. 1986).

47. *Id.* at 833.

48. *Id.* at 834.

dress.⁴⁹ Although the Consulate forwarded the documents by registered mail to the specified address and received acknowledgment of their delivery, Levine claimed he did not receive them.⁵⁰ Approximately six months later, the Regional Court, again pursuant to articles 8 and 10 of the Convention, sent the summons and complaint to the Consulate with a request that the documents be served on Levine at his home address, an apartment complex in New York City.⁵¹ The Consulate forwarded the documents by registered mail to the apartment complex where they were received by an employee who subsequently delivered them to Levine.⁵² Levine acknowledged their receipt but failed to enter an appearance or otherwise defend the suit.⁵³ Judgment was subsequently entered against him.⁵⁴ He received notice of the judgment prior to expiration of the appeal period, but took no action.⁵⁵

2. *The United States District Court Action*

More than a year after the judgment rendered by the German court had become final, plaintiffs sought enforcement in the United States by commencing suit in the District Court for the Southern District of New York.⁵⁶ Levine appeared, contesting, among other things, the adequacy of service of process in the German action.⁵⁷ Levine claimed that service by registered mail on an employee in his apartment complex was improper under the Convention.⁵⁸ It was plaintiffs' position that service was au-

49. *Id.* at 837-39. See *supra* notes 32-33 and accompanying text.

50. *Ackermann*, 788 F.2d at 837-39.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Ackermann v. Levine*, 610 F. Supp. 633 (S.D.N.Y. 1985).

57. Defendant also alleged that (i) service by registered mail violated constitutional due process, (ii) the German court lacked *in personam* jurisdiction, (iii) the judgment had been fraudulently obtained, and (iv) enforcement of the judgment would violate public policy. Joint Appendix at 48, *Ackermann v. Levine*, 788 F.2d 830 (2d Cir. 1986) (No. 85-7553). The focus of this article is the service of process issue; accordingly, these issues will not be addressed.

58. *Ackermann*, 610 F. Supp. at 643. Levine also claimed service was improper under German law. However, the district court held that service by registered mail upon defendants located abroad was permissible under German law. *Id.* at 645-46.

thorized under articles 8 and 10 of the Convention.⁵⁹ The United States had not registered any objection to either article; therefore, plaintiffs argued, article 8 authorized service through the German Consulate in New York, and article 10(a) authorized service by registered mail.⁶⁰

The district court held that article 10 of the Convention did not authorize modes of service independent of those prescribed for the Central Authorities under article 5.⁶¹ Accordingly, when a party chose to effect service through a channel other than a Central Authority, such service had to comply with that available to the Central Authorities — by a method sanctioned by the receiving state's internal law.⁶² The court noted that because service by registered mail was not then permitted under either New York State or federal law, it was defective; therefore, the German judgment could not be enforced.⁶³

3. *The Second Circuit Court of Appeals Decision*

Plaintiffs appealed, *inter alia*, the district court's holding that service of process by registered mail violated the Convention.⁶⁴ The Second Circuit reversed, holding that contrary to the district court's determination, article 8 combined with article 10 provided a valid alternative method for effecting service under the Convention — service through a consulate was proper under article 8 and subsequent mailing by the consulate to the defendant was proper under article 10(a).⁶⁵ Addressing the meaning of the word "send" as used in article 10(a), the court noted that the leading commentator on the Convention, Bruno Ristau,⁶⁶ had reached the "inescapable" conclusion that the

59. *Id.* at 643. See *supra* notes 32-33 and accompanying text.

60. *Ackermann*, 610 F. Supp. at 643.

61. *Id.*

62. *Id.*

63. *Id.* at 643-44.

64. *Ackermann v. Levine*, 788 F.2d 830, 834 (2d Cir. 1986). Plaintiffs also appealed the district court's holdings that service of process by registered mail violated constitutional due process and that enforcement of the judgment would violate New York's public policy. *Id.*

65. *Id.*

66. Mr. Ristau is the author of *INTERNATIONAL JUDICIAL ASSISTANCE (CIVIL AND COMMERCIAL)* (1984), a two-volume treatise on international judicial assistance including service of process abroad under the Convention.

draftsmen of the Convention intended the word "send" to encompass service of process rather than mere mailing of documents for informational purposes and that the use of the word "send" was careless.⁶⁷ In addition, the court endorsed the reasoning of a California state court which held that the inclusion of article 10(a) in the Convention would be superfluous unless it was intended to provide for service of process by mail.⁶⁸ Furthermore, the court reasoned that because article 10(a) had been successfully used by American plaintiffs to effect service on foreign defendants in states that had not objected to such service, it "would undermine the Hague Convention's purpose of unifying the rules of service of process abroad" to invalidate such service when effected against an American defendant.⁶⁹

The court reversed the district court's holding that service of process was ineffective because it failed to satisfy both federal and state civil procedure rules.⁷⁰ With respect to satisfying New York State's civil procedure rules, the court held that federal laws and treaties preempt inconsistent state law.⁷¹ Accordingly, service of process did not have to satisfy state law.⁷² With respect to whether service had to satisfy federal civil procedure rules, the court noted that in ratifying the treaty, the United States had in no manner qualified its acceptance of mail service,⁷³ therefore, the Convention supplemented federal law on

67. *Ackermann*, 788 F.2d at 839. The *Rapporteur's* report on article 10(a) of the draft convention provides in part: "The provision of paragraph 1 [labelled '(a)' in the final text] also permits service by telegram if the state where service is to be made does not object. The Commission did not accept the proposal that postal channels be limited to registered mail." *Translated from 3 ACTES ET DOCUMENTS DE LA DIXIEME SESSION (CONFERENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVE) 90 (1964) [hereinafter 3 ACTES ET DOCUMENTS]*.

68. *Ackermann*, 788 F.2d at 839 (citing *Shoei Kako Co. v. Superior Court of San Francisco*, 109 Cal. Rptr. 411 (Cal. Ct. App. 1973)). The court explicitly noted that by adopting this construction, it was rejecting the interpretation of two New York state courts that had held that "send" as used in article 10(a) did not include service of process. *Id.* at 839 n.11.

69. *Id.* at 840.

70. *Id.*

71. *Id.* (Construction in accord with the Supremacy Clause of the Constitution, U.S. CONST. art. VI, cl. 2 ("This Constitution . . . 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 . . .")).

72. *Ackermann*, 788 F.2d at 840.

73. *Id.*

this issue.⁷⁴

B. *The Eighth Circuit Case*

Bankston v. Toyota Motor Corporation involved a products liability claim by an American plaintiff against a Japanese automobile manufacturer, Toyota Motor Corporation ("Toyota").⁷⁵

1. *The United States District Court Action*

Plaintiffs first attempted service of process within the United States by mailing the summons and complaint by regular mail to an affiliated corporation in California, Toyota's purported agent.⁷⁶ Toyota filed a motion to dismiss, claiming service of process was not in compliance with the Convention to which both Japan and the United States are signatories.⁷⁷ Toyota claimed that under the Convention, service of process by regular mail within the United States was impermissible and that the Convention required plaintiffs to effect service through Japan's designated Central Authority.⁷⁸ The District Court for the Western District of Arkansas denied the motion and granted plaintiffs forty-five days to comply with service under the Convention.⁷⁹

Plaintiffs then mailed the summons and complaint by registered mail to Toyota in Japan and received a return acknowledgment evidencing receipt.⁸⁰ Toyota, however, renewed its motion to dismiss, claiming that plaintiffs' mode of service still did not comply with the Convention because it violated Japanese

At the time of ratification of the Convention, the United States did not require that mail service comply with the federal rules of civil procedure regarding mail service. HANDBOOK, *supra* note 44, at 130.

74. *Ackermann*, 788 F.2d at 840. In addition, the court declared that "where the Convention provides a rule of decision, that rule is dispositive, barring any contrary declaration by the United States; where the Convention is silent, federal law should govern where possible." *Id.*

75. *Bankston v. Toyota Motor Corp.*, 889 F.2d 172 (8th Cir. 1989).

76. Joint Appendix at 13, *Bankston v. Toyota Motor Corp.*, 889 F.2d 172 (8th Cir. 1989) (No. 89-1249WA) [hereinafter Joint Appendix].

77. *Id.* at 13-14.

78. *Id.*

79. *Id.* at 17.

80. *Id.* at 18-25.

law.⁸¹ In addition, Toyota claimed that "send" as used in article 10(a) of the Convention did not mean service of process.⁸² Plaintiffs, however, alleged that the word "send" was the equivalent of "serve," and, therefore, article 10(a) did authorize mail service.⁸³

The district court held that direct service of process by mail was not addressed by the Convention.⁸⁴ The court reasoned that given the deliberation which attends the negotiation and drafting of treaties, it would be inconceivable for the drafters of the Convention to have used the word "send" in article 10(a) to mean service of process, when they had used the word "service" in other sections of the treaty⁸⁵ — *expressio unius est exclusio alterius*.⁸⁶ The court concluded that article 10(a) merely provided a method for sending follow-up documents after service of process had been obtained through the Central Authority.⁸⁷ Accordingly, service had to be effected through this medium.⁸⁸ Upon plaintiffs' motion, the court certified the question regarding the meaning of article 10(a) for interlocutory appeal to the circuit court of appeals.⁸⁹

81. *Id.* at 26 (Toyota claimed that in order to use mail service of process, the Convention, by its express terms, required that such service be permitted under the law of the receiving state).

82. *Bankston v. Toyota Motor Corp.*, 123 F.R.D. 595, 597 (W.D. Ark. 1989).

83. *Id.*

84. *Id.* at 599.

85. *Id.*

86. BLACKS LAW DICTIONARY 521 (5th ed. 1979)(to use one is to exclude the other).

87. *Bankston*, 123 F.R.D. at 599. In this regard, the court was endorsing the interpretation given article 10(a) of the Convention by E. Charles Routh (member of the firm of Houger, Garvey and Schubert in Seattle, and resident attorney from that firm with the Matsuo Law Office in Tokyo from 1973 to 1975). CURRENT LEGAL ASPECTS OF DOING BUSINESS IN JAPAN AND EAST ASIA xiv (John O. Haley, ed., A.B.A. 1978). Mr. Routh's belief that article 10(a) did not permit service of process by mail was based on his conclusion that to interpret article 10(a) as permitting such service would lead to "a rather illogical result, as the Convention sets up a rather cumbersome and involved procedure for service of process [service through the Central Authority]; and if [article 10(a)] allowed one to circumvent the procedure by simply sending something through the mail, the vast bulk of the Convention would be useless." *Id.* at 190-91.

88. *Bankston*, 123 F.R.D. at 599.

89. Joint Appendix, *supra* note 76, at 41-42.

2. *The Eighth Circuit Court of Appeals Decision*

The Court of Appeals for the Eighth Circuit affirmed the reasoning and holding of the district court.⁹⁰ In addition, however, the court adopted the reasoning of a California state court which had held that because direct service of process by registered mail was not permitted within Japan under Japanese law, it was unlikely that Japan intended to sanction the use of this method under the Convention.⁹¹ Japan's failure to object to article 10(a) when it had objected to the more formal modes of service under articles 10(b) and (c) (service by judicial officers or officials of the receiving state) evidenced Japan's belief that article 10(a) did not authorize mail service.⁹²

IV. Analysis

An early commentator on the Convention, noting its lack of clarity, expressed the hope that "in interpreting the Convention the courts will go beyond narrow, overly-literal interpretations in order to forward its spirit and objectives."⁹³ The past decade of cases litigating the interpretation of the word "send," as used in article 10(a) of the Convention, epitomizes the failure of the courts to consistently pursue this ideal.⁹⁴

The Second and Eighth Circuit decisions are representative of the two primary but divergent analytical frameworks federal courts have employed in this interpretative process.⁹⁵ As a starting point, both courts appropriately relied on the language of the Convention.⁹⁶ The first point of departure occurred with respect to the tools each court implemented in interpreting the language of the Convention. The Second Circuit relied on the Convention's purpose and negotiating history⁹⁷ while the Eighth

90. *Bankston v. Toyota Motor Corp.*, 889 F.2d 172, 174 (8th Cir. 1989).

91. *Id.* at 174 (citing *Suzuki Motor Co. v. Superior Court of San Bernardino*, 249 Cal. Rptr. 376 (1988)).

92. *Id.*

93. Stephen F. Downs, *The Effect of the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 1 CORNELL INT'L L.J. 125, 141-42 (1968).

94. *See supra* note 6.

95. *Id.*

96. *Ackermann*, 788 F.2d at 839; *Bankston*, 889 F.2d at 174.

97. *See supra* notes 67-69 and accompanying text.

Circuit looked to canons of statutory construction.⁹⁸ A second point of departure occurred with respect to the role each court accorded internal law in the interpretative process. The Second Circuit believed that reference to internal law was appropriate only when the Convention was silent,⁹⁹ while the Eighth Circuit relied on internal law to support its conclusion that service of process by mail was not a permissible mode of service under the Convention.¹⁰⁰

Although the Second Circuit's approach produced an outcome more consonant with the Convention's purpose, the result was largely fortuitous because it stemmed from mere logic rather than a seasoned knowledge, understanding and application of international law principles of treaty interpretation. It is unfortunate that neither court explicitly recognized the nature of the document whose language they sought to construe.

A. *The Convention, Preamble and Annexes*

The starting point for interpreting a treaty is the language of the treaty itself.¹⁰¹ The preamble to the Convention states a twofold purpose: (1) to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad are brought to the notice of the addressee in sufficient time; and (2) to improve the organization of mutual judicial assistance for that purpose by simplifying and expediting the procedure.¹⁰² Arguably, service of process through the mail most effectively achieves these purposes. The inclusion of a provision in the Convention barring entry of a default judgment when a plaintiff cannot demonstrate that the defendant received service¹⁰³ supports the inference that the drafters of the Convention intended article 10(a) to authorize service of process through the mail. Nevertheless, as the decisions of the Second and Eighth Circuits attest, conclusions based on logical inferences can differ. It was the position of the Second Circuit that the inclusion of article

98. See *supra* note 86 and accompanying text.

99. See *supra* note 74 and accompanying text.

100. See *supra* notes 91-92 and accompanying text.

101. See *supra* note 39 and accompanying text.

102. Convention, *supra* note 2, preamble.

103. See *supra* note 23 and accompanying text.

10(a) in the Convention would have been superfluous unless it was intended to mean "service."¹⁰⁴ However, the Eighth Circuit held that article 10(a) provided a method for sending subsequent documents after service of process had been obtained by means of an alternative method under the Convention.¹⁰⁵ The language of article 10 clouds rather than clarifies the issue because provisions (b) and (c) of article 10 specifically use the word "service," yet (a) does not.¹⁰⁶ The Second Circuit attributed this disparity to "careless drafting,"¹⁰⁷ whereas the Eighth Circuit held that the discrepancy was the result of conscious deliberation.¹⁰⁸

Other provisions of the Convention can provide insight on this divergence of opinion. Article 21 requires each contracting state, at the time of its ratification or accession to the Convention, to notify the Ministry of Foreign Affairs of the Netherlands of any opposition it may have to the methods of transmission under article 10.¹⁰⁹ Accordingly, in ratifying the treaty, several states have stated their objection to article 10(a).¹¹⁰ An application of the Eighth Circuit's holding that article 10(a) only permits a plaintiff to mail follow-up documents after effecting service by other means, would result in the prohibition of such follow-up mailings by those states that have objected to article 10(a). In other words, a defendant-national of an objecting state cannot be kept apprised of the status of proceedings against him in a foreign tribunal by means of the mails. It is unlikely that these signatory states intended such a harsh result against their own nationals. Applying the Second Circuit's holding leads to a much more rational outcome. If article 10(a) is interpreted to include mail service, then those states that have objected to article 10(a) are only proscribing service of process by mail and not the mailing of any follow-up documents. This construction of ar-

104. See *supra* note 68 and accompanying text.

105. See *supra* note 87 and accompanying text.

106. Convention, *supra* note 2, art. 10.

107. See *supra* notes 66-67 and accompanying text.

108. See *supra* notes 85-86 and accompanying text.

109. Convention, *supra* note 2, art. 21.

110. Among the states that have objected outright to article 10(a) are Czechoslovakia, Germany, Norway, and Turkey. HANDBOOK, *supra* note 44, at 97, 106, 118, 126. Japan and the United States did not object. *Id.* at 112, 130.

title 10(a) is consistent with that adopted by the Special Commission at a meeting in the Hague in November, 1977.¹¹¹

B. *The 1977 Special Commission Meeting*

The purpose of the Special Commission meeting was to discuss the practical operation of the Convention.¹¹² The meeting was attended by experts from eleven of the then nineteen states that were parties to the Convention, including representatives from the United States and Japan.¹¹³ German representatives also attended as non-parties.¹¹⁴ The experts oversaw the practical application of the Convention in their respective states.¹¹⁵ Following the meeting, the Permanent Bureau prepared a report summarizing the discussions of the eight-day conference. With respect to service by means of postal channels, the Permanent Bureau specifically noted:

The States which object to the utilisation [sic] of service by post sent from abroad are known thanks to the declarations made to the Ministry of Foreign Affairs.¹¹⁶

It was determined that most of the States made no objection to the service of judicial documents coming from abroad directly by mail in their territory.¹¹⁷

These statements are an explicit recognition that the declarations made by states with respect to article 10(a) refer to service of process through postal channels as opposed to the mailing of follow-up documents. Unfortunately, neither the Second nor Eighth Circuits cited this report in their decisions; however, they did refer to a Handbook prepared by the Permanent Bureau that outlines states' objections to methods of service made pursuant to article 21.¹¹⁸

111. FIRST SPECIAL COMMISSION REPORT, *supra* note 45, at 319.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 329.

117. *Id.* at 326.

118. HANDBOOK, *supra* note 44.

C. *The Handbook*

As its name implies, the Handbook is intended to serve as a guide to service of process under the Convention.¹¹⁹ It was produced in close cooperation with participating states and the Permanent Bureau, and was initially forwarded to the competent authorities of these states for their comments and criticism.¹²⁰ Part Three of the Handbook covers methods of service of process other than service through a Central Authority: service through consular or diplomatic channels, through the post, through process servers or through other channels.¹²¹ The section is organized by country and covers the various channels of transmission and the states' qualifications.¹²² With respect to Japan's comments on article 10(a), the section states: "Japan has not declared that it objects to service through postal channels."¹²³ Similarly, with respect to the United States' comments on article 10(a), the section states: "The United States do [sic] not object to the utilization of postal channels by foreign authorities for the purpose of service on an addressee in the United States."¹²⁴ In view of these statements, it is difficult to comprehend how the Eighth Circuit could have concluded that article 10(a) does not authorize mail service. A ready explanation, which reveals the key to this apparent enigma, can be found in a careful reading of the case: the court's reliance on internal law.

D. *The Role of Internal Law*

Before critiquing each court's treatment of internal law, it is important to identify the role that internal law plays in the context of international law and treaties.

A long-standing principle of international law is that a state cannot interpose its internal law as justification for noncompliance with, or nonrecognition of, international obligations.¹²⁵

119. The idea to produce the Handbook to facilitate service of process had its origins in the 1977 Special Commission meeting. HANDBOOK, *supra* note 44, at V.

120. *Id.*

121. *Id.*

122. *Id.* at 92-131.

123. *Id.* at 112.

124. *Id.* at 130.

125. During the first session of the International Law Commission in 1949, the following article was adopted as part of the Declaration of Rights and Duties of States:

Under the Vienna Convention, internal law has no role in treaty interpretation; only when a treaty specifically incorporates internal law in a particular provision is such reliance appropriate.¹²⁶ Article 10(a) makes no reference to internal law.¹²⁷ Accordingly, the Eighth Circuit's reliance on Japan's internal law to support its conclusion that service by mail is impermissible under the Convention is misplaced. What Japanese law authorizes or proscribes is immaterial. In this regard, the Second Circuit correctly stated the role of the United States' internal procedural law:

[W]hether . . . service satisfied Rule 4 [federal rule governing service of process] as it then existed or as it now exists is irrelevant because the United States has made no declaration or limitation to its ratification of the Convention regarding Federal Rule 4, or Article 10(a) of the Convention or otherwise regarding mail service under the Convention.¹²⁸

The point is, in ratifying or acceding to the treaty, states had express authority to declare reservations with respect to article 10. Japan did not limit its acceptance of article 10(a). For a court to qualify or redefine *sua sponte* a state's reservations is entirely inappropriate. In effect, the Eighth Circuit applied a double standard by clinging to a plain language construction of the Convention itself but unwittingly abandoning this principle in construing Japan's reservations. Instead, the court preferred to probe behind the plain language of the reservations to support its conclusion that "it was 'extremely unlikely' that Japan's failure to object to article 10(a) was intended to authorize the use of registered mail as an effective mode of service of process . . ."¹²⁹ In light of the deference this conclusion accords the possible construction the Japanese government may give to the Convention, it is appropriate to examine the Convention's

"Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law and it may not invoke limitations contained in its own Constitution or its laws as an excuse for failure to perform this duty." *Summary Records of the 14th Meeting*, [1949] Y.B. Int'l L. Comm'n 105, U.N. Doc. A/CN.4/SER.A/1949.

126. Vienna Convention, *supra* notes 34-41 and accompanying text.

127. *See supra* note 33.

128. *See supra* notes 73-74 and accompanying text.

129. *See supra* notes 91-92 and accompanying text.

*travaux préparatoires*¹³⁰ to determine whether during the Convention's negotiation, Japanese representatives were unclear as to the true meaning of article 10(a).

E. *The Travaux Préparatoires*

It is both significant and unfortunate that neither counsel nor the courts in the Second and Eighth Circuit cases referenced the negotiations of the Convention's drafting committee. A cursory examination of the negotiation transcript, contained in the *travaux préparatoires*, would have immediately clarified the ambiguity posited by article 10(a).¹³¹ Article 10(a) *does* authorize service of process by mail.

Both the 1905 and 1954 conventions on civil procedure permitted service of process by mail.¹³² With regard to the 1964 Convention, the German expert in particular, opposed the incorporation of this mode of service; the reasons proffered were sovereignty and public order.¹³³ Notwithstanding these objections, many experts supported its incorporation because of the simplicity and speed by which service could be effected using this method.¹³⁴ Consequently, service of process by mail was incorporated in the final draft.¹³⁵

During oral deliberations on the final draft, the German delegate proposed to limit the use of postal channels to those instances where a state expressly consented to its use; however, the proposal was defeated.¹³⁶ The final text permits the use of postal channels unless a state expressly objects.¹³⁷ Japan did not object, and therefore, it would seem reasonable to conclude that service of process by mail is permissible by foreign plaintiffs upon Japanese defendants. In spite of the language of the final

130. *Travaux préparatoires* are the documents containing the negotiating history of a treaty.

131. See *infra* note 135 and accompanying text.

132. 3 ACTES ET DOCUMENTS, *supra* note 67, at 82.

133. *Id.*

134. *Id.* at 83.

135. *Id.* at 90. The drafting committee specifically refused to limit postal channels to registered mail and furthermore, encompassed within the purview of postal channels service of process by telegram! *Id.*

136. 3 ACTES ET DOCUMENTS, *supra* note 67, at 236-37.

137. *Id.*

text, Japan's position remains unclear in light of a statement by its representative at the 1989 Special Commission meeting.¹³⁸

F. *The 1989 Special Commission Meeting*

In 1989, a Special Commission again convened in the Hague to discuss the Convention.¹³⁹ The issue of the interpretation of article 10(a) arose, and it was noted:

[T]he postal channel for service constitutes a method which is quite separate from service via the Central Authorities or between judicial officers. Article 10 a [sic] in effect offered a reservation to Contracting States to consider that service by mail was an infringement of their sovereignty. Thus, theoretical doubts about the legal nature of the procedure were unjustified. Nonetheless, certain courts in the United States of America . . . had concluded that service of process abroad by mail was not permitted under the Convention.¹⁴⁰

This statement conclusively puts to rest the controversy surrounding the interpretation of article 10(a). Article 10(a) does provide for service of process by mail. However, in view of the following statement by the Japanese delegation at the meeting of the Special Commission, article 10(a) may still pose some problems:

Japan has not declared that it objects to the sending of judicial documents, by postal channels, directly to persons abroad. In this connection, Japan has made it clear that no objection to the use of postal channels for sending judicial documents to persons in Japan does not necessarily imply that the sending by such a method is considered valid service in Japan; it merely indicates that Japan does not consider it as [an] infringement of its sovereign power.¹⁴¹

This statement does little to clarify Japan's position on article 10(a). A foreign plaintiff effecting service of process by mail in Japan does so at the risk of having such service challenged as invalid. However, article 13 of the Convention proscribes a state

138. See *infra* note 135 and accompanying text. SECOND SPECIAL COMMISSION REPORT, *supra* note 45, at 1556.

139. *Id.*

140. *Id.* at 1561.

141. *Id.*

from refusing to comply with a service method authorized under the terms of the Convention, unless the state would deem such compliance an infringement of its sovereignty or security.¹⁴² In light of Japan's express statement that it does not consider mail service of process an infringement of its sovereignty, a foreign plaintiff has some ammunition should its service by mail be challenged. Furthermore, as previously noted, a state cannot advance internal law restrictions to justify its failure to fulfill international obligations; therefore, Japan's failure to object outright to article 10(a) imposes upon it the duty to comply with its obligations arising under article 10(a).¹⁴³

V. Conclusion

The intended meaning of article 10(a) was clarified at a Special Commission meeting in 1977; nevertheless, over a decade of litigation has ensued concerning its interpretation. The fact that a source of clarification exists but has not been utilized casts a poor light on the functioning of the judiciary and the legal profession. More regrettable, however, is the effect this past decade of litigation has had on the Convention. It has done much to undermine not only the cooperative spirit with which the Convention was drafted and implemented, but also the efficacy of the Convention itself.

With the advent of open market economies in the Soviet Union and Europe, treaties among various states are sure to increase. To avoid repetitions of such misinterpretations, states must agree to abide by liberal constructions of treaties that evidence their accord. Courts and counsel must learn to probe deeply to divine the meaning of treaties but at the same time tread carefully in those areas of the law that transcend national borders.

*Patricia N. McCausland**

142. *See supra* note 22.

143. *See supra* note 123 and accompanying text.

* This article is dedicated to my mother.